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Supreme Court No. (to be set)  
Court of Appeals No. 37088-7-III

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**IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON**

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STATE OF WASHINGTON,

Respondent,

v.

ANTHONY RYAN GALLO,

Appellant.

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PETITION FOR REVIEW  
BY THE APPELLANT, ANTHONY RYAN GALLO

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SPOKANE COUNTY  
THE HONORABLE JOHN O. COONEY, JUDGE

---

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## **I. IDENTITY OF PETITIONER**

Anthony Ryan Gallo, the Appellant, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part II of this motion.

## **II. COURT OF APPEALS DECISION**

Mr. Gallo seeks review of the unpublished decision of the Court of Appeals, Division III, issued on December 10, 2020. A copy of this decision is attached, see App. at 1-12. The Court declined to reconsider this decision in an order dated January 21, 2021, see App. at 13-14.

## **III. ISSUE PRESENTED FOR REVIEW**

Should this Court grant review and reverse when the prosecutor repeatedly asked the state's central witness leading questions, over numerous sustained objections?

## **IV. STATEMENT OF THE CASE**

The charges in this case arose from a confidential informant, A.B. Working with police, A.B. attempted to buy heroin from Mr. Gallo. RP at 38. The buy went wrong, and A.B. told police that Mr. Gallo had refused to sell her drugs, grabbed her money, and struck her in the face with a handgun. RP at 97-99, 101-02. The state charged Anthony Gallo with first-degree robbery and second-degree assault. CP 1-2; RP at 77, 167.

At trial, A.B. testified twice. RP at 77, 167. The first time she testified, she denied that Mr. Gallo had a gun or had struck her. RP at 88,

90, 98-99. She testified that she got her injuries from a domestic violence altercation with her boyfriend. RP at 97-98. A.B. said that she wore makeup to cover up the injuries before the controlled buy, so that police did not notice. RP at 88-89, 98. After the attempted buy, she said that she was worried because she did not have the money or the drugs. RP at 98. A.B. testified that she lied to police and told them that Mr. Gallo struck her with a gun because things had not gone as planned. RP at 98-99.

The next day, A.B. testified again, but her story changed completely. She said that she had lied the previous day on the stand. RP at 173-75. This time, she testified that her original story to police was accurate. RP at 173. She said that Mr. Gallo struck her with a gun and took the money. RP 172-73.

Throughout A.B.'s testimony, the prosecutor repeatedly asked leading questions despite sustained objections. RP at 87-88, 100-01, 172. He also asked A.B. over and over whether she was afraid of Mr. Gallo. RP at 90-91. Initially, A.B. answered "No" but eventually she changed her answer to "I guess kind of. Yeah. Sure." *Id.* Defense counsel objected, and the objection was sustained. RP at 91. However, the trial court never instructed the jury to disregard the leading questions, the repetitive questions, or A.B.'s answers. RP at 87-88, 90-91, 100-01, 172.

The jury convicted Mr. Gallo of both first-degree robbery and second-degree assault. RP at 210. Mr. Gallo appealed. The parties agreed—and the Court of Appeals concluded—that double jeopardy prohibited convictions on both counts. App. at 6. The Court rejected Mr. Gallo’s other challenges to his conviction. *Id.* at 6-12. Mr. Gallo seeks review.

**V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED**

Mr. Gallo respectfully requests that the Washington Supreme Court grant review and reverse the Court of Appeals. This Court grants review under four circumstances:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). Here, review is appropriate under subsections (2) and (3), because the prosecutor repeatedly asked the state’s key witness leading questions.

Mr. Gallo was prejudiced and denied a fair trial because the prosecutor repeatedly filled in the gaps in A.B.’s memory with his desired testimony, over numerous sustained objections. The Court of Appeals

correctly decided that the prosecutor's questions were improper. App. at 8. However, the Court erred by concluding that these leading questions were not prejudicial. App. at 8-9.

