

71929.7

71929.7

NO. 71929-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

---

STATE OF WASHINGTON,

Respondent,

v.

WALLACE ROBINSON, JR.,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE RONALD KESSLER

---

**BRIEF OF RESPONDENT**

---

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

NAMI KIM  
Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 3rd Avenue  
Seattle, Washington 98104  
(206) 296-9650



TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	2
1. PROCEDURAL FACTS .....	2
2. SUBSTANTIVE FACTS .....	3
C. <u>ARGUMENT</u> .....	11
1. THE 911 CALLER'S STATEMENTS WERE NOT TESTIMONIAL .....	11
a. Relevant Facts .....	11
b. The Statements On The 911 Call Are Not Testimonial .....	13
c. Any Error Was Harmless Beyond A Reasonable Doubt .....	22
2. ROBINSON FAILS TO ESTABLISH THAT THE PROSECUTOR COMMITTED MISCONDUCT .....	24
a. The Prosecutor Did Not Align Himself With The Jury .....	25
b. The Prosecutor Did Not Vouch For The Victim's Credibility .....	39
c. The Defendant Has Failed To Establish Prejudice .....	43
D. <u>CONCLUSION</u> .....	46

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Crawford v. Washington, 541 U.S. 36,  
124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)..... 14, 16, 17

Davis v. Washington. 547 U.S. 813,  
126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006)..... 14-16, 19-21

Michigan v. Bryant, \_\_\_ U.S. \_\_\_,  
131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011)..... 15, 16, 18, 20, 21

United States v. Bentley, 561 F.3d 803  
(8<sup>th</sup> Cir. 2009) ..... 27, 28, 31, 33, 36

United States v. Liera-Morales, 759 F.3d 1105  
(9<sup>th</sup> Cir. 2014) ..... 18

United States v. Younger, 398 F.3d 1179  
(9th Cir. 2005) ..... 27, 28, 33, 36

United States v. Solorio, 669 F.3d 943  
(9<sup>th</sup> Cir. 2012) ..... 17, 18

Washington State:

Berschauer/Phillips v. Seattle Sch. Dist. No.1, 124 Wn.2d 816,  
881 P.2d 986 (1994)..... 20

Feis v. King Cnty. Sheriff's Dep't, 165 Wn. App. 525,  
267 P.3d 1022 (2011)..... 27

Kucera v. Dep't of Transp., 140 Wn.2d 200,  
995 P.2d 63 (2000)..... 20

State v. Beadle, 173 Wn.2d 97,  
265 P.3d 863 (2011)..... 15, 20

<u>State v. