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IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

GUADALUPE RAMOS LEIVA,

Petitioner.

PETITION FOR REVIEW

Court of Appeals No. 54439-3-II
Appeal from the Superior Court of Pierce County
Superior Court Cause Number 14-1-04268-1
The Honorable Karena Kirkendoll, Judge

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I. Identity of Petitioner

The Petitioner is Guadalupe Ramos Leiva, Defendant and Appellant in the case below.

II. Court of Appeals Decision

Petitioner seeks review of the unpublished opinion of the Court of Appeals, Division 2, case number 54439-3-II, which was filed on February 8, 2021. (Attached in Appendix) The Court of Appeals affirmed the conviction entered against Petitioner in the Pierce County Superior Court.

III. Issues Presented for Review

1. Was Guadalupe Leiva denied his constitutional right to a fair and impartial trial, where the lead detective in the case gave improper opinion testimony on Leiva's guilt and the complaining witness' credibility by stating that the complaining witness' calm demeanor during the forensic interview showed that she had been "conditioned" by repeated instances

of sexual abuse by Leiva.

2. Should the trial court have declared a mistrial after the lead detective made an improper comment on Guadalupe Leiva's guilt and on the credibility of the complaining witness in a case that was decided primarily on the jury's assessment of their credibility?

3. Where the State failed to present sufficient proof that the object that Guadalupe Leiva purportedly pointed at his wife was a real firearm and not a BB gun or other gun-like object, must Leiva's conviction for second degree assault with a deadly weapon and the jury's findings that he was armed with a firearm, be vacated and dismissed?

IV. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Guadalupe Ramos Leiva with three counts of second degree rape of a child, one count

of attempted second degree rape of a child, one count of second degree assault, and two counts of felony harassment. (CP 8-12) The State alleged several aggravators, including that the crimes were domestic violence incidents, that Leiva abused his position of trust, that the rapes were part of an ongoing pattern of abuse, and that he was armed with a firearm when he committed the assault and harassment offenses. (CP 8-12)

The jury found Leiva not guilty of one of the harassment charges (against alleged victim A.S.), but guilty of the remaining substantive offenses and aggravators. (CP 174-98; 11RP 1271-75)[1]

The trial court rejected the State's request to impose an exceptional sentence above the standard range. (12RP 1312; CP 267-79) The court sentenced

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[1] The trial transcripts labeled volumes 1 thru 12 will be referred to by their volume number (#RP). The remaining pretrial transcripts will be referred to by the date of the proceeding.

Leiva to a standard range sentence, plus firearm enhancements, totaling 334 months to life. (CP 314; 12RP 1312, 1314-15) Leiva timely appealed. (CP 330) The Court of Appeals affirmed Leiva's convictions.

B. SUBSTANTIVE FACTS

Guadalupe Leiva and Eugenia Ramos met as teens in their native Guatemala. (6RP 766) They began dating and eventually married. (6RP 766) A few years later, in 2001, Leiva moved to the United States. (6RP 766) Ramos was pregnant at the time, and gave birth to their daughter, A.S., on September 22, 2001. (5RP 662; 6RP 767)

Ramos and A.S. came to the United States in 2003, and reunited with Leiva in 2005. (6RP 767) Ramos and Leiva had three more children together, one daughter and two sons. (5RP 663; 6RP 765; 8RP 992) The family lived in various locations in Colorado, California, and Washington State. (6RP 768) They moved to a trailer

near Eatonville in 2012, when A.S. was 11 years old. (5RP 664-65, 670) When A.S. was 12 years old, they moved into another residence outside of Eatonville, near Alder Lake. (5RP 664-65, 671; 6RP 768, 769-70)

A.S. testified that she and Leiva engaged in sexual activities on numerous occasions over the next few years. (5RP 667, 698; 6RP 738-39, 740, 751) The first incident occurred when they still lived in the trailer. (5RP 667) According to A.S., Leiva asked if she had ever seen a penis. (5RP 668) He pulled down his pants to showed her his, then he made her touch it with her hand. (5RP 668) Next he pulled A.S. into the bedroom, where he touched her vagina with his hand or mouth. (5RP 669)

The next incident that A.S. recalled occurred after they moved to the home near the lake. (5RP 672) According to A.S., Leiva commented that "[her] body had changed and how he couldn't help himself anymore. And he pulled down [her] pants, and he put his penis into [her]

vagina." (5RP 673) A.S. testified that she asked him to stop and began to cry because it hurt. (5RP 673) Later, Leiva told A.S. not to tell anyone, and told A.S. he would hurt her and the rest of the family if she ever did. (5RP 667) A.S. believed that he would, because he owned guns and had been abusive towards Ramos in the past.[2] (5RP 677-78)

A.S. recalled one occasion where she and Leiva had intercourse in the back of their red van, and another time that they had intercourse on Christmas Eve of 2013. (5RP 689-90, 694, 696) A.S. testified that when the sexual contact first began she would cry and ask Leiva to stop, but her protestations did not work so eventually she just complied. (5RP 693)

On the night of October 12, 2014, as A.S. was

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[2] A.S. described an incident that occurred in Colorado, where she saw Leiva hit her mother's head into a door, causing injuries, and testified that Leiva beat Ramos other times as well. (5RP 681-83)

getting ready to go to bed, Leiva called for her to come outside and help him check on their water tank. (5RP 707) But instead, Leiva lead her to their greenhouse, which was a few yards from the house and unlit. (5RP 703, 708) According to A.S., Ramos pulled down her pants and his own, and began to rub his penis against the outside of her vagina. (5RP 708-09; 733)

At that moment, Ramos came outside and started calling for A.S. (5RP 709, 710) Leiva pulled up his pants, told A.S. to pull up hers, and told A.S. to let him talk to Ramos. (5RP 710) A.S. testified that Ramos was upset, and demanded to know why A.S. needed to be outside with Leiva. (5RP 711-12) Ramos took A.S. into her bedroom, locked the door, and began asking her what had happened. (5RP 712) A.S. told her mother in vague terms what had been going on. (5RP 712)

According to Ramos, she went looking for A.S. to say goodnight, and became concerned when she could

not find her inside the house. (6RP 776) When she went outside and called to A.S., she saw Leiva walking out of the greenhouse, fixing his pants. (6RP 777-78) A.S. followed behind him, and she was shaking and crying. (6RP 779) Ramos demanded to know what was going on, but A.S. and Leiva both said nothing had happened. (6RP 781) So Ramos took A.S. into the bedroom and locked the door. (6RP 781) A.S. eventually told Ramos that Leiva was abusing her. (6RP 796-97)

Ramos and A.S. both testified that Leiva broke through the bedroom door and began yelling. (5RP 712-13; 6RP 782) Ramos testified that Leiva grabbed her by the hair and pulled her to another room. (6RP 782) Ramos told Leiva she would call the police. (6RP 782) According to Ramos, Leiva then grabbed a pistol and said that if she did, he would kill her, the children, the police, and then himself. (6RP 782-83) Ramos testified that Leiva pointed the pistol at her and at their son who was in

his crib. (6RP 791)

Ramos believed that he would carry through on the threat because he had mistreated her in the past.[3] (6RP 792) But A.S. did not recall hearing Leiva make those threats and did not see him holding a gun. (5RP 717-18; 6RP 755)