This Court should grant review because the Court of Appeals' decision conflicts with a published Division I decision, *State v. Torres*, 16 Wn. App. 254, 554 P.2d 1069 (1976). RAP 13.4(b)(2). Additionally, this Court should clarify the legal standard for when leading questions amount to prejudice and require reversal. RAP 13.4(b)(3).

**A. The Prosecutor Committed Prejudicial Misconduct by Repeatedly Asking the State's Key Witness Leading Questions.**

Mr. Gallo was prejudiced by the state's leading questions because these questions were (1) repeated, (2) asked over sustained objections, and (3) addressed to the state's key witness, who also had memory problems. The result was that the jury did not truly hear A.B.'s testimony. It heard the prosecutor's testimony, filtered through A.B.

The right to a fair trial is a fundamental liberty secured by the United State and Washington Constitutions. U.S. Const. amend.s VI, XIV; Wash. Const. art. I, § 22; *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); *State v. Finch*, 137 Wn.2d 792, 843, 975 P.2d 967 (1999). Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial. *State v. Davenport*, 100 Wn.2d 757, 762,



675 P.2d 1213 (1984). In order to prevail on a claim of prosecutorial misconduct, a defendant must show that the prosecutor's conduct was both improper and prejudicial. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). The Court of Appeals in this case properly concluded that the prosecutor's leading questions were improper. App. at 8.

Mr. Gallo was also prejudiced. Prejudice requires showing a substantial likelihood that the misconduct affected the jury verdict. *State v. Ish*, 170 Wn.2d 189, 195, 241 P.3d 389 (2010). A defendant cannot establish prejudice where a curative instruction could have corrected any error. *State v. Corbett*, 158 Wn. App. 576, 594, 242 P.3d 52 (2010). However, "the cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect." *State v. Walker*, 164 Wn. App. 724, 737, 265 P.3d 191 (2011).

Here, the leading questions were prejudicial because the prosecutor effectively testified for A.B., the state's central witness. RP at 87-88, 100-01, 172. The prosecutor also asked the same question over and over until A.B. supplied the answer he wanted. RP at 90-91. This conduct was flagrant, repetitive, and occurred despite numerous sustained objections.

A.B. had memory problems on the stand. She could not remember her birthdate, the date of the events in question, the dollar amounts involved,

or the names of the police officers she worked for. RP at 78-80, 174. By asking leading questions, the prosecutor was able to fill in these gaps in her memory with his “desired results.” *See Torres*, 16 Wn. App. at 258. For example, the prosecutor supplied A.B. with answers about her injuries and the alleged firearm:

Mr. Treece: Now, right when this happened, you told officers that Mr. Gallo used a firearm on you, didn’t you?

A.B.: Yeah, I did.

Mr. Treece: And you had a bruise from where he pushed the firearm into your face so hard that it caused a bruise –

RP 87. At this point, defense counsel objected, and the objection was sustained. RP 87-88. However, the court did not instruct the jury to disregard the question or answer. RP 88.

The prosecutor did not stop asking A.B. leading questions. On redirect, he supplied her answers for what occurred during and after the attempted buy:

Mr. Treece: A.B., do you recall actually calling Officer Scott Lesser on your phone while you were still in the car?

A.B.: I don’t know.

Mr. Treece: Where he heard the scuffle that was going on in the car?

A.B.: He definitely could have because I wanted to – I didn’t want them to think that I was doing something that I wasn’t, so.

Mr. Treece: Okay.

A.B.: If I did, I was trying to, but I don't know if I –

Mr. Treece: But there was a scuffle that he heard on the phone?

A.B.: Yeah. I guess.

Mr. Treece: Okay. And then, just within seconds after that, you called him immediately and told him that you had been robbed at gunpoint?

A.B.: Yeah.

Mr. Treece: Okay. And immediately Officer Mark Brownell saw you with your jacket over your shoulder?

A.B.: Yeah.

Mr. Treece: And that was the sign of emergency?

A.B.: Yeah.

