NO. 99742-0
COA NO. 81152-5-I

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICAH OLEXA,

Petitioner.

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

PETITION FOR REVIEW

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A. INTRODUCTION

Longstanding precedent forbids a prosecutor from arguing the jury may believe the defendant's testimony only if it finds the prosecution's witnesses are lying. The prosecutor did exactly that at Micah Olexa's trial, improperly narrowing the bases on which the jury could acquit Mr. Olexa and misstating the prosecution's burden of proof.

In addition, the prosecutor's closing argument offered medical opinions unsupported by any witness's testimony that exaggerated an alleged victim's injuries. And the prosecution asked a question about Mr. Olexa's prior police contacts that violated a pretrial order, implying a propensity to criminality.

The Court of Appeals held the prosecution committed no prejudicial misconduct. This holding not only contravened decades of the Court's own precedent, but it also flouted this Court's repeated warnings against obtaining convictions by improper means. Worse, it sanctioned the prosecution's deprivation of Mr. Olexa's right to a fair trial.

B. IDENTITY OF PETITIONER

Petitioner Micah Olexa asks for review of the Court of Appeals's decision affirming his convictions.

C. COURT OF APPEALS DECISION

Mr. Olexa seeks review of the Court of Appeals's unpublished decision in *State v. Olexa*, No. 81152-5-I (Wash. Ct. App. Apr. 19, 2021.

D. ISSUES PRESENTED FOR REVIEW

1. A prosecutor may not argue the jury may believe a defendant's testimony only by finding the prosecution's witnesses are lying. Numerous published opinions of the Court of Appeals explain this argument misstates the bases on which the jury may acquit and lessens the prosecution's burden of proof. Here, the Court of Appeals contravened these opinions in holding the prosecutor did not commit misconduct.

2. A prosecutor may not urge the jury to convict based on facts outside the record. This Court has held that, by arguing such facts to the jury, a prosecutor ceases acting as an advocate and becomes a witness. The prosecutor violated

this rule by offering medical opinions in her closing argument unsupported by any testimony. The Court of Appeals's contrary conclusion contravenes this Court's precedent.

3. Multiple acts of misconduct may combine to cause prejudice requiring reversal. In combination, the prosecution's acts of misconduct exaggerated the strength of its case and deprived Mr. Olexa of a fair trial. Nonetheless, the Court of Appeals held the improper arguments were not misconduct and did not analyze whether they caused prejudice.

E. STATEMENT OF THE CASE

Mr. Olexa lived with his mother, Jean Kimerling, near Bastyr University, where she is a student. RP 538–39, 544–45. Ms. Kimerling's classmate Deborah Langheld also lived with her. RP 540–42. The events at issue occurred on June 19, 2019, when Ms. Kimerling told Ms. Langheld she needed to move out. Ms. Kimerling's, Ms. Langheld's, and Mr. Olexa's accounts of that date differ greatly.

Mr. Olexa testified he was in the kitchen and Ms. Kimerling was at the dining table when Ms. Langheld came

home. RP 1013–14. Mr. Olexa heard a "chair crash down" and turned to see Ms. Kimerling and Ms. Langheld fighting on the floor. RP 1017. He pushed Ms. Langheld off Ms. Kimerling, and Ms. Langheld "charged" at him." RP 1018. Mr. Olexa struck Ms. Langheld once "[a]bove her eyebrow." RP 1020. Ms. Langheld ran out of the house. RP 1020, 1022–23.

Ms. Kimerling said Mr. Olexa slapped and pushed her. RP 549–50. He was angry because he thought Ms. Kimerling let Ms. Langheld take advantage of her. RP 552–54. When Ms. Langheld came home, Ms. Kimerling, who was waiting at the dining table, said she had to move out. RP 554–55, 603.

Mr. Olexa came out of the kitchen and sat at the table. RP 555–56. Ms. Kimerling believed she saw him reach out and Ms. Langheld's chair fall. RP 558. Ms. Kimerling stood, walked around the table, and saw Ms. Langheld on the floor and Mr. Olexa kneeling with "his hands on her cheeks." RP 559–60, 616. She did not see Mr. Olexa harm Ms. Langheld by any other means. RP 563. Ms. Kimerling pulled Mr. Olexa off Ms. Langheld, who ran out to her car. RP 559, 564–65.

