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No. 69401-4-I

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

CITY OF KENT,

Petitioner

v.

EVERARDO BECERRA-AREVALO,

Respondent

BRIEF OF PETITIONER CITY OF KENT

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1. Assignments of Error

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(b) Assignment of Error No. 2: The RALJ court erred in reversing Becerra-Arevalo's conviction and remanding the case for retrial based on improper opinion testimony regarding his guilt when it failed to apply the proper standard of review and determine whether the issue amounted to a manifest error of constitutional magnitude that could be raised for the first time on appeal.

(c) Assignment of Error No. 3: The RALJ court erred in reversing Becerra-Arevalo's conviction and remanding the case for retrial based on prosecutorial misconduct or improper opinion testimony when the prosecutor's statements and Officer Nastansky's testimony were invited, provoked, or in pertinent reply to defense counsel's questioning.

(d) Assignment of Error No. 4: The RALJ court erred in reversing Becerra-Arevalo's conviction and remanding the case for

retrial when any errors at trial regarding improper opinion testimony were invited by the defense and therefore barred from appeal under the invited error doctrine.

2. Issues Pertaining to Assignments of Error

(a) Should Becerrea-Arevalo's conviction for Assault in the 4th Degree with Sexual Motivation be reversed and remanded for retrial based on prosecutorial misconduct when the RALJ court failed to apply the proper standard of review required by *State v. Emery*, 174 Wn.2d 741, 278 P.3d 653 (2012), reversed solely on the allegedly improper remarks of the prosecutor, and failed to consider whether any error could have been cured at trial had Becerra-Arevalo properly objected? (Assignment of Error No. 1)

(b) Should Becerra-Arevalo's conviction for Assault in the 4th Degree with Sexual Motivation be reversed and remanded for retrial based on improper opinion testimony regarding his guilt when the RALJ court failed to apply the proper standard of review required by *Seattle v. Heatley*, 70 Wn. App. 573, 854 P.2d 658 (1993) and first determine whether the issue amounted to a manifest error of constitutional magnitude that could be raised for the first time on appeal when the testimony was not objected to at trial. (Assignment of Error No. 2).

(c) Should Becerra-Arevalo's conviction for Assault in the 4th Degree with Sexual Motivation be reversed and remanded for retrial when the prosecutor's statements and Officer Nastansky's opinion testimony were invited, provoked, or in pertinent reply to defense counsel's questioning and permitted by *State v. Ramos*, 164 Wn. App. 327, 263 P.3d 1268 (2011) and *State v. Russell*, 125 Wn.2d 24, 882 P.2d 747 (1994). (Assignment of Error No. 3).

(d) Should Becerra-Arevalo's conviction for Assault in the 4th Degree with Sexual Motivation be reversed and remanded for retrial when any errors at trial regarding improper opinion testimony were invited by the defense and therefore barred from appeal under the invited error doctrine in accordance with *In re Pers. Restraint of Tortorelli*, 149 Wn.2d 82, 66 P.3d 606 (2003). (Assignment of Error No. 4).

B. STATEMENT OF THE CASE

On December 12, 2011, trial began in a criminal case in the Kent Municipal Court against Mr. Everardo Becerra-Arevalo ("Becerra-Arevalo") on the charge of Assault in the 4th Degree with Sexual Motivation. CP 56. The trial concluded the following day with the jury returning a guilty verdict on the charge and a finding on special verdict that the assault was committed with sexual motivation. CP 353.

At trial, the victim, Kelly Fitzpatrick, testified that on the date of the assault, October 27, 2009, Becerra-Arevalo came up behind her, reached underneath her, and put both his hands on her breasts. CP 75-76. Ms. Fitzpatrick, stunned, then walked to and sat in her chair, with Becerra-Arevalo following, who then bent down and tried to kiss her. CP 76, 81. Ms. Fitzpatrick turned her head, and Becerra-Arevalo ended up kissing her on the cheek. CP 76. Ms. Fitzpatrick then told Becerra-Arevalo to leave, and he left without further incident. 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 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. Becerra-Arevalo's counsel did not object to Officer Nastansky's statement. CP 110. Officer Nastansky further described what it was about 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

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

happened you would be able to freely tell the story and you wouldn't have to think about it . . . It seemed to me like he was trying to hide something." CP 111. Becerra-Arevalo's counsel did not object to this testimony. CP 111.

On cross, Becerra-Arevalo's counsel asked Officer Nastansky if Becerra-Arevalo was only "guarded" with respect to questions about his relationships with women at work. CP 117. On re-direct, the prosecutor asked Officer Nastansky if 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. Becerra-Arevalo's counsel did not object, did not move to strike, and did not move for a mistrial. CP 120. The prosecutor immediately moved on. CP 119-120.

On re-cross, however, Becerra-Arevalo's counsel questioned Officer Nastansky extensively concerning Becerra-Arevalo's apparent "lie" to her:

> 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.

Through leading questions to Officer Nastansky, Becerra-Arevalo'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." CP 125, line 12; CP 131, lines 17-21. *None of this questioning was elicited by the prosecutor.*

In the City's second re-direct, and based on Becerra-Arevalo significantly opening the door, the prosecutor asked Officer Nastansky the basis for her opinion that was elicited by Becerra-Arevalo's counsel. CP 128, line 8. Officer Nastansky then explained what led her to her opinion. CP 128-129. Although Becerra-Arevalo objected, he again objected based on "speculation," not improper opinion or misconduct, and made no motion to strike or for a mistrial. 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, to come into a room full of strangers and tell them something very personal that had happened to her—that Becerra-Arevalo had touched her breasts and kissed her. CP 326-327. No objection was made by Becerra-Arevalo to these closing statements. CP 325-328.

The jury returned a verdict finding Becerra-Arevalo guilty of Assault in the 4th Degree and returned a special verdict finding that the assault was committed with Sexual Motivation. CP 4, 5, 352-353. Becerra-Arevalo timely filed for review of the conviction alleging: (i) prosecutorial misconduct based on: improper opinion testimony, improper cross-examination and impeachment, improper comment on his constitutional right to confront witnesses; (ii) admission of improper opinion evidence that denied Becerra-Arevalo of his constitutional right to a jury trial; and (iii) admission of evidence on rebuttal that did not rebut any new evidence presented by the defense. CP 1, 30-54.