Mr. Treece: And you were crying hysterically?

RP 100-01. At this point, defense counsel objected, and the objection was sustained. RP 101. Once again, the court did not instruct the jury to disregard the questions or answers. *Id.*

The prosecutor continued asking A.B. leading questions. Specifically, he led her to his desired answers about the alleged firearm. For example, he said, “And were you immediately saying that Mr. Gallo had put a gun to your face?” RP 101. When A.B. testified a second time the next day, he asked her about the gun yet again:

Mr. Treece: A.B., going back to the night that you had contact with Mr. Gallo back in December, one of the times he went back to the trunk of the vehicle and he got back in the car, did he come back with a firearm?

RP at 172. Defense counsel objected, but A.B. got the hint. *Id.* The prosecutor rephrased, and this time she gave the right answer and said that Mr. Gallo had a gun. *Id.*

The prosecutor also used other methods to get his desired answer from A.B. He wanted A.B. to say that she was afraid of Mr. Gallo, but that was not her testimony. RP at 90. So the prosecutor asked her the same question three times until she came up with the right answer:

Mr. Treece: Are you scared of Mr. Gallo?

A.B.: No.

Mr. Treece: You're not scared of Mr. Gallo?

A.B.: Well, anybody would in this type of situation, not – if I was getting, you know, this whole situation to me, I would not be very happy about it, so yeah.

Mr. Treece: You are scared of Mr. Gallo?

A.B.: I guess kind of. Yeah. Sure.

Mr. Treece: Okay.

RP at 90-91. Yet again, defense counsel objected, and the objection was sustained. RP 91. Again, the trial did not strike the testimony or instruct the jury not to consider it. *Id.*

Intentionally asking leading questions, after repeated sustained objections, amounted to prejudicial prosecutorial misconduct in this case. It effectively resulted in the prosecutor testifying instead of the witness. It also pointed A.B. in the direction intended by the state. It was prejudicial to ask the same question over and over until A.B. provided the answer sought by the prosecutor.

Courts typically do not permit leading questions because they allow an attorney to “suggest his desired results” to the witness. *Torres*, 16 Wn. App. at 258 (quoting *Locken v. United States*, 383 F.2d 340 (9th Cir. 1967)). “The asking of leading questions is not usually a reversible error; however, ‘the persistent pursuit of such a course of action is a factor to be added in the balance.’” *Stevens v. Gordon*, 118 Wn. App. 43, 56, 74 P.3d 653 (2003) (quoting *Torres*, 16 Wn. App. at 258).

Leading questions were prejudicial in this case, for three reasons. First, as described above, A.B. had memory problems on the stand. RP at 78-80, 174. Second, the prosecutor was able to fill in gaps in A.B.’s memory with his “desired results.” *See Torres*, 16 Wn. App. at 258. As discussed above, the prosecutor supplied A.B. with answers about her injuries and the alleged firearm. RP 87. He continued to ask leading questions and supply A.B. with answers about the attempted buy, the

alleged firearm, and her supposed fear of Mr. Gallo. RP at 90-91, 100-01, 172.

Third, the state's leading questions were prejudicial because of their "cumulative effect". *Walker*, 164 Wn. App. at 737. Mr. Gallo's attorney objected appropriately, and his objections were sustained. RP at 87-88, 90-91, 100-01, 172. However, the trial court did not instruct the jury to disregard these questions or answers. *Id.* A curative instruction would not have corrected the prejudice in this case because the damage was already done. The state's case rested on A.B., she had massive credibility problems, and her testimony was repeatedly bolstered by the state's leading questions.

Leading questions are prejudicial if they are "indicative of a persistent pattern of leading questions" and "appreciably affect [the witness's] testimony". *See Stevens*, 118 Wn. App. at 56. Both prongs of this test are met here. The state engaged in a persistent pattern by continuing to ask leading questions despite numerous sustained objections. These leading questions also appreciably affected A.B.'s testimony: the questions supplied her with the correct answer when she otherwise testified to something entirely different or stated that she could not remember. This Court should grant review and reverse because the state's misconduct was prejudicial and denied Mr. Gallo a fair trial.

