SUPREME COURT NO. 96112-3

NO. 76371-7-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JUSTIN BACANI,

Petitioner.

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

The Honorable Kenneth Schubert, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Justin Bacani asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

The petitioner seeks review of the Court of Appeals' unpublished decision in State v. Justin Matthew Bacani, filed June 18, 2018 ("Opinion" or "Op."), appended to this petition as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. A redacted 9-1-1 call made by the petitioner left the jury with the impression that he was willing to kill another person. However, admission the unredacted call would have left jurors with the opposite impression—that he was not willing to kill because to do so would result in life in prison. Where the redacted call was misleading and prejudicial, did the trial court violate the petitioner's right to present a defense and the rule of completeness? If counsel failed to preserve this error, was counsel prejudicially ineffective?

2. Did the trial court err by failing instruct the jury on voluntary intoxication?

3. Did prosecutorial misconduct deny the petitioner a fair trial?

D. STATEMENT OF THE CASE[1]

The State charged Bacani with second degree murder for the February 2015 death of Annelise Harrison. CP 1-11. The State alleged, in the alternative, theories of intentional murder and felony murder based on second degree assault.[2] CP 1. The jury convicted Bacani as charged. CP 155-56. The court sentenced Bacani to life in prison without the possibility of parole under the persistent offender statute.[3] CP 167-75.

Before trial, the parties argued regarding introduction of a 9-1-1 call (discussed in detail below) placed by Bacani the night that, under the State's theory, Harrison died. Bacani moved to exclude, in its entirety, his statement that "I kill to protect myself *but I already got two strikes* so I don't want to go there." 17RP 1439-62; see also Ex. 39 (disk containing three 9-1-1 calls); CP 234 (unofficial transcripts of 9-1-1 calls, transcribed by police detective). In contrast, the State wished to introduce the statement but

[1] This petition refers to the verbatim reports as follows: 1RP – 7/22, 7/27, and 9/8/15; 2RP – 9/25, 10/2 and 10/26/15; 3RP – 11/2, 11/5 and 12/21/15; 4RP – 4/22, 9/15 and 9/19/16; 5RP – 9/28, 10/24 and 11/4/16; 6RP – 10/25/16; 7RP – 10/27/16; 8RP – 10/31/16; 9RP – 11/1/16; 10RP – 11/2/16; 11RP – 11/3/16; 12RP – 11/7/16; 13RP – 11/8/17; 14RP – 11/9/16; 15RP – 11/14/16; 16RP – 11/16/16; 17RP – 11/17/16 (morning and first portion of afternoon session); 18RP – 11/17/16 (second portion of afternoon session); 19RP – 11/21/16; 20RP – 11/22/16 (morning); 21RP – 11/22/16 (afternoon); 22RP – 11/28/16; 23RP – 11/29/16; 24RP – 11/30/16; 25RP – 12/1/16; 26RP – 12/5/16; 27RP – 12/6/16; 28RP – 12/7/16; 29RP – 12/8/16; and 30RP – 1/27/17.

[2] RCW 9A.32.050(1)(a); RCW 9A.32.050(1)(b).

[3] RCW 9.94A.570; RCW 9.94A.030(38)(a)(i), (ii).

argued the court should redact the reference to "two strikes." 17RP 1439-40.

Bacani's counsel argued the statement should be omitted entirely because, under ER 403, it was more prejudicial than probative. 17RP 1440-42. But, counsel argued, if the court ruled the statement was admissible, the statement regarding "two strikes" should be included because otherwise the statement would mislead the jury. 17RP 1448, 1458-59.

The trial court ruled the statement was admissible and refused to include the "two strikes" language because jury would not understand what "two strikes" meant. 17RP 1457-58. Following additional argument, the court ruled it would admit only Bacani's statement that he would "kill to protect myself" and omit the remainder. 17RP 1458. But the court later determined it would admit the rest of the statement, other than the "two strikes" portion. 17RP 1473.

According to trial testimony, on February 7, 2015, Harrison's body was discovered in the bathroom of a vacant apartment in the Ridgedale apartment complex near 140th Avenue Southeast and Southeast Sixth Street in Bellevue. 11RP 562-63, 572. Maintenance staff made the discovery while investigating an unrelated sewer issue. 11RP 569; 13RP 897-98. The apartment complex was undergoing renovations, so the apartment had been vacant for some time. 11RP 567-68; 13RP 906. Maintenance employees

estimated that three weeks had passed since an authorized person had entered the apartment. 11RP 587-88.

The front door was locked, but a rear sliding door appeared to have been left unlocked, possibly by a contractor. 11RP 574, 598; 14RP 1010. Maintenance employees realized something was amiss upon seeing a purse near the front door. 11RP 572. They found a woman, who was fully clothed, sitting or leaning on a closed toilet. 11RP 579. She had no pulse. The employees summoned authorities. 11RP 580-82.

Detective Jennifer Robertson arrived at the scene about an hour later. 12RP 737-38. She noted that a smoke alarm in the apartment chirped continually, as if running out of batteries. 12RP 752, 844; 15RP 1215. There was no sign of forced entry, but the inside deadbolt lever had apparent blood on it.[4] 12RP 747; 12RP 840-41. Robertson observed black marks on the hall floor. She also observed black marks on the hall walls and baseboards, which otherwise appeared freshly painted. 12RP 748, 840; 13RP 896. Clothing and other miscellaneous items (including toothbrushes and two pairs of women's boots) were strewn about the bathroom. 12RP 750, 879; 13RP 922-29.

[4] A forensic scientist from the state crime lab testified a swab taken from deadbolt and another from the hall matched Bacani's genetic profile. 22RP 1817-18, 1825; 25RP 2213.

Detectives searched the purse. 12RP 757. They discovered several drug-related items including a syringe, a cotton swab, and foil with burn marks. 12RP 779; 13RP 920, 976-77; 14RP 1414. According to Detective Robertson, drug users often use foil to ingest certain drugs. 12RP 779; 13RP 968-69. The syringe was never tested because a detective threw it away. 17RP 1410-11, 1492-93; 22RP 1753-54

A patrol officer eventually recognized the decedent as Harrison, a heroin user who frequented the Crossroads area of Bellevue. 12RP 767-70, 806-07, 810-11, 873; 14RP 1127. The state toxicology lab found evidence of methamphetamine and heroin or their chemical derivatives in her system at the time of death. 14RP 1130; 25RP 2310-27, 2336; 27RP 2384.

Dr. Richard Haruff, a county medical examiner, viewed Harrison's body at the apartment on February 7 and later performed an autopsy. 26RP 96-100. Based on the condition of the body, he believed Harrison had been deceased for "some time." 26RP 104-05, 118-19. Dr. Haruff seemed skeptical Harrison had been dead since February 2 but acknowledged the cool temperature inside the apartment could have affected the body's condition. 27RP 2364-65.

Haruff noted the presence of scrapes and bruises on Harrison's neck, as well as small blood spots (known as petechiae) on her eyes and under her eyelids. 26RP 106-07. Based on these injuries, as well as signs of struggle

at the apartment, he opined Harrison died from asphyxiation due to manual strangulation. 26RP 154-55, 161; 27RP 2356. But Haruff acknowledged that common signs of fatal strangulation, such as deep tissue bruising, were not present. 27RP 2379. Haruff acknowledged, moreover, that the level of heroin or its derivatives in Harrison's blood could have produced a fatal overdose.[5] 26RP 158-60; 27RP 2358, 2386, 2388. Heroin can slow breathing to the point of asphyxiation. 27RP 2359.

