No. 90441-3
(Court of Appeals No. 69401-4-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF KENT,

Respondent

v.

EVERARDO BECERRA-AREVALO,

Petitioner

ANSWER TO PETITION FOR REVIEW

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I. RELIEF REQUESTED.

The unpublished appellate decision of which the Petitioner, Mr. Everardo Becerra-Arevalo, seeks review is in accord with existing case law, and frankly, unremarkable. The Washington Court of Appeals, Division I, correctly decided that no prosecutorial misconduct occurred, that Mr. Becerra-Arevalo's trial counsel opened the door to the questioning of which he took issue with in his appeal, that the prosecutor's redirect of the officer was in direct and pertinent response to defense counsel's cross examination, that defense counsel caused any potential prejudice, and regardless, that any resulting prejudice was neutralized by the given jury instructions. Appendix A at pgs. 7-8, 10-12. Having lost before the Court of Appeals, Mr. Becerra-Arevalo has recrafted his argument and alleges, for the first time, that ineffective assistance of trial counsel was a basis of the RALJ court's decision to overturn his conviction. Petition for Review at 9-11. His arguments are without merit, and he has failed to demonstrate that the issues in this case conflict with existing law, or are sufficiently concerning enough to warrant review under RAP 13.4(b). His Petition for Review should therefore be denied.

II. STATEMENT OF THE CASE.

In December 2011, after a two-day jury trial, Mr. Everardo Becerra-Arevalo was convicted in the Kent Municipal Court of Assault in

the 4th Degree with Sexual Motivation. CP 56, 353. At trial, the victim, Kelly Fitzpatrick, testified that on October 27, 2009, Mr. Becerra-Arevalo came up behind her, reached underneath her, and put both his hands on her breasts. CP 75-76. He then bent down and tried to kiss her, but she turned her head and he kissed her cheek. CP 76, 81. When efforts to report the assault to her supervisor failed to bring about responsive action, Ms. Fitzpatrick reported the assault to police. CP 82-84.

During trial, former Kent Police Officer Carrie Nastansky[1] testified on direct that her conversation with Mr. Becerra-Arevalo about Ms. Fitzpatrick's allegations "was kind of odd because it was—I don't want to say he was trying to hide something. He was very careful about what he said and how he answered the questions." CP 110. Officer Nastansky further described what it was about Mr. Becerra-Arevalo that led her to believe he was being careful—"he was slow to answer as if he were trying to come up with a story in his head versus just if something had happened you would be able to freely tell the story and you wouldn't have to think about it...." CP 111.

[1] At the time of trial, the officer was employed as a Deputy with the Thurston County Sheriff's Office. CP 103-104.

On cross, Mr. Becerra-Arevalo's counsel asked Officer Nastansky if Mr. Becerra-Arevalo was only "guarded"[2] with respect to questions about his relationships with women at work. CP 117. On re-direct, the prosecutor asked Officer Nastansky if Mr. Becerra-Arevalo was guarded in other respects, to which Officer Nastansky stated:

> Yes he was. And he lied to me also. He told me he didn't know why I was there, although he had already been contacted by the property manager, so you would assume he would know why I was there.

CP 119-120. No objection was made, and the prosecutor immediately moved on. CP 119-120.

On re-cross, however, Mr. Becerra-Arevalo's counsel questioned Officer Nastansky extensively concerning Mr. Becerra-Arevalo's apparent "lie" to her.[3] Through leading questions to Officer Nastansky, Mr. Becerra-Arevalo's counsel drew the conclusions that "just the people that

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[2] A term the officer had not previously used.

[3] Q: You said he lied to you? That's a pretty bold statement by an officer, wouldn't you agree? (CP 122, line 1-2)
Q: And you said that the reason you thought it was a lie was because this other person had talked to him previously? (CP 122, line 8-9)
Q: You go from the perspective that someone's guilty of a crime. What about somebody that doesn't think they've committed a crime? (CP 122, line 21-22)
Q: You classify this as a lie. You specifically said it was a lie. (CP 124, line 14)
Q: So what about that statement is a lie? (CP 124, line 16).
Q: I'm asking about that statement specifically, not your interactions. (CP 124, line 18)
Q: If you were accused of a crime—most people that you deal with, when you accuse them of a crime, are they guarded? (CP 125, line 9-10)
Q: So you're saying just the people that are guilty are guarded? (CP 125, line 12)
Q: And that's the statement that you're saying is a lie? (CP 126, line 10)

are guilty are guarded," "people that are guarded are guilty," "and people that are not guilty but accused of a crime are not guarded." CP 125, line 12; CP 131, lines 17-21. In the City's second re-direct, and based on Mr. Becerra-Arevalo significantly opening the door, the prosecutor asked Officer Nastansky the basis for her opinion that was elicited by defense counsel. CP 128, line 8.

In their instructions, the jurors were provided with WPIC 1.02, which provided that the jury was the sole judge of the credibility of each witness. CP 8. During closing, the prosecutor referred to this instruction multiple times and the guidance it provided that the jury, and they alone, were the sole judges of each witness's credibility. CP 320, 321, 325. The prosecutor discussed with the jury those things included in their instructions that they may consider when assessing credibility, including a witness's demeanor while testifying. CP 325-326. In closing, the prosecutor asked the jury to ask themselves if they believed, based on Ms. Fitzpatrick's demeanor when she testified, that she was making up the allegations, and to consider what motive, bias, or prejudice Ms. Fitzpatrick would have to fabricate her claims. CP 326-327.

Mr. Becerra-Arevalo timely appealed his conviction alleging: (1) prosecutorial misconduct based on: improper opinion testimony, improper cross-examination and impeachment, improper comment on his

constitutional right to confront witnesses; (2) admission of improper opinion evidence; and (3) admission of evidence on rebuttal that did not rebut any new evidence presented by the defense. CP 1, 30-54. The RALJ court overturned Mr. Becerra-Arevalo's conviction on the basis of his first claim for appeal (prosecutorial misconduct) and remanded the case for retrial. Appendix B and CP 459-460. Having made that decision, the RALJ court never reached his second[4] and third[5] claims. CP 30-31, 49, 50; Appendix B; CP 459-460.

The City timely moved for discretionary review before the Court of Appeals. Appendix C. After granting discretionary review, the Court of Appeals overturned the RALJ court, and reinstated Mr. Becerra-Arevalo's conviction. Appendix D, Appendix A. The Court of Appeals held that the prosecutor did not commit misconduct because the officer's testimony elicited on direct regarding the defendant being "careful" was not a direct comment on Mr. Becerra-Arevalo's guilt, was based on the officer's observations, and because the officer's later opinion testimony was first elicited by defense counsel on cross, the prosecutor's redirect was invited by the defense and not improper given the sequence of testimony. Appendix A at 4-8. Additionally, the Court of Appeals held that no prosecutorial misconduct occurred during closing argument as the

4 Claim for improper opinion testimony. CP at 49-50.
5 Claim for trial court's abuse of discretion in allowing City's rebuttal case. CP at 50-53.

prosecutor's isolated comment, when viewed in the context of her entire closing argument, was not a comment on Mr. Becerra-Arevalo's constitutional right to confront the witnesses against him, but pertained to the jury's consideration of Ms. Fitzpatrick's demeanor in assessing her motive and credibility. Appendix A at 8-9. Further, even if the Court of Appeals assumed the prosecutor's comments were improper, it held Mr. Becerra-Arevalo could not demonstrate that prejudice occurred given defense counsel's tactics and the testimony of others, apart from the officer, who undermined and impeached Mr. Becerra-Arevalo's courtroom testimony. Appendix A at 10-12. Although the Court of Appeals accepted review of Mr. Becerra-Arevalo's claim of improper opinion testimony, it declined to decide that issue, having reversed the RALJ court on the prosecutorial misconduct issue. Appendix D at 8, Appendix A at 13, Appendix B.

III. ARGUMENT WHY REVIEW SHOULD BE DENIED

A. Mr. Becerra-Arevalo's Petition for Review on Basis of Ineffective Assistance of Counsel is Time-Barred.

While an ineffective assistance of counsel claim may be raised for the first time on appeal, that claim must still be filed within the appeal deadlines set by RALJ 2.5 and RAP 5.2. No extraordinary circumstance existed in accordance with RALJ 10.3 or RAP 18.8, and no extension was

sought before either the RALJ court or the Court of Appeals as required by those rules to preserve the claim.

An appeal from a Court of Limited Jurisdiction must be filed within 30 days after entry of a final decision. RALJ 2.5(a). Here, the Kent Municipal Court entered its judgment on February 13, 2011, and the appeal period ran on March 15, 2011, ***over three years ago***. No Notice of Appeal alleging ineffective assistance of counsel was filed with the RALJ court, and no extension was sought under RALJ 10.3. CP 1-466. A discretionary appeal from the RALJ court must be filed within 30 days after the act the party wants reviewed. RAP 5.2(b). In this case, the RALJ Decision was entered on September 7, 2012, and the appeal period ran on October 7, 2012, ***nearly two years ago***. No Notice of Appeal or Notice of Discretionary Review alleging ineffective assistance of RALJ appellate counsel was filed with the Court of Appeals, and no extension was sought under RAP 18.8. CP 1-466.

Mr. Becerra-Arevalo first attempted to raise his ineffective assistance of counsel claim, for both his trial and RALJ appellate counsel, before the Court of Appeals in his Answer to the City of Kent's Motion for Discretionary Review, filed on February 1, 2013, long after the appeal period ran for both those claims. Appendix E at 15-19. The Court of Appeals properly denied Mr. Becerra-Arevalo's ineffective assistance of

counsel claims on May 6, 2013, holding that those claims were untimely, were not raised before the RALJ court, and would not be considered for the first time on discretionary review from the RALJ appeal. Appendix D at 3, footnote 1. No Motion for Reconsideration was filed before the Court of Appeals under RAP 12.4, and no interlocutory review was sought under RAP 13.5(a). This claim is untimely, and review should be denied.

B. The RALJ Court did not Include Ineffective Assistance of Trial Counsel as a Basis for its Decision, and the Court of Appeals Correctly Decided the Issue.

There is no evidence the Court of Appeals misunderstood or incorrectly interpreted the RALJ court's Order on RALJ Appeal as argued by Mr. Becerra-Arevalo. Petition for Review at 9-11. Having failed before the Court of Appeals, Mr. Becerra-Arevalo now re-crafts his ineffective assistance of counsel argument and claims, for the first time in his Petition for Review, that ineffective assistance of counsel was a basis upon which the RALJ court reversed his conviction. *Id.* This position was never asserted in either of the lower appellate courts. Appendix E, Appendix F. This claim is without merit, without support in the record, and should be stricken.[6]

Here, Mr. Becerra-Arevalo claims that the RALJ court's statement in its "Order on RALJ Appeal" that it:

[6] Portions of a brief that contain factual material not submitted to or considered by the trial court should be stricken. *Burrell v. State*, 137 Wn.2d 918, 932, 976 P.2d 113 (1999).

> DOES HEREBY HOLD AS FOLLOWS: the lower court erred for the following reasons: the cumulative effect of the combination of the police officer's comment on the credibility of the defendant and the emphasis by both counsel on lying during the officer's testimony with the comment on the defendant's presence during the witness's testimony when he had a constitutional right to be there require reversal and remand for retrial....

means that the RALJ court necessarily considered that Mr. Becerra-Arevalo's trial counsel was ineffective. Petition for Review at 10. An ineffective assistance of counsel claim was not raised by Mr. Becerra-Arevalo in his Notice of Appeal to the RALJ court, dated December 30, 2011; or in his Brief before the RALJ court, dated June 25, 2012. CP 1, 30-54. Nor was this position argued before the RALJ court, or included in the RALJ's court's oral decision on September 7, 2012. Appendix F. While an oral decision may not be used to contradict an unambiguous written finding, it may be consulted to determine a court's basis for a conclusion of law if the written order does not provide an explanation. *See, Schmechel v. Ron Mitchell Corp.*, 67 Wn.2d 194, 197, 406 P.2d 962 (1965), and *Lang v. Hougan*, 136 Wn. App. 708, 716, 150 P.3d 622 (2007). Here, Mr. Becerra-Arevalo argues a position that is not expressly apparent on the RALJ court's written order. Appendix B, Petition for Review at 9-11. When the transcript of the RALJ hearing is consulted, it is clear that no reference is made to any ineffective assistance of counsel

claim—by either party or by the RALJ court. Appendix F. In fact, Mr. Becerra-Arevalo's appellate counsel, Ms. Andrea Beall[7], commented several times that the substantial cross examination by defense counsel of the police officer concerning Mr. Becerra-Arevalo's "lie" was a deliberate trial tactic made in an effort to discredit the officer. Appendix F at 7, 8, 28. There is no basis in the record to support Mr. Becerra-Arevalo's claim that his ineffective assistance of counsel claim was timely raised before the RALJ court or the Court of Appeals, or was a basis for the RALJ court's decision. As such, review should be denied.

The Court of Appeals also correctly decided the issues before it and reversal was warranted under the law. In its oral decision, the RALJ court expressed that no individual allegation raised by Mr. Becerra-Arevalo would have warranted reversal and remand. However, the RALJ court expressed that the combination of issues alleged under Mr. Becerra-Arevalo's first claim of appeal for prosecutorial misconduct—including the prosecutor's question to the officer about the "lie," regardless of the questions asked by defense counsel; the officer's answers in response to the prosecutor's questions; and the prosecutor's comment in closing argument about the victim's demeanor while testifying and Mr. Becerra-Arevalo's presence—combined to warrant reversal and remand.

[7] Ms. Beall was formerly a member of Stewart, MacNichols & Harmell. However, she left that firm to serve as Presiding Judge for the Puyallup Municipal Court.

Appendix F at 30-33, Appendix B. Because the RALJ court never reached Mr. Becerra-Arevalo's second and third claims for appeal, the sole basis upon which the RALJ court reversed the conviction was on what it believed was the cumulative effect of alleged prosecutorial misconduct. Appendix B at 2. Due to the Court of Appeals finding no prosecutorial misconduct, and that defense counsel opened the door to the officer's opinion testimony, there was nothing that remained intact of the RALJ court's decision to support reversal. Appendix A at 4-5, 7-8, 10-12. Having so found, it was unnecessary for the Court of Appeals to consider Mr. Becerra-Arevalo's second claim of appeal for improper opinion testimony, of which it had accepted review for judicial efficiency. In short, once the Court of Appeals found that Mr. Becerra-Arevalo's trial counsel opened the door to the officer's opinion testimony, and that the prosecutor's redirect of the officer, and the officer's responses to those questions, were in direct and pertinent response to defense counsel's questioning, Mr. Becerra-Arevalo's remaining claim for improper opinion testimony became a nullity, evaporated as invited error, and it became unnecessary for the Court of Appeals to decide that issue. Appendix A at 5, 7, 8, 10-12; *See e.g.*, *State v. Powell*, 166 Wn.2d 73, 81, 206 P.3d 321 (2009), *In re Pers. Restraint of Tortorelli*, 149 Wn.2d 82, 94, 66 P.3d 606 (2003). On remand, the RALJ court would be bound by the

determinations made by the Court of Appeals in its written decision, and the law of the case established by that decision would guide the RALJ court's resolution of any remaining issues.

C. Effective Assistance of Counsel was Provided to Mr. Becerra-Arevalo By Both Trial Counsel and RALJ Appellate Counsel.

Should any weight be given to Mr. Becerra-Arevalo's ineffective assistance of counsel claim, the record reflects that Mr. Becerra-Arevalo's claim fails as he received effective assistance of both trial and RALJ appellate counsel. In fact, Mr. Becerra-Arevalo's RALJ appellate counsel was successful before that court and convinced it to overturn his conviction. Appendices B and F. However, because the RALJ court failed to apply the proper legal standard, though it was cited by both counsel, the Court of Appeals overturned the RALJ court's decision. Appendix A. That result was not attributable to any RALJ counsel deficiency.

