SUPREME COURT NO. 100056-1
NO. 81129-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL HERRERA,

Petitioner.

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

The Honorable John R. Ruhl, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Michael Herrera asks this Court to grant review of the court of appeals' unpublished decision in State v. Herrera, No. 81129-1-I, filed June 14, 2021 (Appendix A). The court of appeals denied Herrera's motion to publish on July 7, 2021 (Appendix B).

B. ISSUES PRESENTED FOR REVIEW

1. Should this Court grant review to determine whether a neutral eyewitness's impermissible testimony on a key issue of fact for the jury to decide necessitates reversal under a properly applied constitutional harmless error standard?

2. Should this Court likewise grant review to determine whether a prosecutor's unprofessional misconduct in ridiculing the defendant on cross-examination necessitates reversal, where its purpose and effect was to undermine the defendant's credibility?

3. Is this Court's review necessary, where the court of appeals held the cumulative error standard is not met where each error, standing alone, is harmless—essentially nullifying the cumulative error doctrine?

C. STATEMENT OF THE CASE

On February 19, 2018, Michael Herrera went with his wife, Chelsea Crowley, to buy marijuana at Ocean Greens, a dispensary on Aurora Avenue North in Seattle. RP 395, 444, 740. Herrera went inside the dispensary while Crowley waited in the car with their infant son. RP 740-42.

Herrera could not see or hear what unfolded outside. RP 745-46. Herrera was about to purchase the marijuana when Crowley entered the store and yelled, "babe, come help. Some guy's messing with me." RP 747, 749-50. Crowley looked scared and Herrera could tell something was wrong. RP 751. Herrera went into "protect mode" and followed his wife out. RP 751-52.

In the span of just a few seconds, Herrera saw a man he had never met before, Leigh Orlando-Ward, walk towards his wife, yelling at her about her car. RP 753-757; Ex. 24 (Aurora Parking Lot W Entrance, 3:37-3:40). Herrera recalled it was "angry" and "intimidating yelling." RP 761. Herrera saw Orlando-Ward's arms move and heard him call Crowley a bitch. RP 760-61. Herrera saw Crowley's hands come up "as if to brace

for something." RP 762. Herrera thought Orlando-Ward pushed Crowley. RP 762, 778-79.

Fearing for his wife's safety, Herrera hit Orlando-Ward. RP 765. Herrera explained, "I just wanted to get in between her and him" and "get her safe." RP 765. Orlando-Ward fell to the ground. RP 467. Herrera continued hitting Orlando-Ward until he saw his wife was safely inside their car and Orlando-Ward was no longer a threat to her. RP 766-67. He explained, "So I kept hitting him for him to stay where he was." RP 797.

Orlando-Ward stood as soon as Herrera stopped. RP 767; Ex. 24 (Aurora Parking Lot W Entrance, 3:49-3:52). As Herrera got in the car, Herrera saw Orlando-Ward reach for his pocket. RP 769. Herrera told Crowley, "throw it in reverse, let's go," fearing Orlando-Ward might be reaching for a gun. RP 769. They left the scene, rattled by the experience. RP 770-72.

Orlando-Ward called 911 and reported Crowley's license plate number. RP 469. Orlando-Ward ultimately had to have surgery for a fractured cheekbone. RP 480, 725-31.

Herrera was arrested several months later and charged with second degree assault. CP 1. In an interview, Herrera told

detectives that he saw Orlando-Ward push Crowley. RP 668-69. Herrera claimed, "All I did was push that guy down." RP 669. Herrera understood later, after watching security footage of the incident, that Orlando-Ward did not actually push Crowley. RP 789. Herrera acknowledged he did more than push Orlando-Ward, but explained, "I hit him because I thought he had attacked my wife." RP 791.

Herrera proceeded to a jury trial, asserting he acted lawfully in defense of his wife. RP 171, 382.

Orlando-Ward testified at trial that he and his girlfriend, Cassidy Wolff, stopped at Ocean Greens on their way home. RP 447-48. Orlando-Ward parked his large pickup truck next to Crowley's sedan. RP 445, 448, 740. Crowley approached Orlando-Ward's window to complain about his poor parking job and ask him to move his truck, in what Orlando-Ward recalled as "a very rude tone." RP 448.

Frustrated, Orlando-Ward asked Crowley if that was really necessary, feeling that she had enough space to get in and out of her vehicle. RP 449, 497, 567. When this response angered

Crowley, Orlando-Ward started laughing at her and told her to "go fuck herself." RP 452.

Orlando-Ward re-parked his truck. RP 452. As he exited his truck and headed to the front door, Orlando-Ward saw Crowley and a man, Herrera, walking briskly towards him. RP 457. Orlando-Ward denied any further altercation with Crowley, claiming "there were zero words exchanged at this point." RP 457, 516.

