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SUPREME COURT NO. 99327-1
COA NO. 78849-3-I

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ZACHARY CRAVEN,

Petitioner.

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

The Honorable Helen L. Halpert, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Zachary Craven asks the Supreme Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Craven requests review of the partially published decision in State v. Zachary Damien Craven, Court of Appeals No. 78849-3-I (slip op. filed November 16, 2020), attached as an appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the prosecutor's scripted, thematic misconduct in closing argument, in repeatedly telling jurors that the correct verdict — a guilty verdict — will "feel right," while sequentially pointing to his head, heart, and gut, constituted a misstatement of the burden of proof and improper appeal to emotion, such that the trial court's initial remark to the jury to decide the case based on intellect while continually overruling defense counsel's objections did not cure the prejudice?

2. Whether the court erred in denying the defense motion to sever counts because consideration of the requisite factors showed Craven could not receive a fair trial by needing to defend against murder and assault charges against different victims in a single trial?

3. Whether the court erred under ER 404(b) in admitting evidence of domestic violence assaults against Theresa Cunningham, who

was not a victim of the charged crimes, and the taking of her dog, because the evidence was not admissible for a permissible purpose or because any probative value was outweighed by unfair prejudice?

4. Whether the court had a duty to instruct the jury that it could not consider ER 404(b) evidence for a propensity purpose despite defense counsel's request for a defective limiting instruction? Alternatively, was counsel ineffective in proposing this instruction?

5. Whether the court committed reversible error in admitting the lead detective's testimony that no evidence showed Craven was so intoxicated that he lacked the intent to kill, as such testimony constituted an impermissible opinion on guilt, in violation of the right to a jury trial, and was not harmless beyond a reasonable doubt?

6. Whether the court erred in admitting a portion of the 911 call in which Theresa Cunningham calls Craven a psychopath because it was irrelevant and unfairly prejudicial?

7. Whether an informant's non-verbal, assertive conduct indicating that Craven provided an inculpatory document constitutes a testimonial statement, the admission of which violated the right to confrontation and, if so, whether Craven's attempt to mitigate the evidence following its admission did not waive the error for appeal?

8. Whether a combination of errors specified above violated Craven's right to a fair trial under the cumulative error doctrine?

D. STATEMENT OF THE CASE

Angela Hayden was Zachary Craven's grandmother and raised him. 2RP¹ 591, 595-96. Robert Luxton was in a relationship with Hayden and helped raise Craven. 2RP 591-95. Craven used to live with Hayden, but later moved into Luxton's home in Kent. 2RP 589, 596, 602, 659. Theresa Cunningham was in a dating relationship with Craven. 2RP 1797-98. Cunningham broke up with him in June 2015. 2RP 1878. Megan Smith was her friend. 2RP 1796.

On July 1, 2015, Craven injected drugs, threatened to kill Luxton in his home, then hit him on the head with a pistol. 2RP 614-16, 620-23, 660, 681-82. Luxton had never seen him act that way before. 2RP 630.

On July 7, Luxton discovered Hayden's lifeless body slumped over a table in her living room. 2RP 606-11. A spent .22 caliber casing was on the couch. 2RP 548. The cause of death was a single gunshot wound to the head. 2RP 1539. Craven's relationship with Hayden had deteriorated

¹ The verbatim report of proceedings is cited as follows: 1RP - 13 consecutively paginated volumes consisting of 6/12/17, 1/9/18, 1/10/18, 1/31/18, 3/14/18, 3/22/18, 3/27/18, 4/6/18, 4/16/18, 5/11/18, 5/24/18, 5/29/18; 2RP - 19 consecutively paginated volumes consisting of 4/23/18, 4/24/18, 4/25/18, 4/26/18, 4/30/18, 5/1/18, 5/2/18, 5/3/18, 5/7/18, 5/8/18, 5/9/18, 5/10/18, 5/14/18, 5/15/18, 5/16/18, 5/17/18, 5/21/18, 5/23/18, 8/17/18; 3RP - 5/24/18.

in recent years, and he had twice pleaded guilty to felony harassment for threatening to kill Hayden. 2RP 1144-46, 1161-62, 1901-02, 2137.

On July 7, the Cunningham family returned to their home in Renton to find Meagan Smith's body on the kitchen floor. 2RP 806, 828, 1799, 1802. Smith had been looking after the house while the family was on vacation. 2RP 1799. A .22 shell casing was next to Smith's body. 2RP 743. Smith died from a gunshot wound to the head. 2RP 1539. Cunningham called 911 and said Craven had killed Smith. 2RP 1806-07. Craven had previously threatened to harm Cunningham and those close to her, including Smith, after their relationship began falling apart. 2RP 1819-20, 1836-39. Craven called Cunningham while she was at the police station and requested that she pick him up at a Renton Walgreens. 2RP 1810-11. At about 1 a.m., police took Craven into custody. 2RP 895, 937, 940, 956, 960. There was evidence that Craven was under the influence of drugs at the time. 2RP 819, 1002, 1564-68, 2008, 2374,

The State charged Craven with the premeditated murders of Hayden and Smith and second degree assault of Luxton. CP 1-2. Before trial, the court denied the defense motion to sever the counts. CP 174-76; 1RP 227-28. The denial caused a change in defense strategy, leading defense counsel in opening statement to concede Craven killed Hayden and Smith but did not do so with premeditated intent. 2RP 478-79, 2406.

The court denied a renewed motion to sever during trial. 2RP 2405-07. A large amount of ER 404(b) evidence was admitted over defense objection, including evidence of Craven's prior domestic violence directed toward Cunningham. CP 139-68. The defense argued to the jury that Craven was in a downward spiral in the months leading up to the homicides, increasingly impulsive, irrational and paranoid due to increased drug consumption. 2RP 2460, 2464, 2467.

In closing argument, the prosecutor contended the law was rooted in "our shared" intellectual sense and "our shared common moral sense." 2RP 2434. The court overruled defense counsel's objection. 2RP 2434. The prosecutor continued: "what this means is that if we apply the law to the evidence in this case, and if we follow the law we will reach the correct verdict. And it should feel right when you do so." 2RP 2434. The court again overruled counsel's objection, stating "Jury will apply the law to the facts. The law is what is contained in my instructions. The facts are the evidence, which the jury finds to have been proven and established. It is an intellectual, not an emotional decision, but that is the process that will be used." 2RP 2434.

The prosecutor resumed: "If we follow the law, we will reach the correct verdicts. If you follow the law, you will reach the correct verdicts. And when you do that it will feel right here intellectually." 2RP 2434.

Counsel again objected "to characterization of the feeling right here." 2RP 2434. The court overruled the objection. 2RP 2435.

The prosecutor bore down on the theme: "It will feel right here intellectually. Remember our shared common intellectual sense. It will feel right here morally, our shared common moral sense. That's the law, and it should feel right here." 2RP 2435. Counsel again objected, which the court "noted." 2RP 2435. The prosecutor continued: "And that's because the law makes sense. It makes sense here, and it makes sense here, and it makes sense here. (Indicating.)" 2RP 2435.

The prosecutor further argued that guilty verdicts "are the only verdicts that make sense." 2RP 2455-56. The court overruled defense counsel's objection. 2RP 2456. The prosecutor continued: "When you consider the evidence, and you follow the law these verdicts make sense. They make sense here. (Indicating.) They make sense here. (Indicating.)" 2RP 2456. Counsel objected again. 2RP 2456. The prosecutor finished: "and they make sense here. (Indicating.) Thank you." 2RP 2456. That is how the initial phase of this closing argument ended.

Outside the presence of the jury, defense counsel addressed his objections to the prosecutor's argument as a misstatement of the law and lowering of the State's burden. 2RP 2457. Counsel noted for the record that the prosecutor, in making these statements, touched his head, touched

his heart, and touched "his gut or stomach." 2RP 2457. The court said the objections were not "well taken," as it was clear that the prosecutor was not asking the jury to eschew the reasonable doubt standard. 2RP 2458.

Defense counsel addressed the issue in his closing argument, saying the State misstated the law. 2RP 2484-85. In rebuttal, the prosecutor responded:

Let me set something else straight. Counsel accused me of asking you or suggesting that you convict based on morals or a gut feeling. It's an example of overselling. It's taking my statements out of context. What I reminded you repeatedly was to apply the facts, and the evidence to the law. The law makes sense because it's rooted in our intellect and our morals. And when you apply the facts to the evidence it should feel right.

MR. DUBOW: I'm going to object again, your Honor.

THE COURT: Objection overruled.

MR. YIP: Not just do whatever feels right. That's a different argument. And let's be clear, I said it should feel right because it makes sense. I never felt that - I never said that you should feel good about it. I never said you should feel bad about it. The point was if you follow the law and apply the evidence to the law you will reach the right conclusion. RP 2507-08.

The jury found Craven guilty for the first degree premeditated murder of Hayden, first degree premeditated murder committed of Smith, and the second degree assault of Luxton. CP 508-10, 511-12, 514-15, 585-96. The court imposed a 72-year sentence. CP 572.

Craven raised multiple challenges on appeal, including prosecutorial misconduct. The Court of Appeals affirmed. Slip op. at 1.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT VIOLATED CRAVEN'S DUE PROCESS RIGHT TO A FAIR TRIAL.

Prosecutorial misconduct can violate the due process right to a fair trial. Greer v. Miller, 483 U.S. 756, 765, 107 S. Ct. 3102, 97 L. Ed. 2d 618 (1987); U.S. Const. amend. XIV. Prosecutors, in exhorting jurors to convict, cannot argue the correct verdict in a case is equivalent to doing what "feels right." The prosecutor here improperly appealed to emotion and undermined the burden of proof beyond a reasonable doubt by making this argument. The misconduct violated Craven's right to a fair trial, requiring reversal of the convictions. This case presents a significant question of constitutional law warranting review under RAP 13.4(b)(3).

"Misstating the basis on which a jury can acquit insidiously shifts the requirement that the State prove the defendant's guilt beyond a reasonable doubt." In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 713, 286 P.3d 673 (2012). "Arguments by the prosecution that shift or misstate the State's burden to prove the defendant's guilt beyond a reasonable doubt constitute misconduct." State v. Lindsay, 180 Wn.2d 423, 434, 326 P.3d 125 (2014). Further, "[a] prosecutor may not properly invite the jury to decide any case based on emotional appeals." In re Detention of Gaff, 90 Wn. App. 834, 841, 954 P.2d 943 (1998).

The Court of Appeals rightly condemned the prosecutor's argument as misconduct. Because the process by which jurors reach a verdict should be based in reason and logic, "a prosecutor makes an improper closing argument by emphatically inviting jurors to rely on their emotions and moral sense as well as their intellect when reaching a verdict." Slip op. at 1; see United States v. Hernandez, 176 F.3d 719, 731 (3d Cir. 1999) (the determination of guilt beyond a reasonable doubt as to each element of a crime cannot be based upon what is in a juror's heart or a juror's individual "gut feeling.").

"The prosecutor urged the jury to rely upon their emotions and instincts when weighing the facts alleged. It was improper for the prosecutor to insist a juror should 'feel right' and have a decision 'make sense' in the heart and in the gut when reaching a verdict." Slip op. at 9. "As a judicial officer, the prosecutor should have understood that following and applying the law will not always feel right emotionally or instinctually." Slip op. at 9. "Because the prosecutor's argument here emphatically and expressly invited jurors to use their emotions and visceral instincts equally with their intellect when reaching a verdict, closing argument was improper." Slip op. at 11.

But then the Court of Appeals concluded: "Although Zachary Craven demonstrates the State's closing argument was improper, he fails

to show it was prejudicial in view of the trial court's timely oral instruction to the jury that the application of the law to the facts is 'an intellectual, not an emotional decision.'" Slip op. at 1.

This conclusion does not heed precedent. The prosecutor's improper statements in Craven's case were repeated. Repetitive misconduct can carry a cumulative effect. State v. Loughbom, 196 Wn.2d 64, 77, 470 P.3d 499 (2020) (repeated war on drugs argument could not be cured by instruction). "The cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect." Lindsay, 180 Wn.2d at 443 (quoting in Glasmann, 175 Wn.2d at 707). And in determining whether there was a substantial likelihood that instances of prosecutorial misconduct affected the jury's verdict, the cumulative effect of repetitive misconduct must be considered. State v. Allen, 182 Wn.2d 364, 376, 341 P.3d 268 (2015) (quoting Glasmann, 175 Wn.2d at 707).