Ramos did not call the police because she was worried Leiva would hurt them. (6RP 794) But eventually Leiva calmed down, and he left the house around 3:00 in the morning. (6RP 793, 794, 795)

Later that day, Ramos took A.S. to Mary Bridge Hospital, where she was examined and questioned by child sexual abuse intervention specialists. (6RP 741, 743; 7RP 881) A.S. told Dr. Yolanda Duralde that the

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[3] Ramos also testified about the incident in Colorado, describing how she was injured when Leiva pushed her head into a wall. (6RP 792) Leiva testified that Ramos actually slipped and hit her head against the refrigerator. (8RP 1010, 1012)

most recent incident of sexual intercourse with Leiva occurred three or four days prior, and she described the incident in detail. (7RP 901, 905-06) A.S. also told clinical social worker Patricia Mahaulu-Stephens about the sexual abuse during their forensic interview. (7RP 916, 944, 951)

Detective Sergeant Gary Sanders of the Pierce County Sheriff's Department was assigned the case, but was unable to locate Leiva. (8RP 979) A few days later, Sanders learned that Leiva was in Colorado. (8RP 980) Deputy US Marshall Bryan Bailey was tasked with locating and apprehending Leiva. (6RP 816-17) He was able to determine that Leiva drove South on Interstate 5 into Portland on October 14, and arrived in Colorado on October 17, 2014. (6RP 818, 820) Leiva withdrew $880 in cash from a bank in Colorado, then traveled to Mexico. (6RP 820, 823) Leiva then took a flight from Mexico to Guatemala, where he was believed to be staying with his

brother. (6RP 823) With Ramos' help, Deputy Bailey was eventually able to locate and arrest Leiva in Guatemala. (6RP 824) Leiva returned to the United States on October 25, 2019. (6RP 825)

Leiva testified and denied ever engaging in any inappropriate sexual contact with A.S. (9RP 1043, 1053-54) He also denied ever threatening anyone with a gun. (8RP 1016, 1018)

Leiva was in a car accident and fractured his neck in 2014.[4] (8RP 1005-06) As a result, Leiva could not work at the same physical job he had before the accident, and Ramos became the primary breadwinner in the family. (8RP 1006, 1007) The injuries also made it difficult and painful for Leiva to have sexual intercourse with Ramos. (8RP 1007; 9RP 1091-92) But Ramos frequently belittled and mocked Leiva's manhood, which

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[4] Ramos confirmed that Leiva injured his back in a car accident in 2014. (6RP 805)

Leiva believes may have also contributed to his difficulties having sexual relations. (8RP 1007, 1013)

Leiva often had to tend to their water pump, and it was Ramos' idea that A.S. should help him with that chore. (8RP 999-1000, 1004; 9RP 1042) They were tending to the pump and their animals, when Ramos came outside and accused him of abusing A.S. (9RP 1042) He testified that Ramos slapped A.S. and dragged her into the house. (9RP 1044)

Leiva denied breaking down the bedroom door or arming himself with a gun. (9RP 1045) Instead, Ramos came out of the bedroom and attacked Leiva. (9RP 1046) Ramos told Leiva to leave, and threw a bag of his laundry at him. (9RP 1046-47) Leiva took what he could carry and left. (9RP 1048)

He decided to go to Colorado to stay with his brother, and hoped he could get his old job back. (9RP 1048) He was unable to secure the job, and his family in

Guatemala needed help, so he eventually decided to go home. (9RP 1049-50) He did not go to Guatemala to hide. (9RP 1051) Leiva testified that he would not have left the country if he had known about the allegations made against him because he would have wanted to stay and resolve the case. (9RP 1050)

V. ARGUMENT & AUTHORITIES

The issues raised by Leiva's petition should be addressed by this Court because the Court of Appeals' decision conflicts with settled case law of the Court of Appeals, this Court and of the United State's Supreme Court. RAP 13.4(b)(1) and (2).

A. DETECTIVE SANDERS' IMPROPER TESTIMONY COMMENTING ON A.S.'S CREDIBILITY DENIED LEIVA A FAIR TRIAL.

The trial court violated Leiva's constitutional right to a fair trial by denying his motion for a mistrial after the lead detective gave impermissible testimony commenting

on the credibility of A.S.[5]

Detective Sanders described A.S.'s demeanor during the forensic interview, but did not refrain from stating or implying his opinion that A.S. was telling the truth and that she had been a victim of sexual abuse.

> [PROSECUTOR]: And did you observe anything about her demeanor during the interview?
> [DETECTIVE]: Yeah. I hate to say typical victim, unfortunately, but, you know, very upset, very emotionally distraught. But also in the things that she described, the repetitive nature kind of -- it showed –
> [DEFENSE ATTORNEY]: I'm going to object. This is getting to commenting on the credibility of the witness, in this case the alleged victim, and vouching for her credibility.
> THE COURT: I'll sustain that. You can rephrase.
> …
> [PROSECUTOR]: Was there anything

[5] In briefing to the Court of Appeals, Leiva argued that Detective Sanders' testimony was an improper opinion on Leiva's guilt (See Opening Brief of Appellant). The Court of Appeals disagreed with this characterization, finding instead that it was a "comment on the credibility of another witness, A.S." (Opinion at 8 fn 9) The determination of whether this testimony warranted a mistrial is the same regardless of the characterization.

> about [A.S.'s] demeanor that you observed other than what you've already described?
>
> A: She was distressed, but she was also calm, which was kind of disturbing in that fact.
>
> [PROSECUTOR]: Why do you say that?
>
> [DETECTIVE]: Because -- to say that someone is calm is to say that they've been conditioned with it, that it's been happening so much that they almost accept it, which is kind of sad. I mean, you could tell she was upset, but –
>
> [DEFENSE ATTORNEY]: Your Honor, I'm going to object. Can I be heard outside the presence of the jury?

(8RP 971-72) Leiva asked the court to declare a mistrial. (8RP 973-75) The trial court agreed that the Detective's comments were improper and violated the order in limine forbidding witnesses from commenting on the veracity of a witness or the guilt of the defendant. (8RP 975; 1RP 12) But the court found that the testimony was not prejudicial enough to warrant a mistrial. (8RP 975-76)

A trial court's decision on a motion for a mistrial is reviewed for an abuse of discretion. *State v. Weber,* 99 Wn.2d 158, 164, 659 P.2d 1102 (1983). The trial court's

decision to deny a motion for a mistrial "will be overturned when there is a 'substantial likelihood' the prejudice affected the jury's verdict." *State v. Russell,* 125 Wn.2d 24, 85, 882 P.2d 747 (1994) (quoting *State v. Crane,* 116 Wn.2d 315, 332-33, 804 P.2d 10 (1991)). Determining whether a trial irregularity is so prejudicial as to warrant a mistrial depends on (1) the seriousness of the irregularity, (2) whether it involved cumulative evidence, and (3) whether the trial court properly instructed the jury to disregard it. *State v. Greiff,* 141 Wn.2d 910, 921, 10 P.3d 390 (2000).