In Ms. Langheld's account, Ms. Langheld walked into the house and saw Ms. Kimerling at the dining room table. RP 722. Ms. Kimerling said, "We need to talk." RP 725.

Mr. Olexa joined them at the table—in Ms. Langheld's telling, he held a kitchen knife. RP 728–30. He moved toward Ms. Langheld, and she found herself on her back with Mr. Olexa hitting her. RP 733–35. Ms. Kimerling paced behind Mr. Olexa, trying to pull him off. RP 846–49. Ms. Langheld said Mr. Olexa tried to strangle or suffocate her at times. RP 737–39, 741–42. She also said her bladder voided, soaking her jeans. RP 738. A police officer who took photos of the house shortly afterward did not report urine on the floor. RP 975.

According to Ms. Langheld, Mr. Olexa started kicking her in the side. RP 743–45. She managed to open the front door and crawl over the gravel driveway to her car. RP 745–46, 861. She said the rocks hurt her hands and knees. RP 862–63. Ms. Kimerling followed her and gave her car keys to her. RP 747. Ms. Langheld realized she forgot her phone, and Ms. Kimerling told her to leave without it. RP 747.

Ms. Langheld drove to the home of another classmate, Jessica Jarrett. RP 748–49, 918. Ms. Jarrett assisted Ms. Langheld in contacting police, retrieving her phone from Ms. Kimerling's house, and going to the hospital. RP 751–60, 928–29, 943–47. Ms. Langheld's and Ms. Jarrett's accounts of these events differ in many respects. *Id.*; Br. of App. at 9–12.

Dr. Chad Bentsen examined Ms. Langheld at the hospital. RP 676. He testified Ms. Langheld had several injuries, including a concussion. RP 677, 684. He did not describe what a concussion is or explain its effect on Ms. Langheld's cognitive functions. RP 671–96. Despite performing a CT scan on her neck, he did not testify she had injuries consistent with strangulation. RP 679–81.

The prosecution charged Mr. Olexa with second-degree assault as to Ms. Langheld and fourth-degree assault as to Ms. Kimerling. CP 22–23. Mr. Olexa moved in limine to exclude prior police contacts related to his mental health. CP 3, 48. The court granted the motion. RP 117.

The prosecutor asked Deputy Hughes Ebinger, a police officer who responded to Ms. Jarrett's call, whether he had "ever met Micah Olexa before this incident." RP 957. Deputy Ebinger replied, "Yes." RP 957. Defense counsel moved for a mistrial, pointing out "Mr. Olexa had dealt with Officer Ebinger about his mental health incarceration." RP 984–85. The trial court agreed the question violated the court's pretrial ruling but denied the motion. RP 985–87, 989.

At closing, the prosecutor argued Ms. Langheld's concussion was a "bruise on her brain" that impaired "her brain actions." RP 1131. The prosecutor also showed a photo of Ms. Langheld's neck and said: "Ladies and gentlemen, that is strangulation." RP 1133; Ex. 10 at 15–17.

The prosecutor moved on to assert the "only way" Ms. Olexa's testimony could be true was if Ms. Langheld "was lying when she took the stand" and Ms. Kimerling "made up" her account. RP 1138–39.

The jury found Mr. Olexa guilty. CP 90, 92. The Court of Appeals affirmed. Slip Op. at 7.

F. WHY THIS COURT SHOULD ACCEPT REVIEW

"[A] prosecutor must 'seek convictions based only on probative evidence and sound reason,'" and not "arguments calculated to inflame the passions or prejudices of the jury." *In re Pers. Restraint of 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); Am. Bar Ass'n, Standards for Criminal Justice, Standard 3-5.8(c)). Because Mr. Olexa is "among the people the prosecutor represents," the prosecution bore a duty to ensure he received a fair trial. *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011).

This Court has reminded prosecutors of this duty numerous times in recent years. *E.g.*, *State v. Loughbom*, 196 Wn.2d 64, 69–70, 470 P.3d 499 (2020); *State v. Walker*, 182 Wn.2d 463, 476–77, 341 P.3d 976 (2015); *State v. Lindsay*, 180 Wn.2d 423, 442, 326 P.3d 125 (2014); *Glasmann*, 175 Wn.2d at 703–04; *Monday*, 171 Wn.2d at 676.