The trial court's oral comment after overruling one of the objections did not cure the prejudice. The timing is significant. The court instructed the jury at the beginning of the argument, before the prosecutor started pointing to his heart and gut in telling the juror to decide the case based on what feels right. 2RP 2434. When the argument bloomed into its truly egregious form, the court simply overruled defense counsel's

repeated objections without issuing a curative construction and without condemning the argument or signaling in any way that it was improper.

In failing to sustain the objections, "the trial court augmented the argument's prejudicial impact by lending its imprimatur to the remarks." State v. Perez-Mejia, 134 Wn. App. 907, 920, 143 P.3d 838 (2006). The rulings "lent an aura of legitimacy to what was otherwise improper argument." State v. Davenport, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984). In Allen, for example, the jury instruction correctly stated the law, but "the trial court twice overruled Allen's timely objections in the jury's presence, potentially leading the jury to believe that the 'should have known' standard was a proper interpretation of law." Allen, 182 Wn.2d at 378. Similarly, here, while instruction on the State's burden of proof in relation to the reasonable doubt standard was correct, and the judge orally told the jury that the application of the law to the facts is "an intellectual, not an emotional decision," the judge sent a message to the jury that there was nothing wrong with the prosecutor's argument in repeatedly overruling defense counsel's objections to it.

The Court of Appeals thought Allen was inapposite because the prosecutor in that case "repeatedly misstated the law during closing argument, the court overruled the defendant's objections without providing a curative instruction, and the jury's questions during deliberation showed

it had been misled." Slip op. at 13. Allen, though, recognized the cumulative effect of repeated misconduct and, in that case, the "sheer amount of instances where the prosecuting attorney misstated the law heavily indicates that Allen was prejudiced." Allen, 182 Wn.2d at 376-77. While the jury inquiry in Allen showed it was influenced by the prosecutor's argument, Allen, 182 Wn.2d at 378-79, such an affirmative showing of prejudice is not always necessary to demonstrate prejudice. This Court has found incurable prejudice from repetitive misconduct despite there being no affirmative or specific showing in the record that the jury was influenced by the misconduct. Loughbom, 196 Wn.2d at 75-78; Lindsay, 180 Wn.2d at 443; Glasmann, 175 Wn.2d at 707-08.

In State v. Copeland, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996), the State argued the defendant could not assert prejudice resulting from misconduct in light of the curative instruction given and the principle that a jury is presumed to follow instructions. This Court pointed out "the giving of a curative instruction does not end the inquiry." Id. "If misconduct is so flagrant that no instruction can cure it, there is, in effect, a mistrial and a new trial is the only and the mandatory remedy." Id. (quoting State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988)).

Relevant to flagrancy, the Court of Appeals noted this same prosecutor had made the same scripted argument in other cases. Slip op.

at 11, n.28. And misconduct that forms the theme of the prosecutor's argument to the jury can be impervious to cure. State v. Walker, 164 Wn. App. 724, 738-39, 265 P.3d 191 (2011) (misstating self-defense standard); Loughbom, 196 Wn.2d at 75 (war on drugs theme). The Court of Appeals recognized the prosecutor's argument that "each juror should feel right intellectually, emotionally, and instinctually when applying the law to the facts" constituted the "core theme" of closing argument. Slip op. at 9-10. Yet the Court of Appeals did not address how misconduct that forms the theme of closing argument can be impervious to cure.

Finally, in deciding prejudice, the racial aspect of this case cannot be overlooked. Craven is a Black man. Cunningham, his estranged girlfriend, is white. Smith, Hayden and Luxton, the victims, are white. This Court recognizes "racial bias is a common and pervasive evil that causes systemic harm to the administration of justice." State v. Berhe, 193 Wn.2d 647, 657, 444 P.3d 1172 (2019). Juries tasked with deciding a defendant's fate are not immune from this evil. Id. The prosecutor's argument, in exhorting jurors to convict based on what feels right in their heart and gut, told jurors to make a visceral determination of whether Craven was guilty. That is particularly problematic in a case of "black on white crime" such as this because implicit racial bias exists at the visceral level. While the prosecutor did not make an expressly racist appeal, the

racial dynamic in this case increased the prejudicial impact of the prosecutor's closing argument because "implicit racial bias exists at the unconscious level, where it can influence our decisions without our awareness." Berhe, 193 Wn.2d at 657. In effect, the misconduct invited jurors to decide Craven's fate by resorting to a mode of visceral decision-making where racial bias is known to persist, making any generic court instruction about needing to decide the case based on intellect ineffectual.

2. THE REFUSAL TO SEVER COUNTS PREJUDICED CRAVEN'S RIGHT TO A FAIR TRIAL.

Joinder of charges that result in a fundamentally unfair trial violates due process. Bean v. Calderon, 163 F.3d 1073, 1084 (9th Cir. 1998); U.S. Const. amend. XIV. Four factors help determine whether prejudice results from joinder: "(1) the strength of the State's evidence on each of the counts; (2) the clarity of the defenses on each count; (3) the propriety of the trial court's instruction to the jury regarding the consideration of evidence of each count separately; and (4) the admissibility of the evidence of the other crime." State v. Cotten, 75 Wn. App. 669, 687, 879 P.2d 971 (1994).

In denying the pre-trial motion to sever counts, the trial court ruled evidence showing Craven used the same firearm in each case and that an acquaintance named Lopez drove Craven to the homicide locations

beforehand would be cross-admissible to prove identity. 1RP 227-28; CP 174-76. The Court of Appeals deemed "cross admissibility of the evidence between the assault and murder charges and between each murder charge" to be the "critical factor." Slip op. at 28. Incongruously, it then held the assault charge did not need to be severed even if the evidence would not have been cross-admissible. Slip op. 30.

"The fact that separate counts would not be cross admissible in separate proceedings does not necessarily represent a sufficient ground to sever as a matter of law." State v. Kalakosky, 121 Wn.2d 525, 538, 852 P.2d 1064 (1993). But depending on the facts of the case, lack of cross-admissibility is the decisive factor mandating severance. See Bluford, 188 Wn.2d at 315 (court abused its discretion in joining counts where evidence was not cross-admissible). Here, it is beyond serious debate that, had the assault against Luxton been prosecuted separately, evidence that Craven later killed Smith and Hayden would have irredeemably prejudiced the jury against Craven, resulting in an unfair trial on the assault charge. Neither the trial court nor the Court of Appeals explained how this would not be so.

The Court of Appeals opined "Testimony about the gun, including Luxton's, would have been cross admissible for all three charges, and Lopez's testimony was probative of intent for both murders." Slip op. at

30. Not so. Testimony about the gun was inadmissible under ER 403 because "[t]he availability of other means of proof is a factor in deciding whether to exclude prejudicial evidence." State v. Johnson, 90 Wn. App. 54, 62, 950 P.2d 981 (1998). "[U]nfair prejudice occurs whenever the probative value is negligible, but the risk that a decision will be made on an improper basis is great." State v. Rivera, 95 Wn. App. 132, 139, 974 P.2d 882 (1999), portion of opinion withdrawn and modified, 95 Wn. App. 132, 992 P.2d 1033 (2000).

In considering cross-admissibility if the Luxton assault case were tried alone, the State would not need to put on evidence that Craven killed Smith and Hayden with the firearm used to assault Luxton. Aside from Luxton's own testimony, other evidence that did not involve the killings showed Craven had the gun. 2RP 1857-59 (Craven's possession of gun during May 2015 camping trip); 2RP 1363 (in June, Craven had the firearm while with acquaintance); 2RP 1404-05, 1408-12, 1418-19 (on July 5, Craven waved the gun around at acquaintance's house). A further link was provided by the .22 caliber ammunition found in Craven's bedroom and the camper, which ties to the Luxton assault. 2RP 1649-51, 1654-55. Because there are other means of proof, the firearm-related evidence from the Smith and Hayden cases would be properly excluded as too prejudicial if the Luxton case were tried alone.

For same reason, the firearm evidence from the Hayden homicide would not have been cross-admissible to prove identity in the Smith homicide and vice-versa. As set forth above, Craven's possession of the firearm is established by other evidence. Moreover, the similarity of the crimes heightens prejudice under ER 403. "[T]he risk that the verdict will be improperly based on considerations of the defendant's propensity to commit the crime charged . . . is especially great when the prior offense is similar to the current charged offense." State v. Young, 129 Wn. App. 468, 475, 119 P.3d 870 (2005), review denied, 157 Wn.2d 1011, 139 P.3d 350 (2006). For the jury to hear evidence in one murder trial that he killed someone else that same day would have caused unfair prejudice.

It is undisputed that Lopez's testimony about driving Craven to each of the separate murder locations would not have been admissible in a separate trial on the assault count. Such testimony would not have been admissible in trial for a single murder count either. Lopez could have testified in a separate trial on the Hayden murder count that he drove Craven to the Hayden murder location. He likewise could have testified in a separate trial on the Smith murder count that he drove Craven to the Smith murder location. But testimony from Lopez in one murder trial that he drove Craven to *the other* murder location would not show intent. For ER 404(b) evidence to be admitted for intent, "there must be a logical

theory, *other than propensity*, demonstrating how the prior acts connect to the intent required to commit the charged offense." State v. Wade, 98 Wn. App. 328, 334, 989 P.2d 576 (1999). "To use prior acts for a non-propensity based theory, there must be some similarity among the facts of the acts themselves." Id. at 335. Neither the trial court nor the Court of Appeals ever attempted to meet that standard.

The trial court denied the renewed motion to sever during trial, by which time identity was no longer at issue because defense counsel in opening statement changed defenses, telling the jury that the disputed issue was whether Craven killed Smith and Hayden with premeditated intent, not whether he was the killer. 2RP 478-79, 489-90. In upholding the trial court's denial of the renewed motion, the Court of Appeals opined "[a]ll of the ER 404(b) evidence admitted pretrial to show the identity of Hayden's killer was also admitted to show the motive, intent, or knowledge of Smith's killer, and remained cross admissible for those purposes." Slip op. at 31. First, this does not speak to the lack of cross-admissibility had the assault charge been separately tried. Second, in terms of cross-admissibility between the murder counts, the Court of Appeals ignored the fact that evidence of misconduct directed to Hayden was limited to the Hayden homicide, with the jury instructed that it could not consider this evidence as to the other counts. CP 491. Evidence of

misconduct directed to Cunningham through April 2015 was limited to the Smith homicide, with the jury instructed that it could not consider this evidence as to the other counts. CP 492. So there is no cross-admissibility in this respect. While the limiting instruction for the misconduct directed toward Cunningham did not cover post-April 2015 misconduct, such misconduct was not cross-admissible to prove the Hayden and Luxton charges. The threats and abuse directed toward Cunningham arguably provided intent or motive to kill Smith (a point addressed in section E.4., infra), but there is no ER 404(b) basis for admission of this evidence in the killing of Hayden and the assault on Luxton if separate trials were held.

The Court of Appeals emphasized if the murder charges were severed, then 22 of the 44 witnesses would have testified at both trials. Slip op. at 31. The desire for judicial economy, however, "can never outweigh a defendant's right to a fair trial." Bluford, 188 Wn.2d at 316. Furthermore, this conclusion ignores what would happen if only the assault charge involving Luxton was severed. In that case, nothing like 22 witnesses would have needed to testify in the assault trial. Craven seeks review under RAP 13.4(b)(4).

3. THE COURT'S ADMISSION OF ER 404(b) EVIDENCE MADE FOR AN UNFAIR TRIAL.

Under ER 404(b), the court admitted evidence that Craven assaulted Cunningham and took her dog to show identity, motive and intent for the charged crimes. CP 149, 152-54, 158-60, 166-67.

"Much like in cases involving sexual crimes, courts must be careful and methodical in weighing the probative value against the prejudicial effect of prior acts in domestic violence cases because the risk of unfair prejudice is very high." State v. Gunderson, 181 Wn.2d 916, 925, 337 P.3d 1090 (2014). "To guard against this heightened prejudicial effect, we confine the admissibility of prior acts of domestic violence to cases where the State has established their overriding probative value." Id. Regardless of whether there was a proper non-propensity purpose for admitting the evidence, it should have been excluded under ER 403 because its probative value was outweighed by its prejudicial effect.