The Court of Appeals found that "the irregularity may be characterized as serious … because it involves an arguable violation of a pretrial order." (Opinion at 9) But the Court nevertheless affirmed because it found that "the level of seriousness is low, and so it does not justify a mistrial." (Opinion at 9) The Court of Appeals was incorrect.

First, this is a serious irregularity. Detective Sanders testified that A.S. was calm because she had been conditioned by repeated sexual abuse. (8RP 971-72) This is a direct and unequivocal statement that, in Detective Sanders' opinion, A.S. was credible and that Leiva sexually abused A.S. on countless occasions.

Next, the testimony did not involve cumulative evidence. And finally, the trial court instructed the jury to disregard it. (8RP 978) However, the damage was already done. It is well established that a police officer's improper opinion raises additional concerns because "an officer's testimony often carries a special aura of reliability." *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007). And where misconduct strikes at the heart of the defense case, a curative instruction is ineffective to "unring the bell." *See, e.g., State v. Powell*, 62 Wn. App. 914, 919, 816 P.2d 86 (1991) (reversing conviction and quoting *State v. Trickel*, 16 Wn. App. 18,

30, 553 P.2d 139 (1976)). Considering Detective Sanders' improper opinion testimony went to the very "essence of the crime," and his "aura of reliability" as a detective, the curative instruction would have been ineffective to unring the bell.

It was an abuse of discretion to deny Leiva's motion for a mistrial. Improper opinion testimony as to a commenting on a witness' credibility and ultimately the defendant's guilt violates a defendant's constitutional right to have a fact critical to his guilt determined by the jury. *State v. Quaale*, 182 Wn.2d 191, 201-02, 340 P.3d 213 (2014). Admission of such testimony is constitutional error and the Court should apply the constitutional harmless error standard to determine whether the error was harmless. *Quaale*, 182 Wn.2d at 202.

Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless. *State v. Guloy*, 104 Wn.2d 412, 425, 705

P.2d 1182 (1985). An error is harmless only if the Court is "convinced beyond a reasonable doubt any reasonable jury would reach the same result absent the error and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt." *State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996) (internal citation omitted). If the error was not harmless, the defendant must have a new trial. *Easter*, 130 Wn.2d at 242.

In *State v. Barr*, the court found that the untainted evidence was not so overwhelming as to necessarily lead to a finding of guilt because "at its heart, the ultimate issue here revolved around an assessment of the credibility of Mr. Barr and [the victim]" and because "the opinion of a government official, especially a police officer, may influence a jury." 123 Wn. App. 373, 384, 98 P.3d 518 (2004). The court reversed Barr's convictions and remanded for a new trial. 123 Wn. App. at 384.

The same can be said here. Without any physical or eyewitness testimony to corroborate A.S.'s testimony, the ultimate issue revolved around an assessment of the credibility of Leiva and A.S. The opinion testimony came from a Detective, and a law enforcement officer's opinion testimony is "especially likely" to influence the jury. *State v. Demery*, 144 Wn.2d 753, 762, 30 P.3d 1278 (2001). The prejudice was compounded by Detective Sanders' later testimony that he did not see the need to collect fingerprint or other identification evidence because there was "no question, I guess you would say, as to whether -- who had done it[.]" (8RP 984-85) The prejudice was further compounded by the prosecutor's closing statement where he expressed his opinion that Leiva "was not truthful" and that A.S.'s testimony "is compelling,

it is true, and you know it to be true."[6] (10RP 1248, 1259)

The prejudice from the Detective's improper opinion testimony could not be cured by any instruction, and the trial court abused its discretion when it denied Leiva's motion for a mistrial. This error is not harmless, and requires reversal of Leiva's convictions and remand for a new trial.

B. THE STATE FAILED TO PROVE THAT LEIVA WAS ARMED WITH A FIREARM.

Contrary to the Court of Appeals' opinion, the State did not present sufficient evidence to prove that Leiva was armed with a deadly weapon or firearm, and therefore failed to prove an essential element of second degree assault and failed to prove the firearm enhancement

[6] Defense counsel's objection to this testimony was overruled, but his objections to the prosecutor's statements were sustained. (8RP 985; 10 RP 1248, 1260)

allegations.[7]

"Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt." *City of Tacoma v. Luvene*, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)); U.S. Const. amend. 14. Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119

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[7] A challenge to the sufficiency of the evidence supporting a conviction may be raised for the first time on appeal. *State v. Sweany*, 162 Wn. App. 223, 228, 256 P.3d 1230 (2011); *City of Seattle v. Slack*, 113 Wn.2d 850, 859, 784 P.2d 494 (1989); RAP 2.5(a)(3).

Wn.2d at 201.

The State elected to instruct the jury that, to find Leiva guilty of second degree assault, it must find that he assaulted Ramos "with a deadly weapon."[8] (Instruction Nos. 18 and 22 at CP 219, 223) The only definition of deadly weapon given to the jury stated that "[a] firearm, whether loaded or unloaded, is a deadly weapon."[9] (Instruction No. 19 at CP 220) The State also alleged that Leiva was armed with a firearm when he committed the second degree assault and the harassment offenses.[10]

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[8] A person is guilty of assault in the second degree if he assaults another with a deadly weapon. RCW 9A.36.021(1)(c).

[9] The statutory definition of deadly weapon also includes any weapon which, "under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm." RCW 9A.04.110(6). But the jury was not instructed on this definition of a deadly weapon.

[10] "[A]dditional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010." RCW 9.94A.533(3).

(CP 10-12; CP 239) "Firearm" is defined as "a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." RCW 9.41.010(11) (see also Instruction No. 38 at CP 239).

Leiva testified that he did not own a firearm, but instead the items A.S. and Ramos were referring to were actually cap guns or BB guns. (8RP 1014-15) However, it is well established that BB guns are not firearms. *See, e.g., State v. Carlson,* 65 Wn. App. 153, 157, 828 P.2d 30 (1992) ("A BB gun is not an explosive nor is it a firearm."). A BB gun is not a firearm and thus is not a deadly weapon per se. *Carlson,* 65 Wn. App. at 161 n. 10; *see State v. Majors,* 82 Wn. App. 843, 847, 919 P.2d 1258 (1996) (in most situations, a BB gun is not capable of causing death or serious injury).

The State must present sufficient proof that the person possessed an actual deadly weapon, not a toy. *State v. Tongate*, 93 Wn.2d 751,755, 613 P.2d 121

(1980). So the relevant inquiry is whether the item Ramos saw in Leiva's hand was a gun in fact or instead a BB gun or gun-like object that does not use explosives. See *State v. Faust*, 93 Wn. App. 373, 379-81, 967 P.2d 1284 (1998).

In *State v. Raleigh,* 157 Wn. App. 728, 734, 238 P.3d 1211 (2010), the State proved the firearm at issue was a gun in fact where the officer who executed the search warrant found two "toy" guns and one "real" gun. The real gun held a magazine, was loaded with a round of ammunition in the chamber, and had a working safety and slide. 157 Wn. App. at 734.