But Orlando-Ward admitted he was irritated when he saw Crowley had parked equally poorly. RP 453. And, consistent with Herrera's recollection, Wolff saw Orlando-Ward and Crowley "face-to-face," yelling at each other in front of the truck. RP 549, 570, 580. Security footage showed Orlando-Ward gesture several times towards Crowley's car as she approached, also consistent with Herrera's impression that Orlando-Ward pushed Crowley. Ex. 24 (Aurora Parking Lot W Entrance, 3:34-3:38); RP 515.

Orlando-Ward testified, before he knew it, Herrera hit him and he fell to the ground, where Herrera continued hitting him. RP 464-67. An onlooker, David Bradley, saw the incident from across Aurora Avenue. RP 408-11, 414. Over defense objection to

improper opinion, Bradley described the event as "[a]n unnecessary beat down." RP 415.

Herrera testified at trial. RP 738. On cross-examination, the prosecutor asked Herrera to count the number of punches seen on the security video. RP 823. The following exchange ensued:

> Q And then while he was on the ground, you hit him at least 17 more times, correct?
>
> A I'm not sure the count, but yes.
>
> Q Would you like to watch and count them?
>
> A No, I —-
>
> Q I'm going to ask you to count them.
>
> A I wouldn't be able to from here, nor if I was up at the screen.
>
> Q *Do you not know how to count?*
>
> [DEFENSE COUNSEL]: Your Honor, objection, Your Honor. That's improper.
>
> THE COURT: Sustained. Why don't you just play the video, if that's what you were going to do. I can't see the screen.
>
> Q (By [the prosecutor]) All right. Mr. Herrera, please do your best to let us know how

many times you punched Mr. Orlando-Ward after he went to the ground.

[Exhibit 24 played.]

A (By Mr. Herrera) I would say about 17 times.

Q *I thought you couldn't count to 17.*

A I never said –

[DEFENSE COUNSEL]: Your Honor –

A (By Mr. Herrera) –- I couldn't count.

[DEFENSE COUNSEL]: -– objection. That is just offensive and improper.

THE COURT: All right.

MR. HERRERA: It is.

THE COURT: Overruled, go ahead.

A (By Mr. Herrera) I gave you my answer. I said about 17 times.

RP 823-24 (emphasis added).

The jury was instructed on lawful use of force in defense of others: "The use of force upon or toward the person of another is lawful when used by someone lawfully aiding a person who he reasonably believes is about to be injured in preventing or

attempting to prevent an offense against the person, and when the force is not more than necessary." CP 65.

After deliberating for more than a day, the jury found Herrera guilty. CP 48, 116-18 (jury begins deliberations on December 17 and returns a verdict on December 19).

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. This Court's review is warranted to determine whether a neutral eyewitness's impermissible testimony on a key issue for the jury to decide necessitates reversal under a properly applied constitutional harmless error standard.

Herrera argued on appeal that David Bradley's characterization of the incident as an "unnecessary beat down" constituted an improper opinion on guilt, where a key disputed issue at trial was whether the force Herrera used to protect his wife was "not more than necessary." Br. of Appellant, 9-16.

The court of appeals agreed, reasoning "Bradley's opinion that the 'beat down' was 'unnecessary' went to a key issue of fact for the jury to decide, i.e., whether Herrera acted reasonably in response to the perceived threat to Crowley." Opinion, 7. The court acknowledged, "[w]here a witness's opinion parrots the language of a key instruction, it may constitute an impermissible

opinion," citing this Court's decision in State v. Quaale, 182 Wn.2d 191, 195, 200, 340 P.3d 213 (2014). Opinion, 7. "Given the nature of the charge, second degree assault, and Herrera's defense, lawful defense of another," the court concluded, "Bradley's opinion that Herrera's use of force was unnecessary constituted impermissible opinion testimony." Opinion, 7.

Yet the court of appeals did not find reversible error, holding the constitutional error was harmless. Opinion, 7-8. Constitutional error is harmless only if the prosecution establishes beyond a reasonable doubt that a reasonable jury would reach the same result absent the error. Quaale, 182 Wn.2d at 202. Bradley was the only uninvolved eyewitness to the incident—Orlando-Ward did not have a clear recollection of what happened; Wolff missed the precipitating events; Crowley did not testify; and Herrera had an interest in the outcome. Br. of Appellant, 15-16. Bradley's opinion could have easily carried significant weight with the jury.

The court of appeals nevertheless believed each juror in Herrera's case "was fully capable of discerning the necessity of the force Herrera used," despite Bradley's improper testimony.