A defendant's gun possession in one incident may be relevant to show identity in another incident involving the same gun. State v. Hartzell, 153 Wn. App. 137, 151-52, 221 P.3d 928 (2009), remanded on other grounds, 168 Wn.2d 1027, 230 P.3d 1054 (2010). But again, "[t]he availability of other means of proof is a factor in deciding whether to exclude prejudicial evidence." Johnson, 90 Wn. App. at 62, and "unfair prejudice occurs whenever the probative value is negligible, but the risk that a decision will be made on an improper basis is great." Rivera, 95 Wn.

App. at 139. The State did not need to put on evidence that Craven assaulted Cunningham with a gun to show he had access to the firearm used to assault Luxton and kill Hayden and Smith. Other, properly admitted evidence showed he had the gun in the time period leading up the shootings. 2RP 599-600, 614-16, 1363, 1404-05, 1408-12, 1418-19, 1857-59. The probative value of him using a gun to assault Cunningham was diminished to the point that it was outweighed by the danger of unfair prejudice under the ER 403 prong embedded in the ER 404(b) analysis. The dognapping, meanwhile, did not involve a firearm. The court nowhere explained why the dognapping was admissible to show identity in the absence of a firearm.

To justify the admission of ER 404(b) evidence under an "intent" theory, "there must be a logical theory, *other than propensity*, demonstrating how the prior acts connect to the intent required to commit the charged offense." Wade, 98 Wn. App. at 334. The State's theory was that Craven must have killed Smith with premeditated intent because he intentionally harmed Cunningham in the past and because Craven made good on his threat to kill the dog by dognapping her, he must have followed through on his threat to harm Smith by killing her with premeditated intent. That is propensity reasoning in the absence of some additional factual similarity between the charged and uncharged crimes.

Even assuming relevancy to show intent, this evidence should still have been excluded because its probative value was outweighed by unfair prejudice. Other evidence admitted under ER 404(b) was admitted to show intent to kill Smith, most obviously the threat to kill her if Cunningham did not comply with his wishes. A good deal of other ER 404(b) evidence was admitted to show intent as well, including the hostile relationship between Craven and Cunningham, his threats to harm her and those close to her, and his controlling behavior.

As for motive, the evidence was cumulative of other evidence admitted to show motive, including Cunningham's perceived infidelity, refusal to marry, and termination of their relationship, so the probative value of the assaults and dognapping is lessened to the point of being unfairly prejudicial. Rivera, 95 Wn. App. at 139.

The assaults against Cunningham are overt acts of violence. The dognapping is an overt act as well, with the implication being that Craven killed the dog because he threatened to kill it and it was never found. These actions showed an escalation from threat to action, but the escalation feeds into a propensity theory of the case: he escalated his actions toward Cunningham, and therefore he must have killed Smith with premeditation as a form of repeated behavior, in conformity with his character for violence. Craven seeks review under RAP 13.4(b)(4).

4. THE COURT ERRED IN GIVING AN INSTRUCTION THAT ALLOWED THE JURY TO CONSIDER EVIDENCE OF BAD ACTS FOR A PROPENSITY PURPOSE OR DEFENSE COUNSEL WAS INEFFECTIVE IN REQUESTING IT.

The trial court gave a limiting instruction for ER 404(b) that restricted how the jury could consider eight months of misconduct but contained no restriction for the two months leading up to the crime. CP 492. The instruction thus allowed the jury to consider prior bad acts against Cunningham during that two-month period as proof of propensity to commit the charged crime.

Defense counsel proposed the flawed instruction, but "once a criminal defendant requests a limiting instruction, the trial court has a duty to correctly instruct the jury, notwithstanding defense counsel's failure to propose a correct instruction." State v. Gresham, 173 Wn.2d 405, 424, 269 P.3d 207 (2012). "An adequate ER 404(b) limiting instruction must, at a minimum, inform the jury of the purpose for which the evidence is admitted and that the evidence may not be used for the purpose of concluding that the defendant has a particular character and has acted in conformity with that character." Id. at 423-424.

Notwithstanding Gresham, the Court of Appeals held the error was invited. Slip op. at 22-24. That conflicts with State v. Moreno-Valentin, 190 Wn. App. 1022, 2015 WL 5724962, at *5 (2015) (unpublished),

which held the invited error doctrine did not apply even if the defendant requested an erroneous limiting instruction because the court had an independent duty to correctly instruct the jury on the limited purpose for which it could consider the ER 404(b) evidence.

Even if invited error applies, defense counsel was ineffective in proposing the defective instruction. Craven is guaranteed the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); U.S. Const. amend. VI. Counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687. Counsel's proposed, and accepted, limiting instruction allowed the jury to consider the post-April 2015 misconduct evidence for the purpose of showing action in conformity with Craven's violent character.

The Court of Appeals held "[d]efense counsel made a legitimate, strategic decision to avoid conviction on the most serious charges by showing and letting the jury infer Craven's propensity for irrational violence when using drugs in the months leading to his crimes." Slip op. at 26. The Court of Appeals did not grasp that counsel's theory of the case and argument to the jury about Craven's delusional, downward spiral fueled by drug use remains intact with a proper limiting instruction that would have limited consideration of the evidence to Craven's state of mind

rather than propensity for violence. The two are not mutually exclusive. In assessing the ER 404(b) evidence, the jury was likely to ascribe greatest significance to the domestic violence that occurred in the two-month lead up to Smith's homicide as having greater probative value due to greater temporal proximity. The instruction allowed the jury to infer Craven had a propensity for violence against women, and, acting in conformity with his character, must have committed premeditated murder against Smith. Craven seeks review under RAP 13.4(b)(4).

5. THE COURT ERRED IN ADMITTING TESTIMONY FROM A LAW ENFORCEMENT WITNESS THAT EXPRESSED AN IMPERMISSIBLE OPINION ABOUT CRAVEN'S INTENT AND GUILT.

Over defense objection, the trial court admitted testimony from the lead detective that no evidence showed Craven was so intoxicated that he acted without intent in killing Hayden and Smith. 2RP 2364-65. Supreme Court precedent is clear that "[o]pinions on guilt are improper whether made directly or by inference." State v. Quaal, 182 Wn.2d 191, 199, 340 P.3d 213 (2014). Craven's intent in killing Hayden and Smith, or lack thereof, was the key issue in the case and the only disputed element of the murder charges. Where a criminal defendant's intent is "the core issue and the only disputed element" of the crime, a police officer's testimony on the issue amounts to an improper opinion on guilt, which impinges the

constitutional right to a jury trial. State v. Montgomery, 163 Wn.2d 577, 594, 183 P.3d 267 (2008); U.S. Const. amend. VI.

The Court of Appeals assumed constitutional error but held it was harmless beyond a reasonable doubt. Slip op. at 34-38. There was evidence to support Craven's defense theory that he did not commit the murders with premeditated intent, including evidence that he was under the influence of drugs at the time of offense, which may have caused him to act impulsively. 2RP 819, 942, 949, 1002, 1564-73, 1582, 2008, 2374. This was against the backdrop of Craven's increasing struggle with mental instability leading up to the homicides. 2RP 1150-54, 1164-67, 1173-74, 1401-02, 1415-20, 1904-07, 1921-22, 1925. In concluding the error was harmless, the Court of Appeals ignored the established proposition that "[a] law enforcement officer's opinion testimony may be especially prejudicial because the 'officer's testimony often carries a special aura of reliability.'" State v. King, 167 Wn.2d 324, 331, 219 P.3d 642 (2009) (quoting State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007)). Craven seeks review under RAP 13.4(b)(3).

6. THE COURT ERRED IN REFUSING TO REDACT THE IRRELEVANT AND INFLAMMATORY DESCRIPTION OF CRAVEN IN THE 911 CALL.

Cunningham called Craven a "fucking psychopath" at 1:15 of the 911 recording. Ex. 75. The trial court denied the defense motion to

exclude this evidence without articulating why the inflammatory term was relevant to any material fact at trial. 2RP 1770-71, 1780-81. The trial court thought the evidence was admissible because Cunningham did not offer a formal diagnosis. 2RP 1780-8. But this is precisely why the description is nothing but pejorative. There is zero probative value to describing Craven this way. It is purely inflammatory.

The Court of Appeals thought the evidence was relevant because "[h]er vocal tone and decision to say 'psychopath' corroborated Cunningham's testimony about her fear of Craven in the months before the assault and killings." Slip op. at 40. It is an implausible stretch to say calling Craven a psychopath made it more likely that Craven committed the charged crimes. But even if relevant, the evidence remains inadmissible under ER 403, as there was plenty of other evidence showing Cunningham's fear of Craven, none of which required additional corroboration through the use of an epithet. Under ER 403, relevant evidence is excludable "if its probative value is substantially outweighed by the danger of unfair prejudice. Evidence should not be admitted "where the minute peg of relevancy will be entirely obscured by the dirty linen hung." State v. Smith, 106 Wn.2d 772, 774, 725 P.2d 951 (1986) (quoting State v. Goebel, 36 Wn.2d 367, 379, 218 P.2d 300 (1950)). Craven seeks review under RAP 13.4(b)(4).

7. THE TESTIMONIAL STATEMENT FROM A NON-TESTIFYING WITNESS VIOLATED CRAVEN'S RIGHT TO CONFRONTATION.

A person accused of a criminal offense has the right to confront the witnesses against him. Crawford v. Washington, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004); U.S. Const. amend. VI. The right to confrontation is triggered by the admission of testimonial hearsay. Davis v. Washington, 547 U.S. 813, 823-24, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). Mr. Matchette, an inmate, did not testify at trial. But the substance of his statement to police, identifying a document he handed over to police as one written by Craven, was used against Craven at trial as inculpatory evidence. 2RP 2263-78, 2317-21; Ex. 110. Evidence that Matchette provided the documents to the detective investigating Craven's case was a communicative act amounting to testimonial hearsay, so admitting them was akin to the inmate testifying to their origin. ER 801(a); State v. Mauti, 448 N.J. Super. 275, 309, 153 A.3d 256 (N.J. Super. Ct. App. Div. 2017) (in sex offense prosecution, nonverbal act of retrieving towel with defendant's semen on it in response to request constituted testimonial hearsay in violation of the confrontation clause), review denied, 230 N.J. 562, 170 A.3d 336 (2017).

The Court of Appeals held Craven waived his right to confrontation because he stipulated to admission of other hearsay

statements. Slip op at 40. This holding conflicts with Supreme Court precedent, warranting review under RAP 13.4(b)(1). "A defense lawyer who introduces preemptive testimony only after losing a battle to exclude it cannot be said to introduce the evidence voluntarily." State v. Thang, 145 Wn.2d 630, 648, 41 P.3d 1159 (2002). Defense counsel tried to make the best of a bad situation. The record is clear that counsel altered his trial strategy in response to the court's admissibility ruling. Defense counsel sought admission of the hearsay statements after he lost his motion to exclude the document in an attempt to blunt the prejudicial impact of admitting the document without additional context. 2RP 78-79, 2284-87, 2203. A defendant whose motion to suppress evidence has been denied "should not be cast in the untenable position of choosing between his right to mitigate the impact of that evidence and his right to seek appellate review of an erroneous trial court decision." Thang, 145 Wn.2d at 649. Having lost the battle to exclude the out-of-court statements altogether, counsel tried damage control. That does not waive the root error in failing to exclude the challenged evidence in the first place.

8. CUMULATIVE ERROR VIOLATED CRAVEN'S DUE PROCESS RIGHT TO A FAIR TRIAL.

Under the cumulative error doctrine, a defendant is entitled to a new trial when it is reasonably probable that errors, even though

individually not reversible error, cumulatively produce an unfair trial by affecting the outcome. State v. Coe, 101 Wn.2d 772, 788-89, 684 P.2d 668 (1984); Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007); U.S. Const. Amend. XIV. An accumulation of errors affected the outcome and produced an unfair trial in Craven's case, including (1) prosecutorial misconduct (section E.1., supra); (2) denial of the severance motion (section E.2., supra); (3) improper admission of ER 404(b) evidence (section E.3., supra); (4) flawed limiting instruction or ineffective assistance connected with the instruction (section E.4., supra); (5) improper opinion testimony (section E.5., supra); (6) failure to redact the 911 call (section E.6., supra); and (7) confrontation error (section E.7., supra). Craven seeks review under RAP 13.4(b)(3).