**B. This Court Should Grant Review in Order to Clarify When Leading Questions Require Reversal.**

Review is appropriate in this case because Court of Appeals' decision conflicts with a prior decision, *State v. Torres*, 16 Wn. App. 254. RAP 13.4(b)(2). In addition, this Court should grant review in order to provide guidance about when leading questions require reversal. RAP 13.4(b)(3).

The Court of Appeals in this case concluded that Mr. Gallo did not suffer prejudice because the prosecutor's leading questions did not "suggest any new information to the jury" and "largely pertained to inconsistencies between A.B.'s original trial testimony and her previous statements to police." App. at 8. This was factually incorrect. The prosecutor did supply new information to the jury through leading questions, including that Mr. Gallo had a gun, that Mr. Gallo bruised A.B.'s face, that A.B. was afraid of Mr. Gallo, that there was a "scuffle" in the car, and that A.B. was "crying hysterically." RP at 87, 90-91, 100-1, 172.

The Court of Appeals also erred by applying the incorrect test. The question is not just whether leading questions suggest new information to the jury. Other Courts have held that leading questions are improper when they "suggest [the attorney's] desired results" to the witness, *Torres*, 16 Wn. App. at 258, or are "indicative of a persistent pattern of leading questions"

and “appreciably affect [the witness’s] testimony,” *Stevens*, 118 Wn. App. at 56. Applying these tests, reversal is required, as explained above.

This Court should grant review in order to reaffirm the holding and test from *Torres*, 16 Wn. App. 254. RAP 13.4(b)(2). This Court should also grant review in order to provide guidance to lower courts about when leading questions by a prosecutor deprive a defendant of his constitutional right to a fair trial. RAP 13.4(b)(3).

## VI. CONCLUSION

Mr. Gallo respectfully requests that the Washington Supreme Court grant review and reverse the Court of Appeals.

RESPECTFULLY SUBMITTED this 19th day of February, 2021.



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STEPHANIE TAPLIN

WSBA No. 47850

Attorney for Appellant, Anthony Ryan Gallo



**VII. APPENDIX**

Court of Appeals, Division Three, Unpublished Opinion  
December 10, 2020 ..... 1-12

Court of Appeals, Division Three, Order Denying Appellant’s  
Motion for Reconsideration  
January 21, 2021 ..... 13-14

Renee S. Townsley  
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December 10, 2020

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CASE # 370887  
State of Washington v. Anthony Ryan Gallo  
SPOKANE COUNTY SUPERIOR COURT No. 181054321

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review of this decision by the Washington Supreme Court. RAP 13.3(b), 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact that the moving party contends this court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration that merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of a decision. RAP 12.4(b). Please file the motion electronically through this court's e-filing portal or if in paper format, only the original need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of the decision (may also be filed electronically or if in paper format, only the original need be filed). RAP 13.4(a). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates each is due. RAP 18.5(c).

Sincerely,

Renee S. Townsley  
Clerk/Administrator

RST:btb  
Attachment

c: **E-mail** Honorable John O. Cooney  
c: **E-mail** Anthony Ryan Gallo (DOC #402694 – Coyote Ridge Corrections Center)

**FILED**  
**DECEMBER 10, 2020**  
In the Office of the Clerk of Court  
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	No. 37088-7-III
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
ANTHONY R. GALLO,	)	
	)	
Appellant.	)	

PENNELL, C.J. — Anthony Gallo appeals his convictions for first degree robbery and second degree assault. As the parties agree, Mr. Gallo’s assault conviction must be vacated on double jeopardy grounds. The robbery conviction is affirmed.

FACTS

A.B. acted as a confidential informant with the Spokane Police Department. One of her tasks was to set up a controlled drug buy with Anthony Gallo. A.B. was given \$500 in prerecorded bills and instructed to purchase heroin.