Despite these "frequent warnings that prejudicial prosecutorial tactics will not be permitted, . . . some

prosecutors continue to use improper, sometimes prejudicial means in an effort to obtain convictions." *State v. Charlton*, 90 Wn.2d 657, 665, 585 P.2d 142 (1978). In Mr. Olexa's trial, the prosecution misstated its burden of proof and argued facts outside the record. Both improper arguments were contrary to longstanding precedent of this Court and the Court of Appeals. This Court should grant review and make clear that prosecutors in this state must adhere to their duty to ensure defendants receive fair trials.

1. **In contravention of decades of its own published authority, the Court of Appeals erred in holding the prosecution did not misstate its burden of proof.**

Multiple opinions published over a span of decades make clear a prosecutor may not argue that, "to acquit a defendant or to believe a defendant's testimony, the jury must find the State's witnesses are lying." *State v. Vassar*, 188 Wn. App. 251, 260, 352 P.2d 856 (2015); *accord State v. Rich*, 186 Wn. App. 632, 649, 347 P.3d 72 (2015); *State v. Fleming*, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996); *State v. Wright*, 76 Wn. App. 811, 826, 888 P.2d 1214 (1995); *Casteneda-Perez*, 61

Wn. App. at 362–63. A jury may find a prosecution witness unconvincing for other reasons, such as doubt in the witness's "ability to accurately recall and recount what happened." *Fleming*, 83 Wn. App. at 213.

A jury is "*required* to acquit *unless* it ha[s] an abiding conviction in the truth" of the prosecution's evidence. *Id.* By misstating "the bases upon which a jury can acquit," this argument mischaracterizes the prosecution's burden. *Id.* at 214. Misstating the burden of proof "is flagrant misconduct." *State v. Miles*, 139 Wn. App. 879, 890, 162 P.3d 1169 (2007).

The prosecutor argued "the only way" Mr. Olexa's account "could be accurate" was if Ms. Langheld "was lying when she took the stand." RP 1138. Likewise, the prosecutor insisted "the only way for Mr. Olexa's version of events to be accurate" was if Ms. Kimerling "made up" her account. RP 1138–39. This improper argument narrowed the bases on which the jury could acquit Mr. Olexa and misstated the burden of proof. *Fleming*, 83 Wn. App. at 213–14.

A prosecutor's misconduct requires reversal if there is "a substantial likelihood that the prosecutor's statements affected the jury's verdict." *Lindsay*, 180 Wn.2d at 440. If, as here, trial counsel did not object, the misconduct must also be "flagrant and ill intentioned." *Id.* at 430. This standard is met where "many cases" published by this Court and the Court of Appeals "clearly warned against the conduct." *Glasmann*, 175 Wn.2d at 706–07; *accord State v. Jones*, 13 Wn. App. 2d 386, 406, 463 P.3d 738 (2020); *Fleming*, 83 Wn. App. at 213–14.

Many cases warned the prosecution it may not assert the jury can believe the defendant's account only if the prosecution witnesses are lying. *Vassar*, 188 Wn. App. at 260; *Rich*, 186 Wn. App. at 649; *Fleming*, 83 Wn. App. at 213–14; *Wright*, 76 Wn. App. at 826; *Casteneda-Perez*, 61 Wn. App. at 362–63. "[A]ny prosecuting attorney should know not to instruct the jury that it must find the victim to be lying." *State v. Crossguns*, 37079-8-III, 2020 WL 7231098, at *11 (Wash. Ct. App. Dec. 8, 2020) (unpub.); *see* GR 14.1(a). In violating this black-letter principle, the prosecutor committed

flagrant misconduct. *Glasmann*, 175 Wn.2d at 706–07. In fact, the Court of Appeals found this argument to be necessarily "flagrant and ill-intentioned" 25 years ago, for exactly this reason. *Fleming*, 83 Wn. App. at 214.