Police discovered a flip phone in the purse and a smartphone in Harrison's front pocket. 12RP 758-60; 14RP 1086-87; 16RP 1330. They obtained phone records for each phone. 14RP 1089. Based on phone usage, police believed Harrison took public transportation from Seattle to Bellevue the evening of February 1 or early morning hours of February 2. Records showed the phones were last used during that period. 14RP 1123-24; 16RP 1353, 1358. Police obtained video of Harrison and a man, later identified as Bacani,[6] walking through Westlake Station in Seattle, traveling by bus to Bellevue, stopping at a Walgreens in Bellevue, and walking near the apartments. 15RP 1181-90; 16RP 1364-74; 17RP 1481-86; 19RP 1574-79.

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[5] Notably, Dr. Haruff continued to seek additional toxicology testing well after the autopsy was complete. E.g. 27RP 2385.

[6] 18RP 30; 19RP 1605.

Police discovered three 9-1-1 calls made by the same deactivated cell phone the morning of February 2.[7] 17RP 1508-10. The calls were played for the jury. 17RP 1510-13; 18RP 8-13. Over objection, described above, a redacted version of the third call was played. 17RP 1507.

In the first call, made at 12:13 a.m., 18RP 12-13, the caller asks the dispatcher to "triangulate the call." He gives his location as "NE Fifth Street and . . . 14th Avenue Northeast or something." Ex. 39 (CFS 974). He took the "Rapid Ride" bus from Bellevue Transit center. The caller wants the dispatcher to know who and where he is, in case something happens. He expresses fear that two people were shot "downtown last night" and states he is "black" in a white neighborhood and feels uncomfortable. The caller gives his name as Justin Bacani. He tells the dispatcher he is with a friend and can be heard addressing "Annelise." Ex. 39.

On the brief second call, made at 2:18 a.m., only muffled sounds can be heard. 17RP 1510-11; Ex. 39 (CFS 12).

On the third call, made at 2:44 a.m., 18RP 12-13, the caller whispers. He asks dispatcher to triangulate the call. He tells the dispatcher he is "on like 140th in Bellevue." Ex. 39 ("CFS 21 (redacted)"). He is in an apartment complex and there is a man outside with a gun. The man is trying to sneak

[7] The phone was later found in Bacani's possession. 19RP 1629-31, 1658.

up on him. The dispatcher asks if the caller is "Justin. The caller says "yes." The dispatcher asks if the caller is with someone. The caller says he is with a friend, a "female" named Rachel, who is sleeping. He tells the dispatcher she can't speak with the friend. He explains he feels paranoid and reiterates there is a man with a gun outside. The dispatcher reassures the caller she has notified police and asks if he has a weapon. The caller eventually states, in a whisper, "I kill to protect myself [redacted] so I don't want to go there." Ex. 39 at approx. 5:10-5:17. The dispatcher asks, "So you're saying that you have killed to protect yourself?" Id. at approx. 5:18-5:20. The caller does not answer. Ex. 39.

Phone records indicated Bacani contacted several people the morning of February 2. 21RP 13-15; 19RP 1629-30; 18RP 26-27; 23RP 1968-69, 1972-75. One was Andrew Whitehead, a deacon at the church Bacani attended. 23RP 1897, 1900-02. Bacani called Whitehead the morning of February 2 before 7:00 a.m. and asked to visit. 23RP 1897, 1909-10. When Bacani arrived, however, Bacani refused to enter Whitehead's residence. Whitehead reported that Bacani appeared anxious and said he thought people were watching him. 23RP 1908. Whitehead suspected Bacani had used methamphetamine. 23RP 1908.

Bacani's cousin Latena Isabel received a call from Bacani on February 3, 2015. 24RP 2028. He asked her to call 9-1-1 on his behalf

because he had just been hit by a car and his phone was out of minutes. 24RP 2028, 2034-35, 2065. Isabel testified that the next day, Bacani explained he asked her to call 9-1-1 because he wanted to avoid submitting to urinalysis during a meeting with his community corrections officer. He believed the test would have been "dirty." 24RP 2033.

Bacani was convicted as charged and appealed. CP 185. He argued, in part, that the trial court erred by admitting only a misleading portion of the 9-1-1 call, that the court erred in failing to instruct the jury on voluntary intoxication, and that prosecutorial misconduct denied him a fair trial.

The Court of Appeals rejected these arguments. Op. at 8-22. Bacani now asks this Court to accept review and reverse the Court of Appeals.

E. REASONS REVIEW SHOULD BE ACCEPTED

1. REVIEW SHOULD BE GRANTED UNDER RAP 13.4(b)(4) BECAUSE THE CASE INVOLVES AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST—WHETHER BACANI'S STATEMENT REGARDING "STRIKES" COULD BE EXCLUDED WHERE THE STATEMENT WAS NECESSARY FOR HIS DEFENSE.

This Court should accept review under RAP 13.4(b)(4). The trial court erred by admitting a misleading portion of Bacani's statement to the 9-1-1 operator during the third call. The complete statement suggested that Bacani was willing to kill to protect himself, but, crucially, his statement clarified that he would not do so because he had "two strikes." 17RP 1458-

59 (defense argument in favor of admission). Given that three-strikes laws (and their consequences) are the subject of ardent media coverage, an average juror would likely have understood that another strike could mean a life sentence. And, contrary to the Court of Appeals decision, an average juror would also understand that "strikes" do not always represent the most extreme forms of criminality and that strike-based sentencing schemes are often unduly harsh. The trial court's ruling to admit only a misleading and prejudicial portion of the call violated ER 106, rule of completeness, as well as Bacani's constitutional right to present a defense. Because the error was prejudicial, reversal is required. And, although Bacani believes that any evidentiary error was preserved, should this Court conclude otherwise, counsel was ineffective for failing to frame its theory under ER 106 or the "rule of completeness."

The federal and state constitutions guarantee accused persons the right to present a defense, including the right to introduce relevant evidence and cross-examine witnesses. U.S. CONST. amend. VI; CONST. art. 1, § 22; State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). An accused has the right to "present [his] version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." State v. Thomas, 150 Wn.2d 821, 857, 83 P.3d 970 (2004) (quoting Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 1925, 18 L. Ed. 2d 1019 (1967)).

ER 106 provides:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the party at that time to introduce any other part, or any other writing or recorded statement, which ought in fairness to be considered contemporaneously with it.

ER 106. Even before adoption of the rules of evidence, the common-law rule of completeness provided that when the prosecutor introduces part of an inculpatory statement made by an accused, the accused has the right to have the whole conversation admitted if it is part of the same conversation, even if it consists of "self-serving statements." People v. Warren, 65 Mich. App. 197, 199-200, 237 N.W.2d 247 (1975). The purpose of the rule of completeness is "to prevent unfairness which may result if a statement is taken out of context." Moody v. Pulte Homes, Inc., 125 Mich. App. 739, 747, 337 N.W.2d 283 (1983) (discussing identical rule of evidence), rev'd in part on other grounds 423 Mich. 150, 378 N.W.2d 319 (1985). In determining fairness, the issue is whether "the meaning of the included portion is altered by the excluded portion." Young v. Commonwealth, 50 S.W.3d 148, 169 (Ky.2001).

Introduction of the complete statement (if it was to be admitted at all) was crucial to Bacani's ability to defend against the charges. The court's primary reason for excluding the "two strikes" comment appears to have been that it would be confusing. 17RP 1457-58. But, given broad

public familiarity with three-strikes laws, no clarification was required. The concept of "strikes" derives from the sport of baseball, and it is commonly known that only three are allowed before the player is "out." Moreover, a casual Internet search of the term "three strikes" reveals that three-strikes *laws* have eclipsed the historic roots of the term. See Appendix B (first page of "Google" search results for "three strikes," based on August 1, 2017 Internet search, originally appended to Brief of Appellant). Thus, it is widely understood that a person who commits three crimes of a certain level of severity is "out," i.e., imprisoned for life.