At RALJ, the Superior Court entered an Order finding that the cumulative effect of Officer Nastansky's comments on the credibility of

Becerra-Arevalo and his lying, with the prosecutor's comment in closing regarding Becerra-Arevalo's presence during Ms. Fitzpatrick's testimony, was sufficient to warrant reversal of the conviction and remand for re-trial for prosecutorial misconduct. CP 458-460. Having found that prosecutorial misconduct was sufficient to warrant reversal and remand, the Superior Court did not decide the remaining two issues Becerra-Arevalo raised in his RALJ appeal. CP 460.

On the City's motion, this Court accepted discretionary review of three issues raised by City: (1) that the RALJ court applied an improper standard of review to Becerra-Arevalo's claims of prosecutorial misconduct, (2) that any improper statements made by the prosecutor, or improper testimony by Officer Nastansky, were invited, provoked, or in pertinent reply to Becerra-Arevalo's questioning and therefore could not be used as a basis for reversal, and (3) that any error at trial regarding improper opinion testimony was invited by Becerra-Arevalo and therefore barred from appeal. In granting review of these issues, this Court also granted review, in the interests of judicial efficiency, of whether the opinion testimony provided by Officer Nastansky warranted reversal and remand as an improper opinion on Becerra-Arevalo's guilt.

C. ARGUMENT

1. Court Of Appeals' Review Is De Novo.

Under RALJ 9.1(a), when review is taken from a superior court's decision in an appeal of a judgment rendered by a court of limited jurisdiction, the appellate court reviews the decision of the limited jurisdiction court for errors of law. *State v. Steen*, 164 Wn. App. 789, 798-798, 265 P.3d 901 (2011), citing *State v. Ford*, 110 Wn.2d 827, 829, 755 P.2d 806 (1988). Issues of law are reviewed *de novo*. *State v. Pannell*, 173 Wn.2d 222, 227, 267 P.3d 349 (2011). Because this appeal involves issues of law, the Court of Appeals conducts its review *de novo*, applying the same standard of review applicable before the RALJ court at the first level of appeal.

2. Allegations Of Prosecutorial Misconduct Not Objected To At Trial Are Waived Unless Heightened Standard Of Review Required By *State v. Emery* Is Met.

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.* at 762. A reviewing court must consider what would likely have happened if the defendant had timely objected, and this consideration is required before a retrial may be granted. *Id.* at 763-764. The reviewing 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).

3. Prosecutor Did Not Commit Misconduct That Resulted in Prejudice That Could Not Be Cured or Had A Substantial Likelihood of Affecting Jury's Verdict

a. Prosecutor Did Not Elicit Improper Opinion Testimony From Officer Nastansky Regarding Becerra-Arevalo's Guilt.

On review, Becerra-Arevalo alleged the prosecutor committed misconduct by eliciting testimony from Officer Nastansky as to her opinion of the defendant's guilt or credibility. CP 37. The RALJ court agreed with Becerra-Arevalo, reversed his conviction, and remanded the case for retrial. CP 458-460. The transcript and case law, however, do not

support this allegation or reversal of Becerra-Arevalo's conviction. The prosecutor's initial question to Officer Nastansky that Becerra-Arevalo took issue with in his appeal was:

> Q: And once you told him [Becerra-Arevalo] why it was that you were there did he say anything to you about what had happened?
>
> A: Just to refer back to my notes real quick. 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 the questions....

CP 110, lines 4-9. The prosecutor's question was proper and sought only testimony from Officer Nastansky as to statements made by Becerra-Arevalo. However, in response, Officer Nastansky testified concerning her impression of Becerra-Arevalo's demeanor as she spoke with him. At no time during Officer Nastansky's response did Becerra-Arevalo object. CP 110. The following exchange then occurred:

> Q: So why was it that you believed he was trying to be careful in how he answered your questions?
>
> Defense Objection: Objection Your Honor, calls for speculation.
>
> . . .
>
> [Witness allowed to answer with rephrasing of the question]
>
> . . .

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 like okay, well did this happen and then this. You just say what happened, nothing to hide.

Q: And did you get that perception with him here?

A: No. He was—it seemed to me like he was trying to hide something.

CP 110-111. Becerra-Arevalo's initial objection was on the basis of "speculation," not improper opinion or prosecutorial misconduct and there was no objection made to Officer Nastansky's response. CP 110, line 14, 111, lines 3-9. However, to allow review, a trial objection must state the specific point of law that is error. *See* State v. Walker, 121 Wn.2d 214, 217, 848 P.2d 721 (1993). This exchange between the prosecutor and officer ended the inquiry on that issue.

Evidence does not constitute improper opinion testimony when the testimony is not a direct comment on the defendant's guilt, is helpful to the jury, and is based on inferences from the evidence. State v. Fisher, 74 Wn. App. 804, 813-814, 874 P.2d 1381 (1994)[2]. Even though testimony may encompass the ultimate factual issue to be decided by the jury, an

[2] *Aff'd in part, rev'd in part sub nom.*, State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995)

opinion drawn from an inference made after having personally heard the defendant's statement and observing his behavior, is not an impermissible opinion as to the defendant's guilt. *Id.* at 814. In *Fisher*, this Court found that an officer's testimony that a statement a defendant made indicated to the officer that the defendant was "involved in the [drug] transaction," or "running the show," was a permissible inference drawn based not only on the officer's experience, but also on the officer having personally heard the statement and observing that defendant's behavior. *Id.* at 814.

Here, the prosecutor's questioning was proper as it sought testimony concerning Officer Nastansky's observations of Becerra-Arevalo's demeanor, not Officer Nastansky's opinion as to Becerra-Arevalo's guilt. *Id.* at 814. As in *Fisher*, Officer Nastansky's testimony that Becerra-Arevalo was being "careful" and her description of what she observed that led her to that opinion—that Becerra-Arevalo was slow to answer, not freely telling his story—are proper inferences and it was not improper for the prosecutor to elicit that testimony.