Where an ineffective assistance of counsel claim is brought on direct appeal, the reviewing court will not consider matters outside the trial record. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Washington follows the *Strickland*[8] standard to determine whether a defendant had constitutionally sufficient representation. *State v. Breitung*,

[8] *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

173 Wn.2d 393, 397, 267 P.3d 1012 (2011). A defendant bears the burden of establishing ineffective assistance of counsel by showing both deficient performance and resulting prejudice. *State v. Brockob*, 159 Wn.2d 311, 344-345, 150 P.3d 59 (2006). Performance is deficient if, after considering all the circumstances, it falls below an objective standard of reasonableness. *McFarland*, 127 Wn.2d at 334-335. Prejudice results if the outcome of the trial would have been different had defense counsel not rendered deficient performance. *McFarland*, 127 Wn.2d at 337. If the defendant fails to prove either prong, the inquiry ends and the court need not consider the other prong. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). The court will strongly presume that counsel was effective, and to rebut this presumption, the defendant bears the heavy burden of "establishing the absence of any 'conceivable legitimate tactic explaining counsel's performance." *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011).

If trial counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel. *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978). *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). The decision of when or whether to object is a classic example of trial tactics. *State v. Madison*, 53 Wn. App. 754, 763, 770

P.2d 662 (1989). Similarly, the failure to raise all possible nonfrivolous issues on appeal is not ineffective assistance. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 313-314, 868 P.2d 835 (1994). Rather, the exercise of independent judgment in deciding which issues may be the basis of a successful appeal is at the heart of the attorney's role in our legal process. *Id.* To prevail on any appellate ineffectiveness claim, Mr. Becerra-Arevalo must show the merit of the underlying legal issues his appellate counsel failed to raise or raised improperly and then demonstrate actual prejudice—he can do neither. *See, Id., citing Kimmelman v. Morrison*, 477 U.S. 365, 375, 91 L. Ed. 2d 305, 106 S. Ct. 2574 (1986).

First, Mr. Becerra-Arevalo cannot show that either his trial counsel or his RALJ appellate counsel provided deficient performance. Here, when the officer blurted "and he lied to me also," Mr. Becerra-Arevalo's trial counsel made a tactical and strategic decision to attempt to discredit and impeach the officer on cross, instead of moving to strike or pursuing other available remedies. CP 120, 121-126. There are several legitimate trial strategies that explain why defense counsel chose this route—he may not have wanted to emphasize the testimony with an objection, or he may have thought it more persuasive to discredit the officer in front of the jury. See CP 121-126, Appendix F at 7, 8, 28. When the trial transcript is reviewed, it is clear Mr. Becerra-Arevalo's trial counsel attempted to

discredit the officer by alleging she had a preconceived opinion that all suspects accused of crime are guilty. *See* CP 120-126. However, as his RALJ appellate counsel confirmed, this strategy did not have the desired result with the jury. Appendix F at 7, 8, 28. Mr. Becerra-Arevalo's trial counsel could have objected to the blurted statement, as he had competently done throughout the trial. Mr. Becerra-Arevalo's trial counsel had objected at least 21 times during the prosecutor's case in chief, her cross examination of Mr. Becerra-Arevalo, her rebuttal case, and her closing argument. CP 98-350. Mr. Becerra-Arevalo's trial counsel also successfully argued at length against the prosecutor reopening her case in chief. CP 139-162. This conduct, as evidenced in the trial record, does not demonstrate deficient representation by trial counsel. To the contrary, trial counsel's failure to object, when he had previously done so successfully multiple times, further evidences that a strategic decision was made to seek impeachment in lieu of an objection. However, Mr. Becerra-Arevalo cannot now use that failed strategy as a basis for appeal. It is clear that Mr. Becerra-Arevalo's RALJ appellate counsel recognized the trial strategy and tactics evidenced in the record, and for that reason, did not pursue an ineffective assistance of counsel claim. Appendix F at 7, 8, 28. While Mr. Becerra-Arevalo's current appellate counsel may have pursued that claim, she cannot demonstrate by the existing record that

there is any merit to her claim that deficient representation occurred to warrant review of the untimely claim.

Second, Mr. Becerra-Arevalo cannot demonstrate that the jury's decision would have been different but for any deficiency in representation. Here, the evidence simply supports that the jury believed the victim, Ms. Fitzpatrick, her testimony, and her version of the events. Her courtroom testimony was consistent with previous statements she made, and her demeanor while testifying, even from the defense's standpoint, made her appear believable. CP 76, 107, 212-213, 261, 266, 341. While Mr. Becerra-Arevalo also testified, his courtroom testimony was inconsistent with prior statements and admissions he made. Mr. Becerra-Arevalo testified on direct that he was not aware of Ms. Fitzpatrick's assault allegations until Officer Nastansky's November 12, 2009, visit. CP 171-172. He also denied multiple times ever talking to his boss, Ms. Hutchens, about Ms. Fitzpatrick's allegations prior to November 12, 2009. CP 172-173, 185-187. However, Ms. Hutchens testified on rebuttal that she met with Mr. Becerra-Arevalo 10 days prior to Officer Nastanksy's visit, on November 2, 2009, and informed him of Ms. Fitzpatrick's allegations. CP 256, 258, 261-262. In his testimony, Mr. Becerra-Arevalo also denied adamantly that he was on the property on the day of the assault. CP 170-171, 183. However, this testimony was also

contradicted by Ms. Hutchens who produced time card records, completed by Mr. Becerra-Arevalo in his own handwriting, that evidenced he was on the property on the day of the assault and near the time that Ms. Fitzpatrick testified it occurred. CP 226-267, 274-276. Ms. Hutchens also testified that Mr. Becerra-Arevalo admitted to her that he had been on the property on the day of the assault to inspect the meter in Ms. Fitzpatrick's officer, but that Ms. Fitzpatrick was not there. CP 266-267. On cross, Mr. Becerra-Arevalo denied ever touching or kissing Ms. Fitzpatrick, on any occasion, though that too was contradicted by an admission he made to Ms. Hutchens on November 12, 2009. CP 187, 188, 272-273. Because there was significant testimony to support the jury's verdict and its likely disbelief of Mr. Becerra-Arevalo given his statements that directly contradicted admitted evidence, Mr. Becerra-Arevalo cannot demonstrate that the result of the trial would have been different but for any alleged deficient performance by his trial counsel.

Finally, because Mr. Becerra-Arevalo's RALJ appellate counsel was successful at that level of appeal, and because the trial record evidences tactical and strategic reasons for trial counsel not objecting to certain testimony or proceeding to ask certain questions that inquire into otherwise inadmissible evidence, he similarly cannot show that his RALJ appellate counsel provided ineffective assistance by not raising an

ineffective assistance of trial counsel claim before the RALJ court. For all of the foregoing reasons, Mr. Becerra-Arevalo's Petition for Review should be denied as it fails, based on the record, to identify an issue warranting review under RAP 13.4(b)(3).

D. Remand To RALJ Was Procedural, Would Have Occurred Absent Petition for Review, And Petition for Review on That Basis Was Premature And Unnecessary.

Under RAP 12.2, an appellate court may reverse, affirm, or modify the decision being reviewed and take any other action as the merits of the case and the interest of justice may require. RAP 12.2. When one issue is dispositive of a case on appeal, the appellate court may decline to consider other issues before it. *See State v. Reep*, 161 Wn.2d 808, 813, 167 P.3d 1156 (2007). Here, although the Court of Appeals accepted review of two issues: prosecutorial misconduct and improper opinion testimony, it resolved the appeal by deciding the RALJ court erred in overturning Mr. Becerra-Arevalo's conviction because he failed to carry the burden to prove his prosecutorial misconduct claim. Appendix D at 8, Appendix A at 13.

Although an appellate court may not expressly mention in its opinion how every undecided issue will be handled, it is expected that the court from which the appeal was taken "will exercise its discretion to

decide any issue necessary to resolve the case" on remand. *See, e.g.,* *State v. Schwab*, 134 Wn. App. 635, 645, 141 P.3d 658 (2006); *In Re Marriage of Rockwell*, 157 Wn. App. 449, 453-454, 238 P.3d 1184 (2010); *Geissler Estate*, 110 Wash. 14, 15-16, 187 P. 711 (1980). The Court of Appeals makes clear in its opinion that there were a number of issues raised by Mr. Becerra-Arevalo in his RALJ appeal, that some of those issues were not addressed by the RALJ court, and that of those issues accepted for review by the Court of Appeals, the improper opinion issue was not being decided. Appendix A. As such, the Court of Appeals was clear that there were other issues that likely needed to be considered on remand. Although the Court of Appeals did not expressly state that remand would occur, remand was most certainly implied. As further evidence of the Court of Appeals' intent to remand the case to the RALJ court is its Mandate, issued on May 30, 2014, prior to its discovery that Mr. Becerra-Arevalo had filed his Petition for Review. Appendix G.

Here, remand was a procedural issue that was implied by the Court of Appeals' decision, and further evidenced by the premature Mandate it issued. In resolving the remaining issues on remand, the RALJ court will be bound by the Court of Appeals' decision, the law of the case established by it, and the binding effect of its determinations in deciding any issues that remain on remand. Mr. Becerra-Arevalo's appeal on this

issue is premature, and discretionary review of his Petition for Review should be denied.

IV. CONCLUSION

The unpublished decision the Court of Appeals issued in this case is unremarkable and consistent with existing law. Mr. Becerra-Arevalo has failed to demonstrate that this case poses a significant question of law, involves an issue of substantial public interest, or otherwise warrants review under RAP 13.4(b). He has merely attempted to re-craft and disguise his untimely ineffective assistance of counsel claim. Not only is that claim time-barred, but it lacks merit because the record reflects that effective assistance of counsel was provided. Mr. Becerra-Arevalo's trial and appellate counsel zealously advanced his interests. While his current counsel may disagree with the tactics or strategies employed, the practice of law is not a science, and disagreement does not mean effective assistance was not afforded. Because the record contains no evidence to support Mr. Becerra-Arevalo's claims or that review is warranted under RAP 13.4(b), his Petition for Review should be denied.

RESPECTFULLY SUBMITTED this 27th day of June, 2014.

CITY OF KENT

By: _____
TAMMY L. WHITE, WSBA #43595
Assistant City Attorney

DECLARATION OF SERVICE

I, Kim Komoto, declare as follows:

I am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, competent to be a witness herein, and have personal knowledge of the facts stated below.

On June 27, 2014, I caused to be filed the foregoing Answer to Petition for Review, on behalf of the City of Kent, with the Clerk of the Court of Appeals via the electronic filing @ *www.courts.wa.gov*. On this same date, and in the manner indicated below, I caused the City's Answer and this appended Declaration of Service to be served upon:

Elaine L. Winters
Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
[X] Regular U.S. Mail

DATED at Kent, Washington on this 27th day of June, 2014.

Kim A. Komoto
Legal Analyst

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CITY OF KENT,	)	No. 69401-4-I
Appellant,	)	DIVISION ONE
v.	)	
EVERARDO BECERRA-AREVALO,	)	UNPUBLISHED
Respondent.	)	FILED: April 28, 2014

Cox, J. — We granted discretionary review of the superior court's RALJ order reversing the conviction of Everardo Becerra-Arevalo for assault in the fourth degree with sexual motivation. The superior court ruled that the prosecutor committed misconduct by eliciting testimony on Becerra-Arevalo's credibility and by commenting on Becerra-Arevalo's exercise of his constitutional right to confront witnesses against him. Because Becerra-Arevalo fails to establish that the statements, to which he failed to object below, were improper and prejudicial, we reverse the superior court's order and reinstate Becerra-Arevalo's conviction.

On October 27, 2009, Becerra-Arevalo put his hands on Kelly Fitzpatrick's breasts and attempted to kiss her at her place of employment. Fitzpatrick reported the incident to the police. Thurston County Deputy Carrie Nastansky responded to Fitzpatrick's report and investigated the allegation.

The City of Kent charged Becerra-Arevalo with assault in the fourth degree with sexual motivation.

At trial, the City presented the testimony of Kelly Fitzpatrick, Deputy Nastansky, and Teresa Plemmons-Hutchens, Becerra-Arevalo's supervisor. Becerra-Arevalo also testified. We describe this testimony in more detail later in this opinion.

The jury convicted Becerra-Arevalo of assault in the fourth degree with sexual motivation.

He filed a RALJ appeal in superior court asserting, among other claims, that the City committed prosecutorial misconduct by eliciting improper opinion testimony from Deputy Nastansky and by commenting on Becerra-Arevalo's constitutional right to confront a witness against him. The superior court reversed Becerra-Arevalo's conviction on these grounds, concluding that:

> [T]he cumulative effect of the combination of the police officer's comment on the credibility of the defendant and the emphasis by both counsel on lying during the officer's testimony with the comment on the defendant's presence during the witness's testimony when he had a constitutional right to be there require reversal and remand for retrial.[1]

The superior court declined to address the additional issues Becerra-Arevalo raised on appeal.

We granted the City's motion for discretionary review.

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[1] Clerk's Papers at 459-60.

PROSECUTORIAL MISCONDUCT

The City asserts that the superior court erred by concluding that the prosecutor committed misconduct. We agree.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the challenged conduct was both improper and resulted in prejudice.[2] We review alleged misconduct "within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions."[3]

IMPROPER CONDUCT

Becerra-Arevalo contends, as he did on RALJ appeal, that several incidents of misconduct deprived him of a fair trial. He first argues that the prosecutor elicited impermissible opinion testimony on his credibility. He is mistaken.

On direct examination, Deputy Nastansky described her initial contact with Becerra-Arevalo, which occurred on November 12, 2009. Deputy Nastansky testified that her conversation with Becerra-Arevalo "was kind of odd because it was – I don't want to say he was trying to hide something. He was very careful about what he said and how he answered the questions."[4] The following exchange then occurred:

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[2] State v. Cheatam, 150 Wn.2d 626, 652, 81 P.3d 830 (2003).
[3] State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).
[4] Clerk's Papers at 110.

[Prosecutor]:	**Why did you have that opinion [that Becerra-Arevalo was being careful in answering your questions]?**
[Deputy Nastansky]:	Because he was slow to answer as if he were trying to come up with a story in his head versus just if something had happened you would be able to freely tell the story and you wouldn't have to think about it. You just say what happened, nothing to hide.
[Prosecutor]:	And did you get that perception with him here?
[Deputy Nastansky]:	No. **He was – it seemed to me like he was trying to hide something.**[5]

Generally, no witness may offer an opinion regarding the defendant's guilt or veracity.[6] A police officer's testimony on the veracity of another witness raises additional concerns because "an officer's testimony often carries a special aura of reliability."[7] However, testimony that is not a direct comment on the defendant's guilt or veracity, is helpful to the jury, and is based on inferences that is not improper opinion testimony.[8]

Deputy Nastansky's initial statements do not amount to improper opinion testimony. Rather, they were based on her observations of Becerra-Arevalo's

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[5] Clerk's Papers at 111 (emphasis added).

[6] State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007); State v. Rafay, 168 Wn. App. 734, 805, 285 P.3d 83 (2012), review denied, 176 Wn.2d 1023 (2013).

[7] Kirkman, 159 Wn.2d at 928.

[8] State v. Fisher, 74 Wn. App. 804, 813-14, 874 P.2d 1381 (1994) (aff'd in part, rev'd in part sub nom., State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995)).

demeanor when she confronted him about the allegation against him. Although her statements may imply or suggest culpability, they were not direct comments on Becerra-Arevalo's guilt.