Contrary to this precedent, the Court of Appeals held the argument was proper. Slip Op. at 4. According to the Court, the prosecutor merely "highlighted how [Mr.] Olexa's account of the events was factually incompatible with [Ms.] Kimerling['s] and [Ms.] Langheld's descriptions of the incident." *Id.* "[T]here is nothing misleading or unfair" in pointing out "that if the jury accepts one version of the facts, it must necessarily reject the other." *Id.* (quoting *State v. Rafay*, 168 Wn. App. 734, 837, 285 P.3d 83 (2012)).

Though it is true the jury could not accept Mr. Olexa's account without rejecting Ms. Kimerling's and Ms. Langheld's, the prosecution went a step further by arguing the jury could disbelieve these witnesses' testimony *only* if they were lying. RP 1138–39. This is simply false. The jury could have questioned Ms. Kimerling's and Ms. Langheld's

ability to remember what happened without doubting their honesty. *Fleming*, 83 Wn. App. at 213.

"[W]hether the State's argument at trial was that the jury must conclude that the State's witnesses lied in order to *believe* the defendant, or in order to *acquit* [him], either way, the argument was improper." *Rich*, 186 Wn. App. at 649. In endorsing the prosecution's argument, the Court of Appeals's decision contravened decades of its own published authority. RAP 13.4(b)(2). The decision also sanctions a breach of the prosecution's duty to safeguard Mr. Olexa's constitutional right to a fair trial. *Walker*, 182 Wn.2d at 477; RAP 13.4(b)(3). This Court should grant review.

2. The Court of Appeals contravened this Court's precedent in holding the prosecution did not commit misconduct by arguing facts outside the record.

A prosecutor commits misconduct by arguing the jury should convict based on "facts outside the record." *State v. Belgarde*, 110 Wn.2d 504, 508, 755 P.2d 174 (1988) (emphasis omitted). In so doing, a prosecutor presents "not argument,

but testimony," abdicating her "proper role as a quasi-judicial officer and an advocate." *Id.* at 509.

During closing, the prosecutor called Ms. Langheld's concussion "a bruise on her brain" and opined it "affected her ability to think," "affected her ability to function," and caused "an impairment of her brain actions." RP 1131. The prosecution relied on these statements to show "substantial bodily harm," an essential element of second-degree assault. RP 1130–31; Ex. 10 at 10, 13; RCW 9A.36.021(1)(a).

These assertions have no support in the evidence. The sole expert, Dr. Bentsen, did not explain what a concussion looks like in terms of the structure of the brain, much less suggest it is a "bruise" inside the skull. RP 683–84, 692. Nor did he describe a concussion's effects on cognitive functions. RP 671–96. The prosecutor was the only person to opine Ms. Langheld's concussion was a "bruise on her brain" that impaired "her brain actions." RP 1131. Even the prosecution appeared to admit this assertion "misstated medical evidence." Br. of Resp. at 17, 18.

Later, the prosecutor directed the jury's attention to a photo showing marks on Ms. Langheld's neck. RP 1133; Ex. 10 at 15–17. The prosecutor pronounced, "Ladies and gentlemen, that is strangulation." RP 1133. Strangulation is an alternative essential element of second-degree assault. Ex. 10 at 10, 15; RCW 9A.36.021(1)(g).

Dr. Bentsen did not testify Ms. Langheld had injuries consistent with strangulation. RP 671–96. In fact, he examined "the blood vessels of the neck" for strangulation-related injuries and did not find any. RP 679–81, 687. The only opinion that Ms. Langheld's injuries suggested strangulation came from the prosecutor's argument. RP 1133.

Dr. Bentsen was the prosecution's expert. "If the prosecution wished to put in evidence" that Ms. Langheld's concussion resulted in bleeding inside the skull or that her injuries indicated strangulation, "the vehicle was properly to present evidence to that effect." *Belgarde*, 110 Wn.2d at 509. The prosecution's choice not to do so suggests it did not believe Dr. Bentsen would agree with these opinions.

A prosecutor's duty not to act as both witness and advocate is well established. *Lindsay*, 180 Wn.2d at 437; *Belgarde*, 110 Wn.2d at 508–09. Because the prosecutor was on notice that her conduct was improper, that conduct must be deemed "flagrant and ill intentioned." *Glasmann*, 175 Wn.2d at 706–07; *Jones*, 13 Wn. App. 2d at 406.