Opinion, 8. The court emphasized "jurors could watch the video evidence and objectively assess the circumstances." Opinion, 8.

In reaching this conclusion, the court of appeals improperly substituted its own judgment for that of the jury. There was no real dispute as to what transpired. Security footage captured the nine seconds it took for Herrera to knock Orlando-Ward down and hit him several times. Ex. 24 (Aurora Parking Lot W Entrance, 3:40-3:49). But the jury did not need to determine whether or how many times Herrera hit Orlando-Ward. Rather, the jury needed to assess Herrera's perception and state of mind at the time. The ultimate question was whether Herrera used no more force than was necessary, "under the circumstances as they reasonably appeared to [Herrera] at the time." CP 67. The video did not resolve this key question of fact. But David Bradley's improper testimony did.

Constitutional harmless error is a high standard that must be scrupulously applied. See, e.g., State v. Romero-Ochoa, 193 Wn.2d 341, 344, 363-64, 440 P.3d 994 (2019) (granting review based solely on the court of appeals' misapprehension of the

constitutional harmless error standard). This Court's review is therefore warranted under RAP 13.4(b)(3).

2. This Court's review is warranted to determine whether a prosecutor's unprofessional misconduct in cross-examining a defendant necessitates reversal where its purpose and effect is to undermine the defendant's credibility.

Herrera also argued on appeal that the prosecutor engaged in improper and unprofessional misconduct on cross-examination, insinuating that Herrera was too stupid to count to 17. Br. of Appellant, 16-24. Herrera asserted the prosecutor's incivility amounted to improper vouching, where the prosecutor essentially expressed to the jury his personal belief that Herrera's testimony was ridiculous and, thereby, inappropriately worked to undermine Herrera's credibility. Br. of Appellant, 16-24.

This Court has recognized incivility "threatens the fairness of the trial, not to mention public respect for the courts." State v. Lindsay, 180 Wn.2d 423, 443, 326 P.3d 125 (2014). Ridiculing the defendant on cross-examination is not only unprofessional, "[s]uch disrespect for the process infects the entire trial." See id. at 442; see also AM. BAR ASS'N, Criminal Justice Standards for the Prosecution Function, stds. 3-6.2(a), 3-6.7(a) (4th ed. 2017).

The State conceded on appeal that the prosecutor's retorts were improper, and the court of appeals agreed. Br. of Resp't, 17; Opinion, 10. The court recognized "[t]he prosecutor disparaged Herrera's intelligence and mocked him, stating, 'I thought you couldn't count to 17.'" Opinion, 10. "Even reading this from a cold record," the court explained, "the prosecutor's sarcasm and derision are obvious." Opinion, 10. The court therefore concluded the comments "were inappropriate and improper," and so Herrera succeeded in demonstrating the prosecutor engaged in misconduct. Opinion, 10.

Again, however, the court of appeals concluded the comments did not prejudice Herrera. Opinion, 10. The court acknowledged "the prosecutor sarcastically attacked Herrera's credibility," but emphasized Herrera's own inconsistent statements to police following his arrest. Opinion, 10. The court therefore believed the improper remarks "did not attack Herrera's defense." Opinion, 11.

Thus, there is no dispute the prosecutor engaged in unprofessional misconduct and that misconduct was aimed at undermining Herrera's credibility. But Herrera's credibility

cannot be separated from his defense, as the court of appeals would have. The jury had to assess whether Herrera reasonably believed his wife was in danger and whether the force he used in response was not more than necessary. Herrera needed the jury to believe his testimony—his credibility was his defense.

Yet the prosecutor worked purposefully and strategically to undercut Herrera's testimony through ridicule and derision. Division Two of the court of appeals has recognized, "'Because the jury will normally place great confidence in the faithful execution of the obligations of a prosecuting attorney, [a prosecutor's] improper insinuations or suggestions are apt to carry more weight against a defendant.'" State v. Thierry, 190 Wn. App. 680, 694, 360 P.3d 940 (2015) (quoting United States v. Solivan, 937 F.2d 1146, 1150 (6th Cir. 1991)). This reality was exacerbated by the trial court overruling defense counsel's second objection to the continued misconduct. RP 824.

The misconduct tipped the scales against Herrera in a case where his credibility was everything. As this Court has put it, "[t]he requisite balance of impartiality was upset." In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 712, 286 P.3d 673 (2012).

In Glasmann, reversal was required. Id. By reversing, this Court explained, "we give substance to our message that 'prejudicial prosecutorial tactics will not be permitted,' and our warnings that prosecutors must avoid improper, prejudicial means of obtaining convictions will not be empty words." Id. at 712-13 (quoting State v. Charlton, 90 Wn.2d 657, 665, 585 P.2d 142 (1978)).