F. CONCLUSION

For the reasons stated, Craven requests that this Court grant review.

DATED this 16th day of December 2020.

Respectfully submitted,


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

STATE OF WASHINGTON,)	No. 78849-3-I
)	
Respondent,)	
)	
v.)	
)	
ZACHARY DAMIEN CRAVEN,)	PUBLISHED IN PART
)	
Appellant.)	
_____)	

VERELLEN, J. — Jurors should reach a verdict based upon the evidence presented at trial and the law provided by the court. Because this process should be based in reason and logic, a prosecutor makes an improper closing argument by emphatically inviting jurors to rely on their emotions and moral sense as well as their intellect when reaching a verdict. Although Zachary Craven demonstrates the State’s closing argument was improper, he fails to show it was prejudicial in view of the trial court’s timely oral instruction to the jury that the application of the law to the facts is “an intellectual, not an emotional decision.”¹ Retrial is not required.

Craven’s remaining issues also do not warrant any relief on appeal.

Therefore, we affirm.

¹ Report of Proceedings (RP) (May 23, 2018) at 2434.

FACTS

Robert Luxton and Angelika Hayden were in a close relationship for decades and raised Hayden's biological grandson, Zachary Craven. Craven called Luxton "grandpa" and Hayden "mom." As Craven got older, his relationship with Hayden deteriorated. In 2013 and again in April of 2015, Craven pleaded guilty to domestic violence felony harassment for threatening to kill Hayden. He then moved in with Luxton, who no longer lived with Hayden.

On July 1, 2015, Luxton saw Craven come into their house from the garage and inject something into his arm. Luxton had never seen Craven use drugs like that before. Craven then took out an old .22 caliber pistol Luxton kept in the garage, put it to Luxton's temple, and said, "I will kill you."² Although scared, Luxton said, "No, you won't."³ Craven hit Luxton's temple with the gun.

On July 7, Luxton went to check on Hayden at home because she was not answering her phone. The front door was ajar, and he saw Hayden slumped over the coffee table in her living room. The television was on. He saw blood and a shell casing from a .22. Hayden had been shot once in the right temple, killing her.

That same day, Theresa Cunningham and her parents flew back to Washington after a vacation to Indiana. They were supposed to be picked up from the airport by Meagan Smith, who was one of Cunningham's best friends

² RP (May 1, 2018) at 622.

³ Id.

and who had been house-sitting for them. Smith was not at the airport or answering her cell phone, so Cunningham's uncle drove them home. No lights were on in the house, even though it was around 11:00 pm. The front door was locked, and Smith had their keys. Cunningham and her father walked to the back door. It was open. Cunningham used her cell phone as a flashlight as they walked into the house. She saw Smith's body on the kitchen floor and began to scream. Smith had been shot once in the head, killing her. A shell from a .22 was on the floor. They fled from the house. Cunningham called 911 and said her ex-boyfriend, Zachary Craven, had killed Smith.

After responding to the Cunningham home, Renton Police Officer Christopher Reyes brought Cunningham and her parents to the station for an interview. About 10 minutes into his interview with Cunningham, her phone rang. She put the phone on speaker and, in a clear voice, she and Officer Reyes heard Craven say, "I'm in trouble. I need help. Come meet me alone."⁴ Craven said he was at a drugstore in downtown Renton. Officer Reyes told dispatch where to find him.

Officer Dave Adam was on patrol around 1:00 a.m. when the call went out to detain Craven as a person of interest in Smith's death. Officer Adam found Craven waiting outside the drugstore. He called Craven's name and ordered him to lie on the ground. Craven dropped the bag he was holding, put up his hands, and began to walk away. After Craven ignored several more

⁴ RP (May 3, 2018) at 892.

orders to stop, Officer Gary Berntson tased and arrested him. Officer Berntson took Craven to the police station and then to the hospital because Craven complained of pain in his wrists. Craven's blood was drawn at the hospital, and it tested positive for methamphetamine and traces of opiates.

The State charged Craven with second degree assault and two counts of first degree murder. Craven entered pleas of not guilty, made a general denial to the charges, and raised a mitigating theory of voluntary intoxication. The State moved to admit documents Craven wrote and gave to an inmate, who then provided them to the police. The court admitted the documents but reserved ruling on admitting the inmate's police interview because the inmate refused to testify. The State also moved to admit dozens of pieces of evidence under ER 404(b), and Craven moved to sever the charges against him. The court admitted some of the ER 404(b) evidence and denied the motion to sever.

In his opening statement, Craven admitted to killing Hayden and Smith but argued it was not intentional or premeditated. Over the lengthy trial, 44 witnesses testified, including more than 20 police officers and 7 scientists with the Washington State Patrol crime laboratory. During closing argument, the prosecutor argued, "[T]he law is rooted in our . . . common intellectual sense [and] common moral sense. What that means is that if we apply the law to the evidence in this case, and if we follow the law, we will reach the correct verdict. And it should feel right when you do so."⁵ He repeatedly emphasized "it should

⁵ RP (May 23, 2018) at 2434.

feel right” in the head, heart, and gut when applying the law to the facts to find Craven guilty.⁶ After the jury found him guilty, the court sentenced Craven to 72 years’ incarceration.

Craven appeals.

ANALYSIS

I. Prosecutorial Misconduct

“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”⁷ Prosecutors represent the public, including defendants, and have a duty to see that fair trial rights are not violated.⁸ Prosecutors must “seek convictions based only on probative evidence and sound reason.”⁹ A prosecutor acts improperly by seeking a conviction based upon emotion rather than reason.¹⁰ Reversal is required if the improper conduct prejudiced the defendant.¹¹

⁶ Id. at 2434-44, 2455-56, 2507-08.

⁷ Rules of Professional Conduct (RPC) 3.8 cmt. 1.

⁸ State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011) (citing State v. Case, 49 Wn.2d 66, 71, 298 P.2d 500 (1956)).

⁹ In re Glasmann, 175 Wn.2d 696, 704, 286 P.3d 673 (2012) (quoting State v. Casteneda-Perez, 61 Wn. App. 354, 363, 810 P.2d 74 (1991)).

¹⁰ State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993) (quoting State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968)); see Glasmann, 175 Wn.2d at 712-13 (reversing convictions obtained by prosecutor’s prejudicial appeals to emotion).

¹¹ State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940 (2008).

Craven alleges the prosecutor's closing argument prejudiced him. We review allegations of prosecutorial misconduct for an abuse of discretion.¹² We review the argument within the context of the trial as a whole.¹³ Craven bears the burden of proving the prosecutor's argument was both improper and prejudicial.¹⁴

During closing arguments, the prosecutor equated having a verdict "feel right" or "make sense" emotionally and morally with applying the law to the facts of the case:

[PROSECUTOR]: Members of the jury, the law isn't supposed to be mystic. It's supposed to represent us as a society. It's our shared beliefs, our shared understandings, our shared morals. The law is simply a codification of those things, and that's what you have before you in the form of those jury instructions. At first blush they may seem wordy, confusing, complicated. But if you take the time to actually read them, think about them, you will see that they make sense. It's because the law is rooted in our shared common intellectual sense, the law is rooted in our shared common moral sense.

[DEFENSE]: I'm going to object, Your Honor. Improper argument.

COURT: Objection overruled.

[PROSECUTOR]: Common intellectual sense, common moral sense. What that means is that if we apply the law to the evidence in this case, and if we follow the law, we will reach the correct verdict. And it should feel right when you do so.

¹² State v. Lindsay, 180 Wn.2d 423, 430, 326 P.3d 125 (2014) (quoting State v. Brett, 126 Wn.2d 136, 174-75, 892 P.2d 29 (1995)).

¹³ In re Gentry, 179 Wn.2d 614, 631, 316 P.3d 1020 (2014) (citing State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006)).

¹⁴ Lindsay, 180 Wn.2d at 430 (citing Warren, 165 Wn.2d at 26).

[DEFENSE]: Objection, Your Honor.

COURT: Objection overruled. Jury will apply the law to the facts. The law is what is contained in my instructions. The facts are the evidence, which the jury finds to have been proven and established. It is an intellectual, not an emotional decision, but that is the process that will be used.

[PROSECUTOR]: If we follow the law, we will reach the correct verdicts. If you follow the law, you will reach the correct verdicts. And when do you that, it will feel right here intellectually.

[DEFENSE]: Objection, Your Honor, to characterization of the feeling right here.

COURT: The objection is overruled. Your objection is noted.

[PROSECUTOR]: It will feel right here intellectually [indicating the head]. Remember our shared common intellectual sense. It will feel right here morally [indicating the heart], our shared common moral sense. That's the law, and it should feel right here [indicating the gut or stomach].¹⁵

[DEFENSE]: Objection, Your Honor.

COURT: The objection is noted.

[PROSECUTOR]: And that's because the law makes sense. It makes sense here, and it makes sense here, and it makes sense here. (Indicating.)

. . . .

. . . The defendant must be found guilty of assault in the second degree for pistol whipping Luxton on the 2nd. The defendant must be found guilty of murder in the first degree for the premeditated killing of his 66 year old grandmother Angelika Hayden. The defendant must be found guilty of murder in the first degree for the premeditated killing of 21 year old Meagan Smith.

¹⁵ During a sidebar, defense counsel expanded on his objection and noted the prosecutor touched his head, heart, and gut or stomach when arguing where "it feels right." RP (May 23, 2018) at 2457.

These are the only conclusions that make sense. These are the only verdicts that make sense.

[DEFENSE]: Objection, Your Honor.

COURT: Objection overruled.

[PROSECUTOR]: When you consider the evidence, and you follow the law, these verdicts make sense. They make sense here. (Indicating.) They make sense here. (Indicating.)

[DEFENSE]: I'm going to object again.

[PROSECUTOR]: And they make sense here (Indicating.).

Thank you.^[16]

Craven argues this argument was improper because it asked the jury to come to a decision based equally upon what feels right intellectually in the head, emotionally in the heart, and viscerally in the gut. The State concedes the prosecutor's argument was "inartful" but contends he was not asking the jury to base their verdict on emotion.

Read as a whole, the prosecutor told the jurors they would know Craven's guilt beyond a reasonable doubt by, in equal measure, recognizing it intellectually and feeling it emotionally in their hearts and viscerally in their guts. Equating "common intellectual sense" with "common moral sense,"¹⁷ invited jurors to give the same weight to their rationality as to their emotions and instincts. By arguing "only [guilty] verdicts make sense" when also arguing the

¹⁶ Id. at 2433-35, 2455-56.

¹⁷ Id. at 2434, 2435.

law must “make sense” in the head, heart, and gut,¹⁸ the prosecutor told jurors that arriving at a guilty verdict was as much emotional as intellectual. This can be understood only as an appeal to considerations other than the reasoned, intellectual application of law to facts. It risked a conviction based upon reasons other than the evidence.¹⁹

The prosecutor tried to blunt the impact of this theme in rebuttal:

PROSECUTOR: Let me set something else straight. [Defense] [c]ounsel accused me of asking you or suggesting that you convict based on morals or a gut feeling. It’s an example of overselling. It’s taking my comments out of context. What I reminded you repeatedly was to apply the facts and the evidence to the law. The law makes sense because it’s rooted in our intellect and our morals. And when you apply the facts to the evidence, it should feel right.

DEFENSE: I’m going to object again, Your Honor.

COURT: Objection overruled.

PROSECUTOR: Not just do whatever feels right. That’s a different argument. And let’s be clear, I said it should feel right because it makes sense. I never felt that—I never said that you should feel good about it. I never said you should feel bad about it. The point was if you follow the law and apply the evidence to the law, you will reach the right conclusion.^[20]

Despite the prosecutor’s belated attempt, his core theme remained the same: each juror should feel right intellectually, emotionally, and instinctually when

¹⁸ Id. at 2455-56.

¹⁹ Matter of Det. of Urlacher, 6 Wn. App. 2d 725, 748, 427 P.3d 662 (2018) (citing State v. Ramos, 164 Wn. App. 327, 338, 263 P.3d 1268 (2011)), review denied sub nom., In re Det. of Urlacher, 192 Wn.2d 1024, 435 P.3d 276 (2019).