In *State v. Jussila,* 197 Wn. App. 908, 934, 392 P.3d 1108 (2017)*,* "[n]o one explicitly declared that a gun was real or operable." However, a police officer testified he found soft rifle cases with rifles inside, and the owner of the stolen guns identified them as his. 197 Wn. App.at 933. And witnesses repeatedly referred to the stolen

items as guns, shotguns, firearms, weapons, and rifles. 197 Wn. App. at 934. The State also presented evidence that some of the guns were loaded with ammunition. 197 Wn. App.at 933-34.

In *State v. Crowder,* 196 Wn. App. 861, 873, 385 P.3d 275 (2016), the defendant threatened the complainant with a gun and placed it to her head; the complainant described the gun as having a "spinning barrel," and later identified the gun as a revolver that had been seized by law enforcement from Crowder's house.

And in State v. *Tasker*, 193 Wn. App. 575, 595, 373 P.3d 310 (2016), Division 3 found that the State presented sufficient evidence that the gun the defendant used in an assault was a gun "'in fact,'" rather than "'a gunlike but nondeadly object.'" (Quoting *State v. Fowler*,

114 Wn.2d 59, 62, 785 P.2d 808 (1990)).[11]

> The evidence showed that Mr. Tasker pointed the gun at [the victim's] face in demanding her purse and used it to advance a kidnapping. Visibility was good; the crime occurred in daylight on a June afternoon. [The victim] saw the gun at close range and was unwavering in her testimony that it was a gun. While she forthrightly admitted to little experience with guns "in real life," she was old enough, as the mother of a middle schooler, to have seen guns in photographs, on the news, in television programs and in movies. The clicking noise she described hearing behind her head was consistent with Mr. Tasker's use of a real gun. Collectively, the evidence was sufficient to establish the gun met the definition of a "firearm[.]"

193 Wn. App. at 595.

No similar evidence exists in Leiva's case. The State did not offer into evidence the alleged firearm. And the State did not call a firearms expert, or another law enforcement professional who is familiar with firearms.

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[11] "A defendant's penalty cannot be enhanced if the evidence establishes only that he was armed with a gun-like, but nondeadly, object." *Fowler*, 114 Wn.2d at 62.

To establish that Leiva was armed with a firearm, the State relied only on the testimony of A.S. and Ramos. But their testimony did not prove that the object Leiva held met the definition of a "firearm."

Ramos testified that they owned one pistol, one handgun, and one rifle. (6RP 782, 788-89) She testified that Leiva held the pistol in his hand and pointed it at Ramos and at their son when he threatened to kill them. (6RP 782-83, 790, 791) Ramos did not provide any additional description of the pistol, or any other testimony to support a conclusion that what she saw in Leiva's hand met the definition of a firearm.

A.S. testified that Leiva and Ramos each owned a revolver. (5RP 678) Leiva's revolver was silver and Ramos' revolver was black, and Leiva taught A.S. to fire one of them. (5RP 678-79) A.S. also testified that the black one is small and "one where you insert the bullets from the bottom instead of into the revolver." (5RP 679)

A.S. did not see the altercation between Leiva and Ramos, and did not see Leiva in possession of a firearm or gun-like object on the night in question. (5RP 717-18; 6RP 755) So she could not provide any insight into which "revolver" Leiva might have been holding. And A.S. did not provide any testimony indicating that she knows the difference between a BB gun and real firearm. It is entirely possible that A.S. was taught to shoot a BB gun and simply believed, due to her youth, that it was a real gun. A.S. was no more than 14 years old at the time, so it cannot be assumed that she was old enough, as the victim in Tasker was, "to have seen guns in photographs, on the news, in television programs and in movies." 193 Wn. App. at 595.

There is simply insufficient evidence in the record to prove beyond a reasonable doubt which gun-like object Leiva was holding when he threatened Ramos, and insufficient evidence in the record to prove that the object

meets the definition of a "firearm."[12]

The reviewing court should reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996); *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). The State failed to prove that Leiva was armed with a firearm. Leiva's second degree assault conviction and the two firearm sentence enhancements must be reversed and dismissed.

VI. CONCLUSION

For the reasons argued above, Leiva respectfully requests that this Court accept review and reverse Leiva's convictions and remand his case for a new trial, or

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[12] The jury was not instructed on the theory of constructive possession, so whether or not an actual "firearm" was accessible elsewhere in the residence is irrelevant.

alternatively reverse and dismiss his second degree assault and firearm sentence enhancements.

I hereby certify that this document contains 4858 words, excluding the parts of the document exempted from the word count, according to the calculation of the software used to prepare this brief, and therefore complies with RAP 18.17.

DATED: March 2, 2022

STEPHANIE C. CUNNINGHAM
WSBA #26436
Attorney for Guadalupe R. Leiva

CERTIFICATE OF MAILING

I certify that on 03/02/2022, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Guadalupe Ramos Leiva, DOC# 422624, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520.

STEPHANIE C. CUNNINGHAM, WSBA #26436

APPENDIX

Court of Appeals Opinion in *State v. Guadalupe R. Leiva*, No. 54439-3-II

Filed
Washington State
Court of Appeals
Division Two

February 8, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. GUADALUPE RAMOS LEIVA, Appellant.	No. 54439-3-II UNPUBLISHED OPINION

VELJACIC, J. — Guadalupe R. Leiva appeals his conviction for three counts of rape of a child in the second degree, one count of attempted rape of a child in the second degree, one count of assault in the second degree, and one count of felony harassment. Leiva also appeals his sentence for assault in the second degree and felony harassment. Leiva argues that the trial court erred by denying his motion for a mistrial based on a law enforcement officer's improper opinion testimony. Leiva also argues that the State presented insufficient evidence of a firearm to support his conviction for assault in the second degree and the firearm enhancements for assault in the second degree and felony harassment.

We hold that the trial court did not abuse its discretion by denying Leiva's motion for a mistrial. We also hold that the State presented sufficient evidence of a firearm to support his conviction for assault in the second degree and the two firearm enhancements. Accordingly, we affirm Leiva's convictions and sentence.

FACTS

I. Factual Background

Leiva and Eugenia Ramos met as teenagers in Guatemala. They eventually married. In 2001, Leiva moved to the United States. Ramos gave birth to A.S. 2001, after Leiva had left for the United States. Ramos moved to the United States in 2003.

Ramos reunited with Leiva in 2005 and they eventually had three more children together. In 2013, the family moved to a trailer just outside of Eatonville, Washington. A.S. was 11 years old at the time.

Ramos worked as a nurse, frequently worked long hours, and was typically assigned the night shift. Leiva remained at home with the children while Ramos worked.

Leiva sexually abused A.S. the first time at the Eatonville trailer. Ramos had left for work and A.S. was in her room. A.S. could not sleep, so she joined Leiva in the living room to talk to him. Leiva asked A.S. if she had ever seen a penis. When she said no, Leiva pulled his pants down and made her touch his genitals. A.S. did not understand what was happening, but knew that it was not good. Shortly thereafter, A.S. recalled going in a room with Leiva. She could not recall whether Leiva "touch[ed her] private parts or if he was doing something with his mouth." 5 Report of Proceedings (RP) at 669.