Becerra-Arevalo, however, readdressed the issue on cross by asking Officer Nastansky if Becerra-Arevalo's answers were only "guarded" (a term Officer Nastansky had not used) with respect to the relationships he had with women at work. CP 117, lines 13-16. On her

first re-direct examination, and in response to Becerra-Arevalo's implied limitation, the prosecutor asked Officer Nastansky:

> Q: Okay. And now Counsel had asked you questions about whether or not the defendant was just guarded in the questions that you were asking about the relationships that he [sic] with the women on the property?
>
> A: Mm-hmm. (Affirmative).
>
> Q: Was he also guarded with you on the events that occurred on October 27th?
>
> A: 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.*

CP 119, lines 21-23, CP 120, lines 1-6 (emphasis added). Becerra-Arevalo made no objection, no motion to strike, and no motion for a mistrial based on either the question asked or the answer provided. CP 119-120. Upon Officer Nastansky's response, the prosecutor immediately moved on.

An improper opinion cannot support a claim of prosecutorial misconduct if the form of the prosecutor's question did not elicit that opinion. *State v. Jungers*, 125 Wn. App. 895, 902, 106 P.3d 827 (2005). In *Jungers* when the prosecutor asked the officer "And what happened next, Officer Mettler, after you found the evidence," the officer responded

"I talked to some individuals in the residence and through my investigation I determined I believed it belonged to Ms. Jungers." *Id.* at 902. Because the officer's response was not elicited by the form of the prosecutor's question, the court held no misconduct occurred. *Id.* *Jungers* is directly analogous to the facts in the instant case. Here, the questions asked by the prosecutor would not lead one to believe that Officer Nastansky would blurt a response that Becerra-Arevalo "lied" to her. In fact, the form of the question only called for a "yes" or "no" response. Additionally, Officer Nastansky qualified that she made an *assumption* based on information she believed was known to Becerra-Arevalo, which makes it more likely that the jurors could have interpreted Officer Nastansky's opinion more as her description of Becerra-Arevalo's behavior than her opinion regarding his guilt.

All of the exchanges about Becerra-Arevalo "lying" came from *defense counsel* on his first re-cross of Officer Nastansky:

> 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 go from the perspective that someone's guilty of a crime . . . .

CP 122, line 21.

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.

In fact, it was defense counsel that drew the impermissible conclusions, in leading questions to Officer Nastansky, 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." CP 125, line 12, CP 131, line 17-21.

In response, the prosecutor, on her second re-direct, asked Officer Nastansky the basis for her opinion that Becerra-Arevalo had lied to her, as that opinion was elicited by the questioning conducted by Becerra-Arevalo's counsel in cross:

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

CP 128, lines 8-9.3. Becerra-Arevalo's counsel objected to the question arguing "speculation," not improper opinion or prosecutorial misconduct, and the trial court allowed Officer Nastansky to answer the question. CP 128. In response, Officer Nastansky 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 . . . ."

CP 128-129. 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?

A: Yes.

CP 129. No objection, motion to strike, or motion for a mistrial was made by Becerra-Arevalo.

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?

A: Yes.

CP 129. Again, no objection, motion to strike, or motion for a mistrial was made by Becerra-Arevalo. CP 128-130.

A prosecutor does not commit misconduct by eliciting witness testimony that vouches for or against the veracity of another witness if the defense has opened the door to such testimony by placing in issue the first witness's opinion of the second witness's veracity. *State v. O'Neal*, 126 Wn. App. 395, 409-410 and n. 14, 109 P.3d 429 (2005); *State v. Ramos*, 164 Wn. App. 327, 334, 263 P.3d 1268 (2011). Once a party has raised a material issue, the opposing party is permitted to explain, clarify, or contradict the evidence elicited on cross examination. *State v. Berg*, 147 Wn. App. 923, 939, 198 P.3d 529 (2008). A party may open the door

during the questioning of a witness to otherwise inadmissible evidence. *State v. Korum*, 157 Wn.2d 614, 646, 141 P.3d 13 (2006); *In re Pers. Restraint of Tortorelli*, 149 Wn.2d 82, 94, 66 P.3d 606 (2003). Here, the only reason the prosecutor asked Officer Nastansky in her second re-direct the basis for her opinion that Becerra-Arevalo lied to her was because that opinion, and others, were elicited by Becerra-Arevalo's counsel in his cross and re-cross examinations of Officer Nastansky. CP 122-131. Becerra-Arevalo opened the door to this questioning and, when viewed under the *Emery* standard, misconduct was not committed by the prosecutor to require reversal and remand.

b. Prosecutor Did Not Improperly Comment On Becerra-Arevalo's Constitutional Right To Confront His Accusers.

The prosecutor's comment in closing regarding Ms. Fitzpatrick's demeanor while she testified was not an improper comment on Becerra-Arevalo's constitutional right to confront the witnesses who testify against him and cannot support a finding of prosecutorial misconduct. In closing argument, the prosecutor enjoys reasonable latitude in arguing inferences from the evidence, including inferences as to witness credibility. *State v. Gregory*, 158 Wn.2d 759, 810, 147 P.3d 1201 (2006). However, the prosecutor can take no action that will

unnecessarily chill or penalize the assertion of a constitutional right, and may not draw adverse inferences from the exercise of a constitutional right. *State v. Rupe*, 101 Wn.2d 664, 705, 683 P.2d 571 (1984). Additionally, a prosecutor may not invite the jury to draw a negative inference from the defendant's exercise of his right to cross-examine witnesses. *State v. Jones*, 71 Wn. App. 798, 811-12, 863 P.2d 85 (1993). 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 relevant issue is "whether the prosecutor manifestly intended the remarks to be a comment on that right." *Id.* at 807. As 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. *Id.* at 807.

In *State v. Jones*, this Court held the prosecutor there acted improperly when, in cross-examination and closing, the prosecutor commented that the defendant insisted on staring at the child victim while the child testified, and that the courtroom experience was so traumatic for the child that she could not return. *Jones*, 71 Wn. App. at 805-806. This Court held such comments invited the jury to draw a

negative inference from the defendant's exercise of a constitutional right and were improper. *Id.* at 811-812. The comments made in *Jones* were clearly comments on that defendant's exercise of his constitutional right to confront the witnesses against him. Such is not the case here.