Nor was Deputy Nastansky's subsequent testimony improper. The statements were invited by defense counsel's line of questioning.

On cross-examination, Becerra-Arevalo's defense counsel inquired, "And you said his answers were guarded? As far as you were aware did you know if Mr. Becerra was aware of the claims that had been made against him?" and, "The answers that were guarded as far as giving a slow answer to was in response to his relationships with other females?"[9]

During redirect examination, the prosecutor followed up on defense counsel's questions concerning whether Becerra-Arevalo appeared "guarded":

[Prosecutor]:	Was [Becerra-Arevalo] also guarded with you on the events that occurred on October 27th?
[Deputy Nastansky]:	Yes he was. **And he lied to me also**. He told me he didn't know why I was there, although he had already been contacted by the property manager, so you would assume that he would know why I was there.[10]

[9] Clerk's Papers at 117.
[10] Clerk's Papers at 120 (emphasis added).

Then, on recross-examination, defense counsel posed numerous questions regarding Deputy Nastansky's belief that Becerra-Arevalo lied to her and appeared guarded, including the following:

[Defense Counsel]:	You said he lied to you? That's a pretty bold statement by an officer, wouldn't you agree?[11]
[Defense Counsel]:	And you said that the reason you thought it was a lie was because this other person had talked to him previously?[12]
[Defense Counsel]:	You go from the perspective that someone's guilty of a crime. What about somebody that doesn't think they've committed a crime?[13]
[Defense Counsel]:	You classify this as a lie. You specifically said it was a lie.[14]
[Defense Counsel]:	So what about that statement is a lie?[15]
[Defense Counsel]:	If you were accused of a crime -- most people that you deal with, when you accuse them of a crime, are they guarded?[16]
[Defense Counsel]:	So you're saying just the people that are guilty are guarded?[17]

[11] Clerk's Papers at 122.
[12] Id.
[13] Id.
[14] Clerk's Papers at 124.
[15] Id.
[16] Clerk's Papers at 125.
[17] Id.

[Defense Counsel]: And that's the statement that you're saying is a lie?[18]

On second redirect examination, the prosecutor asked Deputy Nastansky additional questions about her conclusion that Becerra-Arevalo lied to her.

A prosecutor's remarks do not constitute misconduct if they are invited by defense counsel or are in reply to defense counsel's acts unless they "'go beyond a pertinent reply and bring before the jury extraneous matters not in the record, or are so prejudicial that an instruction would not cure them.'"[19]

Here, Deputy Nastansky testified on redirect and second redirect examination concerning her belief that Becerra-Arevalo lied to her. But Becerra-Arevalo's defense counsel opened the door to this line of questioning. As detailed above, on cross-examination, defense counsel posed questions about Becerra-Arevalo appearing "guarded." Subsequently, on re-cross examination, defense counsel relentlessly inquired about Deputy Nastansky's stated belief that Becerra-Arevalo lied to her and appeared guarded. The prosecutor's questions on redirect and second redirect examination were a direct and pertinent response to defense counsel's series of questions.

Moreover, the prosecutor cannot be assigned fault for Deputy Nastansky's declaration that Becerra-Arevalo had "lied to me also." Statements in response to a prosecutor's questioning when not elicited by the prosecutor are not

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[18] Clerk's Papers at 126.

[19] State v. Dennison, 72 Wn.2d 842, 849, 435 P.2d 526 (1967) (quoting State v. LaPorte, 58 Wn.2d 816, 822, 365 P.2d 24 (1961)); State v. Jones, 144 Wn. App. 284, 299, 183 P.3d 307 (2008).

characterized as prosecutorial misconduct.[20] Deputy Nastansky volunteered her opinion that Becerra-Arevalo had lied to her. The prosecutor did not pursue this issue on redirect examination after Deputy Nastansky made that remark. Instead, defense counsel reopened the issue on recross-examination. In light of this sequence of testimony, the prosecutor's questions were not improper.

Becerra-Arevalo additionally asserts that the prosecutor's closing statements amounted to an improper comment on Becerra-Arevalo's constitutional right to confront witnesses against him. We reject this contention.

During closing argument, the prosecutor stated to the jury, "[Y]ou saw how difficult it was for [Fitzgerald] to testify. You saw how painful it was for her to look at the defendant. You saw how much she did not want to do that. You saw how uncomfortable she was to be in this environment."[21]

"The State can take no action which will unnecessarily 'chill' or penalize the assertion of a constitutional right and the State may not draw adverse inferences from the exercise of a constitutional right."[22] Specifically, the State may not invite the jury to draw a negative inference from the defendant's exercise of a constitutional right.[23] The right to confront witnesses against an accused is one such right.[24]

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[20] See State v. Jungers, 125 Wn. App. 895, 902, 106 P.3d 827 (2005).

[21] Clerk's Papers at 325.

[22] State v. Gregory, 158 Wn.2d 759, 806, 147 P.3d 1201 (2006) (quoting State v. Rupe, 101 Wn.2d 664, 705, 683 P.2d 571 (1984)).

[23] Gregory, 158 Wn.2d at 806 (citing State v. Jones, 71 Wn. App. 798, 811–12, 863 P.2d 85 (1993)).

[24] U.S. Const. amend. XI; Wash. Const. art. I, § 22.

But a prosecutor has wide latitude in closing arguments to draw reasonable inferences from the facts in evidence and to express such inferences to the jury.[25] Moreover, "not all arguments touching upon a defendant's constitutional rights are impermissible comments on the exercise of those rights."[26] The question is whether the prosecutor "manifestly intended the remarks to be a comment on that right."[27]

A review of the prosecutor's entire closing argument makes clear that her statements were not in any way a comment on Becerra-Arevalo's exercise of his constitutional rights. In closing, the prosecutor emphasized that the case hinged on the witnesses' credibility and that the jury alone was responsible for judging credibility. The prosecutor's reference to Fitzpatrick's demeanor was in support of her argument that the jury must consider the witnesses' motives and credibility. No evidence demonstrates that the prosecutor's intention was to comment on Becerra-Arevalo's right to confront witnesses against him.

We conclude that the prosecutor's conduct was not improper.

PREJUDICE

Even assuming the prosecutor's comments were improper, Becerra-Arevalo's prosecutorial misconduct claim fails because he does not satisfy the heightened standard of review on appeal for prejudicial effect.

Once a defendant establishes that the prosecutor's conduct was improper, a reviewing court determines whether the defendant was prejudiced under one of

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[25] Gregory, 158 Wn.2d at 860; Dhaliwal, 150 Wn.2d at 577.
[26] Gregory, 158 Wn.2d at 806.
[27] State v. Crane, 116 Wn.2d 315, 331, 804 P.2d 10 (1991).

two standards of review.[28] If the defendant objected at trial, "the defendant must show that the prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict."[29] However, where, as here, the defendant failed to object to the prosecutor's alleged misconduct, "the defendant is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice."[30]

Under this latter heightened standard of review, Becerra-Arevalo carries the burden of establishing that "(1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.'"[31] Moreover, "[r]eviewing courts should focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured."[32] Even flagrant misconduct can be cured.[33]

Because Becerra-Arevalo did not object at trial to the prosecutor's alleged misconduct, he must establish prejudice under the heightened standard. He fails to meet this burden here.

We first note that any prejudice derived from Officer Nastansky's remarks was primarily attributed to defense counsel's persistent questioning regarding

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[28] State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012).
[29] Id.
[30] Id. at 760-61
[31] Id. at 761 (quoting State v. Thorgerson, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)).
[32] Id. at 762.
[33] Id. at n.13 (citing State v. Warren, 165 Wn.2d 17, 27, 195 P.3d 940 (2008)).

Deputy Nastansky's belief that Becerra-Arevalo was lying and her theories on the relationship between being guarded and being guilty. As discussed above, Becerra-Arevalo's defense counsel repeatedly posed questions to Deputy Nastansky on this topic. This sequence of testimony diminishes Becerra-Arevalo's contention that the prosecutor's conduct was flagrant or ill-intended. Any prejudicial impact was exacerbated, if not initially caused, by defense counsel.

Second, Becerra-Arevalo cannot prove that a curative instruction would not have obviated any prejudicial impact on the jury. To the contrary, any prejudicial effect resulting from the prosecutor's alleged misconduct was neutralized by the jury instructions.[34] Here, the jury was instructed, "You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness."[35] The instructions also stated, "The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence...."[36] The prosecutor referred to these instructions numerous times during closing argument. We presume that the jury followed the court's instructions.[37]

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[34] See State v. Montgomery, 163 Wn.2d 577, 595, 183 P.3d 267 (2008) ("Important to the determination of whether opinion testimony prejudices the defendant is whether the jury was properly instructed.").

[35] Clerk's Papers at 8.

[36] Id.

[37] State v. Stein, 144 Wn.2d 236, 247, 27 P.3d 184 (2001).

Moreover, defense counsel made no effort to defuse the alleged prejudice by requesting a curative instruction or objecting to the prosecutor's remarks. The absence of a curative instruction or motion for mistrial strongly suggests that the conduct was not prejudicial.[38] Even "[i]f the prejudice could have been cured by a jury instruction, but the defense did not request one, reversal is not required."[39] Furthermore, "[c]ounsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver . . . on appeal."[40] This appears to be the case here.

Becerra-Arevalo also fails to show a substantial likelihood that the prosecutor's statements affected the jury's verdict. Deputy Nastansky was not the sole witness in this case whose testimony undermined Becerra-Arevalo's credibility—Fitzpatrick and Plemmons-Hutchens also offered testimony unfavorable to Becerra-Arevalo.

Becerra-Arevalo testified that when Deputy Nastansky arrived to speak to him on November 12, 2009, he did not know the reason for her visit and was unaware of any allegations against him. Becerra-Arevalo further testified that his manager, Teresa Plemmons-Hutchens, first spoke to him about the allegation on November 12, 2009, after Deputy Nastansky had contacted him. But Plemmons-Hutchens's testimony contradicted Becerra-Arevalo's statements. She testified that she spoke to Becerra-Arevalo on November 2, 2009—10 days before

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[38] See State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).
[39] Dhaliwal, 150 Wn.2d at 578 (citing State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994)).
[40] Jones v. Hogan, 56 Wn.2d 23, 27, 351 P.2d 153 (1960).

Deputy Nastansky contacted him—and informed him of the allegation against him.

Furthermore, during direct examination, Becerra-Arevalo denied visiting the property where Fitzpatrick worked on the day of the assault. However, time cards, written in Becerra-Arevalo's handwriting, proved contrary. They showed that Becerra-Arevalo worked at Fitzpatrick's office building on the day of the assault and at approximately the same time Fitzpatrick testified the assault occurred. Plemmons-Hutchens also testified that Becerra-Arevalo told her that he visited the property where Fitzpatrick worked on the day of the assault and that Fitzpatrick was not there.

Finally, on cross-examination, Becerra-Arevalo denied touching or kissing Fitzpatrick. He also denied admitting to Plemmons-Hutchens that he assaulted Fitzpatrick. But Plemmons-Hutchens later testified that, on November 12, 2009, Becerra-Arevalo admitted to her that he had hugged and kissed Fitzpatrick. Therefore, significant testimony conflicted with Becerra-Arevalo's version of events surrounding the assault. He cannot demonstrate that any prejudice substantially impacted the jury's verdict.

Accordingly, Becerra-Arevalo fails to show that the heightened standard of review for prejudicial effect has been met.

Because we reverse on the prosecutorial misconduct issue, we need not resolve the City's additional claim of error concerning the admissibility of opinion testimony.

We reverse the RALJ court's order reversing Becerra-Averalo's conviction and reinstate the municipal court's judgment and sentence.

COX, J.

WE CONCUR:

APPENDIX B

In the Superior Court of Washington for King County

City of Kent, Plaintiff/Respondent, vs. Everardo Becerra-Arevalo, Defendant/Appellant.	Case No.: 12-1-01212-8 KNT Order on RALJ Appeal **CLERK'S ACTION REQUIRED**

THIS MATTER, having come before the court for oral argument on September 7, 2012, pursuant to RALJ 8.3 before the undersigned Judge of the above-entitled court, and, the court, having reviewed the record on appeal, the transcript, and the written and oral argument of the parties, …

DOES HEREBY HOLD AS FOLLOWS: the lower court erred for the following reasons: the cumulative effect of the combination of the police officer's comment on the credibility of the defendant and the emphasis to by both counsel lying during the officer's testimony with the comment on the defendant's presence during the witness's testimony when he had a constitutional

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right to be there require reversal and remand for retrial. The court does not find error with regard to the questioning of the defendant about hugging and kissing. Based upon the decision on this issue, the second and third claims were not reached.

IT IS HEREBY ORDERED that the above cause is remanded to Kent Municipal Court for further proceedings, in accordance with the above decision.

Dated this 7th day of September 2012.

Hon. L. McCullough
Superior Court Judge

Presented by:

Andrea L. Beall, WSBA 26028
Attorney for Defendant/Appellant

Approved as to form by:

Tammy White, WSBA# 43565
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APPENDIX C

King County Superior Court Cause No. 12-1-01212-8 KNT
Kent Municipal Court Cause No. K77970

No. NOT YET RECEIVED

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

CITY OF KENT,

Petitioner

v.

EVERARDO BECERRA-AREVALO.

Respondent

MOTION FOR DISCRETIONARY REVIEW

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A. IDENTITY OF PETITIONER

The City of Kent, by and through its prosecuting attorney, Tammy L. White, asks this court to accept review of the RALJ decision designated in Part B of this Motion for Discretionary Review.

B. DECISION

The City of Kent respectfully requests pursuant to RAP 2.3(d)(1) and (d)(3), that this court grant its Motion for Discretionary Review of King County Superior Court Judge LeRoy McCullough's Order on RALJ Appeal, dated and filed on September 7, 2012, which reversed the conviction of Everardo Becerra-Arevalo, Respondent, ("Mr. Becerra") for Assault in the Fourth Degree with Sexual Motivation and remanded for retrial, based on claims of prosecutorial misconduct without consideration of the standard of review required when Mr. Becerra failed to object at trial. A copy of the Order on RALJ Appeal is included within the Appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Did the Superior Court err when it held that Mr. Becerra's conviction in Kent Municipal Court should be reversed and the case remanded for re-trial for prosecutorial misconduct based on improper opinion testimony and comments on Mr. Becerra's trial right to confront

witnesses when Mr. Becerra did not object at trial and the Superior Court did not consider the applicable standard of review required by *State v. Emery*, 174 Wn.2d 741, 278 P.3d 653 (2012)?

2. Did the Superior Court err when it held that Mr. Becerra's conviction in Kent Municipal Court should be reversed and the case remanded for re-trial when the prosecutor's questions were invited, provoked, or in pertinent reply to Mr. Becerra's questioning under *State v. Ramos*, 164 Wn. App. 327, 263 P.3d 1268 (2011)?

3. Did the Superior Court err when it held that Mr. Becerra's conviction in Kent Municipal Court should be reversed and the case remanded for re-trial when error was invited by Mr. Becerra in accordance with *In Re: Pers. Restraint of Tortorelli*, 149 Wn.2d 82, 66 P.3d 606 (2003)?

D. STATEMENT OF THE CASE

On December 12, 2011, trial began in a criminal case in the Kent Municipal Court against Mr. Becerra on the charge of Assault in the Fourth Degree with sexual motivation. RP 2[1]. The trial concluded the following day with the jury returning a guilty verdict on the charge and a

[1] Report of Proceedings are referred to as "RP" and copies of the cited portions are included within the attached Appendix.

finding on special verdict that the assault was committed with sexual motivation. RP 299.