Relatedly, the Court of Appeals' assertion, that the statement was properly excluded due to extreme prejudice, is baffling. Op. at 11-12. Bacani wanted the statement in, for good reason. And, as indicated by the same Internet search, jurors were likely to understand that strikes do not necessarily reflect the most extreme forms of criminality—hence the public outcry over the often unduly harsh consequences of such laws. App. B.

Admission of only a portion of Bacani's statement was unfair and misleading because it altered the meaning of the statement. Young, 50 S.W.3d at 169. It was also devastating to Bacani's defense. The jury heard a statement indicating Bacani was willing to kill. Yet the complete statement meant the opposite, that Bacani was *not* willing to kill, even to defend himself in his paranoid state. In summary, the unredacted statement

reconciled with Bacani's theory of the case. The redacted statement devastated the defense.

Admission of the statement violated Bacani's right to present a defense. It also violated the rules of evidence. Under any standard, the error was not harmless. This Court should grant review and reverse.[8]

2. REVIEW IS SHOULD BE GRANTED UNDER RAP 13.4(b)(1) BECAUSE PRECEDENT FROM THIS COURT REQUIRED THAT THE JURY BE INSTRUCTED ON VOLUNTARY INTOXICATION.

This Court should also accept review RAP 13.4(b)(1). Contrary to the Court of Appeals opinion, which primarily relied upon its own prior decision, case law from this Court establishes an instruction was proper.

Counsel requested a voluntary intoxication instruction, arguing that, based on all the evidence presented at trial, the jury could draw an inference that Bacani was high on methamphetamine at the time Harrison was killed, affecting his ability to form intent. CP 125; 27RP 2238-44, 2458. The court denied the request. 27RP 2238-44. The erroneous denial was prejudicial.

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[8] *If* counsel failed to preserve the error, moreover, counsel was ineffective. ER 103(a)(1) requires "a timely objection . . . stating the specific ground of objection, if the specific ground was not apparent from the context." Here, counsel's objection to the incomplete and misleading partial statement was apparent from the context. State v. Swanson, 181 Wn. App. 953, 958, 327 P.3d 67 (2014). While any evidentiary error was preserved by counsel's arguments, should this Court find otherwise, counsel was—for the reasons explained in Bacani's briefing below—ineffective for failing to couch its theory under ER 106 or the "rule of completeness." Brief of Appellant at 28-30.

A voluntary intoxication instruction allows a jury to consider the effect of voluntary intoxication by alcohol or drugs on a defendant's ability to form the necessary mental state for a charged crime. State v. Coates, 107 Wn.2d 882, 889, 735 P.2d 64 (1987). "Intoxication" means "an impaired mental and bodily condition which may be produced either by alcohol, which is a drug, or by any other drug." State v. Dana, 73 Wn.2d 533, 535, 439 P.2d 403 (1968); State v. Hackett, 64 Wn. App. 780, 784, 827 P.2d 1013 (1992). Such an instruction, if warranted based on the evidence, is mandatory. State v. Rice, 102 Wn.2d 120, 123, 683 P.2d 199 (1984).

The standard voluntary intoxication instruction provides that

> No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant *[acted][or][failed to act]* with (fill in requisite mental state).

11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 18.10 (4th ed.); accord RCW 9A.16.090. The defense proposed instruction based on the pattern instruction. CP 125.

A trial court should instruct a jury on voluntary intoxication if: (1) the crime charged includes a mental state as an element, (2) there is substantial evidence of drug or alcohol use and (3) the accused presents evidence that the drug use affected his ability to form the requisite mental state. State v. Webb, 162 Wn. App. 195, 209, 252 P.3d 424 (2011). A trial

court's refusal to instruct the jury on voluntary intoxication is reversible error when these three elements are satisfied. Rice, 102 Wn.2d at 123.

In evaluating whether such an instruction should be given, the court must interpret the evidence "most strongly" in the defendant's favor and "must not weigh the proof, which is an exclusive jury function." State v. Douglas, 128 Wn. App. 555, 561-62, 116 P.3d 1012 (2005).

Here, the trial court erred in failing to instruct the jury on voluntary intoxication. The first element of the Webb three-part test (mental state required for crime) is satisfied. Evidence of intoxication and its effects may be used to negate the element of intent. RCW 9A.16.090; State v. Carter, 31 Wn. App. 572, 575, 643 P.2d 916 (1982). The crimes of intentional murder and felony murder based on second degree assault require the State to prove the accused acted with intent.[9]

The second element is also satisfied. Viewing all the evidence in Bacani's favor, there was substantial evidence of his intoxication at the time of Harrison's death. Bacani told his cousin that he was worried about testing positive for drugs on February 3, the day after Harrison died under

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[9] See RCW 9A.32.050(1)(a) ("[a] person is guilty of murder in the second degree when [w]ith intent to cause the death of another person but without premeditation, [he] causes the death of such person . . . ."); RCW 9A.32.050(1)(b) ("[a] person is guilty of murder in the second degree when [he] commits or attempts to commit any felony, including assault . . . ."); RCW 9A.36.021(1)(g) (second degree assault by strangulation); see also CP 144 (instruction defining assault as "an *intentional* touching or striking of another person that is harmful or offensive) (emphasis added)).

the State's theory. 24RP 2028, 2063-64. Moreover, Andrew Whitehead spent time with Bacani hours after the death occurred. 23RP 1905-09. Based on Bacani's paranoid behavior, Whitehead suspected Bacani was suffering from the effects of methamphetamine use at that point. Finally, the State introduced bizarre 9-1-1 calls that, under the State's theory, bookended Harrison's death. 17RP 1510-13; 18RP 8, 12-13; Ex. 39. Viewed most favorably to Bacani, this evidence supports the instruction.

Finally, the third element is also satisfied. Case law on this factor is inconsistent. State v. Walters, 162 Wn. App. 74, 83, 255 P.3d 835 (2011) (noting different results in this Court's opinion in Rice, 102 Wn.2d at 122-23, versus Division One's opinion in State v. Gabryschak, 83 Wn. App. 249, 253, 921 P.2d 549 (1996)). But in any event evidence presented by both parties suggested that methamphetamine use affected Bacani's ability to perceive and react to the world around him. "The effect of drugs, while certainly a proper subject of expert testimony, has become a subject of common knowledge among laypersons." People v. Yeoman, 31 Cal. 4th 93, 162, 72 P.3d 1166, 2 Cal. Rptr. 3d 186, 248 (2003). The record reflects ample evidence of Bacani's intoxication (and extreme paranoia) at or around the time that, under the state's theory, the death occurred. Considering the paranoia and fear of perscution on display during the 9-1-

1 calls, there is ample evidence of the drug's effects on Bacani's ability to form intent.

Bacani was, moreover, prejudiced by the failure to instruct the jury on involuntary intoxication. Each side in a criminal trial is entitled to instructions based on its theory of the case if, as here, there is evidence to support them. Hackett, 64 Wn. App. at 785. Crucially, a "'defense attorney is only required to argue to the jury that the facts fit the law; [he] should not have to convince the jury what the law is.'" State v. LeFaber, 128 Wn.2d 896, 913 P.2d 369 (1996), abrogated in part on other grounds by State v. O'Hara, 167 Wn.2d 91, 217 P.3d 756 (2009). The test for sufficiency of instructions is whether the court's instructions afforded counsel a satisfactory opportunity to argue his theory to the jury. Hackett, 64 Wn. App. at 787 (citing Dana, 73 Wn.2d at 537). Instructional error is presumed prejudicial. Walters, 162 Wn. App. at 84 (citing Rice, 102 Wn.2d at 123).