²⁰ RP (May 23, 2018) at 2507-08 (emphasis added).

applying the law to the facts. He is incorrect. As a judicial officer, the prosecutor should have understood that following and applying the law will not always feel right emotionally or instinctually. In fact, as the court instructed, jurors are court officers with an obligation to set aside their biases and intellectually apply the law to the facts even if the result is personally distasteful or disappointing.²¹ The prosecutor urged the jury to rely upon their emotions and instincts when weighing the facts alleged. It was improper for the prosecutor to insist a juror should “feel right” and have a decision “make sense” in the heart and in the gut when reaching a verdict.²²

The State cites State v. Curtiss²³ to support the propriety of closing argument because “a criminal trial’s purpose is a search for truth and justice.”²⁴ In Curtiss, the court approved of the prosecutor’s closing argument that because a trial is “a search for the truth and a search for justice,” the jury should

²¹ See RCW 4.44.260 (a juror’s duty is to reach a verdict “according to the law and evidence as given them on the trial”); see also 11 WASHINGTON PRACTICE, PATTERN JURY INSTRUCTIONS: CRIMINAL 1.02, at 22 (4th ed. 2016) (“As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference.”); cf. In re Pers. Restraint of Yates, 177 Wn.2d 1, 30, 296 P.3d 872 (2013) (the right to trial by jury “is violated by the inclusion on the jury of a biased juror, whether the bias is actual or implied”) (citing Morgan v. Illinois, 504 U.S. 719, 729, 112 S. Ct. 2222, 119 L. Ed. 2d 492 (1992)).

²² We recognize that closing arguments in a criminal trial often involves facts that can excite emotion. A prosecutor is not compelled to ignore such facts. But arguing from facts that are inherently emotional is distinct from arguing for reliance upon emotion to decide a fact.

²³ 161 Wn. App. 673, 250 P.3d 496 (2011).

²⁴ Resp’t’s Br. at 39 (citing id. at 701).

“[c]onsider all the evidence as a whole” and convict if “you know in your gut . . . you know in your heart that Renee Curtiss is guilty as an accomplice to murder.”²⁵ The court reasoned “a criminal trial’s purpose is a search for truth and justice. Accordingly, the State’s gut and heart rebuttal arguments in this case were arguably overly simplistic but not misconduct.”²⁶ The court recited that the prosecutor’s single, fleeting “heart and gut” argument did not appeal to emotion, but it did not explain its reasoning. It also explained no prejudice would have resulted because the jury followed the court’s standard instruction not to base its decision on sympathy, prejudice, or personal preference, and that Curtiss, who did not object to the argument, failed to show an additional jury instruction could not have cured any error.²⁷

We disagree with Curtiss’s conclusion that a “heart and gut” argument is not an appeal to emotion. A jury should reach its verdict based upon the evidence presented at trial, not each juror’s preferences or feelings in their heart or gut. Because the prosecutor’s argument here emphatically and expressly invited jurors to use their emotions and visceral instincts equally with their intellect when reaching a verdict, closing argument was improper.²⁸ The search for justice is not consistent with this “heart and gut” appeal to emotion.

²⁵ Curtiss, 161 Wn. App. at 701.

²⁶ Id. at 702.

²⁷ Id.

²⁸ When considering allegations of prosecutorial misconduct, our Supreme Court has taken judicial notice of other cases in which that prosecutor has made the same argument. Warren, 165 Wn.2d at 27 n.4. Thus, we note our concern

However, Craven fails to show the argument was prejudicial. Before closing argument, the court provided the standard jury instruction explaining each juror must “reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference.”²⁹ More significantly, after the prosecutor’s first insistence that a correct verdict should “feel right,” the court correctly instructed the jury:

COURT: [The] jury will apply the law to the facts. The law is what is contained in my instructions. The facts are the evidence, which the jury finds to have been proven and established. It is an intellectual, not an emotional, decision, but that is the process that will be used.^[30]

This curative instruction reminded the jury of its duties and, having been given so timely, shaped the jury’s understanding of the rest of the prosecutor’s closing argument,³¹ significantly limiting any prejudicial impact.

that the same prosecutor has made the same closing argument in other cases, almost word-for-word. E.g., State v. Bacani, No. 76371-7, slip op. at 16-18 (Wash. Ct. App. June 18, 2018) (unpublished), <http://www.courts.wa.gov/opinions/pdf/763717.pdf>; State v. Berhe, No. 75277-4, slip op. at 21-23 (Wash. Ct. App. Feb. 5, 2018), (unpublished), <http://www.courts.wa.gov/opinions/pdf/752774.pdf>, rev’d on other grounds, 193 Wn.2d 647, 444 P.3d 1172 (2019). Bacani is distinguishable because the defendant did not object this argument appealed to emotion. No. 76371-7, slip op. at 15-22. We decline to adopt the reasoning in Berhe because it relies solely upon Curtiss to conclude this argument was proper. No. 75277-4, slip op. at 22-23.

²⁹ CP at 464.

³⁰ RP (May 23, 2018) at 2434 (emphasis added).

³¹ See State v. Stein, 144 Wn.2d 236, 247, 27 P.3d 184 (2001) (“We presume that juries follow all instructions given.”) (citing Degroot v. Berkley Constr., Inc., 83 Wn. App. 125, 131, 920 P.2d 619 (1996)).

Citing State v. Perez-Mejia³² and State v. Allen,³³ Craven insists this instruction failed to cure any prejudice because the court also overruled his objections. Perez-Mejia is not apt because the trial court there did not provide a curative instruction after overruling the defendant's objection to an improper closing argument.³⁴ Allen is also inapposite. There, the prosecutor repeatedly misstated the law during closing argument, the court overruled the defendant's objections without providing a curative instruction, and the jury's questions during deliberation showed it had been misled.³⁵ Because the court here correctly stated the law when providing a curative instruction, we presume the jury followed the court's instructions,³⁶ and nothing suggests the jury was misled, Craven fails to show prejudice from closing argument.

Affirmed.

The remainder of this opinion has no precedential value. Therefore, it will be filed for public record in accordance with the rules governing unpublished opinions.

³² 134 Wn. App. 907, 143 P.3d 838 (2006).

³³ 182 Wn.2d 364, 341 P.3d 268 (2015).

³⁴ 134 Wn. App. at 917-18.

³⁵ 182 Wn.2d at 371-80.

³⁶ Stein, 144 Wn.2d at 247.

II. Evidence Admitted Under ER 404(b)

Craven challenges eight pieces of evidence admitted pretrial under ER 404(b) to prove he intentionally killed Smith. He argues the evidence was not admitted for a proper purpose or was unduly prejudicial.

We review the court's interpretation of ER 404(b) de novo and review a decision to admit evidence for an abuse of discretion.³⁷ A trial court abuses its discretion when its decision rests on untenable grounds or was made for untenable reasons.³⁸ Evidence admitted under ER 404(b) may never be used to demonstrate a defendant's propensity to act in a certain way, but it may be admitted for any other purpose.³⁹ Before admitting evidence of a prior bad act, a court must (1) find by a preponderance of the evidence that the act occurred, (2) determine whether the evidence is relevant to prove an element of the crime charged, (3) identify a proper purpose for admitting the evidence, and (4) weigh the probative value of the evidence against any prejudicial effect.⁴⁰ The court must conduct the analysis on the record and provide a limiting instruction to the jury.⁴¹

³⁷ State v. Arredondo, 188 Wn.2d 244, 256, 394 P.3d 348 (2017) (citing Diaz v. State, 175 Wn.2d 457, 461-62, 285 P.3d 873 (2012); State v. Gresham, 173 Wn.2d 405, 419, 269 P.3d 207 (2012)).

³⁸ Id. (quoting State v. Mason, 160 Wn.2d 910, 922, 162 P.3d 396 (2007)).

³⁹ Gresham, 173 Wn.2d at 420-21.

⁴⁰ Arredondo, 188 Wn.2d at 257 (quoting Gresham, 173 Wn.2d at 421).

⁴¹ Id. (citing State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007)). Craven insinuates the court failed to properly consider the ER 404(b) evidence before admitting it. Appellant's Br. at 56, 63. The record does not

Craven does not contest the first two factors, whether the acts occurred or were relevant.⁴² Thus, we must determine, first, whether admitting the evidence to show Craven's intent was permissible,⁴³ and second, whether the evidence was sufficiently probative of motive and intent to avoid being unfairly prejudicial.

The court admitted each piece of evidence as probative of Craven's motive and intent to control and harm Cunningham and Meagan Smith.⁴⁴ Evidence can be admitted under ER 404(b) to prove motive and intent. A defendant's motive is "what prompted [him] to take criminal action."⁴⁵ "Evidence of a defendant's motive is relevant in a homicide prosecution."⁴⁶ "[E]vidence of quarrels and ill-feeling may be admissible to show motive, and evidence of prior threats is also admissible to show motive or malice if the evidence is of

support him. In addition to a lengthy discussion and series of oral rulings on the evidence, see RP (Apr. 6, 2018) at 278-326 (discussing and ruling on proffered ER 404(b) evidence), the court entered conclusions addressing each of the required factors. See CP at 139-67 (written ruling on ER 404(b) evidence). Craven fails to show the court did not consider the required factors.

⁴² Appellant's Br. at 54-66.

⁴³ Craven does not contest the evidence was admissible to demonstrate motive. See Appellant's Br. at 65.

⁴⁴ E.g., CP at 148 (trial court explaining its reasons for admitting one of the six pieces of evidence).

⁴⁵ Arredondo, 188 Wn.2d at 262 n.7 (citing State v. Tharp, 96 Wn.2d 591, 597, 637 P.2d 961 (1981)).

⁴⁶ State v. Stenson, 132 Wn.2d 668, 702, 940 P.2d 1239 (1997) (citing State v. Pirtle, 127 Wn.2d 628, 644, 904 P.2d 245 (1995); State v. Osborne, 18 Wn. App. 318, 325, 569 P.2d 1176 (1977)).

consequence to the action.”⁴⁷ A defendant’s intent is “what the defendant hopes to accomplish when motivated to take action.”⁴⁸ A defendant’s intent may be inferred from all the circumstances of a case, including the nature of the parties’ relationship and any previous threats.⁴⁹

The State argues Craven had an abusive, controlling relationship with Cunningham and this motivated his intent to act on threats he made against her and those close to her. Craven does not challenge the court’s decision to admit threats he made to Cunningham in the fall of 2014:

If I have to look on your phone and go on your Facebook to find someone else you’re talking to, I WILL hurt you so bad you will wish you were dead, I swear to God, Theresa.

If you even mention breaking up with me tomorrow, I will send you [your dog’s] head. [T]he one thing you love most. I will fucking send you [your dog’s] head. I swear to fucking God, Theresa. So are you?

If you threaten to call the cops one more time I’ll go after your friends. Not bottom up, but start at the top. Marla? Meagan?^[50]

Craven challenges three pieces of evidence from a trip he took in April 2015 to visit Cunningham at Gonzaga University. During that visit, Craven accused Cunningham of cheating on him, threw a glass at her, and assaulted her. Cunningham used her phone to photograph her injuries and concealed

⁴⁷ Id. at 702 (citing State v. Powell, 126 Wn.2d 244, 260, 893 P.2d 615 (1995)).

⁴⁸ Arredondo, 188 Wn.2d at 262 n.7 (citing Powell, 126 Wn.2d at 261).

⁴⁹ State v. Yarbrough, 151 Wn. App. 66, 86-87, 210 P.3d 1029 (2009) (quoting State v. Wilson, 125 Wn.2d 212, 217, 883 P.2d 320 (1994)).

⁵⁰ CP at 143-45.

them from Craven because he would check her phone. He sent a contrite text message after the assault: “I will die before I ever hurt [you] again. . . . [B]ut [you] can’t do this for me without me asking you to do something. Don’t wonder [why] I get mad at [you] for that.”⁵¹ This all demonstrates Craven’s intent to act on his desire to control Cunningham through violence and emotional manipulation. This evidence is also probative of intent because it can rebut Craven’s voluntary intoxication defense.