At trial, the victim, Kelly Fitzpatrick, testified that on the date of the assault, October 27, 2009, Mr. Becerra came up behind her, reached underneath her, and put both his hands on her breasts. RP 21, 22. The victim, stunned, then walked to and sat in her chair, with Mr. Becerra following, who then bent down and tried to kiss her. RP 22, 27. The victim turned her head, and Mr. Becerra ended up kissing her on the cheek. RP 22. The victim then told Mr. Becerra to leave, and he left without further incident. RP 22, 27. When efforts to report the assault to her supervisor failed to bring about responsive action, the victim reported the assault to police. RP 28-30.

During trial, former Kent Police Officer Carrie Nastansky[2] testified that she responded to the victim's 911 call on November 12, 2009. RP 50-51. When the prosecutor asked the officer on direct if Mr. Becerra had said anything to her about the assault, the officer testified that the conversation was odd, and Mr. Becerra was "careful" in how he answered. RP 56. Mr. Becerra's counsel did not object to the officer's statement. RP 56. When the prosecutor asked the officer why she believed Mr.

[2] Currently a Deputy with the Thurston County Sheriff's Office.

Becerra was being careful, Mr. Becerra's counsel then objected on the basis of "speculation," but not on the basis of improper opinion or prosecutorial misconduct. RP 56-57. The trial court then permitted the officer to respond and she described what it was about Mr. Becerra's demeanor that led her to believe he was being careful—he was slow to answer, he was not freely telling his story. RP 57.

On cross, Mr. Becerra's counsel asked the officer if Mr. Becerra was only "guarded" (a term the officer had not used) with respect to questions about his relationships with women at work. RP 63. On re-direct, and in response to counsel's implied limitation, the prosecutor asked the officer if Mr. Becerra was guarded in other respects, to which the officer stated, "Yes he was. And he lied to me also. He told me he didn't know why I was there, although he had already been contacted by the property manager, so you would assume he would know why I was there." RP 65-66. Mr. Becerra's counsel did not object, did not move to strike, and did not move for a mistrial. RP 66. The prosecutor immediately moved on.

On re-cross, however, Mr. Becerra's counsel questioned the officer extensively concerning Mr. Becerra's apparent "lie" to the officer:

Q: You said he lied to you? That's a pretty bold statement by an officer, wouldn't you agree? RP 68, line 1-2.

. . .

Q: And you said that the reason you thought it was a lie was because this other person had talked to him previously? RP 68, line 8-9.

. . .

Q: You go from the perspective that someone's guilty of a crime. What about somebody that doesn't think they've committed a crime? RP 68, line 21-22.

. . .

Q: You classify this as a lie. You specifically said it was a lie. RP 70, line 14.

. . .

Q: So what about that statement is a lie? RP 70, line 16.

. . .

Q: I'm asking about that statement specifically, not your interactions. RP 70, line 18.

. . .

Q: If you were accused of a crime—most people that you deal with, when you accuse them of a crime, are they guarded? RP 71, line 9-10.

. . .

Q: So you're saying just the people that are guilty are guarded? RP 71, line 12.

. . .

Q: And that's the statement that you're saying is a lie? RP 72, line 10.

. . . .

RP 68-77. Through leading questions to the officer, Mr. Becerra's counsel drew the conclusions that "just the people that are guilty are guarded," "people that are guarded are guilty," "and people that are not guilty but accused of a crime are not guarded." RP 71, line 12; RP 77, lines 17-21. *None of this questioning was elicited by the prosecutor.*

Due to Mr. Becerra's counsel substantially opening the door and inviting the questioning, the prosecutor, on her second re-direct, asked the officer the basis for her opinion that Mr. Becerra had lied to her, as that opinion was elicited by the questioning conducted by Mr. Becerra's counsel:

> Q: Given those statements and given the rest of your investigation, why was it that you felt the defendant was lying to you?
>
> . . .

RP 74, lines 8-9.3. Again, Mr. Becerra's counsel objected on the basis of "speculation," not improper opinion or prosecutorial misconduct, and the trial court allowed the officer to answer the question. RP 74. In response, the officer testified:

> A: Because he—just the way that he kind of—when you're asked a certain question and then you answer part of it, but you don't answer the full part of it, you're really kind of choppy on what the answers are . . . ."

RP 74-75. The prosecutor then continued:

Q: So Officer, focusing just on that initial contact that you had with the defendant and your statement today that you felt that the defendant was lying to you on that day, do you base that statement on your entire investigation and all of the information that you obtained during that investigation? RP 75, line 13-17.

A: Yes.

RP 75, line 18. No objection, motion to strike, or motion for a mistrial was made by Mr. Becerra.

Q: And do you base that opinion based on what you were told by other individuals about what occurred and what was communicated to the defendant? RP 75, lines 19-21.

A: Yes.

RP 75, line 22. Again, no objection, motion to strike, or motion for a mistrial was made by Mr. Becerra.

During trial, the victim's courtroom testimony regarding the assault was consistent with what she previously reported to the officer and Mr. Becerra's boss. RP 22, 53, 212. While Mr. Becerra chose to testify on his own behalf, his testimony, in contrast with the victim's, was inconsistent with his prior statements and other witness testimony. On direct, Mr. Becerra testified he was not aware of the victim's assault allegations until the officer's November 12, 2009, arrival. RP 117-118. He also denied multiple times ever talking to his boss about the victim's

allegations prior to November 12, 2009. RP 118-119. However, his boss testified on rebuttal that she met with Appellant 10 days earlier, on November 2, 2009, and informed him of the victim's allegations. RP 202, 204, 207-208. In his testimony, Mr. Becerra also denied being on the property where the victim's office was located near the time of the assault, which was also contradicted by time card records completed by Mr. Becerra and his prior admission to his boss that he had been on the property to inspect the meter, but the victim was not there. RP 116, 117, 129; RP 212-213, 220-222. On cross, Mr. Becerra denied ever touching or kissing the victim, on any occasion, though that too was contradicted by an admission he made to his boss on November 12, 2009. RP 133, 134; 218. The victim, however, testified both on direct and in rebuttal that no hug or kiss ever occurred prior to the assault. RP 20, 248.

During closing, the prosecutor stressed to the jury multiple times that they, and they alone, were the sole judges of each witness's credibility. RP 266, 267, 271. The prosecutor discussed with the jury those things included in their instructions that they may consider when assessing credibility, including a witness's demeanor while testifying. RP 271-272. The prosecutor asked the jury to ask themselves if they believed, based on the victim's demeanor when she testified, that she was making

up the allegations, and to consider what motive, bias, or prejudice the victim would have to fabricate her claims, to come into a room full of strangers and tell them something very personal that had happened to her—that Mr. Becerra had touched her breasts and kissed her. RP 272-273. No objection was made by Mr. Becerra to these closing statements.

The jury returned a verdict finding Mr. Becerra guilty of Assault in the Fourth Degree and returned a special verdict finding that the assault was committed with Sexual Motivation. Mr. Becerra timely filed review of the conviction alleging, among other things, prosecutorial misconduct.

At RALJ, the Superior Court entered an Order on RALJ Appeal finding that the cumulative effect of the officer's comments on the credibility of the defendant and his lying, with the prosecutor's comment in closing regarding the defendant's presence during the victim's testimony was sufficient to warrant reversal of the conviction and remand for re-trial for prosecutorial misconduct. However, in rendering its decision, the Superior Court never addressed: (1) the issues in the context of the standard of review required by *State v. Emery*, 174 Wn.2d 741, 278 P.3d 653 (2012), when Mr. Becerra failed to properly object at trial, and failed to address how no curative instruction could have corrected any prejudice had Mr. Becerra objected; (2) whether the prosecutor's remarks

were invited, provoked, or in pertinent reply to Mr. Becerra's questioning and therefore barred from reversal under *State v. Ramos*, 164 Wn. App. 327, 263 P.3d 1268 (2011), or (3) whether error was invited by Mr. Becerra in accordance with *In Re: Pers. Restraint of Tortorelli*, 149 Wn.2d 82, 66 P.3d 606 (2003) and therefore barred from review.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

RAP 2.3(d) allows discretionary review of a superior court RALJ decision in certain instances. Here, the following sections of RAP 2.3(d) are applicable:

> (1) If the decision of the superior court is in conflict with a decision of the Court of Appeals or the Supreme Court; or
>
> . . .
>
> (3) If the decision involves an issue of public interest which should be determined by an appellate court; or
>
> . . . .

In Rendering Its Order on RALJ Appeal, the Trial Court Ignored The Standard Of Review Required By *State v. Emery* In Appeals Claiming Prosecutorial Misconduct Where There Was No Objection At Trial.

In a prosecutorial misconduct claim, the defendant bears the burden of proving that the prosecutor's comments were both improper and prejudicial, and when no objection is made at trial, a heightened standard applies and the defendant is deemed to have waived any error unless he

can prove both that the prejudice had a substantial likelihood of affecting the verdict, and that the prosecutor's comments were so flagrant and ill-intentioned that no curative instruction would have obviated any prejudicial effect on the jury. *State v. Emery*, 174 Wn.2d 741, 759-761, 278 P.3d 653 (2012). The focus of this inquiry is more on whether the resulting prejudice could have been cured, rather than the flagrant or ill-intentioned nature of the remarks. *Id*, 174 Wn.2d at 762. The appellate court is to make this review in the context of the total argument, the issues in the case, the evidence admitted, and the instructions provided. *State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359 (2007).

Here, the Superior Court ruled that the prosecutor's comments were improper because: (1) they solicited from the officer testimony concerning the defendant lying to her, and (2) they were comments in closing that touched upon Mr. Becerra's constitutional right to confront witnesses. However, in reversing the conviction and remanding the case for re-trial, the Superior Court failed to find that the prejudice had a substantial likelihood of affecting the verdict, and more importantly, because there was no objection at trial, the Superior Court failed to consider whether the prosecutor's comments were so flagrant and ill-intentioned that no instruction could have cured the resulting prejudice. In

fact, there was no discussion or consideration by the Superior Court as to how a proper objection, motion to strike, or request for a jury instruction would have affected any prejudice that may have occurred had Mr. Becerra fulfilled his duty of properly objecting at trial. The Supreme Court held in *State v. Emery* that a reviewing court must consider what would likely have happened if the Defendant had timely objected and this consideration is required before a re-trial may be granted. *Id.*, at 763-764. This consideration is particularly important in the instant case where there was testimony about the defendant's demeanor from which the jurors could have interpreted the officer's opinion as a description of the defendant's behavior rather than an opinion on his credibility, permissible by *State v. Hager*, 171 Wn.2d 151, 160-161, 248 P.3d 512 (2011), where there was significant evidence outside of the officer's testimony from which the jury could have chosen to disbelieve Mr. Becerra given his inconsistent and rebutted testimony, and where the alleged error was invited or provoked by Mr. Becerra through his cross-examination of the officer concerning Mr. Becerra's "lie" to her.

Additionally, in further supporting its reversal and remand, the Superior Court found the prosecutor's comment in her closing statement improper and a comment on Mr. Becerra's constitutional right to confront

witnesses where, when discussing the victim's credibility, the prosecutor discussed the victim's demeanor while testifying:

> But now Kelly, you saw how difficult it was for her to testify. You saw how painful it was for her to look at that defendant. You saw how much she did not want to do that. You saw how uncomfortable she was to be in this environment. And she told you she didn't want all of this to come out of this. She just wanted somebody to do something. She wanted to feel like she was heard. She wanted to have no contact with this individual. She contacted the police after she felt like nobody else did anything. Nothing was being done.
>
> . . .
>
> Do you believe that based on her demeanor when she testified that she made all of this up?
>
> . . .
>
> You saw how she testified. You take into account, in assessing their credibility and their bias and their motives, their demeanor as well. She was crying. She was upset. She answered the questions off the cuff. She wasn't contemplating. She wasn't taking time to formulate her answer for you. She told you, as I asked her the questions, what happened on that day. It was difficult for her, as you could guess from her demeanor. And what motive does Kelly have to come into this court and make up all this stuff? He's a maintenance worker. They didn't have any sort of relationship. He's a maintenance worker. What does she gain by claiming all of this occurred if it didn't? What motive does she have to lie?
>
> . . .
>
> When you consider that, consider what motive, bias, prejudice Kelly has. What does she gain? Other than coming into a room full of strangers and telling about

> something very personal that happened to her on that day. To come in to all of you who she's never seen before and say that her breasts were touched and that she was kissed on the cheek.

RP 271-273. Again, these statements were not objected to at trial and no motion to strike was made by Mr. Becerra, and the Superior Court failed to address what prejudice these comments created that had a substantial likelihood of affecting the verdict and why no instruction could have cured that prejudice, particularly when considering it in the context of the total argument, the issues in the case, the evidence admitted, and the instructions provided to the jury. Here, the prosecutor stated multiple times in closing that this case would come down to credibility, which was for the jury and the jury alone to decide. RP 266, 267, 271. The prosecutor discussed with the jury those things included in their instructions that they consider when they assess credibility—bias, motive, demeanor. RP 271-272. The prosecutor's statements concerning the victim's demeanor had nothing to do with Mr. Becerra's right to confront the victim, and everything to do with the jury judging the victim's credibility as she testified.

Because the Superior Court's Order on RALJ Appeal is in conflict with the standard of review reiterated by *State v. Emery* and is an issue of public interest, the City of Kent respectfully requests the Court of Appeals

grant discretionary review of the Order on RALJ Appeal under RAP 2.3(d)(1) and (3).

The Prosecutor's Comments Were Invited, Provoked, Or In Pertinent Reply To Mr. Becerra's Questioning And Under *State v. Ramos*, the Superior Court Erred in Granting His Appeal.

Improper remarks by a prosecutor are not grounds for reversal if invited or provoked by defense counsel, unless the remarks are not in pertinent reply or are so prejudicial that a curative instruction would be ineffective. *State v. Ramos*, 164 Wn. App. 327, 263 P.3d 1268 (2011). Here, all of the exchanges about Mr. Becerra "lying" to the officer came from his counsel on re-cross of the officer. RP 68-73. In fact, it was Mr. Becerra's counsel that drew the conclusions, in leading questions to the officer, that "just the people that are guilty are guarded," "people that are guarded are guilty? That's your experience," "[a]nd people that are not guilty but accused of a crime are not guarded around you." RP 71, line 12, 77, line 17-21. In the prosecutor's second re-direct, and based on Mr. Becerra significantly opening the door, the prosecutor asked the officer why it was that she felt Mr. Becerra lied to her. RP 74, line 8. The officer then explained the demeanor she observed. RP 74-75. This questioning was permissible by *State v. Ramos* because the comments were in pertinent reply to Mr. Becerra's significant questioning of the officer on

cross of the "lie" Mr. Becerra told her. However, the Superior Court held this second re-direct was improper and the Superior Court used it as a basis to reverse the conviction and remand for re-trial, a decision contrary to the standard set out in *State v. Ramos*.

Because the Superior Court's Order on RALJ Appeal is in conflict with the standard reiterated by *State v. Ramos*, 164 Wn. App. 327, 263 P.3d 1268 (2011), the City of Kent respectfully requests the Court of Appeals grant discretionary review of this issue under RAP 2.3(d)(1) and (3).

Mr. Becerra Invited Error Under *In Re: Pers. Restraint of Tortorelli* And The Superior Court Erred in Granting His Appeal.