Here, the prosecutor's statements were made in the context of the jury assessing Ms. Fitzpatrick's credibility, and the prosecutor stated multiple times in her closing that this case would come down to credibility, which was for the jury and the jury alone to decide. CP 320, 321, 325. Additionally, the jurors received WPIC 1.02 in their instructions that advised them they were the sole judges of each witness's credibility. CP 8. In her closing, the prosecutor discussed this instruction and those things it provides the jury may consider when they assess credibility—bias, motive, demeanor while testifying. CP 325-326. The prosecutor's statements concerning Ms. Fitzpatrick's demeanor had nothing to do with Becerra-Arevalo's constitutional right to confront Ms. Fitzpatrick in court, and everything to do with the jury judging Ms. Fitzpatrick's credibility as she testified, and this intent is clear when the prosecutor's statements are reviewed in context:

> The primary issue is, did an assault occur on that day. This case, as both Counsel and I talked to you when we were going through voir dire and opening is going to come down

to credibility. And that's going to be for you and you alone to decide.

. . .

Now again, this boils down to credibility. You have an instruction that you alone are the ones that decide that. And the Court gives you some things in your instruction as to what you consider. And you consider if anybody has a personal interest, if they have a motive, if they have a bias. And again, it's solely up to you to decide. The burden is always on me. The burden is on me as the City to prove to you beyond a reasonable doubt that a crime occurred on October 27th, 2009. The defendant doesn't have a burden, but when the defendant chooses to testify his testimony is evaluated just like any other witness. You look and you judge his credibility just as you judge the credibility of Kelly Fitzpatrick, just as you judge the credibility of Deputy Nastansky, and just as you evaluate the credibility of Teresa Hutchens.

And we go and we look at the witnesses and what they testified to. We look at inconsistencies.

. . .

Now the defendant's story is the only one that's changed.

. . .

So when you're considering the credibility, the defendant is just like anybody else. You treat him no differently that [sic] you do any other witness. But again, the burden is always with me. The defendant doesn't have the burden.

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.

And when you have your instructions, it's not Kelly Fitzpatrick versus Everardo Becerra-Arevalo. It's the City of Kent. This is a case that the City filed against the defendant, not Kelly. Kelly just wanted it to go away because she didn't want to have any contact with the defendant. And she told you that. But 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? If she did, the City would submit to you that she is an Oscar award winning witness.

Defense Counsel: Objection, Your Honor, vouching for the witness.

Judge Pro Tem: Sustained.

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?

And now when you're assessing credibility, you look at the defendant's motive. Does the defendant have a motive to be dishonest? Does the defendant have a motive to lie? Does

> the defendant have a motive to say this didn't happen? He has a motive more than anybody because he is the one that is being charged with the crime. You can consider that. You can consider what motive, bias, or prejudice he may have. 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.

CP 320-327. Becerra-Arevalo and the RALJ court took issue with the portion of the prosecutor's closing at CP 325, which is underlined above. CP 47-49, 459-460, RP 13, 30-33. However, no objection, motion to strike, or motion for a mistrial was made by Becerra-Arevalo at trial concerning that statement. CP 325-326.

Nothing stated in the prosecutor's closing concerning Ms. Fitzpatrick's demeanor was improper, particularly when considered in the context of the prosecutor's entire closing. There is no evidence that the prosecutor intended the remarks to be a comment on Becerra-Arevalo's constitutional right to confront the witnesses against him, to unnecessarily chill or penalize him for asserting that right, or to ask the jury to draw adverse inferences from the exercise of that right. It was completely proper for the prosecutor, when arguing credibility issues to the jury, to discuss the demeanor of the witnesses as they testified, and

this argument was not an improper comment on Becerra-Arevalo's right to confront his accuser. Even if the court were to find any of the statements improper, none of them were objected to by Becerra-Arevalo, rose to the level of flagrancy requiring reversal and remand, or were of such a nature that they could not have been cured had Becerra-Arevalo objected at trial. Again, the focus of the inquiry is to be more on the ability to cure any resulting prejudice with an instruction, than the flagrant and ill-intentioned nature of the remarks. *Emery*, 174 Wn.2d at 762.

c. Any Prejudice That Resulted From Prosecutor's Statements Could Have Been Cured Had An Objection Been Made.

(1) Prosecutor's Statements Were Not Flagrant or Ill-Intentioned.

To obtain reversal without having objected at trial, Becerra-Arevalo must prove that the prosecutor's statements were so flagrant and ill-intentioned that no curative instruction would have obviated any prejudicial effect on the jury. *Emery*, 174 Wn.2d at 759-761. Prosecutor statements have been found to be flagrant and ill-intentioned when they appeal to racial bias in a way that undermines the defendant's credibility and the presumption of innocence, include repeated attempts to instill inadmissible evidence in juror's minds during closing despite the

sustaining of numerous objections on the matter during trial, and involve the use of highly prejudicial images of the defendant during closing emblazoned with the prosecutor's opinion that the defendant was "guilty." *See*, State v. Monday, 171 Wn.2d 667, 680, 257 P.3d 551 (2011), State v. Alexander, 64 Wn. App. 147, 155-156, 822 P.2d 1250 (1992), *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 705-707, 286 P.3d 673 (2012). However, it has not been found to be flagrant and ill-intentioned for a prosecutor to mention in closing sending the defendant to the "penitentiary" when that issue was discussed by the defense during the defendant's examination and in the defendant's closing argument, or when the prosecutor's arguments included imagined dialogue between the defendant and his murder victim that was prefaced with qualifiers such as "maybe he told her" or "you can be sure that." *See*, State v. La Porte, 58 Wn.2d 816, 821-823, 365 P.2d 24 (1961), and State v. Davis, 175 Wn.2d 287, 338-339, 290 P.3d 43 (2012).