The Court of Appeals found no misconduct. Slip Op. at 5. It reasoned the prosecutor was merely "commenting on the evidence during closing argument" to "demonstrat[e] that [Mr.] Olexa committed assault in the second degree." *Id.* The Court elided that the prosecutor's commentary relied on assertions of fact with no support in evidence.

In upholding a prosecutor's factual assertions based on no evidence in the record, the Court of Appeals's decision contravenes this Court's precedent. *Belgarde*, 110 Wn.2d at 509; RAP 13.4(b)(1). The decision also implicates Mr. Olexa's constitutional right to a fair trial, and the prosecution's duty to safeguard that right. *Walker*, 182 Wn.2d at 477; RAP 13.4(b)(3). This Court should grant review.

3. **Whether viewed in isolation or in combination, the prosecution's act of misconduct deprived Mr. Olexa of his constitutional right to a fair trial.**

During trial, the prosecutor elicited testimony that Deputy Ebinger knew Mr. Olexa. RP 957, 985–87. The Court of Appeals correctly held this question violated a pretrial order but concluded it did not cause prejudice. Slip Op. at 5–6. Because it held the prosecution's improper arguments were not misconduct, it did not analyze whether they caused prejudice in combination with the question. *Id.* at 6.

"[T]he 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 *Glasmann*, 175 Wn.2d at 707). Repetitive misconduct may require reversal in combination even if an instruction "might have cured any potential prejudice" of each improper act individually. *Loughbom*, 196 Wn.2d 77. Considered individually or in combination, the prosecution's misconduct deprived Mr. Olexa of a fair trial and requires reversal.

"[I]mproper trial tactics" are a sign "the prosecutor feels that those tactics are necessary to sway the jury in a close case." *Fleming*, 83 Wn. App. at 215. The prosecution's case was not open-and-shut. Ms. Kimerling's and Ms. Langheld's accounts differed from each other almost as much as they did from Mr. Olexa's, leaving plenty of room for reasonable doubt.

Mr. Olexa catalogued the contradictions in the Court of Appeals, and will repeat only a few key discrepancies here. Br. of App. at 32–35. Ms. Langheld said Mr. Olexa held a knife when he sat at the table, while Ms. Kimerling saw no such thing. RP 612–13, 729–30. Ms. Langheld said Ms. Kimerling tried unsuccessfully to pull Mr. Olexa away from Ms. Langheld "several times," while Ms. Kimerling said she broke up the altercation immediately. RP 559, 615, 617, 848–49. Ms. Langheld said she crawled out of the house and to her car, while Ms. Kimerling said she ran. RP 565, 745–46, 861.

Ms. Langheld's recalled soiling herself and "soak[ing her] jeans," though no one saw urine on her clothing or the floor of Ms. Kimerling's house. RP 738, 938–39, 975. Ms.

Langheld said she crawled through gravel to her car, despite sustaining no damage to her hands or her jeans. RP 745–46, 861–62, 938–39. Mr. Olexa has a knee injury that would prevent him from kicking Ms. Langheld as she described. RP 618–19, 745, 1024. Ms. Langheld's account of events after the altercation differed markedly from that of her friend, Ms. Jarrett. RP 751–60, 928–29, 943–47; Br. of App. at 34–35.

By falsely insisting the jury could believe Mr. Olexa only if Ms. Langheld and Ms. Kimerling were liars, the prosecution obscured these weak points. Exaggerating Ms. Langheld's injuries likely inflamed the jury's anger against Mr. Olexa. And eliciting testimony about Mr. Olexa's past police involvement signaled to the jury that he is a criminal.

Each of these improper arguments and questions distracted the jury from the evidence, inviting it to overlook the inconsistencies in the prosecution's case. *Fleming*, 83 Wn. App. at 215–16. Mr. Olexa did not receive a fair trial.

The better practice may have been to object as each act occurred. But "an accused's rights should not always depend

on . . . whether his lawyer timely objected." *Crossguns*, 2020 WL 7231098, at *11. "[T]he failure to object will not prevent a reviewing court from protecting a defendant's constitutional right to a fair trial." *Walker*, 182 Wn.2d at 477.