By finding no prejudice despite the unprofessional attack on Herrera's credibility, the court of appeals effectively condoned the prosecutor's misconduct, its finding of misconduct amounting to nothing more than empty words. This Court's review is warranted under both RAP 13.4(b)(3) and (4), because unprofessional misconduct by a quasi-judicial officer that serves to undermine the fairness of our justice system is and should be a matter of great public importance.

3. This Court's review is necessary because the court of appeals transformed cumulative error into an impossible, unmeetable standard.

In sum, the court of appeals held two constitutional errors occurred at Herrera's trial, but did not reverse, finding each error, standing alone, did not affect the outcome of Herrera's trial. But Herrera additionally argued the multiple errors necessitated

reversal under the cumulative error doctrine. Br. of Appellant, 24-26. Herrera did not simply provide a perfunctory recitation of the cumulative error standard, instead including specific argument as to why the errors accumulated to prejudice the outcome of his trial. Br. of Appellant, 24-26.

The cumulative error standard is a well-established one. It "applies where a combination of trial errors denies the accused of a fair trial, even where any one of the errors, taken individually, would be harmless." In re Pers. Restraint of Cross, 180 Wn.2d 664, 690, 327 P.3d 660 (2014); accord State v. Venegas, 155 Wn. App. 507, 520, 228 P.3d 813 (2010).

The court of appeals appropriately recited this standard. Opinion, 11. But the court went on to quote its own decision in State v. Rafay, 168 Wn. App. 734, 838, 285 P.3d 83 (2012), concluding, "'But because any errors did not affect the outcome of the trial, the cumulative error doctrine does not apply.'" Opinion, 11. The court did not engage in any specific analysis at to why the two constitutional errors did not work together to deprive Herrera of a fair trial. Opinion, 11.

The court of appeals appears to have relied on Rafay for the proposition that, where errors are determined to be harmless in isolation, they cannot amount to cumulative error. It is true the language in Rafay could be interpreted that way. But doing so is contrary to the clear rule of cumulative error—a necessary doctrine stemming from the accused's constitutional right to a fair trial. Indeed, the Rafay court quoted this Court's decision in State v. Weber, 159 Wn.2d 252, 279, 149 P.3d 646 (2006). Rafay, 168 Wn. App. at 838 n.187. In Weber, this Court recognized "[c]umulative error may warrant reversal, *even if each error standing alone would otherwise be considered harmless*." 159 Wn.2d at 279 (emphasis added).

Thus, the fact that the court of appeals found the multiple errors to be harmless, by themselves, did not resolve the question of cumulative error. The court needed to evaluate "whether the totality of circumstances substantially prejudiced the defendant and denied him a fair trial." Cross, 180 Wn.2d at 690. Instead, the court of appeals abdicated all decision-making, concluding cumulative error was not established because the errors were

individually harmless. This standard essentially renders the cumulative error doctrine a dead letter.

The language in Rafay is sloppy and, apparently, allowed the court of appeals to dodge its necessary role of evaluating whether multiple errors accumulated to prejudice the outcome of Herrera's trial. This implicates not only Herrera's due process right to a fair trial, but his constitutional right to appeal. CONST. art. I, § 22; State v. Rolax, 104 Wn.2d 129, 134-35, 702 P.2d 1185 (1985) (included in the right to appeal is the right to have the appellate court consider the merits of all issues raised on appeal).

This Court's review is necessary under RAP 13.4(b)(3), to correct the pernicious language in Rafay and clarify the cumulative error standard for lower courts.

E. CONCLUSION

For the reasons discussed above, this Court should grant review, reverse the court of appeals, and remand for Herrera to have a new trial.

DATED this 5th day of August, 2021.

Respectfully submitted,

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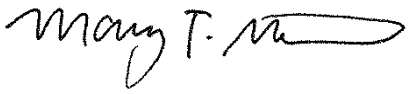

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Appendix A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. MICHAEL DAVID HERRERA, Appellant.	No. 81129-1-I DIVISION ONE UNPUBLISHED OPINION

SMITH, J. — Michael Herrera assaulted Leigh Orlando-Ward outside of a marijuana dispensary in Seattle, Washington, after Orlando-Ward and Herrera's wife, Chelsea Crowley, had an argument. At trial, Herrera alleged that he feared for Crowley's safety and reacted to protect her. An eye witness testified that Herrera's assault on Orlando-Ward was "[a]n unnecessary beat down." In addition, the prosecutor disparaged Herrera, questioning whether he could count during cross-examination. The jury did not accept Herrera's defense that he used the force necessary to protect Crowley and found him guilty of second degree assault. At sentencing, the State included a conviction that Herrera received as a juvenile, and the sentencing court imposed community custody fees.