Here, the instructions did not inform the jury how it could apply methamphetamine intoxication the elements of the crime. Although the primary defense theory was that Harrison had died of a drug overdose, the defense also embraced the secondary theory that the State could not prove Bacani acted with intent. 27RP 2442-43.[10] A voluntary intoxication

[10] Inconsistent defenses are permitted so long as the evidence presented by either party affirmatively establishes the defendant's alternative theory. State v. Fernandez Medina, 141 Wn.2d 448, 457-62, 6 P.3d 1150 (2000).

instruction would have allowed the defense to advance the theory that due to his intoxication Bacani could not have formed the intent to kill or even to assault. The court's refusal to give the instruction left the defense without the means to articulate this theory. LeFaber, 128 Wn.2d at 913. The lack of instruction was, therefore, prejudicial. Hackett, 64 Wn. App. at 787. This Court should grant review and reverse.

3. REVIEW SHOULD BE GRANTED UNDER RAP 13.4(b)(4) BECAUSE THE PROSECUTOR'S USE OF "WE" STATEMENTS CONSTITUTED MISCONDUCT AND THE CASE PRESENTS AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST.

Review is appropriate under RAP 13.4(b)(4). The prosecutor's use of "we" statements sought to improperly align the prosecution with the jury. This Court should accept review because case law Washington case law is scarce on this form of misconduct. See Op. at 22. Nonetheless, the prosecutor's misconduct in this case denied Bacani a fair trial.

During closing argument, the prosecutor raised several questions regarding the circumstances of Harrison's death. He argued the State was not required to answer the questions. The prosecutor added "[t]hese questions can really only be answered by the killer." Defense counsel objected, and jury was instructed to disregard this argument. 28RP 2493. Counsel objected again when the State argued, "Again, [the State] would love to be able to answer every question for you. We would love to be able

to answer every question for [Harrison's] family, but we can't." 28RP 2494. The court also instructed the jury to disregard this argument. 28RP 2494.

Shortly thereafter, the State asserted the controlling law was rooted in "shared common intellectual sense and shared common moral sense." 28RP 2495. The court overruled a defense objection. 28RP 2495. Nearing conclusion of his argument, the prosecutor continued with the theme of "shared common moral sense," arguing:

> As I said at the beginning of my remarks, we spent a lot of time together. I thank you for your attention during these closing remark[s]. We have met a lot of witnesses. We have heard a lot of testimony. We have seen a lot of evidence.
>
> Based on that evidence, we know what happened back on February 2nd, 2015. The evidence is clear. The evidence is overwhelming. That is that on that day, in the State of Washington, Justin Bacani . . . committed intentional murder, which means that he acted with intent to cause the death of Annelise Harrison and [she] died as a result of those acts; and/or, he committed felony murder, meaning that he . . . committed or attempted to commit assault in the second degree, which again is strangulation assault, that he caused the death of Annelise Harrison in the course of that crime and [she] was not a participant.
>
> We know those things to be true. We know it beyond a reasonable doubt. We know what has to happen next. The defendant must be found guilty as charged of the crime of murder in the second degree.
>
> It is the only conclusion that makes sense. It makes sense from the evidence. It makes sense with your intellect. It makes sense up here.

> It makes sense, again, the law being our shared moral sense. It makes sense here. It makes sense deep down in your gut.

25RP 2511-12.

Defense counsel did not object to this specific argument. However, counsel soon moved for a mistrial based on the prosecutor's argument as a whole. 28RP 2513. And, contrary to the Court of Appeals opinion, Op. at 21, this motion for mistrial preserved the error for appellate review. See 28RP 2513 ("Well, Your Honor, there is addressing objections we do feel compelled—I understand that you struck what was said and you told the jury to disregard. We do think it is our responsibility to again request a mistrial as a result of those sorts of statements being made in closing arguments."). Specifically, defense counsel had objected earlier to argument regarding "shared common moral sense." 28RP 2495

The state and federal constitutions prohibit the argument quoted above. A prosecutor has a duty to ensure an accused person receives a fair trial. State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). "The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments . . . and article I, section 22[.]" In re Glasmann, 175 Wn.2d 696, 703, 286 P.3d 673 (2012). When a prosecutor commits misconduct, she may deny the accused a fair trial. Id.; Boehning, 127 Wn. App. at 518.

Even when defense counsel does not object to prosecutorial misconduct, but rather moves for a mistrial, the alleged error has been preserved, and the stringent "flagrant and ill intentioned" standard applicable to unpreserved claims does not apply. State v. Lindsay, 180 Wn.2d 423, 430-31, 326 P.3d 125 (2014) (error preserved where "defense counsel made a motion for a mistrial due to prosecutorial misconduct directly following the prosecutor's rebuttal closing argument"). Prejudice is established where there is a substantial likelihood the misconduct affected the jury's verdict. State v. Yates, 161 Wn.2d 714, 774, 168 P.3d 359 (2007).

Closing argument provides an opportunity to draw the jury's attention to the evidence presented, but it does not give a prosecutor the right to express personal opinions. Walker, 182 Wn.2d at 478 (quoting Glasmann, 175 Wn.2d at 706-07). A prosecutor cannot express his opinion as to the guilt or credibility of an accused or a witness's credibility. Lindsay, 180 Wn.2d at 437; Glasmann, 175 Wn.2d at 706; RPC 3.4 (e). Moreover, the use of personal pronouns may be misconduct when a prosecutor uses them to vouch for witness veracity, suggest that the government has special knowledge of evidence not presented to the jury, or appeal to the jury's passions. A prosecutor is not a member of the jury, so to use "we" and "us" is inappropriate and may be an effort to appeal to the jury's passions. State v. Mayhorn, 720 N.W.2d 776, 790 (Minn. 2006).

Here, the prosecutor expressed his personal opinion on Bacani's guilt, stating "we know" that Bacani killed Harrison. Compounding this, the prosecutor also repeatedly used "we," the first person plural pronoun, to seek to align the jury with the State, and the State with the jury, and then highlighted their shared morals. The State then exhorted jurors to convict, stating "we know what has to happen next." 25RP 2511-12.

This misconduct likely affected the jury's verdict in this case. To prevail on his prosecutorial misconduct claim, Bacani must show the misconduct had a substantial likelihood of affecting the jury's verdict. State v. Pinson, 183 Wn. App. 411, 419, 333 P.3d 528 (2014). Bacani has made this showing. Here, in using the first-person plural, the prosecutor—who had been intimately involved in the case and even visited the scene[11]—conveyed to the jury his personal opinion that Bacani was guilty of murder. Emphasizing shared concepts of morality, the prosecutor also attempted to align himself with jurors via the use of the "we" pronoun. This was an improper appeal to the juror's passions and prejudices. The misconduct likely affected the verdict.[12] This Court should accept review and reverse.

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[11] E.g. 12RP 784-90.

[12] The Court of Appeals' opinion finds it significant that the defense also used "we" statements. Op. at 21. But defense counsel did not use the "we" pronoun in the same manner the State did. In each instance, a passive voice could be substituted for "we" without changing the meaning. For example, defense counsel's statement "we don't know" was used in the manner of "it is not known." Unlike those statements, the theme of the

F. CONCLUSION

For the foregoing reasons, this Court should accept review and reverse the Court of Appeals.

DATED this 18th day of July, 2018.

Respectfully submitted,

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State's closing argument was the moral alignment of the State with the jury, and vice-versa. The State's "we" statements appeared in this context.