To ensure its warnings are not "empty words," this Court should grant review. *Glasmann*, 175 Wn.2d at 712–13. Otherwise, acts of misconduct may well continue, and defendants like Mr. Olexa will be "virtually guaranteed to have their constitutional rights violated." *State v. Jackson*, 195 Wn.2d 841, 856–57, 467 P.3d 97 (2020); RAP 13.4(b)(3).

G. CONCLUSION

This Court should grant review.

DATED this 5th day of May, 2021.

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. MICAH JAMES OLEXA, Appellant.	)	No. 81152-5-I DIVISION ONE UNPUBLISHED OPINION

MANN, C.J. — Micah Olexa appeals his convictions for assault in the second degree and assault in the fourth degree. He argues that his convictions must be reversed for prosecutorial misconduct and that the trial court erred by imposing discretionary legal financial obligations (LFOs). We affirm, but remand to the trial court to strike the discretionary LFOs.

FACTS

Olexa resided with his mother, Jean Kimerling. Kimerling studied naturopathic medicine and she invited Deborah Langheld, a fellow student, to live in the home. Although the arrangement was meant to be temporary, Langheld resided in the house

for almost a year. Kimerling and Langheld decided that Langheld would move out at the end of June 2019, after they completed their final exams.

On June 19, 2019, Olexa became upset with Kimerling. He yelled at her, slapped her, and pushed her against the wall. Olexa told Kimerling he was upset that Langheld was not moving out sooner and insisted she leave. When Langheld arrived home, she noticed that Kimerling was nervous. Kimerling told her that things were not working. Olexa then joined the conversation. Olexa then moved toward Langheld, knocking her out of her chair. He straddled her and hit her on her face repeatedly. Kimerling tried to intervene. Olexa put his hands around Langheld's throat, strangling her. He put his hands over her mouth, which suffocated her, and caused her bladder to void. When Langheld tried to get up, Olexa began kicking her in the ribs. Langheld was able to escape and she drove to a classmate's house who called 911. Kimerling left the house, and spoke to her daughter, who also called the police.

Police apprehended Olexa. Langheld went to the hospital for her injuries. The emergency room doctor reported a concussion, a scalp hematoma, a black eye, a jaw contusion and bruising, rib fractures, blood in her urine, and bruising on her extremities. Langheld also reported pain in her chest and flank to the doctor.

The State charged Olexa with assault in the second degree against Langheld and assault in the fourth degree against Kimerling. Each charge had a domestic violence designation.

Olexa testified at trial. He denied slapping or pushing his mother. He contended that he saw Kimerling and Langheld fighting on the ground, and that he pushed

Langheld off his mother. He testified that he struck Langheld once in self-defense when she charged at him.

A jury convicted Olexa of both counts and found a domestic violence relationship as to both counts. Olexa appeals.

ANALYSIS

A. Prosecutorial Misconduct

Olexa argues that prosecutorial misconduct requires us to reverse his convictions. We disagree.

To demonstrate prosecutorial misconduct, the defendant must prove that the prosecutor's conduct was both improper and prejudicial. State v. Emery, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). "If the defendant objected at trial, the defendant must show that the prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict." Emery, 174 Wn.2d at 760. If the defendant did not object, any error is waived unless the prosecutor's conduct was "so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." Emery, 174 Wn.2d at 760. The defendant must show that (1) no curative instruction would have alleviated any prejudicial effect on the jury and (2) the misconduct resulting in prejudice has a substantial likelihood of affecting the jury's verdict. Emery, 174 Wn.2d at 760-61.

Olexa first contends that the prosecutor misstated the State's burden of proof. During closing argument, the prosecutor argued that the only way Olexa's version of events could be accurate was if Langheld "was lying when she took the stand." The prosecutor also pointed out that defense counsel did not ask Langheld about Olexa's version of events during cross-examination. The prosecutor said that Kimerling's story

would need to be "made up," in order for Olexa's version of events to be accurate. Defense counsel did not object.

We have previously held that "it is misconduct for a prosecutor to argue that in order to acquit a defendant, the jury must find that the State's witnesses are either lying or mistaken." State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996). The prosecutor in Fleming argued that the only way to acquit the defendant was if the jury found that the victim was lying. We held that the statement was improper because it misstated the law and improperly shifted the burden of proof. Fleming, 83 Wn. App. at 213.