Herrera appeals, asserting that the eye witness impermissibly opined to his guilt and that the prosecutor's statements were improper. We agree on both accounts. However, because there was video evidence of the incident, the errors were harmless. And with regard to the inclusion of the juvenile conviction,

the judgment and sentence was valid on its face and properly included in Herrera's sentencing score. Given that the court erred in imposing community custody supervision fees, we affirm Herrera's conviction but remand to the sentencing court to strike those fees.

FACTS

On February 19, 2018, Herrera and Crowley went to a marijuana dispensary in Seattle. Crowley parked the vehicle, and Herrera went inside the shop. After a couple of minutes, Leigh Orlando-Ward pulled his truck into the parking spot next to Crowley's. Both cars were parked outside of the designated parking lines, at skewed angles. Crowley exited her vehicle in anger and approached Orlando-Ward. She yelled at Orlando-Ward for his poor parking job, and Orlando-Ward insulted her.

Nonetheless, when Crowley walked away, Orlando-Ward reparked his truck. Crowley entered the shop and told Herrera, "[B]abe, come help. Some guy's messing with me." Herrera testified that Crowley looked scared. She left the shop, and Herrera followed her out. Herrera alleges that he heard Orlando-Ward yell at Crowley and call her an inappropriate name.

As Orlando-Ward walked toward the shop, Crowley exited the shop, and the two met face-to-face. Herrera walked up behind Crowley, punched Orlando-Ward in the face, and continued to do so even after Orlando-Ward fell to the ground. Orlando-Ward's girlfriend, Cassidy Wolff, was in the passenger seat of Orlando-Ward's truck. When she saw what was happening, she exited the truck and pushed Herrera away. Herrera and Crowley got into her vehicle and drove

away. A video camera at the dispensary captured Crowley and Orlando-Ward's exchange and the assault.

Orlando-Ward called the police and provided them with Crowley's license plate number. He suffered from multiple facial fractures. Specifically, Herrera's assault on Orlando-Ward fractured his cheekbone, orbital floor, alar rim, and four other bones connected to his cheekbone. Orlando-Ward later underwent maxillofacial surgery in order to reconstruct a portion of his face. He suffers from permanent nerve damage and chronic sinus headaches.

In May 2018, Seattle Police Department went to Crowley's apartment following their investigation into the assault. Crowley, Herrera, and their son were at the apartment. The detectives brought Herrera in for questioning. During questioning, Herrera asserted that Orlando-Ward pushed and shoved Crowley, contending, "I [saw] him pushing her." He told the detectives, "All I did was push that guy down."

The State charged Herrera with second degree assault. At trial, Herrera asserted that he acted lawfully in defense of Crowley.

The State showed the video to the jury. In the video, it does not appear that Orlando-Ward shoved Crowley. However, it shows him pointing to her car aggressively.

David Bradley, an eye witness, testified at trial. Bradley was in the parking lot across the street when he witnessed the assault. He testified that he saw someone fall down, and "the next thing [he] saw was somebody beating the living crap out of him on the ground." When the State asked what he would call the

event, Bradley characterized it as "[a]n unnecessary beat down."

Herrera testified in his defense, asserting that he hit Orlando-Ward to protect Crowley and did not stop until she was safely inside their car. He explained, "I hit him because I thought he had attacked my wife." He testified that he told Crowley to drive away when he saw Orlando-Ward reach for his pocket, believing that he was reaching for a gun.

On cross-examination, the prosecutor questioned Herrera about the video:

Q: Now he went straight to the ground when you punched him, correct?
A: Yes.
Q: And then while he was on the ground, you hit him at least 17 more times, correct?
A: I'm not sure the count, but yes.
Q: Would you like to watch and count them?
A: No, I --
Q: I'm going to ask you to count them.
A: I wouldn't be able to from here, nor if I was up at the screen.
Q: Do you not know how to count?
[DEFENSE COUNSEL]: Your Honor, objection, Your Honor. That's improper.
[COURT]: Sustained. Why don't you just play the video, if that's what you were going to do. I can't see the screen.
Q: (By Mr. Carlstrom) All right. Mr. Herrera, please do your best to let us know how many times you punched Mr. Orlando-Ward after he went to the ground.
A: (By Mr. Herrera) I would say about 17 times.
Q: I thought you couldn't count to 17.
A: I never said --
[DEFENSE COUNSEL]: Your Honor --
A: (By Mr. Herrera) -- I couldn't count.
[DEFENSE COUNSEL]: -- objection. That is just offensive and improper.
[COURT]: All right.
MR. HERRERA: It is.
[COURT]: Overruled, go ahead.