The family eventually moved to a larger Eatonville residence. A.S. was 12 years old at the time. A.S. recalled another incident of sexual abuse. Ramos was working the night shift. A.S. was in her room sleeping when Leiva entered. Leiva took A.S. to the room that he shared with Ramos. He commented "about how [A.S.'s] body had changed and how he couldn't help himself anymore." 5 RP at 673. Leiva "pulled down [A.S.'s] pants, and he put his penis into [her] vagina." 5 RP at 673. A.S. cried and asked Leiva to stop, but he did not.

Leiva told A.S. not to tell anybody what had happened. To secure that demand, Leiva threatened to kill A.S., her family, and then himself. A.S. believed this threat "[b]ecause [they] had weapons for him to do that, and [because] he has been aggressive and abusive in the past." 5 RP 678.

A.S. stated that her family owned several guns. They had two revolvers: one was Ramos's and the other was Leiva's. A.S. knew that the revolvers worked because Leiva taught her how to use them and because she fired Leiva's before. A.S. said that the family also owned a small black gun that could be held with one hand—the same size as a pistol. A.S. further described the small black gun as the kind "where you insert the bullets from the bottom instead of into the revolver." 5 RP at 679. She was not sure if the small black gun was operational. A.S. also said that the family owned a longer gun, but was not sure if it was a shotgun or a rifle.

A.S. recalled another incident of sexual abuse in a red van that the family used to own. A.S. was either 12 or 13 years old during this incident. Leiva and A.S. were driving home one day when Leiva stopped along the side of a road. A.S. recalled crawling to the back of the van so that Leiva could have intercourse with her. By this point, A.S. became compliant with Leiva's demands:

> [The State:] You indicated at this point you were already compliant with his requests?
> [A.S.:] Yes.
> [The State:] Was there a time when you weren't compliant with his requests?
> [A.S.:] At the beginning I would cry a lot, and I would ask him to stop. I don't know when, but at one point I realized no matter what I did, he would still continue.
> [The State:] So what would happen if you yelled "Stop" or said "No" or tried to run away or anything like that?
> [A.S.:] He would remind me about his threat.

5 RP at 693.

A.S. recalled another specific incident that occurred on December 24, 2013. The family was celebrating Christmas at A.S.'s grandma's house, but Leiva and A.S. returned to their Eatonville residence to grab overnight supplies. As they were about to head back to A.S.'s grandma's house, Leiva told A.S. to go into his room. A.S. stated that, "whenever [Leiva] asked [her] to go into that room, [she] knew what he wanted," which was sexual intercourse. 5 RP at 696. A.S. recalled going back to her grandma's house and pretending like nothing happened.

A.S. said that she did not know how many times the sex abuse occurred, but she knew it was "a lot of times." 6 RP at 751. A.S. estimated that Leiva had sexually abused her over 50 different times.

Ramos discovered the ongoing sexual abuse on the night of October 12, 2014. A.S. stated that she and the family went out shopping that day. When they got back home, Leiva asked A.S. to go outside to check on the water tank. Ramos was inside the house watching TV. After they checked on the water tank, Leiva took A.S. to their greenhouse. A.S. "was really confused about what was happening because he had never done any sort of sexual act when [Ramos] was home." 5 RP at 708. When they entered the greenhouse, Leiva pulled A.S.'s pants down. That was when Ramos came outside.

Ramos's daughters normally say goodnight to her before bed. Ramos went to A.S.'s room, wondering why she had not said goodnight. Ramos felt something was wrong and started calling out A.S.'s name. Ramos saw Leiva walk out of the greenhouse, fixing his pants. A.S. walked out after Leiva. Ramos noticed that A.S. was "shaky and crying." 6 RP at 779.

Ramos demanded to know what has happening, but both A.S. and Leiva denied that anything had happened. Ramos then went into A.S.'s room and locked the door. A.S. told Ramos that night that Leiva had been sexually abusing her.

Leiva broke down the bedroom door and pulled Ramos by her hair into the living room. Ramos asked Leiva what he had done to her daughter and threatened to call the police. Leiva responded by "grab[bing] one of the pistols" and "[telling her] that if [she] called the police, he was going to kill [her], he was going to kill [her] kids, and he was going to shoot at the police, and then he would kill himself." 6 RP at 782-83. Ramos also testified to owning several guns. She stated that there was one rifle, a pistol, and another handgun in the house, which was Leiva's. Ramos's father gave her the rifle and the pistol. Ramos stated that the pistol worked. Leiva pointed the pistol at Ramos when he made the threat.

Ramos believed that Leiva would carry out his threat based on his abusive and aggressive past. Ramos then told Leiva to "calm down" and that she "wasn't going to say anything." 6 RP at 793. After Leiva left, she locked herself into a bedroom with the rest of her children and waited until dawn "because [she] was so scared that [Leiva] would come back to the house." 6 RP at 793. Ramos never called the police "[b]ecause [she] was very scared that [Leiva] would start shooting at them." 6 RP at 794. The next morning, Ramos took A.S. to be evaluated at the hospital.

Leiva testified that the guns in the household were actually cap guns, or BB guns, and not actual firearms. Leiva said that the guns "weren't capable of killing anybody." 8 RP at 1018.

Leiva left for Colorado after the greenhouse incident. Leiva withdrew $880 in cash, then travelled to Guatemala. He stayed there until he was extradited back to the United States on October 25, 2018.

By amended information, the State charged Leiva with three counts of rape of a child in the second degree, one count of attempted rape of a child in the second degree, one count of assault in the second degree, and two counts of felony harassment. The State also alleged several aggravators, including that the offenses were domestic violence incidents, that he abused his

position of trust, that the rapes were part of a continuing course of conduct, and that he was armed with a firearm when he committed the assault and felony harassment offenses. Leiva pleaded not guilty and the case proceeded to a jury trial.

II. MOTION FOR A MISTRIAL

At trial, Leiva moved to prohibit the State and any witness from offering their personal opinion on the veracity of another witness, or on his veracity or guilt. The trial court granted Leiva's motion.

Gary Sanders, a detective sergeant for the Pierce County Sheriff's Department, testified at trial. Sanders was assigned to work on A.S.'s case. He testified that he observed A.S.'s forensic interview, but from a different room. Sanders testified as to A.S.'s demeanor during the interview, which Leiva objected to:

> [The State:] And did you observe anything about her demeanor during the interview?
>
> [Sanders:] Yeah. I hate to say typical victim, unfortunately, but, you know, very upset, very emotionally distraught. But also in the things that she described, the repetitive nature kind of—it showed —
>
> [Defense Counsel:] I'm going to object. This is getting to commenting on the credibility of the witness, in this case the alleged victim, and vouching for her credibility.
>
> [The Court:] I'll sustain that. You can rephrase.
>
> [The State:] That's fine, Your Honor.
>
> [The State:] Was there anything about [A.S.'s] demeanor that you observed other than what you've already described?
>
> [Sanders:] She was distressed, but she was also calm, which was kind of disturbing in that fact.
>
> [The State:] Why do you say that?
>
> [Sanders:] Because—to say that someone is calm is to say that they've been conditioned with it, that it's been happening so much that they almost accept it, which is kind of sad. I mean, you could tell she was upset, but—
>
> [Defense Counsel:] Your Honor, I'm going to object. Can I be heard outside the presence of the jury?