The invited error doctrine prohibits a party from setting up an error in the trial court and then complaining of it on appeal. *In Re: Pers. Restraint of Tortorelli*, 149 Wn.2d 82, 94, 66 P.3d 606 (2003). Here, it was Mr. Becerra who elicited testimony from the officer, through leading questions, that he was guilty of the crime because he was guarded in his answers to the officer's questions. Therefore, Mr. Becerra cannot now attribute this testimony to the prosecutor and seek reversal due to prosecutorial misconduct where no such misconduct exists. Because the Superior Court's Order on RALJ Appeal is in conflict with *In Re: Pers. Restraint of Tortorelli*, 149 Wn.2d 82, 94, 66 P.3d 606 (2003), the City of

Kent respectfully requests the Court of Appeals grant discretionary review of this issue under RAP 2.3(d)(1) and (3).

F. CONCLUSION

For the reasons indicated in Part E above, and based on the files and records herein, the City of Kent respectfully requests the Court of Appeals grant discretionary review of these issues under RAP 2.3(d)(1) and (3), reverse the Superior Court, and affirm Mr. Becerra's conviction for Assault in the Fourth Degree with Sexual Motivation entered in the Kent Municipal Court on December 13, 2011.

RESPECTFULLY SUBMITTED this ____ day of October, 2012.

CITY OF KENT
TOM BRUBAKER, CITY ATTORNEY

34882/STORMES

By: _____
TAMMY L. WHITE, WSBA #43595
Prosecuting Attorney

APPENDIX D

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

CITY OF KENT, Petitioner, v. EVERARDO BECERRA-AREVALO, Respondent.	No 69401-4-I ORDER GRANTING DISCRETIONARY REVIEW

The City seeks discretionary review of the superior court's reversal of Becerra-Arevalo's conviction for assault in the fourth degree with sexual motivation. The superior court's reliance on prosecutorial misconduct likely conflicts with current case law. Therefore, we grant discretionary review.

FACTS

Everardo Becerra-Arevalo worked as a maintenance man for the owner of several industrial parks. He became friendly with Kelly Fitzpatrick, the office manager of one of the tenants. The two had occasional conversations and once went out to lunch together. Then, during a work visit in October 2009, Becerra-Arevalo allegedly put his hands on Fitzpatrick's breasts and attempted to kiss her. Fitzpatrick reported the incident to her supervisor but was unsatisfied by the lack of action in response to the assault. More than two weeks later, she reported the assault to the police. After an investigation, the City of Kent (City) charged Becerra-Arevalo with assault in the fourth degree with sexual motivation.

Investigating officer Carrie Nastansky was one of the main witnesses for the prosecution. On direct examination, Nastansky testified about her original conversation

with Becerra-Arevalo. According to Nastansky, Becerra-Arevalo claimed to have no idea why she had come to speak with him. She recalled the conversation as "kind of odd." She went on to say, "I don't want to say he was trying to hide something. He was very careful about what he said and how he answered questions." In response to further questions Nastansky elaborated, "he was slow to answer as if he were trying to come up with a story in his head versus just if something had happened you would be able to freely tell the story and you wouldn't have to think about it." According to Nastansky, "it seemed to me like he was trying to hide something."

During redirect examination, Officer Nastansky again testified that she believed Becerra was very guarded and careful in his answers to her questions during the investigation. She later reiterated that he had been guarded and followed with, "And he lied to me also. He told me he didn't know why I was there, although he had already been contacted by the property manager, so you would assume that he would know why I was there." Defense counsel did not object. The prosecutor did not ask follow up questions in response to this statement.

On recross-examination, Defense counsel elicited further testimony concerning the officer's belief that Becerra had lied. He asked several questions on the subject. The defense also cross-examined Nastansky about her testimony that Becerra-Arevalo had been "guarded."

Q: If you were accused of a crime–most people you deal with, when you accuse them of a crime, are they guarded?

A: If they're guilty.

Q: So you are saying just the people that are guilty are guarded?

A: Most of them.

On second redirect, the prosecutor asked Nastansky more questions about her conclusion that Becerra had lied. During the final recross-examination, the defense revisited the relationship between guarded conversation and guilt.

> Q: . . . [T]hen you had someone who denied a crime. And you testified that that person, when you were investigating them for a crime was being guarded. And people that are guarded are guilty? That's your experience as an officer?
>
> A: Correct.
>
> Q: And people that are not guilty but accused of a crime are not guarded around you?
>
> A: For the most part.

This exchange concluded Officer Nastansky's testimony.

The jury convicted Becerra of assault in the fourth degree with sexual motivation. Becerra appealed to the superior court, alleging prosecutorial misconduct among other issues. The superior court concluded that,

> [T]he cumulative effect of the combination of the police officer's comment on the credibility of the defendant and the emphasis by both counsel on lying during the officer's testimony with the comment on the defendant's presence during the witness's testimony when he had a constitutional right to be there require reversal and remand for retrial.

The City now seeks discretionary review of the superior court's decision to reverse the conviction and remand for further proceedings.[1]

[1] Becerra-Arevalo moved in the alternative to have this court consider an ineffective assistance of counsel claim upon acceptance of the City's motion for discretionary review. The issue is untimely. RALJ 2.5(a); RAP 5.2(b). Becerra-Arevalo did not raise the issue on appeal to the Superior Court. We will not consider it for the first time on discretionary review.

DISCRETIONARY REVIEW

Discretionary review on RALJ requires the petitioner to meet strict criteria established by RAP 2.3(d). In this case, the City seeks review under RAP 2.3(d)(1) and(3).

> Discretionary review of a superior court decision entered in a proceeding to review a decision of a court of limited jurisdiction will be accepted only:
>
> (1) If the decision of the superior court is in conflict with a decision of the Court of Appeals or the Supreme Court; or
>
> . . . .
>
> (3) If the decision involves an issue of public interest which should be determined by an appellate court.

RAP 2.3(d). The City claims three errors in its petition: (1) the superior court did not use the proper standard of review for alleged prosecutorial misconduct without an objection as established in State v. Emery, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012); (2) the superior court failed to consider that the prosecutor's improper remarks were not grounds for reversal because they were invited or provoked as described in State v. Ramos, 164 Wn. App. 327, 334, 263 P.3d 1268 (2011); and (3) the invited error doctrine, In re Pers. Restraint of Tortorelli, 149 Wn.2d 82, 66 P.3d 606 (2003), prohibits the defendant from drawing out the testimony about the police officer's opinion that Becerra lied to her and then complaining about it on appeal.

A prosecutor commits misconduct by asking a witness whether another witness is lying. Ramos, 164 Wn. App. at 334. However, "[i]mproper remarks by the prosecutor are not grounds for reversal if invited or provoked by defense counsel 'unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would

be ineffective." Id. (quoting State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994)); see also, State v. Dennison, 72 Wn.2d 842, 849, 435 P.2d 526 (1967); State v. Graham, 59 Wn. App. 418, 428-9, 798 P.2d 314 (1990). Here, the prosecutor did not ask whether the defendant was lying. Officer Nastansky volunteered that statement during redirect examination. The prosecutor did not pursue the issue after the Officer made the comment Rather, defense counsel reopened the issue and asked a series of questions about Nastansky's opinion that Beverra-Arevalo had lied. He also posed questions and elicited testimony about Nastansky's belief that guilty people are guarded around her. Only after the defense resurrected the issue did the prosecutor ask follow-up questions about the lie. Given the sequence of the testimony in this case, we believe the prosecutor's questions were a pertinent reply to questions asked by the defense. Any error appears invited. See, Tortorelli, 149 Wn.2d at 94; State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990). In addition, no objection was made to any of the alleged prosecutorial misconduct. Allegations of prosecutorial misconduct without objection at trial are deemed waived unless the misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. Emery, 174 Wn.2d at 760-61. The flagrant and ill-intentioned standard requires the same strong showing of prejudice required by the test for manifest constitutional error. State v. O'Donnell, 142 Wn. App. 314, 328, 174 P.3d 1205 (2007). The superior court decision did not engage in an analysis of whether the alleged misconduct was so flagrant and ill-intentioned that no curative instruction could have obviated prejudice to the verdict. Without this analysis, the issue should not have been

reached. Therefore, the superior court's finding of prosecutorial misconduct conflicts with Ramos, Tortorelli, and Emery.

In addition to the prosecutor's questions during the officer's testimony, the superior court also specifically cites concern raised by a "comment on the defendant's presence during the witness's testimony when he had a constitutional right to be there." During closing arguments in this case, the prosecutor told the jury, "You saw how painful it was for her to look at that defendant. You saw how much she did not want to do that." This statement came in the context of the victim's credibility, followed shortly by the statement that, "the City anticipates that the defendant—Counsel is going to get up and have you believe that Kelly made all of this up. Do you believe that based on her demeanor when she testified that she made all of this up?"

Comment on a defendant's presence may constitute a violation of the confrontation clause and amount to misconduct. In State v. Jones, 71 Wn. App. 798, 811, 863 P.2d 85 (1991), the prosecutor's closing argument alluded to the fact that the victim's courtroom contact with the defendant had been so traumatic that she could not return to court. On appeal, this court concluded that this argument "constitute[d] an impermissible use of constitutionally protected behavior" by inviting the jury to draw a negative inference from the valid exercise of the right to confrontation. Id. at 812.

However, "not all arguments touching upon a defendant's constitutional rights are impermissible comments on the exercise of those rights." State v. Gregory, 158 Wn.2d 759, 806, 147 P.3d 1201 (2006). The question becomes whether the prosecutor "manifestly intended the remarks to be a comment on that right." State v. Crane, 116 Wn.2d 315, 331, 804 P.2d 10 (1991). We believe the superior court's decision to be in

conflict with case law holding that so long as the focus of the questioning or argument is not upon the exercise of the constitutional right itself, the inquiry or argument does not infringe upon a constitutional right. Gregory, 158 Wn.2d at 807.

The allegations of prosecutorial misconduct in the closing argument and in the examination of Officer Nastansky—two of the three errors supporting the superior court's reversal of the conviction—have possible conflicts with existing case law. We note that the remaining issue of Officer Nastansky's opinion testimony may also pose the same problem. The defense did not object to the testimony, thereby failing to preserve the error. Under City of Seattle v. Heatley, 70 Wn. App. 573, 586, 854 P.2d 658 (1993), testimony that may be an opinion on guilt does not necessarily amount to a manifest constitutional error that will be considered for the first time on appeal. A four part test determines whether an issue is reviewable for the first time on appeal.[2] Id. at 585. In the briefing to the superior court, the defendant alleged the constitutional error and proceeded through a harmless error analysis instead of the required examination of

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[2] Heatley states,

> [T]he proper approach in analyzing alleged constitutional error raised for the first time on appeal involves four steps. First, the reviewing court must make a cursory determination as to whether the alleged error in fact suggests a constitutional issue. Second, the court must determine whether the alleged error is manifest. Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case. Third, if the court finds the alleged error to be manifest, then the court must address the merits of the constitutional issue. Finally, if the court determines that an error of constitutional import was committed, then, and only then, the court undertakes a harmless error analysis.

70 Wn. App. at 585, quoting State v. Lynn, 67 Wn. App. 3390, 345, 835 P.2d 251 (1992)

whether the error was "manifest." The superior court accepted the harmless error argument and ruled on the issue, citing the improper opinion evidence as one of the grounds for reversal. From the record, it appears that Nastansky's initial opinion testimony that Becerra-Arevalo lied to her may not have been "manifest," preventing its review on appeal. Yet, the superior court made no analysis of manifest error. And, questions remain as to whether her additional testimony was invited error, provoked by the defense.

The superior court's reversal of Becerra-Arevalo's conviction presents several applications of law in possible conflict with existing cases. We grant review as to prosecutorial misconduct during Officer Nastansky's testimony and in closing arguments. In the interests of judicial efficiency, we also grant review as to the opinion testimony of the officer that in combination with the prosecutorial misconduct formed the basis of the superior court decision.

Now, therefore, it is hereby

ORDERED that the motion for discretionary review is granted.

Done this 6th day of May 2013.

Appelwick, J

Leach, C.J.

Jan, J.

APPENDIX E

No. 69401-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

CITY OF KENT,

Petitioner,

v.

EVERARDO BECERRA-AREVALO,

Respondent.

ANSWER TO MOTION FOR DISCRETIONARY REVIEW

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A. IDENTITY OF ANSWERING PARTY

Everardo Becerra-Arevalo, defendant and appellant below, asks this Court to deny the motion for discretionary review filed by the City of Kent.

In the alternative, should this Court accept review, Mr. Becerra-Arevalo asks this Court to also address whether he was denied his constitutional right to effective assistance of counsel at the appellate and trial levels.

B. DECISION BELOW

Mr. Becerra-Arevalo's Kent Municipal Court conviction for assault in the fourth degree with sexual motivation was reversed on appeal by the Honorable Leroy McCullough on September 7, 2012. A copy of the Decision on RALJ is attached as Appendix A.

The superior court found reversal was required due to prosecutorial misconduct, specifically the impact on the jury of (1) a police officer's opinion concerning the credibility of the defendant, (2) the emphasis both counsel placed on the officer's belief that the defendant was lying, and (3) the prosecutor's comment in closing argument on the defendant's exercise of his constitutional right to confront the alleged victim. The superior court did not reach two other issues raised by the appellant.

C. ISSUES PRESENTED

1. On RALJ appeal, the superior court reversed Mr. Becerra-Arevalo's misdemeanor conviction and remanded for a new trial based upon the impact of various incidents of prosecutorial misconduct on the jury. The well-know standard of review for prosecutorial misconduct cases was cited in the appellate briefs, and the written decision does not utilize a different standard. Should this Court deny review because the City of Kent cannot demonstrate that the superior court utilized the wrong standard of review and thus presents no compelling argument that the RALJ decision is in conflict with a decision of this Court or the Superior Court or presents an issue of public importance?

2. Mr. Becerra-Arevalo had the constitutional right to effective assistance of counsel at trial and on appeal. U.S. Const. amends. VI, XIV; Const. art. I § 22. His appellate lawyer did not raise ineffective assistance of counsel on appeal even though trial counsel (1) failed to object when a police officer offered her opinion that his client was lying, (2) asked questions on cross-examination that emphasized and strengthened the officer's opinion of the defendant's credibility and therefore guilt, (3) failed to object when the prosecutor commented on the defendant's right to confront witnesses, and (4) failed to object when the officer related the alleged victim's hearsay account of the incident. If this Court grants the

City's motion for discretionary review, should it also address whether Mr. Becerra-Arevalo's constitutional right to effective assistance of counsel was violated by his trial counsel's deficient performance? May Mr. Becerra-Arevalo raise this issue for the first time on discretionary review because his appellate counsel was also ineffective for not raising the issue on appeal?

D. STATEMENT OF THE CASE

Everardo Becerra-Arevalo worked as the maintenance supervisor for Plemmons Industries, owners of four industrial parks and one shopping complex in Kent. RP 15, 110-11, 200, 202.[1] Kelly Fitzpatrick was the office manager for one of Plemmons' tenants, Sound Resurfacing, and she would occasionally speak with Mr. Becerra-Arevalo when he did maintenance or read the water meter at her office. RP 13, 15-16. Ms. Fitzpatrick found Mr. Becerra-Arevalo to be polite and friendly, and the two went to lunch one day. RP 17-20.

According to Ms. Fitzpatrick, Mr. Becerra-Arevalo touched her breasts and tried to kiss when they were alone in her office on October 27, 2009. RP 20-22. Ms. Fitzpatrick reported the incident to the police on November 12 because she did not believe her employer had adequately addressed the problem. RP 29-30, 50-51. Mr. Becerra-Arevalo denied

[1] A copy of the verbatim report of proceedings prepared for the superior court is attached as Appendix D.

touching Mr. Fitzpatrick when interviewed by Kent Police Officer Carrie Nastansky. RP 50, 63. The City of Kent charged him with fourth degree assault with sexual motivation, and he was convicted after a jury trial in Kent Municipal Court. RP 299.