This case is readily distinguishable from Fleming. Here, the prosecutor did not attempt to shift the burden of proof, but instead highlighted how Olexa's account of the events was factually incompatible with Kimerling and Langheld's descriptions of the incident. When "'conflicting versions of the facts and the credibility of witnesses is a central issue, there is nothing misleading or unfair in stating the obvious: that if the jury accepts one version of the facts, it must necessarily reject the other.'" State v. Rafay, 168 Wn. App. 734, 837, 285 P.3d 83 (2012) (quoting State v. Wright, 76 Wn. App. 811, 825, 888 P.2d 1214 (1995)). Therefore, the prosecutor's comments were not improper. Even if the comments were improper, Olexa's counsel failed to object or request a curative instruction. See Emery, 174 Wn.2d at 760-61 (the defendant must demonstrate that the error was flagrant and ill intentioned such that an instruction could not have cured any resulting prejudice).

Olexa next argues that the State violated the advocate-witness rule when the prosecutor offered medical opinions. During closing argument, the prosecutor said that

Langheld's concussion was a "bruise on her brain," which affected her brain actions. The prosecutor also showed the jury a photo of Langheld's neck with bruising and broken skin, stating "that is strangulation." Defense counsel did not object.

The advocate-witness rule prohibits an attorney from appearing as both a witness and an advocate in the same litigation. State v. Lindsay, 180 Wn.2d 423, 437, 326 P.3d 125 (2014). Despite Olexa's contentions, the prosecutor was not attempting to provide medical testimony as a witness, but was commenting on the evidence during closing argument. "In closing argument, the prosecuting attorney has a wide latitude in drawing and expressing reasonable inferences from the evidence." State v. Hoffman, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991). The record contains significant evidence of Langheld's injuries and the prosecutor was demonstrating that Olexa committed assault in the second degree.

Olexa next contends that the prosecutor improperly elicited testimony concerning Olexa's involvement with police. Olexa moved in limine to exclude all evidence of police contacts related to a prior incident where Kimerling tried to commit Olexa under the Involuntary Treatment Act (ITA), chapter 71.05 RCW, which the court granted. During trial, the prosecutor asked King County Sheriff's Deputy Hughes Ebinger, who responded to the incident, if he had met Olexa before the incident. Ebinger responded "Yes." Defense counsel moved for a mistrial based on this exchange. The court offered to instruct the jury to disregard the question, but the defense rejected the limiting instruction. The court denied the motion for mistrial.

Although the prosecutor's question was in error, Olexa cannot show that a simple "yes," in answer to the question had a substantial likelihood of affecting the jury's

verdict. Further, counsel refused the available remedy by refusing the curative instruction asking the jury to disregard the question. Defense counsel's decision not to request a curative instruction "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." State v. Swan, 114 Wn.2d 613, 661 790 P.2d 610 (1990).

Finally, Olexa contends that the prosecutor's conduct resulted in cumulative prejudice. "'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 State v. Walker, 164 Wn. App. 724, 737, 265 P.3d 191 (2011)). None of the alleged instances by the prosecutor amounted to prosecutorial misconduct, therefore, cumulative error does not apply.

B. Legal Financial Obligations

Olexa argues that the court erred by imposing discretionary LFOs. The State concedes. We accept the State's concession.

The trial court found Olexa indigent and waived all waivable fees, fines, and interest. The court imposed community custody supervision fees from boilerplate language on the judgment and sentence. Courts shall not impose discretionary costs on defendants who have been found indigent. RCW 10.01.160(3); State v. Ramirez, 191 Wn.2d 732, 748, 426 P.3d 714 (2018). Supervision fees are discretionary LFOs. State v. Dillon, 12 Wn. App. 2d 133, 152, 456 P.3d 1199 (2020). We remand to the trial court to strike the community custody supervision fees.

Affirmed.

Mann, C.J.

WE CONCUR:

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 81152-5-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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May 05, 2021 - 4:34 PM

Transmittal Information

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Appellate Court Case Number:	81152-5
Appellate Court Case Title:	State of Washington, Respondent v. Micah James Olexa

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