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JUSTIN MATTHEW BACANI, Appellant.	DIVISION ONE No. 76371-7-I UNPUBLISHED OPINION FILED: June 18, 2018

DWYER, J. — Justin Bacani was charged and convicted of murder in the second degree for the death of Annelise Harrison. On appeal, Bacani contends that the trial court erred by (1) refusing to admit hearsay statements concerning Harrison's sexual practices, (2) redacting a portion of a 911 call that was played for the jury, and (3) denying his request to instruct the jury on voluntary intoxication. Bacani also contends that he received ineffective assistance of counsel and that the prosecutor committed flagrant misconduct during closing argument, thus depriving him of a fair trial. Finding no error, we affirm.

I

The Ridgedale Apartments in Bellevue were undergoing major renovations in February 2015. On February 7, maintenance employees were inspecting apartment units and assessing the damage caused by a recent sewer backup. Although all of the apartment units should have been vacant,

maintenance employees discovered a woman's purse on the floor inside one of the apartments. The employees looked around the apartment and discovered the body of Annelise Harrison in the bathroom.

Police searched the apartment and discovered traces of blood on the walls in the bathroom, on the toilet, in the bathroom sink, and on the light switch of the bathroom. Police also discovered blood in the hallway, on the deadbolt of the front door, and in the cracks of the hallway flooring. There were black scuff marks on the hallway baseboards and fresh paint on Harrison's boots that was consistent with the paint from the baseboards. The smoke alarm in the apartment made a chirping sound because the battery was low.

Dr. Richard Harruff, chief medical examiner for the King County medical examiner's office, performed the autopsy. Dr. Harruff noted that Harrison had abrasions and contusions on her neck and blood spots on the surfaces of her eyes. Dr. Harruff concluded that Harrison died by strangulation sometime between February 1 and 2. Harruff also found that Harrison was under the influence of drugs at the time of her death but testified that "if she had died of a drug overdose, simply, then there wouldn't have been any bruising." Finally, Dr. Harruff determined that it was possible, though unlikely, that the injuries sustained from strangulation occurred more than a few hours before Harrison's death.

Police discovered a cell phone inside of Harrison's pants pocket. Detective Jennifer Robertson searched the cell phone and discovered that the last telephone call made from that phone was on February 1 at 8:21 p.m.

Robertson dialed that number and a man answered. The man identified himself as "Jesse" and stated that he did not know anyone named Annalise. Robertson asked the man if he recognized the telephone number that she was calling from. The man stated that he did not and then promptly ended the call.

Police reviewed Harrison's cell phone records and searched for video footage of buses traveling from Seattle to Bellevue. The search produced video footage showing Harrison and a man boarding a bus at Westlake Station on February 1 at 10:53 p.m. Video footage showed Harrison and the man exit together at the Bellevue transit center, enter a Walgreens store near the Ridgedale Apartments, exit Walgreens, and walk toward the Ridgedale Apartments.

Using the video footage and the telephone number that Harrison dialed shortly before her death, the police were able to determine that the man who identified himself as "Jesse" was, in fact, Justin Bacani. The police were able to utilize cell tower information and track Bacani from downtown Seattle to a tower near the Ridgedale Apartments. Police also discovered that Bacani had placed three 911 calls between February 1 and 2. These calls were placed at 12:13 a.m., 2:18 a.m., and 2:44 a.m., and came from near the Walgreens store and the Ridgedale Apartments. Following his arrest, DNA testing revealed that the blood found in the apartment matched Bacani.

Bacani was charged and convicted of murder in the second degree. The sentencing court found that Bacani was a persistent offender and sentenced him to a term of confinement for life. Bacani appeals.

II

Bacani first contends that his constitutional right to present a defense was violated. This is so, he asserts, because the trial court excluded hearsay statements that Harrison allegedly enjoyed engaging in sex acts that included strangulation.

We review an alleged denial of the constitutional right to present a defense de novo. State v. Lizarraga, 191 Wn. App. 530, 551, 364 P.3d 810 (2015), review denied, 185 Wn.2d 1022 (2016). "But a criminal defendant has no constitutional right to have irrelevant or inadmissible evidence admitted in his or her defense." State v. Aguilar, 153 Wn. App. 265, 275, 223 P.3d 1158 (2009). Rather, "[t]he defendant's right to present a defense is subject to 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" Lizarraga, 191 Wn. App. at 553 (quoting Chambers v. Mississippi, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)).

The hearsay rule

> has long been recognized and respected by virtually every State, is based on experience and grounded in the notion that untrustworthy evidence should not be presented to the triers of fact. Out-of-court statements are traditionally excluded because they lack the conventional indicia of reliability: they are usually not made under oath or other circumstances that impress the speaker with the solemnity of his statements; the declarant's word is not subject to cross-examination; and he is not available in order that his demeanor and credibility may be assessed by the jury.

Chambers, 410 U.S. at 298. "[A]llowing inadmissible hearsay testimony 'places the [witness's] version of the facts before the jury without subjecting the [witness]

to cross-examination,' depriving the State 'of the benefit of testing the credibility of the statements' and denying the jury 'an objective basis for weighing the probative value of the evidence.'" Lizarraga, 191 Wn. App. at 558 (some alterations in original) (quoting State v. Finch, 137 Wn.2d 792, 825, 975 P.2d 967 (1999)). "A trial court's ruling on the admissibility of evidence will be disturbed on appeal only if there is an abuse of discretion." Aguilar, 153 Wn. App. at 275.

Here, Bacani sought to elicit testimony from three witnesses whom he stated would all testify that Harrison had expressed to them that she enjoyed "rough sex," "that she was into BDSM," and that "[s]he enjoyed to be choked during the sexual activity." The defense theory was that Harrison had died of a drug overdose and that the indications of strangulation found on her body were caused by a consensual sex act that preceded her death.

Bacani's counsel never indicated to the court when Harrison allegedly made the proffered statements or in what context the statements were made. Neither did defense counsel proffer any evidence that Harrison had sex—or engaged in the acts described—within the relevant window of time before her death.[1] Defense counsel conceded that the statements were hearsay and did not identify any exception to the hearsay rule that would make the statements admissible.

[1] Dr. Harruff testified that it was very unlikely that Harrison was strangled more than 12 hours before her death. Thus, in order for the proffered evidence to be relevant, it was incumbent on Bacani to establish that Harrison engaged in sex acts that included choking within the relevant time frame. However, there is no evidence that Harrison had sex at all the day that she died, let alone evidence that she engaged in choking during sex prior to her death.

The trial court recognized that the limited information provided was insufficient to make such evidence relevant. "Everything that you just told me related to sex. She may like to be choked during sex. She may have been engaged at some point in prostitution. If she hadn't been, if there is no evidence to suggest that she did either one of those things sufficiently close to her death, then that could have been the cause of those marks, then that is just pure speculation; isn't it?" Bacani was not able to provide any further information concerning the statements or evidence that Harrison had sex prior to her death. Accordingly, the trial court ruled that the statements were inadmissible. The ruling was not an abuse of the court's discretion.

Nevertheless, for the first time on appeal, Bacani asserts that the statements were admissible pursuant to the "then existing state of mind" hearsay exception. That exception permits the admission of:

> A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

ER 803(a)(3).

Although Bacani contends that the statements allegedly made by Harrison fit "squarely within the hearsay exception," Br. of Appellant at 23, he entirely fails to identify *when* Harrison was supposed to have made these statements. Under ER 803(a)(3), "hearsay evidence is admissible if it bears on the declarant's state of mind and if that state of mind is an issue in the case." State v. Terrovona, 105 Wn.2d 632, 637, 716 P.2d 295 (1986). Without any indication of when Harrison

allegedly made the proffered statements, it is impossible to know whether Harrison's "then existing state of mind" was material.