8 RP at 971-72.

Leiva moved for a mistrial based on Sanders's testimony. The State informed the court that it told Sanders about the ruling on Leiva's motion in limine, but that the questioning "was a bit too open-ended." 8 RP at 973. The court informed the parties that it was going to review the testimony in "realtime." 8 RP at 975.

The trial court denied Leiva's motion for a mistrial. The court stated that "[w]hat the detective [said] was wrong. It was in violation of my direction during motions in limine, and I want the detective cautioned before he comes back into this courtroom." 8 RP at 975. But the court noted that the detective made "one statement, one comment." 8 RP at 975-76. It did not believe that Sanders's statement rose to the level that anyone was unduly prejudiced. Specifically, the trial court stated that, "I did not observe anyone in the jury reacting to that comment. And I just reviewed the *Demery*[1] case in *Tegland*. So given everything that I've just looked at, everything that I've just reviewed on realtime, that's my ruling." 8 RP at 977.

The trial court promptly gave a curative instruction to the jury. Specifically, the court stated that, "I am admonishing the jury to disregard the detective's last comment. It was improper, and it was in violation of a previous order I had made in this case." 8 RP at 978. Defense counsel declined the court's offer to strike the statement from the record.

III. JUDGMENT AND SENTENCE

The jury found Leiva guilty of three counts of rape of a child in the second degree, one count of attempted rape of a child in the second degree, one count of assault in the second degree, and one count of felony harassment. The jury found Leiva not guilty of one count of felony harassment. Relevant here, the jury also found that Leiva was armed with a firearm in committing assault in the second degree and felony harassment.

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[1] *State v. Demery*, 144 Wn.2d 753, 30 P.3d 1278 (2001).

The trial court imposed a standard range sentence of 334 months to life incarceration, which includes two firearm enhancements for assault in the second degree and felony harassment. Leiva appeals.

ANALYSIS

I. MOTION FOR MISTRIAL

Leiva argues that the trial court violated his constitutional right to a fair trial by denying his motion for a mistrial based on Sanders's improper opinion testimony. We disagree.

A. Legal Principles

"A witness's expression of personal belief about the veracity of another witness is inappropriate opinion testimony in criminal trials." *State v. Perez-Valdez*, 172 Wn.2d 808, 817, 265 P.3d 853 (2011). Opinion testimony invades the exclusive province of the jury and may be reversible error because it violates the defendant's right to an independent determination of the facts by the jury.[2] *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007); U.S. CONST. amend. VI; WASH. CONST. art. I, §§ 21, 22.

When a defendant appeals a trial court's denial of a motion for a mistrial, we review the decision for an abuse of discretion. *State v. Allen*, 159 Wn.2d 1, 10, 147 P.3d 581 (2006). An abuse of discretion occurs when the trial court's decision is contrary to law, manifestly unreasonable or based on untenable grounds. *State v. Sassen Van Elsloo*, 191 Wn.2d 798, 807, 425 P.3d 807 (2018).

"A mistrial should be granted when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly." *State v. Gamble*, 168 Wn.2d 161,

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[2] Leiva argues that the opinion testimony by Sanders is an improper opinion of guilt. Leiva is mistaken. Sanders's comment was instead arguably a comment on the credibility of another witness, A.S.

177, 225 P.3d 973 (2010). We will overturn a trial court's decision denying a motion for a mistrial only when "there is a substantial likelihood that the prejudice affected the verdict." *Id*. Thus, we "look to three factors to determine whether a trial irregularity warrants a new trial: '(1) the seriousness of the irregularity; (2) whether the statement was cumulative of evidence properly admitted; and (3) whether the irregularity could be cured by an instruction.'" *Perez-Valdez*, 172 Wn.2d at 818 (quoting *State v. Post*, 118 Wn.2d 596, 620, 826 P.2d 172, 837 P.2d 599 (1992)). These factors are considered with deference to the trial court because the trial court is in the best position to discern any prejudice. *State v. Garcia*, 177 Wn. App. 769, 776-77, 313 P.3d 422 (2013).

B. Trial Irregularity

Leiva argues that Sanders's improper opinion testimony is a "serious irregularity," which weighs in favor of a mistrial. Br. of Appellant at 14. We agree that the irregularity may be characterized as serious under *Gamble* because it involves an arguable violation of a pretrial order. But the level of seriousness is low, and so itdoes not justify a mistrial.

While "[a] violation of a pretrial order is a serious irregularity," *Gamble*, 168 Wn.2d at 178, we must also consider the degree of seriousness of the irregularity. In doing so, we ask "who was responsible for the errant testimony; whether it was the result of a witness who misunderstood or disregarded instructions or whether the witness was misinformed or uninformed as the result of the actions, or inaction, of one of the attorneys." *State v. Taylor*, 18 Wn. App. 2d 568, 581, 490 P.3d 263 (2021). Generally, the intentional introduction of inadmissible evidence is more serious than an unintentional interjection of inadmissible testimony. *Gamble*, 168 Wn.2d at 178.

Precedent can provide guidance. In *Perez-Valdez*, a child protective services (CPS) investigator vouched for the victims' credibility in a case where the defendant was charged with rape of a child in the second degree and rape of a child in the third degree:

> A. . . . I'm saying these children knew what the parents' bedroom looked like, and in addition, they were in there several times being sexually abused by their father.
>
> Q. Assuming they are telling you the truth?
>
> A. *They are telling me the truth*.

172 Wn.2d at 812-13 (emphasis added). In that case, the Supreme Court concluded that the CPS investigator's statement was a serious trial irregularity "because [the] case hinged on whether the jury found the two victims to be credible." *Id*. at 818. Despite the serious irregularity, the court held that the trial court did not abuse its discretion in denying a motion for a mistrial. *Id*. at 819.

Like in *Perez-Valdez*, Sanders's testimony could be read to indirectly express an opinion on the credibility of A.S.'s allegation that she had been a victim of repeated sexual abuse:

> [The State:] Was there anything about [A.S.'s] demeanor that you observed other than what you've already described?
>
> [Sanders:] She was distressed, but she was also calm, which was kind of disturbing in that fact.
>
> [The State:] Why do you say that?
>
> [Sanders:] *Because—to say that someone is calm is to say that they've been conditioned with it, that it's been happening so much that they almost accept it, which is kind of sad*. I mean, you could tell she was upset, but—
>
> [Defense Counsel:] Your Honor, I'm going to object. Can I be heard outside the presence of the jury?

8 RP 971-72 (emphasis added).

There is no evidence that the State intentionally sought to elicit Sanders's opinion on A.S.'s demeanor, which reduces the seriousness of the irregularity. *See Gamble*, 168 Wn.2d at 178. Specifically, the record demonstrates that the State informed Sanders of the court's pretrial order prior to testifying and acknowledged that its open-ended questioning prompted the subject testimony. Additionally, neither the State nor its witnesses revisited Sanders's comment on A.S.'s

demeanor in the forensic interview, which also reduces the seriousness of the irregularity.[3, 4] *See State v. Hager*, 171 Wn.2d 151, 160, 248 P.3d 512 (2011). Moreover, unlike the CPS investigator's comment in *Perez-Valdez*, Sanders did not directly vouch for the truthfulness of A.S.'s allegations. This further reduces the seriousness of the irregularity.