On appeal to King County Superior Court, Mr. Becerra-Arevalo's conviction was reversed and remanded for a new trial by the Honorable Leroy McCullough. Appendix A. The superior court ruled that Mr. Becerra-Arevalo did not receive a fair trial due to the impact upon the jury of the police officer's testimony concerning the defendant's credibility, the testimony elicited by both counsel that the officer believed the defendant was lying when he denied the offense, and the city attorney's comment during closing argument concerning the defendant's constitutional right confront witnesses. Appendix A.

At issue was Officer Nastansky's trial testimony concerning Mr. Becerra-Arevalo's credibility and guilt.[2] When asked by the city attorney what Mr. Becerra-Arevalo told her about the incident, Officer Nastansky responded that he was very cautious about what he said:

> The conversation, from what I remember, was kind of odd because it was – I don't want to say he was trying to hide something. He was very careful about what he said and how he answered questions. He told me he's only there to

[2] The City conceded the officer's testimony was improper, but argued defense counsel did not timely object and elicited some of the testimony on cross-examination, thus inviting the misconduct. Appendix C at 8-10.

> work. He never talks to females, just that he comes in and says hi, and then he leaves and goes back to work.

RP 56. Over objection the prosecutor was then permitted to ask the officer why she believed Mr. Becerra-Arevalo was being careful in responding to her questions. RP 56-57.

> Q: Why did you have that opinion?
>
> A: Because he was slow to answer as if he were trying to come up with a story in his head versus just if something had happened you would be able to freely tell the story and you wouldn't have to think about it. There would be no like okay, well did this happen and then this. You just say what happened, nothing to hide.
>
> Q: Any did you get that perception here?
>
> A: No. He was – it seemed to me that he was trying to hide something.

RP 57.

On cross-examination, the officer testified that only Mr. Becerra-Arevalo's answers concerning his relationship with other women at work were slow or guarded. RP 63. On re-direct, the prosecutor asked if the defendant's answers were also guarded concerning Ms. Fitzpatrick's allegations. RP 66. Officer Nastansky replied that not only was Mr. Becerra-Arevalo guarded as to the incident, he also lied to her:

> And he lied to me as also. He told me he didn't know why I was there, although he had already been contacted by the property manager, so you would assume he would know why I was there.

Id.

Defense counsel attempted to question the officer to discount her opinion that Mr. Becerra-Arevalo was lying. The officer, however, claimed that she was a very good judge of when people were lying and reiterated that Mr. Becerra-Arevalo lied to her. RP 71-73.

The prosecutor then asked the officer to again confirm that she believed Mr. Becerra-Arevalo was lying to her. RP 74. Over defense objection, Officer Nastansky explained the basis of her opinion:

> Because he – just the way that he kind of – when you're asked a certain question and then you answer part of it, but you don't answer the full part of if, you're really kind of choppy on what the answers are, very careful knowing that there's a police officer in front of you, you're very careful to [sic] how you answer it. Like I said before, if he didn't have anything to hide he would have told me, you know, this, this, and this happened and yes, I was in that room at that time, but I never touched her. But he didn't answer it. He didn't go into detail whatsoever. And then I offered a taped statement. . . .

RP 74-75. The prosecutor ended her examination by asking the officer to confirm that her opinion that Mr. Becerra-Arevalo lied about the incident was based upon her "entire investigation and all of the information she obtained" during the investigation. RP 75. Finally, defense counsel brought out the officer's opinion that guilty people are always guarded

when responding to police interrogation, but innocent people generally are not. RP 77.

In closing argument, the city attorney urged the jury to discount Mr. Becerra-Arevalo's testimony based upon Officer Nastansky's expert opinion that Mr. Becerra-Arevalo's responses to her questions indicated he was guilty. RP 296-97.

The RALJ court's determination that Mr. Becerra-Arevalo's conviction be reversed due to prosecutorial misconduct was also based upon the city attorney's comment in closing argument on the defendant's constitutional rights to confront the witnesses against him:

> But now Kelly, you saw how difficult it was for her to testify. You saw how painful it was for her to look at that defendant. You saw how much she did not want to do that. You saw how uncomfortable she was to be in this environment . . . Kelly just wanted it to go away because she didn't want to have any contact with the defendant.

RP 271-72 (emphasis added); Appendix B at 18-20.[3] The City argued this was proper argument addressing the witness's credibility. Appendix C at 15-16

[3] A copy of the Brief of Appellant is attached as Appendix B, and a copy of the Respondent's Brief is attached as Appendix C.

E. ARGUMENT WHY REVIEW SHOULD BE DENIED

The City cannot demonstrate that the Superior Court utilized the incorrect standard of review in deciding to reverse Mr. Becerra-Arevalo's misdemeanor conviction.

The City asks this Court to accept discretionary review of the RALJ decision, claiming it conflicts with decisions of this Court and the Washington Supreme Court setting forth the standard of review of prosecutorial misconduct claims. The parties briefed the correct standard of review in the superior court, and the RALJ Decision does not reflect that any other standard was utilized by the court. The City's motion should be denied.

A prosecutor plays a unique role in the criminal justice system that requires her to act impartially and seek a just verdict based upon matters in the record. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1934); State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011) (the prosecutor owes a "duty to defendants to see that their rights to a constitutionally fair trial are not violated"); RPC 3.8. Washington courts have long emphasized that a prosecutor's misconduct may violate the defendant's right to due process and a fair trial. State v. Reed, 102 Wn.2d 140, 146-49, 684 P.2d 699 (1984) (and cases cited therein); State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978); State v. Carr, 160 Wash. 83, 90-91, 294 Pac. 1016 (1930).

The well-known standard of review for prosecutorial misconduct requires the reviewing court to determine if the prosecutor's conduct was improper and, if so, whether there is a substantial likelihood the misconduct affected the jury verdict.[4] State v. Emery, 174 Wn.2d 741, 756-59, 760, 278 P.3d 653 (2012); Monday, 171 Wn.2d at 675-76; State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). If, however, the defendant did not object to the misconduct, the reviewing court determines whether the conduct was so flagrant and ill-intentioned that the resulting prejudice would not have been cured by a limiting instruction. Emery, 174 Wn.2d at 760-61; Belgarde, 110 Wn.2d at 508; Charlton, 90 Wn.2d at 661; State v. Case, 49 Wn.2d 66, 72-74, 298 P.2d 500 (1956).

The City contends that Judge McCullough did not utilize this standard of review. There is nothing to support this claim, however, as the RALJ Decision does not reference a different standard of review. The City addressed the correct standard of review in its appellate brief, and the appellant provided the court with the standard utilized when the defense does not object to prosecutorial misconduct. Appendix B at 7; Appendix C at 6. The City argued the appeal on the date the RALJ decision was entered and approved the Decision "as to form." Appendix A. The City

[4] Monday's exception for cases where the prosecutor commits egregious racial misconduct is not at issue here. Monday, 171 Wn.2d at 680 (applying constitutional harmless error test).

could easily have suggested an additional sentence be added to the brief opinion to reflect what standard of review the superior court utilized or provided this Court with a copy of the court's oral ruling.

The City does not have a right to review in this Court; review is discretionary. RALJ 9.1(h); RAP 2.3(d). Discretionary review of an RALJ decision is accepted only if (1) the decision is in conflict with a decision of this Court or the Supreme Court, (2) the decision raises a significant question of law under the state or federal constitution, (3) it addresses a matter of significant public importance, or (4) the superior court has so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by the court of limited jurisdiction, that review is warranted. RAP 2.3(d). The City does not demonstrate that the RALJ decision meets any of these criteria. Instead, the City attempts to manufacture an issue by claiming the superior court did not use the correct standard of review and that the decision is therefore in conflict with appellate cases where the standard of review is utilized or discussed. The City, however, cannot point to any language in the RALJ decision that demonstrates that Judge McCullough did not utilize the correct standard of review.

Thus, the City's argument that the RALJ decision is in conflict with decisions of this Court and the Washington Supreme Court is

meritless. The City first claims the RALJ Decision conflicts with Emery, supra, because McCullough ignored the standard of review utilized in that case. Motion at 11-16. The City suggests that, if Judge McCullough had used the correct standard of review, he would have determined the police officer's testimony was not prejudicial because the jury could have concluded her testimony simply described Mr. Becerra-Arevalo's demeanor. Motion at 13 (citing State v. Hager, 171 Wn.2d 151, 160-61, 248 P.3d 512 (2011)). In Hager, the trial court prevented a detective from testifying as to whether or not the defendant was truthful, but the detective nonetheless violated an in limine ruling and testified that the defendant was "evasive," thus unconstitutionally commenting on his credibility. Hager, 171 Wn.2d at 158. The court, however, found the prejudicial remark was cured by the court's prompt instruction. Id. at 160.

Not every prejudicial remark, however, is susceptible to a curative instruction. Id. The jury could not confuse Officer Nastansky's remarks with a description of Mr. Becerra-Arevalo's "demeanor." Officer Nastansky expressed her strong opinion that Mr. Becerra-Arevalo was lying when he denied committing the crime, thus offering her improper opinion on both his credibility and his guilt. Officer Nastansky initially told the jury that Mr. Becerra-Arevalo was "slow to answer [her questions] as if he were trying to come up with a story in his head." RP 57. She

added that "he lied to me also" when he indicated he did not know why the officer was there to interview him. RP 66. She later explained she felt Mr. Becerra-Arevalo was lying throughout the interview because of his "choppy" answers and failure to "go into detail." RP 74-75. Finally, the prosecutor elicited testimony that the officer's opinion that the defendant was lying was based upon her "entire investigation and all of the information she obtained." RP 75.

Any rational juror would see the officer was offering her opinion that Mr. Becerra-Arevalo was lying when he denied the offense and therefore guilty. No instruction could erase that impression. The RALJ decision hardly conflicts with Emery because the misconduct was so flagrant and ill-intentioned that no curative instruction could remove the prejudice from the minds of the jury, thus preventing a fair trial. See Emery, 174 Wn.2d at 753.

The City's claim that the RALJ Decision is in conflict with State v. Ramos, 164 Wn. App. 327, 263 P.3d 1268 (2011), because the prosecutor's misconduct was provoked by the defense also fails. Motion at 16-17. The City argued strenuously in the superior court that it was the defense who initially elicited the damaging testimony, and there is no reason to conclude Judge McCullough did not consider the City's argument in rendering his decision. Appendix C at 7-10.

Moreover, the City does not explain why the RALJ decision conflicts with Ramos. Motion at 16-17. The Ramos Court reversed the defendant's delivery of cocaine conviction based upon several instances of prosecutorial misconduct in cross-examination and closing argument. Ramos, 164 Wn. App. at 342-43. The State did not argue that any of the misconduct discussed was invited or provoked by the defense, and the opinion thus does not address this. Id. at 333-41. The RALJ decision does not conflict with Ramos.

Ramos in fact supports Judge McCullough's decision, as it clarifies that it is misconduct for the prosecutor to ask a witness if another witness is lying. Ramos, 164 Wn. App. at 334-35. While the case was not reversed because the question was not so flagrant and ill-intentioned that a jury instruction could not have cured the prejudice, that is not the case here. Witness credibility was the key decision for the jury in Mr. Becerra-Arevalo's case, and the opinion testimony elicited by the City meets the flagrant and ill-intentioned test. See State v. Barr, 123 Wn. App. 373, 381-85, 98 P.3d 518 (2004) (conviction reversed where detective's testimony that the defendant's behavior during interrogation indicated he was being deceptive was "clearly designed to give the officer's opinion as to whether Mr. Barr had committed the offense"), rev. denied, 154 Wn.2d 1009 (2005).

The City also claims Judge McCullough's decision is in conflict with the discussion of invited error in In re Pers. Restraint of Tortorelli, 149 Wn.2d 82, 94, 66 P.3d 606, cert. denied, 540 U.S. 875 (2003). Motion at 17-18. The City argued invited error on appeal and cannot point to any language in the RALJ decision that shows Judge McCullough did not properly consider this argument. Appendix C at 9-10.

The RALJ decision is not in conflict with Tortorelli. In his personal restraint petition, Tortorelli argued a statute admitted into evidence created an unconstitutional irrebutable presumption. Tortorelli, 149 Wn.2d at 94. The Supreme Court refused to address the issue because his trial counsel had insisted the entire statute be admitted as evidence at trial and used it to argue the defense of good faith claim of title. Id. at 94, 96. Mr. Becerra-Arevalo's attorney, in contrast, tried to limit the damage caused by Officer Nastansky on cross-examination by pointing out that she had no personal knowledge of the events. He was unsuccessful, however, as the witness instead became even more insistent that she was an accurate judge of who was and was not lying. RP 68, 70-71. The defense gained nothing from the cross-examination, and defense counsel's failure to stop the line of inquiry with a timely objection was not a planned strategy to set up an error for appeal.

This Court should deny the City's motion for discretionary review because there is nothing in the RALJ decision to support the City's claim that the decision is in conflict with Emery, Ramos, or Tortorelli or that the case involves an important public issue.

F. ARGUMENT WHY REVIEW SHOULD BE GRANTED OF ISSUE PRESENTED IN ANSWER

If it accepts review, this Court should determine if Mr. Becerra-Arevalo's constitutional right to effective assistance of trial counsel and/or appellate counsel was violated.

A criminal defendant has the constitutional right to the assistance of counsel. U.S. Const. amends. VI, XIV; Const. art. I, § 22; State v. A.N.J., 168 Wn.2d 91, 96-97, 225 P.3d 956 (2010). Counsel's critical role in the adversarial system protects the defendant's fundamental right to a fair trial. Strickland v. Washington, 466 U.S. 668, 684-85, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); United States v. Cronic, 466 U.S. 648, 656, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." Cronic, 488 U.S. at 655 (quoting Herring v. New York, 422 U.S. 853, 862, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975)). The right to counsel therefore necessarily includes the right to effective assistance of counsel. Kimmelman v. Morrison, 477 U.S. 365,

377, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986); A.N.J., 168 Wn.2d at 98. The right to effective assistance of counsel applies to appellate counsel. Evitts v. Lucy, 469 U.S. 387, 396, 105 S. Ct. 830, 836, 83 L. Ed.2d 821 (1985); In re Pers. Restraint of Morris, ___ Wn.2d ___, 288 P.3d 1140, 1144 (2012). "A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal." State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

When reviewing a claim that counsel was not effective, the appellate court must determine (1) whether the attorney's performance fell below objective standards of reasonable representation, and, if so, (2) did counsel's deficient performance prejudice the defendant. Strickland, 466 U.S. at 687-88; Morris, 288 P.3d at 1144. While the appellate courts presume that defense counsel was not deficient, this presumption is rebutted if there is no possible tactical explanation for counsel's performance. Strickland, 466 U.S. at 689-90; Morris, 288 P.3d at 1145; State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The appellate court will find prejudice under the second prong if the defendant demonstrates "counsel's errors were so serious as to deprive the defendant of a fair trial." Strickland, 466 U.S. at 687.

Mr. Becerra-Arevalo's appellate counsel argued that his conviction should be reversed due to prosecutorial misconduct and because his

constitutional right to a fair trial was violated by the admission of Officer Nastansky's opinion on his guilt. Appendix B at 20-21. Trial counsel, however, did not object to much of the purported misconduct, RP 56-57, 66, 74-75, and his cross-examination contributed to the problem, RP 56-57, 70-71, 77. Trial counsel did not appear to be aware that Officer Nastansky's testimony was an improper opinion on his client's guilt. RP 56-57, 66, 74-75. Defense counsel also failed to object when the police officer related hearsay testimony of her conversations with Ms. Fitzpatrick and others. RP 52-53, 55, 60. And he did not object when the prosecutor commented upon the defendant's right to confront witnesses. RP 271-72. Yet Mr. Becerra-Arevalo's appellate attorney did not argue that defense counsel was ineffective.[5]

The defendant's constitutional right to a jury trial is violated if a witness expresses her opinion about the defendant's guilt or credibility U.S. Const. amend. XIV; Const. art. I §§ 21, 22; State v. Kirkman, 159 Wn.2d 918, 826-27, 155 P.3d 125 (2007); State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). The police officer's testimony that Mr. Becerra-Arevalo lied when he denied committing the crime directly told the jury that the officer believed Mr. Becerra-Arevalo was guilty.