Craven challenges three pieces of evidence from the final days of his relationship with Cunningham. On June 3, 2015, Craven again accused Cunningham of cheating on him and made her strip off her clothes to prove she had no marks on her body showing infidelity. He then punched her in the chest and threatened to kill her by holding up two bullets and saying “pick which one you want.”⁵² On June 7, Cunningham went to a baseball game with her friends and met Craven afterwards. He accused her of cheating, took out a gun, pointed it at her head, and physically assaulted her. The next morning, Cunningham confided in a family friend about the abuse and revealed her injuries. This evidence is probative of Craven’s motive and intent because it shows his need to possess Cunningham and his willingness to exert control through threats and violence. This is also probative of intent because it can rebut Craven’s voluntary intoxication defense.

⁵¹ CP at 149.

⁵² CP at 153.

Craven challenges two pieces of evidence about taking Cunningham's dog. On June 16, 2015, after the breakup, Cunningham refused to see Craven, and then he went to her house and took her dog, a German Shepherd. On July 5, Craven visited a friend and asked if he could leave a German Shepherd with her. This evidence is also probative of Craven's intent to act deliberately on threats made to control Cunningham.

In State v. Arredondo, our Supreme Court upheld a trial court's admission of evidence under ER 404(b) to prove the motive and intent of a gang member charged as an accomplice to second degree murder and assault from a drive-by shooting.⁵³ The victims were all members of a rival gang.⁵⁴ The court concluded the evidence of a past drive-by committed by the gang member against that same rival gang showed his motive, deep-seated animosity toward the rival gang, and his intent to act with extreme violence when faced with his rivals.⁵⁵ Like the gang member, Craven's history of threats and related violence were probative of his need to control Cunningham and his intentional use of violence to do so. And like Arredondo, the State sought admission of these eight pieces of evidence under ER 404(b) to prove intent, not mere propensity. Craven fails to show the trial court erred.⁵⁶

⁵³ 188 Wn.2d 244, 249-50, 394 P.3d 348 (2017).

⁵⁴ Id. at 250-51.

⁵⁵ Id. at 259-61.

⁵⁶ Craven also contends the court erred by admitting evidence under ER 404(b) to show identity. But identity was still a material issue when the court admitted this evidence pretrial. See CP at 45-46 (Craven entering a

Craven argues the evidence was not sufficiently probative to outweigh its prejudicial effect. “Evidence is unfairly prejudicial when it is likely to stimulate an emotional response instead of a rational decision.”⁵⁷ Merely being prejudicial to the defendant does not make it unfair.⁵⁸ In City of Auburn v. Hedlund, for example, our Supreme Court concluded a 911 recording was unfairly prejudicial to a defendant charged as an accomplice to vehicular homicide where the content of the recording was inaccurate, exaggerated the severity of the car crash, and was offered merely to prove a fact “well-established” by other evidence.⁵⁹ And the 911 caller’s “gruesome” description was not germane to the crime charged.⁶⁰ In State v. Pirtle, by contrast, the court concluded gruesome crime scene and autopsy photos were not cumulative or unfairly prejudicial to a defendant charged with first degree murder and felony murder.⁶¹ Some photographs were very similar, but none

defense of general denial in his trial brief); RP (Apr. 6, 2018) at 213 (arguing general denial and intoxication defense the day of oral argument on the motion to admit evidence). Craven abandoned his general denial defense on the first day of trial, after the court admitted the ER 404(b) evidence. See RP (Apr. 30, 2018) at 478-79 (Craven admitting to killings in his opening statement); CP at 167 (court’s written ruling of April 23, 2018, admitting evidence). He did not renew his objections to the evidence after changing his defense. He fails to show the court abused its discretion.

⁵⁷ State v. Scherf, 192 Wn.2d 350, 388, 429 P.3d 776 (2018) (citing State v. Beadle, 173 Wn.2d 97, 120, 265 P.3d 863 (2011)).

⁵⁸ Id. (citing State v. Read, 100 Wn. App. 776, 782, 998 P.2d 897 (2000)).

⁵⁹ 165 Wn.2d 645, 648, 656, 201 P.3d 315 (2009).

⁶⁰ Id.

⁶¹ 127 Wn.2d 628, 635, 655, 904 P.2d 245 (1996).

were duplicative.⁶² Each photograph provided a distinct view, such as how a victim had been wounded or where they had been attacked. The photographs were probative of premeditation because they helped to establish the sequence of the attacks and how the wounds were inflicted.⁶³ Although the photographs were “potentially inflammatory” because they were “gruesome,” that risk was unavoidable because crime itself was “gruesome and horrible.”⁶⁴

Craven contends the evidence of abuse was cumulative and, therefore, unduly prejudicial. As in Pirtle, none of the admitted evidence was duplicative of any other. Each act of abuse was distinct and probative of Craven’s motive and intent. For example, evidence that Craven threatened Cunningham’s life by putting a gun to her head after she socialized without him was probative of premeditation by showing his strategic use of deadly threats to control her. Evidence he stole her dog after the breakup was probative of premeditation, showing his willingness to target others to control her.⁶⁵ Each act was probative of whether Craven acted with premeditation when he killed Smith because acts

⁶² Id.

⁶³ Id. at 644-45, 653-55.

⁶⁴ Id. at 655.

⁶⁵ Craven also asserts the theft of Cunningham’s dog was unfairly prejudicial because it was an “overt act of violence,” Appellant’s Br. at 62-63, but he mischaracterizes the evidence. The court did not admit evidence Craven harmed Cunningham’s dog. Indeed, the evidence showed Craven kept the dog for several weeks and was trying to give it away. See CP at 159, 166-67. Although the jury could have inferred Craven killed the dog based on his threats and the fact it never came home, the jury could have as easily inferred he found someone to take the dog.

of past violence by the defendant against one victim can be probative of the defendant's intent to harm another victim in related circumstances.⁶⁶ Craven's history of threats and subsequent acts were highly probative of his motive and intent in a case where the State had the burden of proving premeditated intent. Craven does not show the court abused its discretion.⁶⁷

III. ER 404(b) Limiting Instruction

Craven assigns error to jury instruction 28, the limiting instruction for prior bad act evidence admitted to prove he killed Smith with premeditated intent. The instruction restricted how the jury could consider eight months of misconduct, but it did not restrict the jury's ability to consider misconduct from the two months before the crime. Craven's counsel drafted and proposed the instruction. The instruction provided:

⁶⁶ See Arredondo, 188 Wn.2d at 249-50, 260 (evidence of a prior, uncharged drive-by shooting committed by a gang member charged as an accomplice to second degree murder in a different drive-by shooting of a rival gang was probative of the defendant's motive and intent because it showed his level of animosity toward rival gang members); Pirtle, 127 Wn.2d at 649-50 (a robber's past conviction for a Montana felony assault was probative of motive and intent in a Washington aggravated murder case because his motive for killing the witnesses of his Washington robbery originated in the existence of the Montana felony assault charges); State v. Boot, 89 Wn. App. 780, 789, 950 P.2d 964 (1998) (in an aggravated first degree murder case for killing a woman, affirming the admission of evidence showing the defendant held a gun to the head of a different woman two days earlier and was mocked as being too weak to pull the trigger, giving him the motive and intent to kill someone).

⁶⁷ Craven argues his prior acts of domestic violence against Cunningham are inadmissible because she was not the victim of the charged crimes. But Craven fails to explain why evidence of a defendant's past violence targeting a romantic partner cannot be probative of the defendant's motive or intent to harm another person connected to that partner.

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of testimony related to

misconduct by the defendant toward Theresa Cunningham between September of 2014 and April of 2015. You may consider this evidence as to motive, intent, and premeditation for [killing Smith]. You may not consider this evidence as to [assaulting Luxton] or [killing Hayden]. Except as indicated in Instruction 35, you may not consider this evidence for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.^[68]

A. Invited Error

As a threshold matter, the State argues the invited error doctrine bars consideration of this issue. “A party may not request an instruction and later complain on appeal that the requested instruction was given.”⁶⁹ This is a strict and inflexible rule⁷⁰ that bars review even where the defendant proposes an instruction in good faith and matters outside his control render it incorrect.⁷¹

Craven argues State v. Gresham created an independent duty for a trial court to provide a defendant’s proposed ER 404(b) limiting instruction after altering it to correctly state the law.^{72 73} But he misreads Gresham. There, the

⁶⁸ CP at 492 (emphasis added).

⁶⁹ State v. Studd, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999) (quoting State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990)).

⁷⁰ Id. at 547 (citing Henderson, 114 Wn.2d at 872).

⁷¹ See City of Seattle v. Patu, 147 Wn.2d 717, 720-21, 58 P.3d 273 (2002) (concluding the invited error doctrine barred review where the ordinance on which the defendant based his instruction was later held unconstitutional).

⁷² 173 Wn.2d 405, 269 P.3d 207 (2012).

⁷³ Craven relies on an unpublished case, State v. Moreno-Valentin, 190 Wn. App. 1022, 2015 WL 5724962 (2015), to support his position, but the case

trial court admitted evidence under ER 404(b), and the defendant's attorney proposed a limiting instruction that incorrectly stated the law.⁷⁴ The trial court rejected the instruction because it was incorrect but failed to give any limiting instruction.⁷⁵ The court stated, "At least in the context of ER 404(b) limiting instructions, once a criminal defendant requests a limiting instruction, the trial court has a duty to correctly instruct the jury, notwithstanding defense counsel's failure to propose a correct instruction."⁷⁶ It explained a defendant should not be held to have waived the right to a limiting instruction by proposing an incorrect one.⁷⁷ It did not address the circumstances here, where the trial court provided the defendant's proposed instruction.

Because the trial court in Gresham rejected the defendant's instruction, the invited error doctrine was not applicable and not addressed. Nor did the court give any indication it was overruling decades of invited error precedent by creating an exception specific to ER 404(b). Indeed, such an exception would be incongruous with more recent Supreme Court decisions holding that the invited error doctrine can preclude review of alleged errors of constitutional magnitude.⁷⁸

is inapposite. The defendant in Moreno-Valentin did not request the erroneous limiting instruction. Id. at *5.

⁷⁴ Gresham, 173 Wn.2d at 424.

⁷⁵ Id.

⁷⁶ Id.

⁷⁷ Id. at 424-25.

⁷⁸ See, e.g., Matter of Pers. Restraint of Salinas, 189 Wn.2d 747, 754, 757-58, 408 P.3d 344 (2018) (holding the invited error doctrine barred review of a defendant's allegation of a public trial violation).

Craven agrees he proposed and the court adopted the portion of instruction 28 he now argues was erroneous.⁷⁹ The invited error doctrine bars Craven from assigning error to the very language he proposed.⁸⁰ We decline to review this alleged error.

B. Ineffective Assistance of Counsel

Craven argues his counsels were ineffective for proposing jury instruction 28. We review a claim of ineffective assistance of counsel de novo.⁸¹ The defendant bears the burden of proving ineffective assistance of counsel.⁸² First, the defendant must prove his counsel's performance was deficient.⁸³ Second, the defendant must prove his counsel's deficient performance prejudiced his defense.⁸⁴ Failure to prove either deficiency or prejudice ends the inquiry.⁸⁵ A defendant must overcome "a strong presumption that counsel's performance was reasonable."⁸⁶ When defense

⁷⁹ See Appellant's Br. at 68 ("[Defense] [c]ounsel proposed the instruction except for the reference to Instruction 35.").

⁸⁰ Patu, 147 Wn.2d at 721 (quoting Studd, 137 Wn.2d at 546).

⁸¹ State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009) (citing In re Pers. Restraint of Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001)).

⁸² State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (quoting Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984)).

⁸³ Id. at 32 (quoting Strickland, 466 U.S. at 687).

⁸⁴ Id. at 33 (quoting Strickland, 466 U.S. at 687).

⁸⁵ State v. Woods, 198 Wn. App. 453, 461, 393 P.3d 886 (2017) (citing State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996)).

⁸⁶ Grier, 171 Wn.2d at 33 (quoting State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)).

counsel's decisions "can be characterized as legitimate trial strategy or tactics, performance is not deficient."⁸⁷

Craven concedes that his trial counsels made a strategic choice when proposing the limiting instruction but contends the decision was not legitimate. The jury instruction prohibited the jury from considering misconduct from September of 2014 through April 2015 to decide whether Craven intentionally assaulted Luxton and killed Hayden, implicitly allowing consideration of misconduct from May, June, and July of 2015 for any purpose. Craven's trial strategy was to contend only that he was incapable of forming premeditative intent due to a downward spiral of drug addiction and not contest attacking Luxton or killing Hayden and Smith. The jury could have found Craven guilty of only lesser offenses had it accepted his theory.