The interaction with Mr. Gallo did not go as planned. While under police surveillance, A.B. walked to Mr. Gallo's car and got inside. Shortly thereafter, Mr. Gallo grabbed A.B.'s money and handed her an empty plastic bag. Mr. Gallo told A.B. he knew she was working with police and ordered her to get out of the car. A.B. did not want to leave without completing the transaction. Mr. Gallo produced a handgun and pushed it against A.B.'s face.

During the struggle with Mr. Gallo, A.B. placed a surreptitious call to her law enforcement contact. The officer could hear rusting sounds, consistent with some sort of struggle. The officer also heard a female voice yelling "'stop.'" Report of Proceedings (RP) (July 30, 2019) at 155.

A.B. left the car and made another call to law enforcement. She was "crying hysterically" and difficult to understand. *Id.* at 155-56. During the call, A.B. reported what had happened, including the fact that Mr. Gallo had placed a gun to her head. A.B. was still crying when officers located her in person. At that point, A.B.'s makeup was smeared and a bruise was forming on her cheek.

The police began searching for Mr. Gallo. After several hours, officers spotted his car and initiated pursuit. At one point, officers could see a car door open and shut, but the car kept moving. Officers lost sight of the car a few times during the chase. Eventually the car stopped after being forced down an embankment. Mr. Gallo was arrested.

Police recovered the prerecorded bills in Mr. Gallo's possession. They also found two gun holsters in the trunk. They did not locate any firearms.

The State charged Mr. Gallo with one count of first degree robbery and one count of second degree assault. A charge of possession of a controlled substance was voluntarily dismissed by the State on the eve of trial.

The case proceeded to a jury trial. When A.B. testified, she claimed to have trouble remembering the incident and initially denied Mr. Gallo had put a gun to her head. She testified the bruise on her face was the result of an unrelated domestic violence incident. The prosecutor asked several leading questions, referring A.B. back to the statements she had made to police. The court sustained defense counsel's objections to the questions; nevertheless, the prosecutor persisted. A.B. agreed with the prosecutor that she had told police Mr. Gallo robbed her at gunpoint. But she claimed those prior statements were untrue.

Mr. Gallo's defense was that he had not robbed or assaulted A.B.; instead, he had merely recouped money from an outstanding drug debt. During cross-examination of A.B., defense counsel attempted to establish A.B. owed Mr. Gallo money for past drug transactions.

- Q: Had you been fronted any drugs by Mr. Gallo in the past?  
A: I don't know. Maybe.  
Q: Did you owe him some money?  
A: I'm sure.

RP (July 29, 2019) at 94.

A.B. was recalled to the stand the day after her original testimony. She explained she had voluntarily contacted law enforcement the previous night because she wanted to “make things right.” RP (July 30, 2019) at 167. A.B. confessed that her previous testimony had been inaccurate. She explained she had been scared and nervous. A.B. testified that Mr. Gallo did in fact push a gun against her face when he told her to get out of the car. She also explained the bruise on her face was caused by the gun, not a domestic violence incident. The defense cross-examined A.B. about her willingness to lie under oath.

Evidence closed without a defense case-in-chief and the parties presented summation. In rebuttal argument, the prosecutor responded to Mr. Gallo’s drug debt theory, stating, “[A.B.] never said on the stand that she had a drug debt to Mr. Gallo. She was asked about that. That’s not what she said on the stand.” *Id.* at 205-06. Mr. Gallo did not object.

The jury convicted Mr. Gallo as charged. The trial court imposed a mid-range sentence of 126 months’ confinement. The court’s judgment and sentence reflects convictions for both first degree robbery and second degree assault. Mr. Gallo appeals.