Similarly, Bacani has not established that evidence concerning Harrison's preferred sexual practices was relevant. "To be relevant, evidence must meet two requirements: (1) the evidence must have a tendency to prove or disprove a fact (probative value), and (2) that fact must be of consequence in the context of the other facts and the applicable substantive law (materiality)." State v. Rice, 48 Wn. App. 7, 12, 737 P.2d 726 (1987). Statements made by Harrison that she enjoyed engaging in sex acts that included choking could be found to be probative, but they are not material absent evidence that Harrison engaged in such acts in close proximity to her death. Bacani proffered no such evidence. The out-of-court statements allegedly made by Harrison are thus lacking both temporality and materiality.

The trial court did not abuse its discretion by excluding the proffered evidence.[2]

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[2] Bacani also contends that he received ineffective assistance of counsel because his counsel failed to identify the "then existing state of mind" hearsay exception. Bacani asserts that, had his counsel asserted the hearsay exception, Harrison's out-of-court statements would have been admitted.

"Constitutionally ineffective assistance of counsel is established only when the defendant shows that (1) counsel's performance, when considered in light of all the circumstances, fell below an objectively reasonable standard of performance and (2) there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different." State v. Woods, 198 Wn. App. 453, 461, 393 P.3d 886 (2017) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Failing to satisfy either requirement ends the inquiry. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). The defendant bears the burden of demonstrating both deficient representation and prejudice. In re Det. of Hatfield, 191 Wn. App. 378, 401, 362 P.3d 997 (2015).

As discussed herein, Harrison's alleged statements lacked both temporality and materiality. There is no indication in the record of *when* the statements were made and there is no evidence that Harrison engaged in such conduct in close proximity to her death. Even assuming that defense counsel had identified the "then existing state of mind" hearsay exception, the alleged statements were not relevant and, thus, were not admissible. Counsel is not

III

Bacani next contends that the trial court erred by redacting a portion of a recording of a 911 call that was played for the jury. Bacani asserts that the trial court's redaction violated the rule of completeness and misled the jury.

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. State v. Brown, 132 Wn.2d 529, 571-72, 940 P.2d 546 (1997). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. Brown, 132 Wn.2d at 572.

The "rule of completeness," as codified in ER 106, provides that "[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the party at that time to introduce any other part . . . which ought in fairness to be considered contemporaneously with it." The offered statement must be relevant and must (1) explain the admitted evidence, (2) place the admitted portions in context, (3) avoid misleading the trier of fact, and (4) insure fair and impartial understanding of the evidence. State v. Larry, 108 Wn. App. 894, 910, 34 P.3d 241 (2001) (citing United States v. Velasco, 953 F.2d 1467, 1475 (7th Cir. 1992)).

Here, Bacani placed three 911 calls on the night of Harrison's murder. During the third 911 call, Bacani whispered to the emergency operator and displayed paranoid behavior. Bacani identified himself on the call and stated that

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ineffective for failing to assert a hearsay exception when the evidence that is sought to be admitted is not relevant.

he was with a female friend, "Rachel." The emergency operator asked to speak to Rachel but Bacani refused, claiming that she was sleeping. Bacani told the emergency operator that there was "somebody outside with a gun" waiting for him. The emergency operator asked Bacani if he had any weapons on him and Bacani replied, "I kill to protect myself but I already got two strikes so I don't want to go there."[3] The chirping sound of the smoke alarm in the apartment could be heard in the background of the recording.

During pretrial motions, the parties agreed that there could be no discussion during trial of the penalty that Bacani faced if convicted, including any mention that a conviction would be Bacani's "third strike." One of Bacani's prior convictions was for robbery—a crime of dishonesty that would be admissible for impeachment purposes should Bacani elect to testify at trial. Defense counsel was cognizant of the prejudicial effect of introducing evidence of past crimes. Accordingly, defense counsel sought a ruling directing the State to refer to that conviction as a "theft of property" conviction or as a felony involving dishonesty should Bacani testify. The trial court denied the request. Bacani did not testify.

During trial, the State sought to play for the jury the portion of the recording of the third 911 call in which Bacani stated, "I kill to protect myself but I already got two strikes so I don't want to go there." Consistent with the pretrial discussion, the prosecutor redacted the words "but I already got two strikes." However, defense counsel objected to the redaction. Defense counsel argued that the redacted statement, "I kill to protect myself . . . so I don't want to go

[3] It is not clear whether the statement was "I kill," "I killed," or "I will kill."

there," was confusing and led to the inference that Bacani would kill Harrison. Defense counsel also argued that redaction of everything after "I kill to protect myself" was likewise misleading.[4]

The trial court disagreed. The trial court determined that the redaction of the "two strikes" comment was not confusing, that Bacani's utterance was highly probative, and that the admission of the redacted utterance was not unduly prejudicial. Defense counsel then requested that the *entire* utterance be played for the jury, including the "two strikes" comment. The State objected, referencing the pretrial ruling that evidence of prior "strikes" could not be admitted. The trial court agreed and the redacted call was later played for the jury.

On appeal, Bacani renews his contention that the redacted 911 call was misleading and led to the inference that Bacani would kill Harrison. Bacani also asserts that production of the entire utterance was required pursuant to the rule of completeness.

Bacani's assertions are unavailing. The redaction of the "two strikes" comment was entirely appropriate and not at all misleading. First, Bacani's statements were not directed at Harrison. Rather, the statements were made in response to the emergency operator's questions concerning the man outside with a gun and whether Bacani was armed. "I kill to protect myself . . . so I don't want to go there" is not a misleading statement, was not admitted to prove

[4] Defense counsel recognized that the admission of the "two strikes" comment was "problematic." The trial court observed that defense counsel's objection "sounds like an objection of reason. Why I am objecting is because it hurts my case."

conformity with a character trait, and was not a statement that was directed toward Harrison or "Rachel."

Second, defense counsel repeatedly recognized that evidence of prior crimes and references to the three strikes policy were highly prejudicial. It would have been damaging to Bacani's case for the jury to learn that he had previously committed two other serious crimes. Had the trial court granted defense counsel's request to have the "two strikes" comment played for the jury, Bacani would now likely be asserting a claim of ineffective assistance of counsel on appeal.[5]

Bacani's assertion that the rule of completeness required production of the entire utterance is likewise meritless. The rule of completeness contemplates the admission of other parts of a recorded statement when those parts "ought in fairness" be considered contemporaneously with the admitted statement. ER 106. The statement that is sought to be admitted must be relevant and the trial court must consider whether its admission will "insure a fair and impartial understanding of all of the evidence." Velasco, 953 F.2d at 1475. As discussed above, Bacani would have been prejudiced by the introduction of the "two strikes" comment. Its admission would not have facilitated a fair and impartial

[5] It is plain that the trial judge was aware of the unfairness to Bacani of the "two-strikes" evidence and of the potential for appellate second-guessing had the judge admitted the entire utterance. Bacani's appellate counsel, at oral argument, pressed the assertion that since trial counsel sought the evidence's admission, the trial judge should simply have acquiesced. Implied in this argument is the assurance that, after conviction, no appellate defense counsel would later seek to exploit the trial judge's acquiescence by claiming either trial court error or ineffective assistance of counsel in association with the admission of the greatly prejudicial "two-strikes" statement. "It is hard to say whether this conclusion springs from a touching faith in the good sportsmanship of criminal defense counsel or an unkind disparagement of their intelligence." Henderson v. United States, 568 U.S. 266, 286, 133 S. Ct. 1121, 185 L. Ed. 2d 85 (2013) (Scalia, J. dissenting). The trial judge's apprehension was well-warranted.

understanding of all of the evidence. Accordingly, the rule of completeness did not mandate its admission.