Because the State did not intentionally illicit testimony concerning A.S.'s credibility in violation of the pretrial order, and because Sanders did not directly vouch for A.S.'s credibility, we conclude that the trial irregularity is not as serious as the CPS investigator's statement in *Perez-Valdez*, 172 Wn.2d at 818. Accordingly, the first factor weighs against a mistrial.

C. Cumulative Evidence

Leiva argues that the second factor weighs in favor of a mistrial because Sanders's "testimony did not involve cumulative evidence." Br. of Appellant at 14. We agree, but only in part, as Sanders's testimony involved more than cumulative evidence.

The second factor asks whether the subject testimony is cumulative of other properly admitted evidence at trial. *Perez-Valdez*, 172 Wn.2d at 818. If the improper opinion testimony is essentially cumulative of other evidence, then a mistrial may not be necessary. *Garcia*, 177 Wn. App. at 781.

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[3] Leiva appears to contend that Sanders offered additional improper opinion testimony when he testified that "there's no question, I guess you would say, as to whether—who had done it." 8 RP at 985. This testimony is neither improper nor prejudicial. Sanders's statement was made in response to why he never took fingerprints in this case. Because both Ramos and A.S. made a strong identification of who the suspect was, and because this was not a stranger rape case, Sanders clearly meant to convey that there was no question as to who the suspect was—not that A.S.'s allegations were credible.

[4] Leiva also contends the prejudicial impact of Sanders's statement was compounded by the prosecutor's vouching of A.S.'s credibility in closing. At closing, the prosecutor said "the State has met [its] burden because [A.S.'s] testimony is compelling, it is true, and you know it to be true." 10 RP at 1259. Defense counsel objected to the statement, and the trial court sustained. However, this statement does not re-ring the bell of Sanders's improper opinion testimony.

Sanders's testimony was that A.S. appeared, based on her affect, to consider the abuse as normalized due to the large volume of sex acts. Here, A.S. testified that as time went on, she became compliant with Leiva's demands and conditioned to accept the reality of what was happening to her:

> [The State:] You indicated at this point you were already compliant with his requests?
> [A.S.:] Yes.
> [The State:] Was there a time when you weren't compliant with his requests?
> [A.S.:] At the beginning I would cry a lot, and I would ask him to stop. I don't know when, but at one point I realized no matter what I did, he would still continue.

5 RP 693. A.S. later reiterated this same point testifying that, as the frequency of the sex acts increased, "[she] would not do anything." 6 RP at 739. In fact, A.S. also testified that she became conditioned to make "deals" with Leiva, meaning that "[i]f [she] wanted to go out with some friends, [she] would have to [engage in sex acts] more often." 6 RP at 740. In fact, A.S.'s testimony established Leiva had sexually abused her over 50 different times.

While cumulative of the notion that A.S. ceased resisting due to becoming conditioned to the abuse, Sanders's testimony also covered his observation of A.S.'s demeanor, generally—to this extent only, Sanders's testimony was not cumulative of A.S.'s testimony. Accordingly, the second factor weighs in favor of a mistrial. *Garcia*, 177 Wn. App. at 781.

D. Curative Instruction

Leiva argues that the trial irregularity could not be cured by an instruction because an officer's testimony carries a special aura of reliability and because the improper opinion testimony goes to very essence of the crime. We disagree.

The third factor is "'whether the irregularity could be cured by an instruction.'" *Perez-Valdez*, 172 Wn.2d at 818 (quoting *Post*, 118 Wn.2d at 620). Generally, "[t]estimony from a law

enforcement officer regarding the veracity of another witness may be especially prejudicial because an officer's testimony often carries a special aura of reliability." *Kirkman*, 159 Wn.2d at 928. But, a prompt instruction to disregard improper opinion testimony may cure any prejudice against the defendant. *Perez-Valdez*, 172 Wn.2d at 818; *Hager*, 171 Wn.2d at 160. "We presume that juries follow the instructions and consider only evidence that is properly before them." *Perez-Valdez*, 172 Wn.2d at 818-19.

Improper opinion testimony may not always be curable by a jury instruction. *Hager*, 171 Wn.2d at 160. Our Supreme Court has stated,

> '[w]hile it is presumed that juries follow the instructions of the court, an instruction to disregard evidence cannot logically be said to remove the prejudicial impression created where the evidence admitted into the trial is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors.'

Hager, 171 Wn.2d at 160 (quoting *State v. Miles*, 73 Wn.2d 67, 71, 436 P.2d 198 (1968)). "[U]ltimately[,] the question is 'whether . . . , viewed against the background of all the evidence,' the improper testimony was so prejudicial that the defendant did not get a fair trial." *Gamble*, 168 Wn.2d at 177 (quoting *State v. Thompson*, 90 Wn. App. 41, 47, 950 P.2d 977 (1998)).

In *Hager*, the State charged the defendant with rape of a child in the first degree. 171 Wn.2d at 154. At trial, the State asked the testifying law enforcement officer what the defendant's demeanor was like on the day he made initial contact. *Id*. at 155. The officer answered that "[the defendant] appeared to be angry. He was evasive." *Id*. Hager moved for a mistrial based on the officer's improper opinion testimony, but the trial court denied the motion. *Id*.

On appeal, the Supreme Court held that the trial court did not abuse its discretion in denying Hager's motion for a mistrial because "[the officer's] description of Hager as 'evasive' was not so prejudicial that it could not be cured by the trial court's instructions." *Id*. at 160. Specifically, the court reasoned that "the statement regarding Hager's evasiveness was brief and was never

mentioned by the State or any of its witnesses again." *Id*. Additionally, the court concluded that the prejudice was slight when compared to Hager's inconsistent testimony regarding his whereabouts at the time of the alleged incident. *Id*.

Likewise, in *Perez-Valdez*, the Supreme Court held that the trial court did not abuse its discretion in denying the defendant's motion for a mistrial based on a CPS investigator's improper opinion testimony. 172 Wn.2d at 819. As discussed above, the CPS investigator in that case vouched for the credibility of the victims' allegation that their father had sexually abused them by testifying that, "[t]hey are telling me the truth." *Id*. at 812-13. Although the statement was a serious trial irregularity, the court held that a prompt instruction cured any prejudice based on the trial court's observation that the statement

> happened so quickly [the jury] didn't even understand what was going on. It happened quickly. She made a quick statement. I told them to disregard it. I am convinced if we ask them, remember what that was all about? I'm convinced they wouldn't even remember what I was talking about. So I'm not convinced that that's tainted this jury.

Id. at 819.

Here, the trial court promptly instructed the jury to disregard Sanders's statement, noting that it was improper. We presume that the jury followed the trial court's instruction. *Perez-Valdez*, 172 Wn.2d at 818-19.

The Sanders's testimony about A.S.'s demeanor was not so prejudicial that it could not be cured by the trial court's instruction. Much like *Hager* and *Perez-Valdez*, Sanders's improper opinion testimony was but "one statement, one comment." 8 RP at 975-76. Neither the State nor its witnesses mentioned Sanders's comment on A.S's demeanor in the forensic interview again. Additionally, the prejudice here appears slight when compared to the statement offered by the CPS investigator in *Perez-Valdez* because Sanders did not directly vouch for A.S.'s credibility. The

prejudice also appears slight because the trial court "did not observe anyone in the jury reacting to [Sanders'] comment." 8 RP at 977. And when the court reviewed the challenged testimony in real time, it "[did] not believe that it [rose] to the level that [Leiva] was unduly prejudiced." 8 RP at 975-76.