Here, the evidence does not suggest that the prosecutor's actions were flagrant and ill-intentioned. Although Officer Nastansky improperly blurted that Becerra-Arevalo "lied" to her, that statement was neither elicited by the prosecutor's question, nor highlighted by the prosecutor through further questioning. CP 120-121. While the

prosecutor questioned Officer Nastansky on her statement that Becerra-Arevalo was "careful" in how he answered her question, it is clear from the context of the testimony that the inquiry was eliciting Officer Nastansky's personal observations made during her questioning of Becerra-Arevalo and the permissible inferences she drew from that questioning pursuant to *Fisher*. CP 110-111. Additionally, the prosecutor's further questioning of Officer Nastansky during her second redirect regarding the basis for her opinion that Becerra-Arevalo had "lied" to her was in direct response to Becerra-Arevalo's counsel having opened the door to that questioning by eliciting Officer Nastansky's opinion on cross. None of the prosecutor's questioning was flagrant and ill-intentioned. Finally, when the prosecutor's statements in closing are viewed in full context, the prosecutor's comment on Ms. Fitzpatrick's demeanor while she testified in court and in front of Becerra-Arevalo, was clearly argument regarding how the jury could judge credibility, not a direct comment made on Becerra-Arevalo exercising his constitutional right or an appeal for the jury to draw adverse inferences against him for exercising that right. Therefore, the prosecutor's comments, either individually or in combination, were not flagrant and ill-intentioned and cannot be used as a basis to support reversal, and the RALJ court erred

when it held reversal was appropriate based solely upon its determination that the prosecutor's statements were improper.

(2) Any Prejudice Created Could Have Been Cured At Trial Had Becerra-Arevalo Objected.

In order to obtain reversal, not only must Becerra-Arevalo prove the prosecutor's statements were flagrant and ill-intentioned, he must also prove that no curative instruction would have obviated any prejudicial effect on the jury. *Emery*, 174 Wn.2d at 759-761. A defense counsel's failure to move for a curative instruction or mistrial at the time of the argument or event in question strongly suggests to a court that the argument did not appear particularly prejudicial in the context of the trial. *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990). It is presumed that juries follow the court's instruction unless the prosecutorial misconduct is so inherently prejudicial that it is likely to impress itself on the minds of the jurors. *State v. Escalona*, 49 Wn. App. 251, 255, 742 P.2d 190 (1987). If the prejudice could have been cured by a jury instruction, but the defense did not request one, reversal is not required. *State v. Dhaliwal*, 150 Wn.2d 559, 578-581, 79 P.3d 432 (2003), citing *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). In *State v. Jungers*, not only did the Court of Appeals hold that it was not

prosecutorial misconduct when a witness provided an unelicited but improper opinion, it also held that the trial court's act of sustaining defense counsel's timely objection and striking the testifying officer's offending opinion that he believed the drugs he found belonged to the defendant sufficiently cured any resulting prejudice. *Jungers*, 125 Wn. App. at 895. Similarly, in *State v. Dennison*, the Supreme Court held that the trial court's: (i) sustaining of a defense objection, (ii) striking of the offending comments regarding the prosecutor's opinion of the testimony provided by a witness, and (iii) admonishment of the prosecutor, effectively dealt with any prejudicial effect the prosecutor's improper statement may have had and retrial was therefore not necessary. *State v. Dennison*, 72 Wn.2d 842, 847-849, 435 P.2d 526 (1967). If nowhere else, it is here that Becerra-Arevalo's appeal must fail.

In this case, had Becerra-Arevalo's trial counsel properly objected to *any* allegedly improper statements made by the prosecutor, the trial court could have stricken the prosecutor's question or statement, the witness's answer, admonished the prosecutor or witness, instructed the jury to disregard, provided a more detailed instruction to the jury, found a mistrial, or taken some other action to immediately remedy the issue at the trial court level. There was a plethora of options available.

However, neither Becerra-Arevalo in his various briefs, nor the record in this case, demonstrates that any of these actions would have been futile.

Further, defense counsel argued before the RALJ court that its decision not to object was a calculated trial tactic:

> Defense Counsel: 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 . . . So it was a trial tactic . . . .
>
> . . .
>
> and that was a tactic from the defense Counsel that, again, the strategy of that could be debated, certainly.

RP 7-8, 28. Counsel argued that its failure to object to: (i) Officer Nastansky's blurted statement that Becerra-Arevalo "lied" to her, (ii) the prosecutor's follow up questions in response to defense counsel's extensive cross of Officer Nastansky concerning the "lie," and arguably, (iii) the prosecutor's closing statements to which counsel took issue with, was a deliberate trial tactic. However, Becerra-Arevalo's counsel provided no argument before the RALJ court as to how the prosecutor's statements were so flagrant and ill-intentioned, particularly in light of

defense counsel's significant cross examination of Officer Nastansky concerning her opinion that Becerra-Arevalo "lied" to her, that no curative instruction would have obviated any prejudicial effect on the jury. CP 30-54, RP 3-17, RP 27-30. Becerra-Arevalo's bare assertion that such action would have been futile does not carry his high burden to support reversal and remand for retrial, particularly when it is presumed that a jury follows the court's instruction.

Any inherently prejudicial remarks that were made that impressed themselves on the minds of the jurors came from a deliberate trial tactic of Becerra-Arevalo's defense counsel to question Officer Nastansky *extensively* concerning Becerra-Arevalo's alleged "lie" to her. CP 122-127. It was defense counsel's questions, and the testimony defense counsel elicited based on those questions, that likely left any prejudicial impact on the jury. This testimony, and defense counsel's line of questioning, cannot be attributed to the prosecutor or used as the basis to support a finding that the prosecutor's actions created the type of prejudice that could not have been cured by the trial court had an objection been made.

(3) Prosecutor's Statements Did Not Have Substantial Likelihood of Affecting the Verdict.

In addition to proving that the prosecutor's statements were so flagrant and ill intentioned that no curative instruction would have obviated any prejudicial effect on the jury, Becerra-Arevalo must also prove that any resulting prejudice had a substantial likelihood of affecting the verdict. Becerra-Arevalo has not met this burden.

A reviewing court considers the weight of properly admitted evidence in determining any prejudice that results from a prosecutor's improper statements. *See* *State v. Warren*, 165 Wn.2d 17, 29, 195 P.3d 940 (2008), *State v. Hager*, 171 Wn.2d 151, 160, 248 P.3d 512 (2011). A defense counsel's failure to move for a curative instruction or mistrial strongly suggests the argument did not appear particularly prejudicial in the context of the trial. *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990). Reversal is not required unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. *State v. Korum*, 157 Wn.2d at 647.