The court provided the jury the instruction for the lawful use of force in defense of others. The jury did not accept this defense and found Herrera guilty

of second degree assault.

Prior to sentencing, the State's presenting report calculated Herrera's offender score as 8. It included a juvenile conviction for "to elude police." However, Herrera's attorney did not challenge that conviction and said, "I am not challenging the State's ability to prove up the . . . convictions." The court agreed with the State's calculation of Herrera's offender score. It sentenced him to the high-end of the standard range. However, it found Herrera indigent and imposed only mandatory legal financial obligations (LFOs) and restitution. Nonetheless, the judgment and sentence includes form language that requires Herrera to pay community custody supervision fees.

Herrera appeals.

ANALYSIS

Eye Witness Testimony

Herrera asserts Bradley's testimony constituted an impermissible opinion of guilt. We agree.

We review the admission of opinion testimony for abuse of discretion. State v. Quaale, 182 Wn.2d 191, 196, 340 P.3d 213 (2014). "A lay opinion is admissible only if it is 'rationally based on the perception of the witness' and 'not based on scientific, technical, or other specialized knowledge." City of Seattle v. Levesque, 12 Wn. App. 2d 687, 704, 460 P.3d 205 (quoting ER 701 (a), (c)), review denied, 195 Wn.2d 1031 (2020). "Put another way, lay testimony must be based on 'knowledge . . . from which a reasonable lay person could rationally infer the subject matter of the offered opinion.'" Levesque, 12 Wn. App. 2d at

704 (alteration in original) (quoting State v. Kunze, 97 Wn. App. 832, 850, 988 P.2d 977 (1999)).

Under ER 704, "opinion testimony is not objectionable merely because it embraces an ultimate issue that the jury must decide." Quaale, 182 Wn.2d at 197. However, "[w]hen opinion testimony that embraces an ultimate issue is inadmissible at a criminal trial, the testimony may constitute an impermissible opinion on guilt." Quaale, 182 Wn.2d at 197. "To determine whether a statement constitutes [impermissible] opinion testimony, a court considers the type of witness, the specific nature of the testimony, the nature of the charges, the type of defense, and the other evidence before the trier of fact." State v. Rafay, 168 Wn. App. 734, 805-06, 285 P.3d 83 (2012). "Impermissible opinion testimony regarding the defendant's guilt may be reversible error." Quaale, 182 Wn.2d at 199.

Bradley's testimony commented on the necessity of Herrera's actions. Bradley testified, "[T]he next thing I saw was somebody beating the living crap out of [Orlando-Ward] on the ground." He opined that it was "[a]n unnecessary beat down." But Herrera asserted that his use of force was necessary to protect Crowley. And the court instructed the jury:

> A person is entitled to act on appearances in defending another, if he believes in good faith and on reasonable grounds that another is in actual danger of injury, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

And necessary was defined as, "under the circumstances as they reasonably

appeared to the actor at the time, (1) no reasonably effective alternative to the use of force appeared to exist and (2) the amount of force was reasonable to effect the lawful purpose intended."

Bradley's opinion that the "beat down" was "unnecessary" went to a key issue of fact for the jury to decide, i.e., whether Herrera acted reasonably in response to the perceived threat to Crowley. Where a witness's opinion parrots the language of a key instruction, it may constitute an impermissible opinion. See, e.g., Quaale, 182 Wn.2d at 195, 200 (holding that an officer's testimony was an improper opinion testimony where, among other issues, the officer's opinion mirrored the legal standard of guilt provided in the jury instructions). Given the nature of the charge, second degree assault, and Herrera's defense, lawful defense of another, Bradley's opinion that Herrera's use of force was unnecessary constituted impermissible opinion testimony. However, Bradley's testimony does not establish a reversible error.

Because impermissible opinion testimony invades the province of the jury by commenting on the defendant's guilt and offends their constitutional right to a fair trial, "'we apply the constitutional harmless error standard.'" Levesque, 12 Wn. App. 2d at 711 (quoting State v. Hudson, 150 Wn. App. 646, 656, 208 P.3d 1236 (2009)). "In a constitutional harmless error analysis, we presume prejudice." Levesque, 12 Wn. App. 2d at 711. And a "[c]onstitutional error is harmless only if the State establishes beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error." Quaale, 182 Wn.2d at 202.