The trial court recognized that the admission of Bacani's "two strikes" comment would be highly prejudicial and determined that the redacted statement was relevant and not confusing or misleading. There was no abuse of discretion.[6]

IV

Bacani next contends that the trial court erred by refusing to instruct the jury on voluntary intoxication. This is so, he asserts, because there was sufficient evidence to support the theory that Bacani was under the influence of methamphetamine at the time that Harrison was killed.

We review a trial court's refusal to give a proposed jury instruction for an abuse of discretion. In re Det. of Pouncy, 168 Wn.2d 382, 390, 229 P.3d 678 (2010). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. Brown, 132 Wn.2d at 572.

"Evidence of intoxication and its effect on the defendant may be used to prove that the defendant was unable to form the particular mental state that is an essential element of a crime." State v. Gallegos, 65 Wn. App. 230, 237, 828 P.2d 37 (1992) (citing RCW 9A.16.090; State v. Coates, 107 Wn.2d 882, 889, 735 P.2d 64 (1987)). "However, '[i]t is well settled that to secure an intoxication

[6] Bacani also asserts that he received ineffective assistance of counsel because his counsel failed to argue that the rule of completeness mandated the admission of the "two strikes" comment. Because the rule of completeness did not require the statement's admission, his claim fails.

instruction in a criminal case there must be substantial evidence of the effects of the alcohol on the defendant's mind or body.'" Gallegos, 65 Wn. App. at 237 (alteration in original) (quoting Safeco Ins. Co. v. McGrath, 63 Wn. App. 170, 179, 817 P.2d 861 (1991)).

"Under RCW 9A.16.090, it is not the fact of intoxication which is relevant, but the degree of intoxication and the effect it had on the defendant's ability to formulate the requisite mental state." Coates, 107 Wn.2d at 891. A defendant is entitled to a voluntary intoxication instruction only if "(1) the crime charged has as an element a particular mental state, (2) there is substantial evidence of drinking, and (3) the defendant presents evidence that the drinking affected his or her ability to acquire the required mental state."[7] Gallegos, 65 Wn. App. at 238 (footnote omitted).

Here, Bacani was charged with murder in the second degree under two alternative means. The State alleged that Bacani intended to (a) cause the death of another person, or (b) assault another person and, in the course of and in furtherance of that assault, caused the death of another person. RCW 9A.32.050(1)(a), (b). "A person acts with intent or intentionally when he or she acts with the objective or purpose to accomplish a result which constitutes a crime." RCW 9A.08.010(a). Thus, Bacani was entitled to a voluntary intoxication instruction only if he produced substantial evidence that he was intoxicated at the

[7] The term "intoxication" "refers to an impaired mental and bodily condition which may be produced either by alcohol, which is a drug, or by any other drug." State v. Dana, 73 Wn.2d 533, 535, 439 P.2d 403 (1968).

time that he strangled Harrison *and* that his intoxication affected his ability to form the intent to assault Harrison or cause her death.

Bacani did not testify. Neither did he call an expert witness to testify concerning intoxication. Rather, Bacani relied exclusively on the testimony of three lay witnesses to establish that he was entitled to a voluntary intoxication instruction. Although it is true that a defendant is "not required to present expert testimony to establish that he or she was too intoxicated to form the necessary mental state," the evidence presented must "contain[] substantial evidence of the defendant's drinking *and of the effects of the alcohol on the defendant's mind or body*." State v. Gabryschak, 83 Wn. App. 249, 253, 921 P.2d 549 (1996) (emphasis added).

Bacani first relies on the testimony of Latena Isabel, his cousin. Isabel testified that, on the morning of February 3, 2015, she received a telephone call from Bacani. Isabel testified that Bacani asked her to call 911 because he had been hit by a car. Latena testified that she learned the following day that the 911 call was a ploy by Bacani to avoid undergoing a urinalysis for his community corrections officer.

Bacani next relies on the testimony of Andrew Whitehead, an acquaintance. Whitehead testified that he recalled an incident in which he observed Bacani acting strangely and believed that Bacani was under the influence of methamphetamine. Whitehead could not remember the exact day or time, though he believed that this incident occurred in February, around the time that Bacani had made several calls to Whitehead.

Finally, Bacani relies on the 911 calls that he made the night that Harrison was killed. Bacani asserted that his behavior on the 911 calls was erratic and indicative of intoxication.

The evidence upon which Bacani relies establishes, at most, that he was under the influence of drugs or alcohol at some point in time proximate to Harrison's death. But evidence of drinking or drug use alone "is insufficient to warrant the instruction; instead, there must be 'substantial evidence of the effects of the alcohol on the defendant's mind or body.'" Gabryschak, 83 Wn. App. at 253 (quoting Safeco Ins. Co., 63 Wn. App. at 179). Indeed, "[a] person can be intoxicated and still be able to form the requisite mental state." Gabryschak, 83 Wn. App. at 254.

None of the evidence presented at trial established that Bacani's intoxication affected his ability to form the requisite intent to assault or kill another person. Accordingly, the trial court refused to instruct the jury on voluntary intoxication. There was no error.

V

Bacani next contends that the prosecutor committed flagrant misconduct, thus depriving him of a fair trial. This is so, he asserts, because the prosecutor repeatedly used "we" statements during closing and rebuttal argument.

To prevail on a claim of prosecutorial misconduct, the defendant must show that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and circumstances at trial. State v. Miles, 139 Wn. App. 879, 885, 162 P.3d 1169 (2007). A defendant must object to a prosecutor's

improper argument at trial. "'[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 a motion for new trial or on appeal.'" State v. Reed, 168 Wn. App. 553, 577-78, 278 P.3d 203 (2012) (internal quotation marks omitted) (quoting State v. Russell, 125 Wn.2d 24, 93, 882 P.2d 747 (1994)). If a defendant does not object to the alleged misconduct at trial, the defendant is deemed to have waived any claim of error unless it is shown 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.'" State v. Emery, 174 Wn.2d 741, 761, 278 P.3d 653 (2012) (quoting State v. Thorgerson, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)).

Here, during closing argument, the prosecutor argued to the jury that, although Bacani's reasons for strangling Harrison were unknown, the State did not have to prove motive before the jury could convict. The prosecutor asked a series of questions that remained unanswered concerning Bacani's motives and then stated that "[t]hese questions can really only be answered by the killer." Defense counsel interposed an objection, arguing that the prosecutor's statement was a comment on Bacani's decision to not testify. The objection was sustained and the jury was instructed to disregard the prosecutor's comment. Defense counsel objected again moments later when the prosecutor continued his argument by stating that "[w]e would love to be able to answer every question for Annelise Harrison's family, but we can't." The jury was again instructed to disregard the prosecutor's statement.

The prosecutor continued his argument.

> It is not a job that we have in this trial to answer every single question. The job here is to determine if the defendant has committed the crime he is charged with, which is murder in the second degree. That is why these elements are the only ones that need to be answered, the four listed up here.
>
> Does that make sense? Of course it does. That's right. The law is not a mystic thing. It is supposed to represent us as a society. It represents our shared beliefs, our shared understandings, our shared morals. The law is simply just a codification of that.
>
> That is what you have before you in the form of these jury instructions, the law. At first blush it is pretty wordy and it might seem a little complicated or confusing. But if you actually take the time to sit down and read it. And if you are confused, read it again, because you will see that it actually makes sense, it is because that the law is rooted in our common intellectual sense and our shared common moral sense.

Bacani again objected to the prosecutor's argument, stating simply, "Objection, Your Honor, 'our shared common moral sense?'" The objection was overruled.

The prosecutor continued his closing argument. Throughout his argument, the prosecutor made various "we" statements: "We have loads of independent evidence," "[w]e know that . . . it matches the paint that is in that apartment," "We still have more evidence of a violent struggle." The prosecutor ended his closing argument using the same language.