In *Hager*, the Supreme Court held that a testifying officer's statement that the defendant was "evasive" was improper because it

violated a pre-trial order, however, the court held that the improper statement did not likely affect the verdict because the statement was brief, was never mentioned again, and any capacity for prejudice was slight when compared with the inconsistent statements made by the defendant. *Hager*, 171 Wn.2d at 160. Similarly, in *Korum*, the Supreme Court held that the admission of improper evidence did not materially affect the outcome of the trial given other admissions the defendant had made that implicated him in some of the crimes for which he was convicted. *Korum*, 157 Wn.2d at 647.

Here, as in *Hager* and *Korum*, there was significant testimony, other than Officer Nastansky's opinion testimony, from which the jury could chose to believe Ms. Fitzpatrick's version of events over the defendant's version. During the trial, Ms. Fitzpatrick's courtroom testimony regarding the assault was consistent with what she previously reported to Officer Nastansky and to Becerra-Arevalo's boss, Teresa Hutchens. CP 76, 107, 261, 266, 212-213. While Becerra-Arevalo chose to testify on his own behalf, his courtroom testimony, in contrast with Ms. Fitzpatrick's, was inconsistent with his own prior statements and other witnesses' testimony. On direct, Becerra-Arevalo testified 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 Becerra-Arevalo 10 days prior to Officer Nastansky's visit, on November 2, 2009, and informed him of Ms. Fitzpatrick's allegations. CP 256, 258, 261-262. In his testimony, 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 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 266-267, 274-276. Ms. Hutchens also testified that 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 office, but that Ms. Fitzpatrick was not there. CP 266-267. On cross, 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 other testimony from which the jury could chose to disbelieve Becerra-Arevalo, he cannot meet his burden by proving that any alleged improper statements made by the prosecutor had a substantial likelihood of affecting the verdict.

4. Officer Nastansky Did Not Provide Improper Opinion Testimony Regarding Becerra-Arevalo's Guilt to Justify Reversal and Remand.

a. Becerra-Arevalo Failed to Object at Trial to Preserve Issue of Improper Opinion Testimony for Appeal.

Separately from his prosecutorial misconduct claim, Becerra-Arevalo alleged before the RALJ court that it was reversible error for the trial court to allow Officer Nastansky to provide improper opinion testimony. CP 30, 49. A party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial. *State v. Saunders*, 120 Wn. App. 800, 86 P.3d 232 (2004). A litigant cannot remain silent as to an alleged error at trial and then, later, raise objections thereto for the first time on appeal. *See, e.g,. State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). A party raising an objection should clearly state the matter objected to and the basis for the objection, the purpose being to "clarify . . . the exact points of law and reasons upon which counsel argues the court is committing error...." *State v. Walker*,

121 Wn.2d at 217. "The pertinent inquiry on review is whether the exception was sufficient to apprise the trial judge of the nature and substance of the objection." *Id.* If an exception is inadequate to apprise the judge of certain points of law, "those points will not be considered on appeal." *Id.* The absence of a motion for mistrial at the time of the argument strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial. *State v. Swan*, 114 Wn.2d at 661.

As stated earlier, Becerra-Arevalo did not object when Officer Nastansky testified that her conversation with Appellant was "odd" because he was "careful" about what he said and how he answered her questions. CP 110. Becerra-Arevalo only objected on the basis of "speculation" when the City asked Officer Nastansky a follow up question as to what it was that made Officer Nastansky believe Becerra-Arevalo was trying to be "careful" about what was said. CP 110, line 14. After Becerra-Arevalo's counsel further questioned Officer Nastansky, this time implying that Becerra-Arevalo was only "guarded" when asked about his relationships with women on the property, the prosecutor asked Officer Nastansky if Becerra-Arevalo was also "guarded" about the events on the date of the assault. CP 119-120. While Officer Nastansky answered in

the affirmative, she also blurted that Becerra-Arevalo had "lied" to her. CP 120. However, Becerra-Arevalo never objected, moved to strike, or moved for a mistrial based on the prosecutor's question or Officer Nastansky's answer. CP 120-121. Thereafter, defense counsel made a deliberate trial tactic to question Officer Nastansky about her blurted statement and questioned her extensively about the "lie," ultimately eliciting from Officer Nastansky her opinion that Becerra-Arevalo had lied to her. CP 121-122, 124-126. As defense counsel had elicited Officer Nastansky's opinion on cross, but not the basis upon which that opinion was formed, the prosecutor addressed the basis of Officer Nastansky's opinion on redirect. CP 128-129. While defense counsel objected to the prosecutor's question, he did so on the basis of "speculation," not improper opinion or prosecutorial misconduct, and he never objected to Officer Nastansky's response. CP 128-129. Those objections that Becerra-Arevalo's counsel did make were insufficient to preserve the issue for appeal, and Becerra-Arevalo waived the issue of improper opinion on appeal unless he can meet the standard of review set out in *Heatley*, discussed below. *See*, *State v. Walker*, 121 Wn.2d at 217.

b. Because Becerra-Arevalo Failed To Object At Trial, The Proper Standard Of Review For A Claim Of Improper Opinion Testimony Is That Under *Heatley*, And Under That Standard, No Reversible Error Occurred.

Because Becerra-Arevalo did not properly object at trial, he alleged in his brief before the RALJ court that improper opinion testimony was an error of constitutional magnitude that could be raised for the first time on appeal and required reversal unless the error was harmless. CP 49-50. That, however, is the incorrect standard of review.

When an objection to an improper opinion is not made at trial, this court rejected the proposition set out in *State v. Carlin*, 40 Wn. App. 698, 700 P.2d 323 (1985), the case relied on by Becerra-Arevalo before the RALJ court, that opinion testimony on guilt necessarily alleges a manifest constitutional error that may be raised for the first time on appeal. *State v. Heatley*, 70 Wn. App. 573, 583 (1993), *review denied by* 123 Wn.2d 1011 (1994). Instead, *Heatley* adopted the approach in *State v. Lynn*, 67 Wn. App. 339, 835 P.2d 251 (1992) for determining whether the admission of opinion testimony involves a manifest error affecting a constitutional right that may be raised for the first time on appeal,

thereby triggering the harmless error standard. That approach 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.