Quaale is instructive here. State Patrol Trooper Chris Stone pulled over Ryan Quaale after Quaale evaded him, lost control of his vehicle, and "skidd[ed] into a homeowner's yard." Quaale, 182 Wn.2d at 194. Trooper Stone believed that Quaale was intoxicated. Quaale, 182 Wn.2d at 193. However, Quaale refused to take a breath test, and Trooper Stone only performed one sobriety test, a horizontal gaze nystagmus test (HGN). Quaale, 182 Wn.2d at 194-95. The State charged Quaale with felony driving under the influence. Quaale, 182 Wn.2d at 195. During trial, Trooper Stone testified "in an aura of scientific certainty" based on the HGN test that "he had 'no doubt'" that Quaale was impaired. Quaale, 182 Wn.2d at 198-99. Our Supreme Court concluded that the testimony was impermissible opinion testimony. Quaale, 182 Wn.2d at 199. It reversed Quaale's conviction, concluding that the only evidence that Quaale was impaired, beyond his poor driving, was Trooper Stone's testimony. Quaale, 182 Wn.2d at 202.

Here, Bradley's characterization of the incident aside, each juror was fully capable of discerning the necessity of the force Herrera used. Unlike the jury in Quaale, which had to rely solely on Trooper Stone's testimony of Quaale's impairment, here, the jury did not have to rely on Bradley's opinion to form a belief on Herrera's guilt and the necessity of his use of force. Instead, the jurors could watch the video evidence and objectively assess the circumstances. There is no doubt that any reasonable jury would have reached the same result.

Herrera disagrees and asserts that Bradley's testimony compares to the

testimony at issue in State v. George[1] and State v. Sargent.[2] Both cases are dissimilar. In George, the witness testified that the defendants were the individuals in the surveillance video offered at trial based on minimal encounters. 150 Wn. App. at 119. In Sargent, a detective opined that he thought the defendant knew his wife was dead when the defendant responded, "'[Y]ou mean something happened to [my wife]?'" 40 Wn. App. at 350. The detective thus opined the defendant lied. Sargent, 40 Wn. App. at 351. George is distinguishable because Bradley was not providing an opinion that the jury could not make for itself based on the video. And Sargent is distinguishable because, there, the detective opined to the defendant's veracity and the State's evidence was not overwhelming, as it is here. Thus, we do not find these cases persuasive.

Prosecutorial Misconduct

Herrera asserts that the prosecutor's statements regarding his ability to count were improper. We agree that the comments were improper but conclude that Herrera fails to show any prejudice.

We review allegations of prosecutorial misconduct for an abuse of discretion. State v. Lindsay, 180 Wn.2d 423, 430, 326 P.3d 125 (2014). "To prevail on a claim of prosecutorial misconduct, a defendant must show first that the prosecutor's comments were improper and second that the comments were prejudicial." State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940 (2008).

[1] 150 Wn. App. 110, 206 P.3d 697 (2009).
[2] 40 Wn. App. 340, 698 P.2d 598 (1985).

Our first inquiry therefore is whether the prosecutor's comments were improper. Lindsay, 180 Wn.2d at 431. Incivility on the part of the attorneys at trial can "threaten[ ] the fairness of the trial, not to mention public respect for the courts." Lindsay, 180 Wn.2d at 432. Here, the State concedes that the prosecutor's comments were improper, and we agree. The prosecutor disparaged Herrera's intelligence and mocked him, stating, "I thought you couldn't count to 17." Even reading this from a cold record, the prosecutor's sarcasm and derision are obvious. And although the comments attempted to attack Herrera's credibility, they were inappropriate and improper. Therefore, Herrera succeeds on the first prong.

However, the comments did not prejudice Herrera. To show prejudice, the defendant "must show a substantial likelihood that the prosecutor's statements affected the jury's verdict." Lindsay, 180 Wn.2d at 440. "In analyzing prejudice, we do not look at the comments in isolation, but in the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury." Warren, 165 Wn.2d at 28.

Given the weight of the evidence presented, Herrera fails to show the prosecutor's inappropriate remarks prejudiced him. See Warren, 165 Wn.2d at 29 (concluding that the weight of the evidence supported the defendant's conviction and prevented any prejudice from the prosecutor's improper comments). In particular, although the prosecutor sarcastically attacked Herrera's credibility with his question, Herrera's inconsistent statements to the detectives before and after he knew that there was a video of the altercation

sufficiently undermined his credibility. The comments also did not attack Herrera's defense and were isolated. And as discussed above, the video evidence allowed the jury to come to their own conclusion regarding the assault. Thus, Herrera does not show there is a substantial likelihood that the comments affected the jury's verdict. See, e.g., State v. Negrete, 72 Wn. App. 62, 67-68, 863 P.2d 137 (1993) (holding that the prosecutor's improper comment impugning defense counsel, although inappropriate, did not result in prejudice where the State presented substantial evidence against the defendant and the remark was isolated). In short, the statements did not prejudice Herrera and were harmless.

Cumulative Error

Herrera contends that the cumulative errors demand that we reverse his conviction and remand for a new trial. We disagree.