## ANALYSIS

### *Double jeopardy*

As the parties agree, double jeopardy<sup>1</sup> prohibits Mr. Gallo from being convicted of both first degree robbery and second degree assault. The evidence at trial was that Mr. Gallo assaulted A.B. in order to facilitate the crime of robbery. Given this circumstance, the charges of first degree robbery and second degree assault merged and double jeopardy prohibits convictions on both counts. *State v. Freeman*, 153 Wn.2d 765, 779-80, 108 P.3d 753 (2005). The applicable remedy is to vacate the lesser crime of assault and remand for resentencing. *In re Pers. Restraint of Francis*, 170 Wn.2d 517, 532, 242 P.3d 866 (2010).

### *Sufficiency of the evidence*

Mr. Gallo challenges his convictions, arguing there was insufficient evidence to prove he was armed with a firearm. According to Mr. Gallo, A.B.'s testimony about the firearm was patently not credible and therefore insufficient to justify a conviction. This argument is foreclosed by the applicable standard of review.

When faced with a sufficiency challenge, we view the evidence in the light most favorable to the State. *State v. Boyle*, 183 Wn. App. 1, 6, 335 P.3d 954 (2014). Our analysis does not permit credibility determinations. *Id.* A jury is entitled to accept a

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<sup>1</sup> U.S. CONST. amend. V; WASH. CONST. art I, § 9.

witness's testimony, regardless of impeachment. Mr. Gallo cites no authority otherwise.

A.B. testified Mr. Gallo was armed with a firearm. Technically, that was all the State needed to justify the jury's verdict.<sup>2</sup> Nevertheless, A.B.'s testimony was corroborated by the bruising to her cheek and her ability to describe the gun in detail. Although police never found any firearms, they did find gun holsters. Given the time that lapsed between the offense and Mr. Gallo's arrest, it was completely possible for Mr. Gallo to have discarded the gun before he was captured by police.

Mr. Gallo's criticisms of A.B.'s credibility are factual arguments that are appropriate for a jury, but not the Court of Appeals. We reject Mr. Gallo's sufficiency challenge.

#### *Prosecutorial misconduct*

Mr. Gallo makes several claims of prosecutorial misconduct, some of which have been preserved, while others have not. Regardless of whether a claim of misconduct has been preserved, the defense must show both misconduct and prejudice. *State v. Echevarria*, 71 Wn. App. 595, 597, 860 P.2d 420 (1993). In the context of an unpreserved claim of misconduct, the defense must also show the prosecutor's actions were so flagrant or ill-intentioned that they could not have been remedied by a curative instruction. *Id.*

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<sup>2</sup> Mr. Gallo does not argue the evidence was insufficient to prove the firearm was a real gun as opposed to a replica. Regardless, the circumstances in which the device was used are sufficient for the jury to find the device was a real gun. *State v. Tasker*, 193 Wn. App. 575, 595, 373 P.3d 310 (2016).



None of Mr. Gallo's misconduct allegations meet the standard for reversal.

*Leading questions*

Mr. Gallo first complains the prosecutor improperly engaged in repeated leading questions. Leading questions are generally inappropriate during direct examination. *See* ER 611(c). While a leading question may be used to address background matters or summarize relatively unimportant information, it is improper for counsel to use leading questions on direct examination in order to convey material substantive facts. *See* 5A KARL B. TEGLUND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 612.10 at 577-78 (6th ed. 2016).

We agree with Mr. Gallo that the prosecutor should not have engaged in repetitive leading questions. The trial court did not grant the prosecutor's request to treat A.B. as a hostile witness. As such, it was improper for the prosecutor to ask leading questions on issues material to Mr. Gallo's guilt.

While the prosecutor's questions were improper, they did not suggest any new information to the jury. The prosecutor's leading questions largely pertained to inconsistencies between A.B.'s original trial testimony and her previous statements to police. A.B. admitted to the inconsistencies. The substance of the inconsistencies was also elicited from the officers who testified at trial. In addition, A.B. later clarified that her original statements to police were correct. There is no indication that A.B.'s decision to come clean and correct her testimony was prompted by the prosecutor's leading questions

or any other undue influence. A.B. was explicit that her decision to come forward the day after her original testimony was hers and hers alone.