[5] Mr. Becerra-Arevalo was represented by attorneys from the same law firm at trial and on appeal.

Competent counsel would have immediately objected to this type of testimony and would not have posed cross-examination questions that emboldened the city attorney to introduce even more damaging opinion testimony.

Even if defense counsel's decision to bring out Officer Nastansky's opinion that his client was lying was in some way tactical, it was not a reasonable tactical decision. Not all tactical decisions are immune from attack. State v. Grier, 171 Wn.2d 17, 33-34, 224 P.3d 1260 (2011); Reichenbach, 153 Wn.2d at 130. "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000).

Additionally, defense counsel did not object when the police officer related her hearsay conversations with Ms. Fitzpatrick, thus bolstering Ms. Fitzpatrick's testimony, and offered her opinion that Ms. Fitzpatrick was still upset from the incident that allegedly occurred over two weeks earlier. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Hearsay is not admissible, and no exception to the hearsay rule permits Officer Nastansky's testimony concerning what Ms. Fitzpatrick told her about the

incident. ER 802, 803, 804(b). Criminal defense attorneys are expected to have a basic understanding of the hearsay rule and to pose objections on that basis.

There are certainly times when a lawyer may decide an objection would draw the jury's attention to prejudicial evidence that is mentioned indirectly or in a fleeting comment. This is not the type of decision made by trial counsel here. Trial counsel permitted a police officer to directly testify that she believed Mr. Becerra-Arevalo was lying when he denied committing the crime – a direct opinion that he was guilty. Mr. Becerra-Arevalo was prejudiced by his lawyer's deficient performance, and this Court should accept review of this important constitutional issue. RAP 2.3(d)(2).

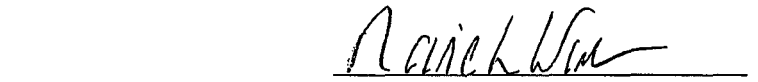
G. CONCLUSION

Mr. Becerra-Arevalo asks this Court to deny the City's motion for discretionary review. There is nothing in the wording of the RALJ decision to support the City's argument that Judge McCullough did not utilize the correct standard of review.

If this Court grants the City's motion, this Court should also grant review to determine if Mr. Becerra-Arevalo's constitutional right to effective assistance of counsel was violated by his trial and appellate attorneys.

DATED this 1st day of February 2013.

Respectfully submitted,



Elaine L. Winters – WSBA #7780
Washington Appellate Project
Attorneys for Respondent

APPENDIX F

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

CITY OF KENT, Respondent, vs. EVERARDO BECERRA-AREVALO, Appellant.	)	No. 69401-4-I NOTICE OF FILING VERBATIM REPORT OF PROCEEDINGS (RAP 9.5)

DECLARATION

I, Jo L. Jackson, transcriber, mailed for filing the original of the verbatim report of proceedings on July 9 2013 for the following dates and provided (as per the Court's instructions). (Please identify each volume, if more than one volume is filed.) 9/7/12 hearing.

The transcript was computer generated and I filed a copy of the ASCII diskette or compact disk on the same date as the transcript was filed and provided a copy to the party who arranged for transcription.

CERTIFICATE OF SERVICE

I certify that on the 9th day of July 2013, I caused a true and correct copy of this Notice to be served on the following, in the manner indicated below:

Tammy Larson White via email
twhite@kent.wa.gov

Elaine L. Winters via email
Elaine@washapp.org

By: _____
(Signature)

Jo L. Jackson
509-745-9507

Court of Appeals, Division I No. 694014

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

CITY OF KENT,	)	
Appellant,	)	**No. 12-1-01212-8 KNT**
	)	
v.	)	
	)	
EVERARDO BECERRA-AREVALO,	)	
Respondent.	)	

THE HONORABLE LEROY McCULLOUGH
MOTION FOR REMAND
(Pages 1 - 34)

APPEARANCES:

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Friday, September 7, 2012 at 1:39 p.m.

CLERK: All rise.

THE COURT: Thank you. You may be seated.

Good afternoon.

MS. BEALL: Good afternoon, Your Honor.

THE COURT: Alright. Someone call the case.

MS. BEALL: Your Honor, this is an appeal in *The City of Kent versus Everardo Becerra-Aravalo*, cause number 12-1-01212-8 K-N-T. And, Your Honor, for the record, I am Andrea Beall, representing the appellant, Mr. Becerra-Arevalo.

MS. WHITE: And, Your Honor, I am Tammy Larson White, representing the City of Kent.

THE COURT: Okay. Is that Larson?

MS. WHITE: Larson White.

THE COURT: Larson White. And Ms. Beall. Okay.

Alright. I've read your respective briefs. I did not get a DVD or an audio of the proceeding, but I do have the transcript and your references to that.

MS. BEALL: Okay.

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THE COURT: So, with that, if you both are ready to proceed, Ms. Beall, we'll start with you.

MS. BEALL: Okay. Thank you, Your Honor.

As the Court is aware, we have three separate issues that we're raising in this appeal, and our first, and we believe most persuasive, is that there is an issue of prosecutorial misconduct, and that that arose in three different ways during the course of this trial. The first was in the Prosecutor's elicitation of opinion testimony from the police officer as to the credibility of the Defendant.

As I noted in our brief, police do have a special aura of reliability, and when they offer an opinion as to a witness's credibility, that carries a certain weight with the jury, and this is particularly important where the credibility is offered as to the opinion of the Defendant, and the case is essentially a he-said-she (skip in recording) there are no other eyewitnesses; it's the alleged victim came in and told her story, and then the Defendant contradicted that and denied the accusations.

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And in this case our position is the question (skip in recording) here was pervasive. The City's brief attempts to shift the blame to defense Counsel, but it did arise in the course of the City's initial direct examination of the officer, and that's on page 56, and the (skip in recording) it wasn't necessarily that the City at that point intended to elicit a comment on the credibility (skip in recording) essentially offered up her opinion on the Defendant's credibility, a statement, "He was careful in the way that he testified," and then it was asked, "Well, how he was he careful," and then the officer is allowed to expand on that, and it's as though he was trying to hide something --

THE COURT: Uh-huh (affirmative).

MS. BEALL: -- as though -- he was speaking as though he was making something up rather than just telling a story. The defense did object at that point, and we would acknowledge that the objection was couched in terms of speculation, not eliciting an opinion on the credibility, but there was an objection in the record at that point in time.

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Our most concerning part of the cross examination came later on re-direct of the officer, and that's at page 74, when the Prosecutor directly asked the officer, "Why was it that you felt the Defendant was lying to you," and there again is an objection from the defense Counsel.

THE COURT: Uh-huh (affirmative).

MS. BEALL: The questions asked to be -- are allowed to be asked. I think at that point there was a sidebar. Unfortunately in this case, the sidebars did not tend to make it into the record in terms of what was said and what was discussed at sidebar. But the officer was allowed to explain why she felt the Defendant was lying, and it was asked twice, "Why was it, given your entire investigation, the specific information, the statement from the Defendant made to you that you felt was a lie?" There was objection. Again, "You felt the Defendant was lying to you? You faced that on your entire investigation, all the information," and the officer is allowed to tell the jury that she believed when the Defendant denied the accusations, he was lying about that.

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The second issue is --

THE COURT: Before you leave that one --

MS. BEALL: Yes?

THE COURT: -- of what effect is the fact that the defense lawyer sort of, according to the City's response, compounded that by continuing to raise that issue and continuing to use the very phrase, does that have any effect?

MS. BEALL: Well, I think we need to break it up, and there's first the original (skip in recording) and that's where the statement of the officer was that he was careful, that he was seeming as though --

THE COURT: Got it.

MS. BEALL: -- he was attempting to hide something. Defense Counsel at that point does cross examine the officer and try to narrow her -- he uses the term guarded instead of careful, but narrow her opinion in terms of what exactly the Defendant was talking when he appeared, in his words, guarded, and the officer's words, careful. So in the first cross examination, it is an attempt by the officer -- or by the defense attorney to narrow the

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officer's testimony and to show the jury that she didn't necessarily believe he was lying about the denial, but that he was careful in his answers about how he interacted with other women on the property.

Then, on re-direct, the Prosecutor again brings up the issue regarding the officer's testimony that he appeared careful and... And I think it's during the course of that that the officer sort of blurts out, "Well, and then he lied to me, too." And, then, the -- So, then, the defense Counsel could've at that point made an objection, asked for a limiting instruction to the jury or asked the statement to be stricken and the jury instructed, but the cat's already out of the bag and, as experienced trial counsel know, even though a jury's told to disregard a statement, "The Defendant was lying," that's still going to be in the back of their minds. So, rather than doing that, the tactic was to, again, try to elicit exactly what the officer was referencing. Rather than allow it to be as applied to his whole denial, he tries again to narrow it, "Well, isn't it that maybe because you came at it with the

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perspective that he was already guilty you thought he was careful?" So it was a trial tactic I think --

THE COURT: The question, "So what about that statement is a lie?" "You said he lied to you. That's (skip in recording) by an officer, wouldn't you agree? "You classify this as a lie. You specifically said it was a lie," and this is from Respondent's brief, page (skip in recording) note 2.

MS. BEALL: Yes.

THE COURT: And referring to Report of Proceedings, pages 68 through 71 or 72.

MS. BEALL: Thank you.

THE COURT: Just wondering if -- what the legal effect of that is, in your opinion? And we can come back to that on your rebuttal, if you like.

MS. BEALL: Okay. I, I guess my initial response would be that we're still talking about prosecutorial misconduct --

THE COURT: Uh-huh (affirmative).

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MS. BEALL: -- and we're still talking about what questions are appropriate from the Prosecutor.

THE COURT: Uh-huh (affirmative).

MS. BEALL: And the Prosecutor could've left that subject alone --

THE COURT: Uh-huh (affirmative).

MS. BEALL: -- but chose not to --

THE COURT: Got that part.

MS. BEALL: -- and then he comes back in page 74 and asks, very directly, as I said before, "Why was it that you felt that he was lying to you," and is allowed to expound on that, and that's over the defense objections at that point --

THE COURT: Yes.

MS. BEALL: -- and that's over a sidebar.

THE COURT: Yes.

Alright.

MS. BEALL: And the second --

THE COURT: Go ahead.

MS. BEALL: Alright.

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The second issue, then, is the questioning of the Defendant by the Prosecutor, and then our position, trying to use impeachment to really bring out what is essentially substantive evidence that was not raised in the City's case in chief, and that was the question as to whether or not the Defendant told another individual that he hugged and kissed Ms. Fitzpatrick. And that testimony takes place in pages 133 and 134 of the transcript. And it's our position that the question, "On November 12th, after the officer had arrived and talked with you, did you tell Theresa Hutchins (phonetic) that, yes, you did kiss and hug Kelly Fitzpatrick," implies that he admitted to the assault, that the assault is one of sexual motivation, the allegation is that he grabbed Ms. Fitzpatrick's breasts on October 27th is the offense date (sic).

The Prosecutor admits that it's an attempt to impeach the Defendant in their (skip in recording) response brief they state that they asked this question for the purpose of setting up a future impeachment, but our position would be it's impeachment on a collateral issue, at

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best, but really it's an introduction of substantive evidence that was not introduced in their case in chief, they (skip in recording) Hutchins testify to the admissions that Mr. Becerra said to her, or allegedly said to her when she interviewed Mr. Becerra about Ms. Fitzpatrick's allegations, they didn't bring Ms. Hutchins in in their case in chief. When Mr. Becerra testifies, they certainly can ask him questions to set up impeachment, we agree that that's the appropriate process, but not on collateral issues, and this would be a collateral issue. This would be something that he said regarding a totally separate incident. From the City's information in their brief, they knew, based upon the notes, that it was a separate incident, that was talking about the time that they went lunch, not the time that there's this alleged accusation, yet the question is said in such a way that it implies that he made an admission as to the substance of the allegation, that he admitted to touching Ms. Hutchins (sic) in an unwanted way on October 27th, not that he was referring to a prior lunch, and she doesn't distinguish that in the cross

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examination of Mr. Bacerra. She says twice, "On November 12th, after the officer arrived and talked with you, did you tell Theresa Hutchins that, yes, you did and kiss (sic) Kelly -- or Kelly Fitzpatrick?" The defense objects, the Judge allows her to ask the question, she again phrases the question the exact same way.

And, so, our position would be that it's impeachment on a collateral issue, number one, and, number two, that it's really an introduction of substantive evidence that probably would not have been admitted had it been brought forward in the case in chief because it, again, it's on a collateral issue (sic), it brings into question whether or not a prior bad act is being alleged, based upon behavior at a lunch that's unrelated to the assault on October 27th, and that it's an improper question.

And, then, I would also note that it's significant in that in closing the Prosecutor, again, did refer to that statement, on page 271 of her closing said, "The Defendant is not credible because he denied the kissing and hugging." So it is again brought back in closing and it's

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-- it wasn't substance evidence (sic) and it was impeachment on a collateral issue and it should not have been brought into evidence at all.

Our third issue with regard to prosecutorial misconduct is the City commenting on the Defendant being present while the adverse witness testified. And our position with that would be that that's a comment on the Defendant's right to be present and to confront his accusers at the time of trial, and that the City's reference to that in closing suggests that he should not have exercised that right, that he put Ms. Fitzpatrick in an awkward situation by requiring her to come forward and testify and tell about this incident in front of strangers and in front of him, and didn't that make her uncomfortable. That would be a comment on his ability to do that, his Constitutional right to do and his Constitutional right to confront his accuser.

So our position would be that the accumulation of those three incidents are significant. They are particularly significant in this case because, as I said before,

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it's a he-said-she-said. It's Ms. Fitzpatrick stating, "This is what happened on this date," and Mr. Bacerra-Arevalo saying, "I didn't touch her," and that's the only evidence that there is. It's not a case where there (skip in recording) there's nothing to corroborate Ms. Fitzpatrick's statement, and Mr. Bacerra is flatly denying it. So in a case where credibility is so important, these issues are important, as well, and, in our opinion, did affect the verdict and would have affected the verdict and that reversal was appropriate, based upon prosecutorial misconduct.

If the Court does not agree, then I've also briefed those two -- the last two issues in terms of the Constitutional (skip in recording) apart from prosecutorial misconduct, and I'm sure Your Honor has reviewed the brief and I won't expound on that further, unless you have questions.

THE COURT: What are you asking me to do, then?

MS. BEALL: I'm asking you to reverse, first based upon prosecutorial misconduct. If you don't agree that the

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cumulative actions of the Prosecutor require reversal, then, second, we'd ask to reverse on (skip in recording) of the opinion evidence because that did invade the province of the jury because it was a comment on the Defendant's guilt in terms of what the officer believed in terms of his denial, whether or not his denial was genuine or not, and that that took that away from the jury because of the credibility that is afforded officers. And, third, we're asking to reverse based upon the rebuttal evidence that was not truly rebuttal evidence.

THE COURT: Send it back for retrial or just what? What are you asking me to do?

MS. BEALL: Retrial.

THE COURT: Reverse and remand?

MS. BEALL: Yes.

THE COURT: And you will have an opportunity for rebuttal, but I'm curious, on your last one --

MS. BEALL: Yes.