"'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.'" 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)). "But because any errors did not affect the outcome of the trial, the cumulative error doctrine does not apply." Rafay, 168 Wn. App. at 838.

For the foregoing reasons, we affirm Herrera's conviction.

Offender Score

Herrera challenges the inclusion of a juvenile conviction in his offender score. We conclude that the court correctly calculated his offender score.

"It is well established that the State has the burden to prove prior

convictions at sentencing by a preponderance of the evidence." State v. Hunley, 175 Wn.2d 901, 909-10, 287 P.3d 584 (2012). "While the preponderance of the evidence standard is 'not overly difficult to meet,' the State must at least introduce 'evidence of some kind to support the alleged criminal history.'" Hunley, 175 Wn.2d at 910 (quoting State v. Ford, 137 Wn.2d 472, 480, 973 P.2d 452 (1999)). However, "a sentence in excess of statutory authority is subject to collateral attack, . . . a sentence is excessive if based upon a miscalculated offender score (miscalculated upward), and . . . a defendant cannot agree to punishment in excess of that which the legislature has established." In re Pers. Restraint of Shale, 160 Wn.2d 489, 494, 158 P.3d 588 (2007).

Herrera stated he was not challenging the at-issue juvenile conviction. However, on appeal, he asserts a legal challenge to the juvenile conviction's judgment and sentence: that it is invalid on its face. Such a challenge is nonwaivable. See In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 875-76, 50 P.3d 618 (2002) (holding that the defendant could not waive a challenge to a miscalculated offender score that asserts and proves that a judgment and sentence was invalid on its face). And contrary to the State's contention, Shale does not control here because Shale involved factual challenges to the defendant's convictions. And the court discerns the validity of those factual challenges employing its discretion. See Shale, 160 Wn.2d at 494 ("[W]aiver can be found where the alleged error involves an agreement to facts, later disputed, or where the alleged error involves a matter of trial court discretion.").

Here, the judgment and sentence stated only that the conviction was for

"to elude the police." Herrera asserts that the judgment and sentence was invalid because it did not provide that the offense was "Attempting to elude police vehicle—Defense—License revocation," as set out in RCW 46.61.024. In support of his assertion, Herrera cites a number of cases that are inapplicable. See In re Pers. Restraint of Hinton, 152 Wn.2d 853, 857-58, 100 P.3d 801 (2004) (in addressing a personal restraint petition, holding that the defendants could attack their convictions where they were convicted of a crime that did not exist); In re Pers. Restraint of Thompson, 141 Wn.2d 712, 719, 10 P.3d 380 (2000) (holding that where the crime did not exist, judgment and sentence was facially invalid). The crime of eluding police did exist, even if the judgment and sentence lacked the precise statutory title of the crime. This is not a case where the crime for which he was convicted did not exist, and it appears disingenuous to assert as much. Therefore, we are not persuaded. The judgment and sentence was facially valid, and Herrera's offender score was correctly calculated.

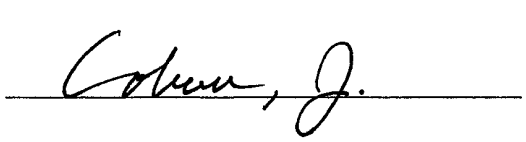
Supervision Fees

As a final matter, Herrera asserts that the trial court erred when it imposed DOC supervision fees. The record in this case reflects that the trial court intended to waive all discretionary LFOs. And where the trial court intended to waive all discretionary LFOs, remand is appropriate to strike the boilerplate language requiring a defendant to pay DOC supervision fees. See State v. Dillon, 12 Wn. App. 2d 133, 152, 456 P.3d 1199 (remanding for the trial court to strike DOC supervision fees where "[t]he record demonstrate[d] that the trial court intended to impose only mandatory LFOs"), review denied, 195 Wn.2d

1022 (2020). Accordingly, we remand for the trial court to strike the imposition of these fees.

We affirm Herrera's judgment and sentence but remand for the trial court to strike its imposition of supervision fees.

WE CONCUR:



Appendix B

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

STATE OF WASHINGTON, Respondent, v. MICHAEL DAVID HERRERA, Appellant.	No. 81129-1-I ORDER DENYING MOTION TO PUBLISH OPINION

Appellant Michael Herrera has filed a motion to publish the opinion filed on June 14, 2021. Respondent State of Washington has filed an answer to appellant's motion. The panel has determined that appellant's motion to publish the opinion should be denied. Now, therefore, it is hereby

ORDERED that appellant's motion to publish the opinion is denied.

FOR THE COURT:

Judge

NIELSEN KOCH P.L.L.C.

August 05, 2021 - 10:49 AM

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