Not every trial impropriety warrants reversal. The key is prejudice. As stated, the danger of leading questions is that they will suggest new information to the jury. That did not happen here. Because the prosecutor's use of leading questions did not endanger the fairness of Mr. Gallo's trial, we will not disturb the jury's verdict on appeal.

*Argument during summation*

Mr. Gallo argues the prosecutor made two improper statements during summation. First, he claims the prosecutor improperly referred to the crime as a "drug rip," RP (July 20, 2019) at 199, in violation of the court's instructions to jurors. Second, he argues the prosecutor misstated A.B.'s testimony on whether she owed Mr. Gallo money. We find no misconduct.

It was not wrong for the prosecutor to refer to the facts of the case as a drug rip. The court's instructions appropriately advised the jury that evidence of drug activity was only relevant for the limited purpose of "establishing the defendant and the complaining witness were together on the night in question." CP at 38. The prosecutor did not argue otherwise. The prosecutor did not attempt to reference drugs in order to assail Mr. Gallo's character. Rather, the prosecutor was simply referencing the uncontested fact that Mr. Gallo and A.B. were together because of drugs. The State's position was that a robbery related to drugs occurred. The defense claim was that a payment of a debt related to drugs

occurred. The State’s reference to what happened as a drug rip was just a short-handed way of explaining its uncontested theory of the case. There was no improper argument.

We also disagree that the prosecutor mischaracterized A.B.’s testimony. When asked if she owed Mr. Gallo money, A.B. said “I’m sure.” RP (July 29, 2019) at 94. A.B. was not specifically asked if she owed Mr. Gallo *drug* money and she never explicitly said as much. One might infer A.B. was talking about drugs, but inferences from facts are not the same as the facts themselves. It is the role of an attorney to argue inferences. The transcript shows it was technically accurate for the prosecutor to claim A.B. “never said on the stand that she had a drug debt to Mr. Gallo.” RP (July 30, 2019) at 205. The jury—which had as much access to A.B.’s testimony as the prosecutor—was free to disagree with the prosecutor’s characterization of the testimony if they found it unwarranted. We will not second guess the jury’s verdict by questioning whether it might have been swayed by an unpersuasive factual inference.

*United States Marshal Service violent offender task force*

Mr. Gallo’s final misconduct claim stems from the testimony of various officers who stated they were part of a United States Marshal Service violent offender task force. Mr. Gallo claims this testimony improperly suggested he was a violent offender, as prohibited by ER 404(b). We disagree with this assessment.

In explaining their backgrounds, the officers involved in Mr. Gallo’s case testified they were part of two units. One was the Spokane Police Department’s “Patrol Anti-

No. 37088-7-III  
*State v. Gallo*

Crime Team” (PACT). RP (July 29, 2019) at 50. The other was the United States Marshal Service violent offender task force. Trial testimony made clear that Mr. Gallo’s investigation fell under the officers’ PACT work, not the violent offender task force. *See id.* (“Q: And do you recall running a specific operation or helping run a specific operation with PACT on December 10th, 2018? A: That’s correct, yes.”). Nevertheless, one of the officers briefly referenced the violent offender task force when describing how he became involved in Mr. Gallo’s case. The court sustained an objection to this reference before it could be explained. There was never any explicit testimony that Mr. Gallo was being investigated as part of the officer’s work on the violent offender task force, as opposed to the PACT. We perceive no danger that the jury made this connection.

The various references to the violent offender task force were irrelevant and objections to the testimony were appropriately sustained. But because the task force information was irrelevant, it posed no danger of prejudice to Mr. Gallo’s case. There is no basis for reversal.


#### *Cumulative error*

Mr. Gallo argues that the cumulative errors in his case require reversal. We disagree. Mr. Gallo’s case was not infected by multiple errors, let alone a combination of errors that jeopardized his right to a fair trial. The jury’s adjudication must be affirmed.