> As I said at the beginning of my remarks, we spent a lot of time together. I thank you for your attention during these closing remark[s]. We have met a lot of witnesses. We have heard a lot of testimony. We have seen a lot of evidence.
>
> Based on that evidence, we know what happened back on February 2nd, 2015. The evidence is clear. The evidence is overwhelming. That is that on that day, in the State of Washington, Justin Bacani, the defendant, committed intentional murder, which means that he acted with intent to cause the death of Annelise Harrison and Annelise Harrison died as a result of those acts; and/or, he committed felony murder, meaning that he . . . committed or attempted to commit assault in the second degree,

> which again is strangulation assault, that he caused the death of Annelise Harrison in the course of that crime and Annelise Harrison was not a participant.
>
> We know those things to be true. We know it beyond a reasonable doubt. We know what has to happen next. The defendant must be found guilty as charged of the crime of murder in the second degree.
>
> It is the only conclusion that makes sense. It makes sense from the evidence. It makes sense with your intellect. It makes sense up here.

Defense counsel moved for a mistrial immediately following the prosecutor's argument. However, counsel did not do so to object to the prosecutor's use of "we" statements. Instead, defense counsel argued, "Well, Your Honor, there is addressing objections we do feel compelled – I understand that you struck what was said and you told the jury to disregard. We do think it is our responsibility to again request a mistrial as a result of those sorts of statements being made in closing arguments. . . . We think that being heard, period, so prejudices things that Mr. Bacani can't get a fair trial."

The trial court disagreed that a mistrial was the only available remedy.

> I instructed the jurors to disregard those comments. I believe that is the appropriate remedy. If you would like for me to give an instruction when they come out that the attorney's arguments are not itself evidence, the evidence is the testimony, the exhibits that were admitted, I can. But otherwise, I think that that would be the only remedy that would be left. But I certainly don't feel that a mistrial is appropriate. You haven't shown any prejudice to your client to his ability to have a fair trial.

Defense counsel did not request a curative instruction.

On appeal, Bacani contends that the prosecutor's use of "we" statements constituted misconduct. Bacani asserts that the use of "we" statements were

manifestations of the prosecutor's personal opinion and were an attempt to align the jury with the State.

A

As a preliminary matter, the parties dispute whether Bacani has waived his claim of prosecutorial misconduct by failing to object to the prosecutor's use of "we" statements during closing argument.

Bacani contends that a motion for a mistrial based on prosecutorial misconduct necessarily preserves for appeal any specific claim of misconduct. Thus, he avers, because he moved for a mistrial based on the prosecutor's references to a "shared moral sense" and statement that "we would love to be able to answer every question," his claim of misconduct based on the prosecutor's "we" statements was not waived. In support of this assertion, Bacani relies on State v. Lindsay, 180 Wn.2d 423, 326 P.3d 125 (2014).

Bacani's reliance is misplaced. Lindsay concerned prosecutorial misconduct during closing argument and a subsequent motion for a mistrial based on that misconduct. 180 Wn.2d at 441. Although defense counsel in Lindsay did not interpose an objection to each and every instance of prosecutorial misconduct throughout the course of closing argument, defense counsel did identify a number of improper statements made by the prosecutor in the subsequent motion for a mistrial. The judge ruled that the prosecutor's comments were not improper and, accordingly, denied the motion. On appeal, defense counsel relied on the same statements identified in the motion for a

mistrial as the basis for the claim of misconduct. Lindsay, 180 Wn.2d at 431, 441.

The Supreme Court held that the motion for a mistrial in Lindsay served the same function as a contemporaneous objection. The trial court was given an opportunity to rule on each asserted basis for misconduct. This gave the trial court "a chance to correct the problem with a curative instruction." Lindsay, 180 Wn.2d at 441. Accordingly, the court ruled that the issue was adequately preserved for review.

Here, defense counsel never identified the prosecutor's use of "we" statements as a basis for misconduct, either in the form of a contemporaneous objection or as a basis for a mistrial. Defense counsel never objected to or identified in the motion for a mistrial any statement that constituted a personal opinion of the prosecutor or that was intended to align the jury with the State. Thus, the trial court was never given an opportunity to rule on whether these statements constituted misconduct, let alone issue a curative instruction.

Moreover, it also appears that defense counsel made a tactical decision to not object to the prosecutor's use of "we" statements. First, defense counsel waited until the end of the prosecutor's closing argument before moving for a mistrial, despite the prosecutor's frequent use of "we" statements throughout the lengthy argument. Had defense counsel objected to the use of "we" statements during closing argument, the issue could have been resolved immediately through a curative instruction. But defense counsel waited until after closing argument before moving for a mistrial and then tacitly declined the trial court's

offer of a curative instruction. This suggests that defense counsel was not interested in addressing any perceived misconduct at the outset but, rather, intended to let the wound fester until a mistrial was the only available remedy.

Second, after the trial court denied Bacani's motion for a mistrial, defense counsel elected to use the same tactics during his closing argument. Defense counsel repeatedly argued to the jury that "we don't know" various aspects of what occurred the night that Harrison was killed. Defense counsel also argued that "[w]e know" that Bacani did not hide from the police and that "[w]e can know that he tried to say where he was. We know that."

B

In any event, even if Bacani has not waived his claim, we conclude that the prosecutor's argument does not constitute misconduct.

It is improper for a prosecutor to personally vouch for the credibility of a witness. State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). "'Vouching may occur in two ways: the prosecution may place the prestige of the government behind the witness or may indicate that information not presented to the jury supports the witness's testimony.'" State v. Robinson, 189 Wn. App. 877, 892-93, 359 P.3d 874 (2015) (internal quotation marks omitted) (quoting State v. Coleman, 155 Wn. App. 951, 957, 231 P.3d 212 (2010)). "Prejudicial error will not be found unless it is 'clear and unmistakable' that counsel is expressing a personal opinion." State v. Allen, 161 Wn. App. 727, 746, 255 P.3d 784 (2011) (internal quotation marks omitted) (quoting Brett, 126 Wn.2d at 175), affirmed, 176 Wn.2d 611, 294 P.3d 679 (2013).

Courts have routinely chastised prosecutors for the use of "we" statements. See United States v. Younger, 398 F.3d 1179, 1191 (9th Cir. 2005) (a prosecutor's use of "we know" "readily blurs the line between improper vouching and legitimate summary"); United States v. Bentley, 561 F.3d 803, 812 (8th Cir. 2009) (it is improper to use "we know" "when it suggests that the government has special knowledge of evidence not presented to the jury, carries an implied guarantee of truthfulness, or expresses a personal opinion about credibility"); State v. Mayhorn, 720 N.W.2d 776, 790 (Minn. 2006) ("[A] prosecutor is not a member of the jury, so to use 'we' and 'us' is inappropriate and may be an effort to appeal to the jury's passions."). However, a prosecutor's use of "we" in argument is unlikely to warrant reversal. See Robinson, 189 Wn. App. at 894-95 (a prosecutor's use of "we" to marshal evidence is not misconduct).

Here, the prosecutor's use of "we" did not constitute misconduct. Rather, the prosecutor's argument was an attempt—though perhaps unartful—to marshal evidence. "The evidence is clear. The evidence is overwhelming. . . . We know those things to be true." Here, as in Robinson, the prosecutor's use of "we" did not imply any special knowledge, express a personal opinion, or attempt to appeal to the jury's passions. 189 Wn. App. at 894-95.

There was no misconduct.

VI

Finally, Bacani contends that cumulative errors mandate the reversal of his conviction. Bacani has not demonstrated any trial court error. There is

nothing to accumulate. Accordingly, his contention does not warrant appellate relief.

Affirmed.

Dwyer, J.

We concur:

Mann, A.C.J.

Leach, J.

APPENDIX B

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