As discussed above, we review a trial court's decision denying a motion for a mistrial for an abuse of discretion. *Allen*, 159 Wn.2d at 10. This standard of review gives deference to the trial court based on the "'the oft repeated observation that the trial judge, having seen and heard the proceedings, is in a better position to evaluate and adjudge than can we from a cold, printed record.'" *Perez-Valdez*, 172 Wn.2d at 819 (internal quotations omitted) (quoting *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006)).

Given the trial court's assessment, and in light of the factors for a new trial, we hold that the trial court did not abuse its discretion in denying Leiva's motion for a mistrial. *See Allen*, 159 Wn.2d at 10.[5]

II. SUFFICIENCY OF THE EVIDENCE

Leiva argues that the "State did not present sufficient evidence to prove that [he] was armed with a deadly weapon or firearm, and therefore failed to prove an essential element of second degree assault and failed to prove the firearm enhancement allegations." Br. of Appellant at 17. We disagree.

[5] Because we hold that the trial court did not abuse its discretion in denying Leiva's motion for a mistrial, we need not address his constitutional harmless error argument, which principally relies on *State v. Barr*, 123 Wn. App. 373, 98 P.3d 518 (2004). Regardless, Leiva's harmless error analysis is misplaced because the correct standard of review is abuse of discretion. *Allen*, 159 Wn.2d at 10.

A. Legal Principles

Due process requires the State to prove every element of the charged crime beyond a reasonable doubt. *State v. Kalebaugh*, 183 Wn.2d 578, 584, 355 P.3d 253 (2015). The test for determining sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Cardenas-Flores*, 189 Wn.2d 243, 265, 401 P.3d 19 (2017). In a sufficiency of the evidence claim, the defendant admits the truth of the evidence and the court views the evidence and all reasonable inferences drawn from that evidence in the light most favorable to the State. *Id.* at 265-66. Credibility determinations are made by the trier of fact and are not subject to review. *Id.* at 266. Circumstantial and direct evidence are equally reliable. *Id.*

RCW 9A.36.021 provides in relevant part that "[a] person is guilty of assault in the second degree if he or she . . . (c) [a]ssaults another with a deadly weapon." A "deadly weapon" is defined as a "loaded or unloaded firearm." RCW 9A.04.110(6). "[A]ssault in the second degree is a class B felony." RCW 9A.36.021(2)(a).

RCW 9A.46.020(1)(a)(i) provides that, "[a] person is guilty of harassment if: (a) Without lawful authority, the person knowingly threatens: (i) To cause bodily injury immediately or in the future to the person threatened or to any other person." Under RCW 9A.46.020(2)(b)(ii), a person is guilty of a class C felony if "the person harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person threatened or any other person."

A firearm enhancement increases the sentence for an underlying felony "if the offender or an accomplice was armed with a firearm" during the course of the crime. RCW 9.94A.533(3). "When the term 'sentence enhancement' describes an increase beyond the maximum authorized statutory sentence, it becomes the equivalent of an 'element' of a greater offense." *State v.*

Recuenco, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494 n.19, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)). Therefore, "[t]he State must allege and prove beyond a reasonable doubt that the offender was 'armed with a firearm' during the commission of the charged crime." *State v. Johnson*, 185 Wn. App. 655, 674, 342 P.3d 338 (2015) (quoting *Recuenco*, 163 Wn.2d at 439-40).

A "firearm" is defined as "a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." RCW 9.41.010(11). "The plain language of the statute does not require that the gun be 'operational' at the time of the offense." *State v. Olson*, 10 Wn. App. 2d 731, 738, 449 P.3d 1089 (2019). "Evidence that a device appears to be a real gun and is being wielded in committing a crime is sufficient circumstantial evidence that it is a firearm." *State v. Tasker*, 193 Wn. App. 575, 594, 373 P.3d 310 (2016).

B. Sufficient Evidence Supports That Leiva Threatened The Victims With A Firearm.

Here, the State presented sufficient evidence of what it was required to prove: that the object Leiva used was a gun, and therefore, a firearm.[6] At trial, Ramos testified that Leiva pointed a pistol at her when she threatened to call the police after the greenhouse incident. While possessing the pistol, Leiva threatened "to kill [her] children, . . . kill [her], and . . . kill himself with the police." 6 RP at 791.

Both A.S. and Ramos testified that their family owned guns. A.S. testified that two of the guns were revolvers. A.S. stated that she knew they were functional "[b]ecause [Leiva] taught [her] how to use them, and we fired them before." 5 RP at 678. The family also had a small black gun which A.S. testified was the type "where you insert the bullets from the bottom instead of into the revolver." 5 RP at 679. Ramos also testified that she owned a "pistol" that her father gave her

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[6] The term "'Gun' has the same meaning as firearm." RCW 9.41.010(12).

and that she knew it worked. 6 RP at 789. Neither of them testified to owning cap guns or BB guns.

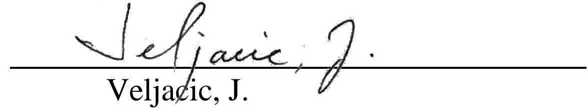
Additionally, Ramos expressed fear based on Leiva's threat. Specifically, Ramos testified that as Leiva pointed the pistol at her, she told him to "calm down" and that she "wasn't going to say anything." 6 RP at 793. After Leiva left, she locked herself into a bedroom with the rest of her children and waited until dawn "because [she] was so scared that [Leiva] would come back to the house." 6 RP at 793. Additionally, Ramos believed Leiva's threats and chose not call the police "[b]ecause [she] was very scared that he would start shooting at them." 6 RP at 794.

Based on the A.S.'s and Ramos's personal knowledge, and based on the fear that Ramos expressed, it is reasonable to infer that the object that Leiva pointed at Ramos was a gun—not a toy. *See Cardenas-Flores*, 189 Wn.2d at 265-66. Therefore, viewing the evidence in light most favorable to the State, any rational trier of fact could conclude that Leiva threatened Ramos with a firearm to support the assault in the second degree conviction and the two firearm enhancements. *See Id*. at 265.

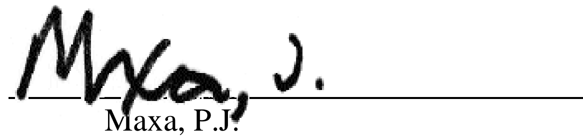
Leiva appears to contend that the State presented insufficient evidence of a firearm because the State did not offer the alleged firearm into evidence and did not call a firearms expert to testify, but rather, relied on A.S.'s and Ramos's lay testimony. We disagree. The admission of the alleged firearm and expert testimony is simply not required under *Tasker*, 193 Wn. App. at 595. Leiva's argument fails.

Based on the foregoing, the State presented sufficient evidence of a firearm. Accordingly, we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.


Veljacic, J.

We concur:


Maxa, P.J.

Price, J.

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