CONCLUSION

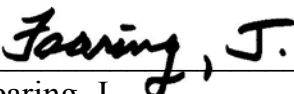
Mr. Gallo's conviction for first degree robbery is affirmed. The conviction for second degree assault is vacated and we remand for resentencing.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

  
\_\_\_\_\_  
Pennell, C.J.

WE CONCUR:

  
\_\_\_\_\_  
Korsmo, J.

  
\_\_\_\_\_  
Fearing, J.

Renee S. Townsley  
Clerk/Administrator

(509) 456-3082  
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*The Court of Appeals  
of the  
State of Washington  
Division III*



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January 21, 2020

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Spokane, WA 99260-2043

CASE # 370887  
State of Washington v. Anthony Ryan Gallo  
SPOKANE COUNTY SUPERIOR COURT No. 181054321

Counsel:

Enclosed is a copy of an order denying the appellant's motion for reconsideration of this Court's December 10, 2020, opinion.

A party may seek discretionary review by the Washington Supreme Court of a Court of Appeals' decision. RAP 13.3(a). A party seeking discretionary review of the December 10, 2020, opinion must file a petition for review in this Court within 30 days after the order on reconsideration is filed. RAP 13.4(a). Please file the petition electronically through the Court's e-filing portal. The petition for review will then be forwarded to the Supreme Court. The petition must be received in this court on or before the date it is due. RAP 18.5(c).

If the party opposing the petition for review wishes to file an answer, that answer should be filed in the Supreme Court within 30 days of the service on the party of the petition. RAP 13.4(d). The address of the Washington Supreme Court is Temple of Justice, P.O. Box 40929, Olympia, WA 98504-0929.

Sincerely,

Renee S. Townsley  
Clerk/Administrator

RST:btb  
Attachment

c: **E-mail** Anthony Ryan Gallo (DOC #402694 – Washington State Penitentiary)

**FILED**  
**JANUARY 21, 2021**  
In the Office of the Clerk of Court  
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	
	)	No. 37088-7-III
Respondent,	)	
	)	ORDER DENYING MOTION
v.	)	FOR RECONSIDERATION
	)	
ANTHONY R. GALLO,	)	
	)	
Appellant.	)	

THE COURT has considered appellant Anthony Gallo's motion for reconsideration of our December 10, 2020, opinion; and the record and file herein.

IT IS ORDERED that the appellant's motion for reconsideration is denied.

PANEL: Judges Pennell, Korsmo, and Fearing

FOR THE COURT:



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REBECCA L. PENNELL  
Chief Judge

Supreme Court No. (to be set)  
Court of Appeals No. 37088-7-III

CERTIFICATE OF SERVICE

I, Stephanie Taplin, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct to the best of my knowledge:


On February 19, 2021, I electronically filed a true and correct copy of the Petition for Review by the Appellant, Anthony Ryan Gallo, via the Washington State Appellate Courts' Secure Portal to the Washington Court of Appeals, Division III. I also served said document as indicated below:

Larry D. Steinmetz Spokane County Prosecuting Attorney's Office	( X ) via email to: lsteinmetz@spokanecounty.org, scpaappeals@spokanecounty.org
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Brett Ballock Pearce, Spokane County Prosecuting Attorney's Office	( X ) via email to: bpearce@spokanecounty.org; scpaappeals@spokanecounty.org
--	--

Anthony Ryan Gallo DOC # 402694 Washington State Penitentiary 1313 North 13th Avenue Walla Walla, WA 99362	( X ) via U.S. mail
--	---------------------

SIGNED in Park City, Utah, this 19th day of February, 2021.

  
\_\_\_\_\_  
STEPHANIE TAPLIN  
WSBA No. 47850  
Attorney for Appellant, Anthony  
Ryan Gallo



**NEWBRY LAW OFFICE**

**February 19, 2021 - 11:36 AM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 37088-7  
**Appellate Court Case Title:** State of Washington v. Anthony Ryan Gallo  
**Superior Court Case Number:** 18-1-05432-1

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