During opening statement, defense counsel asserted Craven was experiencing a "deterioration," becoming "incoherent" and having "delusional, irrational thinking that was increasing" such that he "was absolutely delusional by the time" he attacked his victims.⁸⁸ He expressly invited testimony about misconduct after April 2015 to prove his theory. For example, defense counsel invited testimony from one witness to prove Craven regularly used methamphetamine and heroin in June and July of 2015 and would suddenly

⁸⁷ Kyllo, 166 Wn.2d at 863.

⁸⁸ RP (Apr. 30, 2018) at 487-89.

became violent when under the influence.⁸⁹ He also cross-examined Cunningham about Craven's increasing violence and drug use through May, June, and July of 2015, asking if his behavior was a "consistent straight line down" during those months.⁹⁰ During closing, defense counsel argued Craven's increasingly irrational, impulsive, and violent behavior in May, June, and July of 2015 was due to drug abuse.⁹¹ The jury could have concluded heroin and methamphetamine use gave Craven a propensity for irrational, rather than intentional, violence when he attacked Luxton, Hayden, and Smith. Defense counsel made a legitimate, strategic decision to avoid conviction on the most serious charges by showing and letting the jury infer Craven's propensity for irrational violence when using drugs in the months leading to his crimes. Because defense counsels' decisions were legitimate and strategic, Craven fails to demonstrate they were ineffective.

IV. Severance

Craven argues the trial court abused its discretion when it denied his pretrial motion to sever and when it denied his renewed, half-time motion to sever. We review a trial court's denial of a motion to sever for abuse of

⁸⁹ See RP (May 8, 2018) at 1377-81.

⁹⁰ RP (May 14, 2018) at 1910.

⁹¹ RP (May 23, 2018) at 2466-71 (arguing Craven's behavior in May, June, and July of 2015 was a "descent" into impulsive violence and irrationality due to drug use).

discretion.⁹² Severance is appropriate where the defendant demonstrates that holding a single trial is “so manifestly prejudicial” that it “outweigh[s] the concern for judicial economy.”⁹³ To determine whether a single trial would cause undue prejudice, we weigh “(1) the strength of the State’s evidence on each count; (2) the clarity of defenses as to each count; (3) court instructions to the jury to consider each count separately; and (4) the admissibility of evidence of the other charges even if not joined for trial.”⁹⁴ Even if evidence of separate charges would not be cross admissible in separate trials, severance is not required.⁹⁵

Because we consider only the facts known to the trial court at the time it evaluated a severance motion, we first evaluate the court’s denial of Craven’s pretrial motion to sever and then consider his renewed motion.⁹⁶

⁹² State v. Nguyen, 10 Wn. App. 2d 797, 814, 450 P.3d 630 (2019) (citing State v. Bythrow, 114 Wn.2d 713, 717-18, 790 P.2d 154 (1990)), review denied sub nom. State v. Thanh Pham Nguyen, 195 Wn.2d 1012, 460 P.3d 178 (2020).

⁹³ Id. (quoting Bythrow, 114 Wn.2d at 718).

⁹⁴ State v. Bluford, 188 Wn.2d 298, 311-12, 393 P.3d 1219 (2017) (quoting State v. Russell, 125 Wn.2d 24, 63, 882 P.2d 747 (1994)).

⁹⁵ State v. Kalakosky, 121 Wn.2d 525, 538, 852 P.2d 1064 (1993) (citing State v. Markle, 118 Wn.2d 424, 439, 823 P.2d 1101 (1992); Bythrow, 114 Wn.2d at 720).

⁹⁶ See Bluford, 188 Wn.2d at 310 (“[W]here we are reviewing only pretrial joinder, we review only the facts known to the trial judge at the time, rather than the events that develop later at trial.”).

A. Pretrial Denial of Severance

For the first factor, Craven does not argue the evidence was weak on either murder charge. Although he argues evidence of the murder charges “were not equally strong” as evidence of the assault charge,⁹⁷ a review of the record shows the evidence on each charge was compelling. For the second factor, he concedes his assertion of the same defenses to all three charges, general denial and voluntary intoxication, did not support severance.⁹⁸ For the third factor, Craven asserts the jury would have been unable to follow the court’s instruction to consider each charge separately.⁹⁹ But we presume a jury will follow the instructions provided absent evidence to the contrary,¹⁰⁰ and the court planned to provide the jury with an instruction to consider each charge separately.¹⁰¹ The critical factor here is the fourth: cross admissibility of the evidence between the assault and murder charges and between each murder charge.

Craven argues evidence related to the gun and evidence of him being driven to the two killings was not cross admissible between the charges. He

⁹⁷ Appellant’s Br. at 33.

⁹⁸ See id. (explaining “[t]he court noted, and defense counsel agreed, there was no conflict in the defenses).

⁹⁹ Id. at 34-35.

¹⁰⁰ State v. Kirkman, 159 Wn.2d 918, 928, 155 P.3d 125 (2007) (citing State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984); State v. Cerny, 78 Wn.2d 845, 850, 480 P.2d 199 (1971)).

¹⁰¹ RP (Apr. 6, 2018) at 228.

admits “the firearm-related evidence, including forensic analysis, provided a basis for the State to argue that the gun used to assault Luxton was the gun used to kill Smith and Hayden.”¹⁰² He contends, however, that this firearm evidence had little probative value, making it unfairly prejudicial and inadmissible because other evidence showed Craven possessed a .22 caliber gun. He also argues evidence Jorge Lopez drove him to Hayden’s house and then to Cunningham’s house would not have been cross admissible because it was not relevant to the assault on Luxton.

Before Craven changed his defense, the State still had to prove he shot Hayden and Smith. Forensic evidence showed the same gun was used in all three crimes. Luxton’s testimony about being assaulted with that specific .22 was highly probative of identity because it connected Craven with the murder weapon.¹⁰³ And with intent and premeditation at issue, Lopez’s testimony would have been probative and cross admissible to the murder charges because he could testify about Craven’s requests to be driven to Hayden’s house and Cunningham’s house on the day of the murders. He could also

¹⁰² Appellant’s Br. at 37.

¹⁰³ Craven contends other witnesses could link him to the gun, making Luxton’s testimony less probative. But other witnesses provided conflicting evidence, describing the gun by color or size rather than caliber. Only one other witness, Michael Garcia, could testify he saw Craven with a .22 caliber gun around the time of the killings. The presence of one other witness who could connect Craven to that caliber of weapon does not reduce the probative value of Luxton’s testimony so low as to render it unfairly prejudicial.

rebut Craven's mitigation theory by testifying about his demeanor the day of the killings.

Although evidence about the killings would not necessarily have been admitted in a separate trial on the assault charge, severance is not required merely because some evidence is not cross admissible.¹⁰⁴ Indeed, an entire criminal charge may not be cross admissible, and a court is still not obligated to sever the charge.¹⁰⁵ Testimony about the gun, including Luxton's, would have been cross admissible for all three charges, and Lopez's testimony was probative of intent for both murders. Because the factors predominantly favored trying the charges together, Craven fails to show the court abused its discretion.

B. Denial of Severance During Trial

CrR 4.4(b) allows severance when "the court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense." Accordingly, a defendant may raise a motion to sever after trial has begun to address "[a]ny prejudice that emerges over the course of the trial."¹⁰⁶ Craven argues the court abused its discretion when it denied his renewed motion to sever. He asserts none of the ER 404(b) evidence previously

¹⁰⁴ Kalakosky, 121 Wn.2d at 538.

¹⁰⁵ Bythrow, 114 Wn.2d at 720.

¹⁰⁶ Bluford, 188 Wn.2d at 310 (citing CrR 4.4(a)(2)).

admitted remained cross admissible because he changed his strategy, contesting only intent and not identity.

The four factors did not favor severance. The court instructed the jury to consider each charge separately.¹⁰⁷ Craven asserted the same voluntary intoxication defense to all three charges. Severing the murder charges would have required repeating testimony from 18 witnesses, of the 44 total, who either investigated both killings or, like Luxton, could address the voluntary intoxication defense by testifying about Craven's behavior when on drugs. And if the State also called the arresting officers who personally observed Craven's behavior in the hours following Smith's killing, then 22 of the 44 witnesses called would have testified at both trials. All of the ER 404(b) evidence admitted pretrial to show the identity of Hayden's killer was also admitted to show the motive, intent, or knowledge of Smith's killer, and remained cross admissible for those purposes. Declining to contest identity eliminated the risk of prejudice from the jury improperly inferring Craven committed one act of violence because he committed another. Considering the factors as a whole, Craven fails to show a manifest prejudice compelling severance.

IV. Improper Opinion Testimony

We review an allegation the court admitted improper testimony for abuse of discretion.¹⁰⁸ A court abuses its discretion if it admits opinion testimony that

¹⁰⁷ See CP at 465.

¹⁰⁸ State v. Blake, 172 Wn. App. 515, 523, 298 P.3d 769 (2012) (citing State v. Demery, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001)).

embraces the ultimate issue in a trial and is not otherwise admissible.¹⁰⁹ A lay witness's opinion about a witness's demeanor is admissible, even if it goes to the ultimate issue, when based upon their personal observation of the defendant.¹¹⁰ Because improper opinion testimony violates the defendant's right to a trial by jury, we review improper admission of opinion testimony under the constitutional harmless error standard.¹¹¹ Reversal is required unless the State can prove beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error.¹¹² If the untainted evidence was so overwhelming the jury necessarily would have found the defendant guilty, then the error was harmless.¹¹³

Craven contends Detective Peter Montemayor, the lead detective on Smith's death, prejudiced him by giving improper opinion testimony. The primary issue at trial was whether Craven acted with the requisite intent.

¹⁰⁹ State v. Quaaale, 182 Wn.2d 191, 197, 340 P.3d 213 (2014) (citing ER 704).

¹¹⁰ See State v. Rafay, 168 Wn. App. 734, 808, 285 P.3d 83 (2012) (citing cases) ("Washington courts have repeatedly found [opinions about a defendant's demeanor] admissible when based on a proper foundation of factual observations that directly and logically support the witness's conclusion."); City of Seattle v. Heatley, 70 Wn. App. 573, 579, 854 P.2d 658 (1993) (concluding a police officer's opinion that went to an ultimate issue for the jury was admissible when "based solely on his experience and his observation").

¹¹¹ Quaaale, 182 Wn.2d at 201-02.

¹¹² Id. (citing State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002)).

¹¹³ Scherf, 192 Wn.2d at 371.

Montemayor testified for the State four times during the trial. The fourth time he took the stand, Montemayor and the prosecutor had the following exchange:

Q: Although Ms. Hayden's homicide is not your specific investigation, is it fair to say that you are familiar with that investigation?

A: I am familiar with it, yes.

Q: Familiar with the autopsy findings?

A: Yes.

Q: Reviewed all this video evidence?

A: Yes.

Q: Based on your investigation, the accompanying investigation that you were part of and also made aware of, are you aware of any evidence, any evidence to show that Mr. Craven's killing of Angelika Hayden was not intentional?

[DEFENSE]: Your Honor, this is an improper question.

COURT: What?

[DEFENSE]: This is ultimately for the jury.

COURT: Objection sustained.

Q: Did you find any actual evidence of Mr. Craven being intoxicated at the time of Angelika Hayden's murder or homicide?

A: No. Just being in possession of narcotics upon arrest.

Q: Any evidence that during the time of Angelika Hayden's homicide that Mr. Craven was so intoxicated he could not form intentional acts?

[DEFENSE]: Your Honor, . . . I'm going to object to this. This is an ultimate question for the jury.

COURT: I'm going to allow this question.

A: I have not seen any of that evidence, no.

Q: Are you aware of any actual evidence that Mr. Craven was so intoxicated at the time of Ms. Smith's killing that he was not capable of committing that act intentionally?

A: No.

[DEFENSE]: I'm also going to have –

COURT: I'm going to sustain this objection. [T]he jury will disregard.

Q: Any actual evidence that Mr. Craven at the time of Meagan Smith's homicide was so intoxicated that he was not capable of forming or committing an intentional act?

[DEFENSE]: Your Honor, I'm going to object both on it's an ultimate question and also on speculation based upon the question.