THE COURT: -- regarding the comment on the (skip in recording) being present, I can anticipate, based on the

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City's response, that they're saying that they have the right to explain why a person has a certain kind of physiological or other reaction as they're testifying. What's your response to that? They're saying that they were not making a comment about the Defendant's being present; they're just saying that they were trying to put in (skip in recording) why this person's presentation might've been as it was. What's, what's your response to that?

MS. BEALL: My response is that the City could've argued, "If this is a touchy subject, if it's a sensitive subject, certainly it would be difficult for Ms. Fitzpatrick to talk about that subject," but what the City said was, "You saw how difficult it was for her to testify. You saw how painful it was for her to look at the Defendant. You saw how much she did not want to do that. You saw how comfortable she was (sic) to be in this environment." So it's all about the fact that she's on the witness stand and the Defendant is in the same room, and that was the focus of the City's argument; it wasn't just

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that is a sensitive subject, this is difficult to talk about, and that could account for any demeanor that the jury observed in her, it was all about her being in Court testifying with the Defendant was present.

THE COURT: Thank you very much.

Ms. Larson White?

MS. WHITE: Thank you, Your Honor.

And, Your Honor, (skip in recording) to the chase on the prosecutorial misconduct part, particularly about soliciting an improper opinion, you were asking what the legal effect was of defense Counsel going into the further questioning about, "He lied to you. What was it that he lied to you about?" And I apologize that this was not in my brief, it was not a case I found until recently, but it's *State v. Ramos*, which is 164 Wn. App. 327 (2011). It says there that, "Any improper remarks by a prosecutor are not grounds for reversal if invited or provoked by defense counsel, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective." That's the legal effect here. Was it wrong

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for the officer to blurt out that, "He lied to me?" Absolutely. (skip in recording) that the Prosecutor asked solicit that response? Absolutely not. The Prosecutor was not seeking that response from the officer, it was something that the officer blurted out, the Prosecutor quickly moved on, did not touch that subject and left it alone. However, when defense Counsel got up and was addressing the officer on cross, then all of that information came out.

It was a trial strategy, as Ms. Beall just stated in her argument, that Counsel could have moved to strike the statement, get a curative instruction, or even move for a mistrial at that time, but they made the trial strategy not to do that. By doing so, under *State v. Emery*, they've now put themselves in a heightened standard of review for Your Honor to review in determining whether or not misconduct occurred. Because they did not object, they didn't give the Court an opportunity to try to correct any sort of error, and a curative instruction here certainly could've corrected that one statement from the officer, "And he lied to me, too," but they didn't give the trial Judge the

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opportunity to do that. Because they didn't do that, they cannot meet the burden here, and should not be, I guess, granted their appeal to reverse on the prosecutorial misconduct claims as to this issue.

All of the Prosecutor's questions to the officer initially were going to -- attempting to go to the Defendant's demeanor, which *State v. Fisher* says is proper. *State v. Fisher* says that what's improper are questions that are a direct comment on the Defendant's guilt. That's not what we have here. What we had was questions that were attempting to elicit the Defendant's behavior, and as the officer was answering those questions, she stated that she believed the Defendant was being careful because he was slow in answering her, and she was talking about his demeanor. Well, the case law says that those type of comments are proper. But what we had was the defense Counsel completely opened the door with all of the lie questions, and it was Counsel that was drawing the improper conclusions about, "Well, if a person is guarded, they're therefore guilty." All of that information came in to the

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jury from defense Counsel, not from the Prosecutor. There was nothing from the Prosecutor's questions that were improper or prosecutorial misconduct. All of the error here was invited by Counsel. Given that, they shouldn't be given the benefit now of having the appeal reversed and sent back.

Now, the issue of the cross examination and impeachment of the appellant, that too, is also proper. Under Evidence Rule 611, cross examination is okay as to matters that are discussed on direct and issues of credibility. Now, there's another Evidence Rule, 613, which talks about if you're going to admit an inconsistent statement with nonparty witnesses, you have to confront the witness with that statement first before you can then bring in that prior inconsistent statement. Although party admissions are exempt under that rule, certainly if it's proper to confront a witness with an inconsistent statement if they're a nonparty, it certainly would also be proper to confront a party witness with that statement. The Prosecutor here was confronting the Defendant with an in-

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consistent statement. He had testified that he had never hugged and kissed the Defendant -- or, excuse me, the victim, but, yet, he had told his boss that, yes, he had previously given her a hug and a kiss.

Now, there's a lot of discussion about whether or not that's on a collateral issue or not. Certainly it's for impeachment, but it's also a party admission. Because it is a prior statement that he made, it is admissible for substantive evidence. It's not to -- It's not on a collateral issue; it's something that the jury can consider as substantive evidence. Now, the Defendant had denied on the stand that he ever kissed and hugged the victim, but he told Ms. Hutchins that, yes, he previously had. Now, the jury could take that information as he had admitted the crime to Ms. Hutchins earlier in an effort to try to deflect the attention from the assault to this prior consensual lunch that they had, because the victim herself had denied that absolutely no hug and kiss had ever occurred until the day of the assault. She said that as part of the assault a kiss occurred, but she denied that

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there was any sort of hug and kiss at any point in time prior, so given that, I think it certainly is not a collateral issue, it is something that is substantive evidence; it is a party admission and can be admissible for that purpose. So, again, I don't think there is anything that the Prosecutor's cross examination of the Defendant was improper (sic).

Defense (skip in recording) argument I don't think went into so much of a prior bad act, I think she did address it in her brief, and that, too, again, goes to the same issue, that we're not dealing with a prior bad act that is trying to be admitted for propensity purposes, but, again, it was something that was being admitted for the prior in (sic) -- prior admission that he had made, and then also the inconsistent statement during his testimony.

(skip in recording) Counsel also had gone into, separately from the prosecutorial misconduct claims, separate claims for an improper opinion, as well as that the Court had erred in the rebuttal, and I'm going to defer

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to my brief on those issues. I don't know if the Court had particular questions for me in my response?

THE COURT: Hmmm. Why couldn't the Prosecutor have let the lie issue alone?

MS. WHITE: And I think the Prosecutor certainly could've left the lie issue alone, could've left it to defense Counsel and everything that defense Counsel went into. I think what the Prosecutor was intending was get to what was it about the Defendant's demeanor that led the officer to believe that she was lied to.

Could the Prosecutor's question have been more direct? Absolutely. Could the Prosecutor had worded it differently to try to get more of an exact answer? Certainly so. But I think the officer's response to that questioning, again, was going to the Defendant's demeanor. Everything about the lie and the, I guess, conclusions that were drawn about people being guarded always being guilty were from defense Counsel and his leading questions. But the Prosecutor certainly could've walked away and left it alone, but I think the case of *State v. Ramos* states that

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defense Counsel opened the door by defense Counsel going into all of the questioning of the lie, even if the Prosecutor was improper in going into further explanation as to why the officer believed she was being lied to, *State v. Ramos* would state that that's not improper for reversal.

THE COURT: And was that the issue of credibility or lying (skip in recording) I don't... What was, what was it that the defense lawyer was talking about in *Ramos*?

MS. WHITE: And that I'm not, I'm not sure of, Your Honor.

THE COURT: Okay.

MS. WHITE: I'm not sure of the full facts of that case.

THE COURT: Regarding the comment on the Defendant's presence at trial?

MS. WHITE: And that, Your Honor, I don't think is an issue in this case. The case that Counsel cites in her brief as to being analogous to this situation is a Prosecutor who directly was commenting on the defendant's presence in a courtroom and questioning the defendant while

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he was on the stand about how upset he got when the Prosecutor was blocking his view of the victim while the victim testified. What we have here is the wit (sic) -- the Prosecutor discussing with the jury time and time again that the jury are the sole judges of credibility in this case, that they and they alone, decide credibility. The Prosecutor went through WPIC 1.02 with the jury, went through and explained the things that they can consider when they're judging credibility, which has to do with bias and motive and all of that. So when the Prosecutor is discussing the victim's demeanor, she is also discussing what motive it is that the victim would have to come into the courtroom and give the story that she was giving on the witness stand, and to consider what she was stating on the witness stand in the context of her full physical demeanor and whether or not that proved that she was credible or not, not whether or not the Defendant had a right to confront her (skip in recording)

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THE COURT: (skip in recording) agree, however, that that could've been said without a reference to the Defendant sitting there.

MS. WHITE: And I don't think there was any reference to, to the Defendant sitting there, other than, "You saw how difficult it was for her to come into this courtroom."

THE COURT: Okay. Let me...

MS. WHITE: But my recollection was that it wasn't something that was stating specifically him being there and his right to confront her, but more about how difficult it was for her to come into the courtroom with him to tell the jury what had happened.

THE COURT: Hmmm.

MS. WHITE: But, again, even, even if, if that did occur, Your Honor, and I'm sorry, my recollection, I just can't remember the exact words that were used, I don't think Counsel can meet the high burden here because, again, they did not object at trial. Given that, the higher burden is that they have to prove that no curative instruc-

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tion could've corrected any prejudice that occurred, and that hasn't been demonstrated.

THE COURT: Thank you.

MS. WHITE: Thank you.

THE COURT: Ms. Beall, your rebuttal?

MS. BEALL: Yes, thank you, Your Honor.

I, I think it's important on the statements regarding the officer's comments on the Defendant's credibility to look at it and how it comes out, and first it's on direct from the Prosecutor, and it's a statement that he was careful, that he appeared to be making it up as he was stating it. Her specific answers are in response to the Prosecutor's questions, "Why did you think he was being careful?" "Because he was slow to answer, as if he were trying to come up with a story in his head. If this is -- If something had happened, you'd be able to (skip in recording) but here you would just say what happened, nothing to hide." And, again, "Did you get that perception from him here?" "Yes, he seemed like he had something to hide." So defense Counsel, again, tries, on his cross, to

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narrow that to the discussion about investigation of other women or his interactions with other women and not that that was related to the occurrence of October 27th. But, then, Prosecutor then, on re-direct, asked the officer about the relationships, whether going on the property, and then he says, "Was he also guarded with you on the events that occurred on October 27th," and the answer is, "Yes, he was," and that's when she blurts out, "And he lied to me, also." And, so, again, the defense Counsel, then, on his re-cross, attempts to narrow that again to what exactly he had lied about and tries to focus it away from the fact that -- or from the implication that he may have lied about everything, and that he, in the officer's opinion, lied about what time he spoke to his supervisor about the incident, and that was a tactic from the defense Counsel that, again, the strategy of that could be debated, certainly. But, then, on the Prosecutor's again questioning of the officer, she again asks the statement, "Why did you believe that he was lying to you," and she's

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allowed to ask that question over defense Counsel's objections at that point.

With regard to the questioning of the Defendant and his -- whether or not he hugged and kissed Ms. Fitzpatrick, the City's arguments, I believe, weighs in favor of our arguments here. The City's arguing that it was substantive evidence. Well, if it's substantive evidence, then it should've come in in their case in chief, and it was directly related to October 27th, but the City at the same time is arguing, "Well, it wasn't about October 27th, it was about the time that they went to lunch, and defense Counsel knew that because they had that in discovery," and if it's about when they went to lunch, then, again, our position would be that is a collateral issue. It's not, "Did you kiss and hug Kelly Fitzpatrick?" It was, "Did you tell Theresa Hutchins that you kissed and hugged Kelly Fitzpatrick?" And what he may or may not have told another individual is a collateral issue and, our opinion, was introduced by the City under the guise of impeachment, but was not really impeachment; it was an

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attempt to insinuate that he made an admission that he kissed and hugged Kelly Fitzpatrick, but no admission was, in fact, made about the incident that occurred on October 27th.

Based on the third issue that Your Honor inquired, I don't have anything else to add on that. I think the record speaks for itself. There clearly was a reference to the Defendant being present at the time that Ms. Fitzpatrick testified, and that argument was made to the jury. Thank you.

THE COURT: I did review, on page 271 of the report of proceeding (sic), lines 19 to 22, which reads, in relevant part, "But, now, Kelly, you saw how difficult it was for her to testify. You saw how painful it was for her to look at that Defendant. You saw how much she did not want to do that. You saw how uncomfortable she was to be in this environment." So that, I think, probably needs to be considered in the, in the entire deliberation, Ms. Larson White, so there was actually, if I read this transcript correctly, a reference to looking at the Defendant.

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In my opinion, the police do have a certain (unintelligible) of credibility, and, in my opinion, in a case like this where there is no physical evidence or other evidence which could be used to verify or contradict claims made by either party, it is important to give a fair weight to the testimony of the accuser and the accused. Based on that, and the fact that there was no other evidence, this Court would be concerned with the Prosecutor's question about why the officer felt the Defendant was lying. I do have to consider, as the City has suggested, that the defense Counsel, instead of leaving the issue alone, brought the issue up several times, but then the Prosecutor could've left it alone after that, as well, and they didn't, so I do believe that in the unique circumstances of this case, with the emphasis on the lying and so forth, that this caused a problem for the fairness of the trial.

With respect to the question of the Prosecutor regarding the hugging and the kissing, I cannot conclude that that was a collateral issue, and I think that those questions were proper.

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With respect to the comment on the Defendant's being present and, as I read at the beginning of my decision, the emphasis on the Defendant's being present in Court I think was something that was problematic. Certainly the Defendant had a right to be in Court, and while the State or the prosecution could have talked about the issues of discomfort, it was unfortunate, I think, that they mentioned the fact that the complaining witness was required to be there to actually look at that Defendant in this way. So the content and the context were very, very unfortunate.

Given, then, the combination of things, I do believe that a remand is appropriate. I think that the Defendant is entitled to a trial where there is no State or police comment on his credibility. I think that the Defendant is entitled to a trial where there is to be no comment on his being present at the trial, which he has a right to be. Independently these things probably would not have caused any kind of remand, but the combination of things

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suggests to this Court that the appeal is well-taken and I'm ordering a remand and a retrial.

MS. BEALL: Okay.

THE COURT: Is your practice to have an order on criminal motion, or do you want to prepare some document for the Courts (sic) later?

MS. BEALL: I have an order that I've partially prepared. I leave it blank as the Court's reasoning so that I can hear what the Court has to say --

THE COURT: Alright. Why don't the two of you work on that, and then would you let me know when they're ready?

UNIDENTIFIED MALE: I will.

THE COURT: Thank you.

MS. BEALL: Thank you, Your Honor.

(END OF HEARING - 2:12:56 p.m.)

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CERTIFICATE

STATE OF WASHINGTON)
) ss.
County of Douglas)

I, Jo L. Jackson, do hereby certify:

That I was requested to provide the foregoing transcript of digitally-recorded proceedings;

That the foregoing transcript consisting of thirty-three (33) pages is a true and correct transcript of all such recorded testimony adduced and proceedings had and of the whole thereof to the best of my ability;

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal this 5th day of July 2013.

JO L. JACKSON

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APPENDIX G

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

CITY OF KENT, Appellant, v. EVERARDO BECERRA-AREVALO, Respondent.	No. 69401-4-I MANDATE King County Superior Court No. 12-1-01212-8.KNT ***Court Action Required***

THE STATE OF WASHINGTON TO: The Superior Court of the State of Washington in and for King County.

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division I, filed on April 28, 2014, became the decision terminating review of this court in the above entitled case on May 30, 2014. This case is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

c: Elaine Winters
Tammy Larson-White
Hon. Leroy McCullough

Court Action Required: The sentencing court or criminal presiding judge is to place this matter on the next available motion calendar for action consistent with the opinion.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Seattle, this 30th day of May, 2014.

RICHARD D. JOHNSON
Court Administrator/Clerk of the Court of Appeals, State of Washington, Division I.

SEAL OF THE COURT OF APPEALS • STATE OF WASHINGTON •