Heatley, 70 Wn. App. at 585. (*emphasis added*). However, after completing that review, should the court decide that an error is of constitutional import, then a harmless error analysis requires the prosecution to show beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained, and requires consideration of a host of factors, including the importance of the witness's testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. *State v. Jasper*, 174 Wn.2d 96, 117, 271 P.3d 876 (2012).

Becerra-Arevalo cannot meet *Heatley*'s preliminary standard to obtain review as he cannot show that the portion of the officer's opinion, not elicited by defense counsel on cross or in pertinent reply by the prosecutor to that cross examination, was manifest and had practical and identifiable consequences in the trial. Evidence does not constitute improper opinion testimony when the testimony is not a direct comment on the defendant's guilt, is helpful to the jury, and is based on inferences from the evidence. *State v. Fisher*, 74 Wn. App. 804, 813-814, 874 P.2d 1381 (1994), *State v. Saunders*, 120 Wn. App. 800, 812 (2004). Testimony that a defendant was "evasive" had the capacity to cause only slight prejudice in comparison to the defendant's inconsistent statements about his whereabouts. *State v. Hager*, 171 Wn.2d at 160-161. In *Saunders*, the court held that an officer's statement that the defendant's statements were "inconsistent" was not an impermissible opinion because the officer relied on his personal, direct knowledge of the defendant's statements in describing them as inconsistent, and therefore did not impermissibly invade the exclusive province of the jury and was not unacceptable opinion testimony. *Saunders*, 120 Wn. App. at 812. When there is 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 as an opinion on his credibility, a court should have faith in the juror's common sense ability to come to a reasonable conclusion about the defendant's credibility. *State v. Hager*, 171 Wn.2d at 160-161.

Here, Officer Nastansky's testimony concerning Becerra-Arevalo being "careful" when he spoke to her, in the full context of her testimony, was more akin to an inference from the evidence or testimony concerning his demeanor, which *Saunders*, *Hager*, and *Fisher* provide is permissible testimony. While Officer Nastansky did blurt that Becerra-Arevalo had "lied" to her in claiming that he did not know why Officer Nastansky was there to see him, in the same breath, she qualified and downplayed that statement stating that because he had already been contacted by the property manager, "you would *assume* that he would know why I was there." CP 119-120 (emphasis added). Any impact that this statement had on the case would have been minimal. After Officer Nastansky made this statement, the prosecutor immediately moved on and asked no further questions on this topic. CP 119-120. Additionally, in closing, the prosecutor highlighted time and time again that the jurors, and the jurors alone, were the sole judges of credibility in the case, including determining the credibility of Officer Nastansky and Becerra-Arevalo. CP

320, 321, 325-327, 349. Therefore, this testimony, even if error, was not a manifest error that had practical and identifiable consequences in the trial when it is reviewed in the context of the total argument, the issues in the case, the evidence admitted, and the instructions provided. Any improper opinions provided by Officer Nastansky were elicited by Becerra-Arevalo's counsel on cross based on a deliberate trial tactic, and he cannot now claim that improper testimony he elicited warrants reversal and a new trial.

Assuming, *arguendo*, that this Court finds Becerra-Arevalo met *Heatley*'s preliminary standard to obtain review and that this claim must survive a harmless error analysis, the above facts, coupled with the rebuttal testimony that contradicted much of Becerra-Arevalo's testimony, and the prosecutor's repeated statements in closing that the jury and the jury alone are the ones to judge credibility, establish that the jury had more than enough untainted evidence to disbelieve Becerra-Arevalo on their own, and hence, any potential error committed was harmless.

5. Prosecutor's Statements Were Invited, Provoked, Or In Pertinent Reply To The Questioning Of Becerra-Arevalo's Counsel And Is Barred As Basis For Reversal.

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), *quoting* *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). A prosecutor does not commit misconduct by eliciting witness testimony that vouches for or against the veracity of another witness if the defense has opened the door to such testimony by placing in issue the first witness's opinion of the second witness's veracity. *State v. O'Neal*, 126 Wn. App. 395, 109 P.3d 429 (2005); *State v. Ramos*, 164 Wn. App. 327, 334, 263 P.3d 1268 (2011). Once a party has raised a material issue, the opposing party is permitted to explain, clarify, or contradict the evidence elicited on cross examination. *State v. Berg*, 147 Wn. App. 923, 939, 198 P.3d 529 (2008).

Here, all of the exchanges about Becerra-Arevalo "lying" to Officer Nastansky came from his counsel's re-cross of Officer Nastansky. CP 122-127. In fact, it was Becerra-Arevalo's counsel that drew the

conclusions, in leading questions to Officer Nastansky, 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." CP 125, line 12, 131, line 17-21. In the prosecutor's second re-direct, and based on Becerra-Arevalo significantly opening the door, the prosecutor asked Officer Nastansky why it was that she felt Becerra-Arevalo lied to her. CP 128, line 8. This questioning was permissible by *State v. Ramos* and *State v. Russell* because the comments were in pertinent reply to Becerra-Arevalo's significant questioning of Officer Nastansky on cross of the "lie" Becerra-Arevalo told her. Once Becerra-Arevalo's counsel asked Officer Nastansky to express her opinion that Becerra-Arevalo had lied to her, Becerra-Arevalo's counsel placed that opinion in issue and the prosecutor was permitted to seek testimony from Officer Nastansky to explain or clarify that opinion. While it is unfortunate that Becerra-Arevalo's counsel went down this line of questioning, existing case law supports the prosecutor's redirect of Officer Nastansky on the issue as that questioning was provoked and invited by defense counsel, and Becerra-Arevalo is therefore barred from using any improper remarks the prosecutor may have made, or improper testimony Officer Nastansky may have provided,

to reverse his conviction. The RALJ court therefore erred when it held that the prosecutor's second re-direct eliciting the basis for Officer Nastansky's opinion drawn out by defense counsel on cross was improper and therefore a basis to reverse the conviction and remand for re-trial, a decision contrary to the standard set out in *State v. Ramos* and *State v. Russell*. CP 458-460, RP 30-33. Therefore, Becerra-Arevalo's conviction should be reinstated.