COURT: Alright. I will allow this, but I do want to caution the jury that ultimately it will be the jury's determination, based on all the evidence received in the courtroom, to determine whether Mr. Craven is responsible for any of these crimes.

Q: Are you aware of any such evidence?

A: No.^[114]

Assuming Montemayor gave an improper opinion, the question is whether the error was harmless.

The State argues Montemayor's testimony was not necessary to establish premeditated intent because testimony from other witnesses established that Craven could act intentionally when he attacked Luxton,

¹¹⁴ RP (May 17, 2018) at 2363-65.

Hayden, and Smith. Unlike Montemayor, the other witnesses who testified about Craven's intent had seen his demeanor and based their testimony upon personal observations. Cunningham testified Craven's several assaults on her, including hitting her and pointing a gun at her head, were intentional.¹¹⁵ Luxton testified Craven acted intentionally when putting a gun to his head, threatening to kill him, and striking him with the gun.¹¹⁶ Lopez, who drove Craven to Hayden's house the day of her killing, testified Craven gave turn-by-turn directions to her house.¹¹⁷ Lopez also testified Craven gave him turn-by-turn directions to from Hayden's house to Cunningham's house.¹¹⁸ Douglas Beaton was Hayden's neighbor. Beaton spoke with Craven after he left her house on the afternoon of her killing.¹¹⁹ Beaton testified Craven had no trouble walking, no trouble speaking, and no trouble getting into a vehicle.¹²⁰ Officer Berntson, who helped arrest Craven and is a certified emergency medical technician and trained combat medic, testified Craven's uncooperative behavior around the arrest was intentional despite him being high on heroin.¹²¹ Officer Adam, who helped arrest Craven and was an emergency medical technician and firefighter

¹¹⁵ RP (May 14, 2018) at 1933-34.

¹¹⁶ RP (May 1, 2018) at 631-32.

¹¹⁷ RP (May 8, 2018) at 1285-87.

¹¹⁸ Id. at 1289, 1293-95.

¹¹⁹ RP (May 7, 2018) at 1085-90.

¹²⁰ Id. at 1092-93.

¹²¹ RP (May 3, 2018) at 987, 1002-03.

before his career as a police officer, testified Craven did not appear to be too intoxicated to act without intent.¹²² Officer Reyes, who heard Craven speak with Cunningham the night of the killings, testified Craven's speech was confident and not slurred.¹²³ Most notably, the prosecutor asked Officer Corey Jacobs, a 29-year veteran police officer who also helped arrest Craven, a series of questions, like those posed to Montemayor, about whether Craven could act intentionally on the night of the killings:

Q: Was there anything that led you to believe that during that observation that [Craven's] decision to walk backwards and keep an eye on [the drugstore] or look toward that [drugstore], that was not a purposeful or intentional action?

A: No, sir.

....

Q: When that person turned, you said, saw your vehicle, and then you described the path in which this person took. Anything about that period of time you observed this individual, anything for you to believe that those actions were not purposeful or intentional?

A: No, sir.

....

Q: When that individual headed northbound, after you went into the Fred Meyer parking lot, anything that to you even remotely seemed not purposeful or unintentional?

A: No, sir.

....

¹²² Id. at 926-27.

¹²³ Id. at 894.

Q: When you ordered [Craven] to stop, you told us that he had some words for you?

A: Yes, sir.

Q: "Why? What did I do?" Is that correct?

A: Yes, sir.

. . . .

Q: Did that appear to be in response to your commands?

A: Yes.

Q: So, anything about that seem unpurposeful or unintentional?

A: No, sir.

Q: Putting the hands up but continuing to walk away and dropping the [backpack], anything about that seem to you [to be] unpurposeful or unintentional?

A: No, sir.

Q: And then, putting it all together, all of your observations that day, because sometimes when you have little bits and pieces and you are so focused on little pieces you might not get the big picture, right? So, I want to now talk about putting all of your observations together on that night of this individual, is there anything combined that causes you to think that any of his actions were not purposeful or unintentional?

A: No, sir.^[124]

The State also demonstrated Craven's motive for killing Smith, his desire to control Cunningham. Cunningham testified about Craven's escalating use of threats and violence to control her: a threat from April 2015 to kill her family if

¹²⁴ Id. at 977-80 (emphasis added).

she refused to marry him;¹²⁵ physically assaulting her on June 3;¹²⁶ putting a gun to her head on June 6;¹²⁷ and taking her dog after they broke up, which he had threatened to do if she broke up with him.¹²⁸ Cunningham also testified about Craven's threats to "kill one of your friends right now, if you say the wrong thing" and to kill Smith "[if] you threaten to call the cops one more time."¹²⁹

Craven contends this evidence does not overwhelm Montemayor's inappropriate opinion because other evidence suggested he was on drugs and unsteady on his feet the night of the arrest. But a voluntary intoxication defense merely instructs the jury to consider evidence of intoxication when deciding the defendant's intent;¹³⁰ it does not mandate acquittal due to any evidence of intoxication. Cunningham and Luxton, two people who knew Craven better than every other witness, said he threatened their lives and assaulted them intentionally when he was under the influence of drugs. Lopez testified that on the day of the murders, Craven carefully directed him to Hayden's house and then to Cunningham's house. The jury would have reached the same verdict regardless of Montemayor's testimony because of the overwhelming evidence

¹²⁵ RP (May 14, 2018) at 1839.

¹²⁶ Id. at 1869-70.

¹²⁷ Id. at 1871-73.

¹²⁸ RP (May 8, 2018) at 1359-61; RP (May 14, 2018) at 1887-89.

¹²⁹ RP (May 14, 2018) at 1836-39.

¹³⁰ State v. Webb, 162 Wn. App. 195, 208, 252 P.3d 424 (2011) (citing State v. Thomas, 123 Wn. App. 771, 781, 98 P.3d 1258 (2004)).

of Craven's intentional conduct. The decision to admit Montemayor's testimony was harmless beyond a reasonable doubt.

V. Sixth Amendment Right to Confrontation

Craven argues his Sixth Amendment right to confrontation was violated when the court admitted documents that an inmate provided to a detective investigating Craven's case because the inmate refused to testify and verify that Craven wrote the documents. Craven asserts providing the documents was a communicative act, so admitting them was akin to the inmate testifying to their origin. Assuming Craven's assertion is correct, he waived his right to confrontation because he stipulated to admission of other testimonial hearsay from the inmate.¹³¹

Both the Sixth Amendment and article I, section 22 of Washington's Constitution guarantee a defendant's right to confront adverse witnesses.¹³² Witnesses are either adverse to the defendant and must be produced by the State or helpful to the defendant and may be called if he chooses.¹³³ "[T]here is not a third category of witnesses."¹³⁴ Where the State invites inculpatory hearsay, the defendant must assert his right to confront the absent declarant or

¹³¹ RP (May 17, 2018) at 2204-06.

¹³² State v. Burns, 193 Wn.2d 190, 207, 438 P.3d 1183 (2019).

¹³³ Melendez-Diaz v. Massachusetts, 557 U.S. 305, 313-14, 129 S. Ct. 2527, 2534, 174 L. Ed. 2d 314 (2009).

¹³⁴ Id. at 314.

he waives it.¹³⁵ Placing the burden to object on the defendant supports clarity and judicial efficiency by giving appellate courts a reviewable decision.¹³⁶

Pretrial, Craven contended admitting the documents violated his right to confrontation because providing them was functionally testimonial and the inmate refused to testify. During trial, the inmate still refused to testify, but Craven wanted to admit exculpatory evidence from the inmate's interview with the police and stipulated to its admission.¹³⁷ Notably, the court was going to refuse to admit the interview as hearsay and allowed it only because Craven and the State agreed to it.¹³⁸ By stipulating to admission of other testimonial hearsay from the inmate, Craven waived his right to confront him. Because he waived this right, he fails to present an appealable decision for review.

VI. 911 Recording

The State played a recording of the 911 call Cunningham made after she discovered Smith's body. In the call, Cunningham calls Craven a "psychopath."¹³⁹ The court refused to edit the tape to omit "psychopath" because it was a colloquial use of the word and clearly not used to formally

¹³⁵ Burns, 193 Wn.2d at 208 (quoting Melendez-Diaz, 557 U.S. at 314 n.3, at 327).

¹³⁶ Id. at 211.

¹³⁷ RP (May 17, 2018) at 2203-07.

¹³⁸ Id. at 2204-05.

¹³⁹ Ex. 75 at 1:10-1:15. At trial, Craven argued Cunningham called him a "sociopath." In the recording, she clearly says "psychopath," and appellate counsel agrees. Appellant's Br. at 84 n.14. Regardless, Craven argues either word was prejudicial for the same reasons.

diagnose. Craven contends the call should have been edited to remove “psychopath” as irrelevant and unfairly prejudicial.

Evidence is relevant when it has any tendency to make the existence of any fact more or less likely.¹⁴⁰ This is a “very low” threshold, and even “minimally relevant evidence is admissible.”¹⁴¹ As Craven notes, calling him a “psychopath” could be pejorative, but the context and Cunningham’s vocal tone illustrated her use of the term was to express fear, shock, and upset, not to insult. Craven argues the pejorative use of “psychopath” was prejudicial, but it is the word’s colloquial, nonclinical meaning that makes it relevant. Her vocal tone and decision to say “psychopath” corroborated Cunningham’s testimony about her fear of Craven in the months before the assault and killings. Cunningham testified that she feared for her life in April 2015 when Craven physically assaulted her. She also explained she took Craven’s threats to kill her and her loved ones as genuine.¹⁴² “Psychopath” was relevant.

It was also admissible. Cunningham’s reaction in the minutes after discovering her friend’s corpse was admissible under ER 803(a)(2) as an

¹⁴⁰ ER 401.

¹⁴¹ State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002) (citing State v. Hudlow, 99 Wn.2d 1, 16, 659 P.2d 514 (1983)).

¹⁴² See, e.g., RP (May 14, 2018) at 1834 (explaining she took Craven’s threat to “make you go to everyone’s funeral, and then I will take you out” as “[t]hat he is going to kill everyone that I cared about and then kill me after . . . because I wasn’t doing what he wanted me to do”).

excited utterance.¹⁴³ Even if the word was emotionally loaded, Craven fails to explain how a single use of “psychopath” in a searing, eight-minute recording played in the middle of a lengthy trial would inflame the jury’s passions sufficiently to cause prejudice. Craven fails to show the court abused its discretion by refusing to remove “psychopath” from the 911 recording.¹⁴⁴

VIII. Cumulative Error

Craven argues cumulative error deprived him of a fair trial, requiring reversal. “The cumulative error doctrine applies where a combination of trial errors denies the accused a fair trial even where any one of the errors, taken individually, may not justify reversal.”¹⁴⁵ A new trial is required when the “accumulation of errors most certainly requires a new trial.”¹⁴⁶ Assuming admitting Montemayor’s testimony was erroneous, it was undoubtedly harmless and minor in the context of the entire trial. Although the prosecutor’s closing argument was improper, the court’s clear curative instruction substantially reduced the risk of prejudice. Thus, it is highly unlikely these errors cumulatively affected the outcome of the trial when the State presented considerable,

¹⁴³ See ER 803(a)(2) (an excited utterance is any “statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.”).

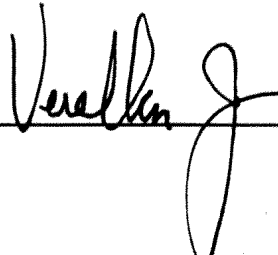
¹⁴⁴ See Darden, 145 Wn.2d at 619 (citing Powell, 126 Wn.2d at 258) (decision to admit evidence is reviewed for abuse of discretion).

¹⁴⁵ State v. Song Wang, 5 Wn. App. 2d 12, 31, 424 P.3d 1251 (2018) (quoting In re Detention of Coe, 175 Wn.2d 482, 515, 286 P.3d 29 (2012)), review denied, 192 Wn.2d 1012, 432 P.3d 1235 (2019).

¹⁴⁶ State v. Clark, 187 Wn.2d 641, 649, 389 P.3d 462 (2017) (quoting State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984)).

compelling evidence on all three charges. The cumulative error doctrine does not warrant any relief on appeal.

Therefore, we affirm.



WE CONCUR:





NIELSEN KOCH P.L.L.C.

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