6. Becerra-Arevalo's Appeal For Improper Opinion Testimony Is Barred Under The Invited Error Doctrine.

The invited error doctrine prohibits a party from setting up an error in the trial court then complaining of it on appeal. *In re Pers. Restraint of Tortorelli*, 149 Wn.2d 82, 94 (2003). The doctrine applies when a party induces the trial court to err. *State v. Jones*, 144 Wn. App. 284, 297-299, 183 P.3d 307 (2008).

It is important to note that the only questioning by the City, prior to Becerra-Arevalo's significant cross examination of Officer Nastansky concerning Becerra-Arevalo's "lie" to her, concerned Becerra-Arevalo's demeanor in answering Officer Nastansky's questions, which Officer Nastansky interpreted as Becerra-Arevalo being "careful." CP 110-111; 119-120. Unprompted by the prosecutor, Officer Nastansky blurted that Becerra-Arevalo had "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. There was no objection or motion to strike made by Becerra-Arevalo's counsel and the prosecutor immediately moved on. CP 119-120. On re-cross, however, Becerra-Arevalo's counsel made a deliberate trial tactic to question Officer Nastansky extensively about the "lie" in an effort to discredit her, as Becerra-Arevalo conceded before the RALJ court. CP 122-131. By going down that line of questioning and eliciting Officer Nastansky's opinions that: (i) Becerra-Arevalo lied to her, (ii) Becerra-Arevalo was guarded in answering her questions, (iii) guilty people are guarded, and (iv) innocent people are not guarded, Becerra-Arevalo opened the door to Officer Nastansky testifying on redirect regarding the bases for her opinions. CP 122-131. The trial court agreed and allowed the prosecutor in her second redirect to question Officer Nastansky regarding the bases for the opinions elicited from her by Becerra-Arevalo's counsel on cross. CP 128-129. Therefore, any error attributable to this questioning was invited by Becerra-Arevalo, is barred from appeal by the invited error doctrine, and the RALJ court erred when it reversed and remanded the case for a new trial.

D. CONCLUSION

The record in this case and existing law does not support the RALJ court's determination that reversible error occurred. The RALJ court's act of reversing Becerra-Arevalo's conviction and remanding the case for retrial based solely on its determination that the prosecutor's statements were improper, without having considered whether any resulting prejudice from those statements could have been cured had Becerra-Arevalo objected at trial, was improper and contrary to existing case law. When the record in this case is reviewed under the proper standard of review as described in *State v. Emery*, it is clear that no prosecutorial misconduct occurred to warrant a new trial. First, the prosecutor's questions of Officer Nastansky that sought the demeanor she observed from Becerra-Arevalo that led her to believe he was being "careful" in answering her questions were not a direct comment on Becerra-Arevalo's guilt, were based on inferences from the evidence, and were therefore proper. Second, the form of the prosecutor's question to Officer Nastansky did not elicit the officer's blurted response that Becerra-Arevalo "lied" to her. Third, the prosecutor's follow up questions to Officer Nastansky regarding the basis for her opinion that Becerra-Arevalo "lied" to her were invited, provoked, and in pertinent

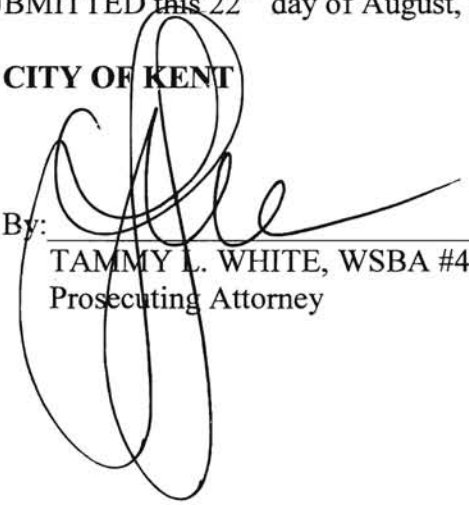
reply to defense counsel's cross examination of the officer on that issue, and even if improper, those prosecutor statements cannot be used as a basis for reversal. Finally, any comments the prosecutor made in her closing statement regarding the victim's demeanor as she testified in court, when viewed in context, were comments made to the jury in discussing the jury's assessment of the victim's credibility and were not direct comments on Becerra-Arevalo exercising his constitutional right to confront the witnesses against him, nor made in a manner to chill his exercise of that right nor requesting the jury draw a negative inference from Becerra-Arevalo exercising that right.

Independently of any prosecutorial misconduct claim, Becerra-Arevalo also cannot prevail on a claim of improper opinion testimony. While it was improper for Officer Nastansky to blurt "and he lied to me also," the likelihood that her isolated statement would have caused prejudice in the case was slight as the officer qualified her opinion as an assumption based on information she believed was known to Becerra-Arevalo, and there was significant evidence of contradictory statements made by Becerra-Arevalo in this case. Therefore, no manifest error occurred under the *Heatley* standard to warrant review. Not only did Becerra-Arevalo fail to object to Officer Nastansky's blurted response,

his counsel made a deliberate trial tactic to question the officer extensively about that statement. Through that deliberate trial tactic taken by Becerra-Arevalo's counsel, he invited any error that may have occurred regarding improper opinion testimony and his appeal on that issue cannot stand. For these reasons, as well as the argument provided in Section C above, the City asks that this Court overturn the decision of the RALJ court and reinstate Becerra-Arevalo's conviction for Assault in the 4th Degree with Sexual Motivation.

RESPECTFULLY SUBMITTED this 22nd day of August, 2013.

CITY OF KENT



By: _____
TAMMY L. WHITE, WSBA #43595
Prosecuting 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 August 22, 2013, I caused to be filed the foregoing Brief of Petitioner City of Kent, on behalf of the City of Kent, with the Clerk of the Court via ABC Legal Messenger. On this same date, and in the manner indicated below, I caused the City's Brief and this appended Declaration of Service to be served upon:

Elaine L. Winters
Washington Appellate Project
701 Melbourne Tower
1511 Third Ave
Seattle, WA 98101

[X] ABC Legal Messenger

DATED at Kent, Washington on this 22nd day of August, 2013.

Kim A. Komoto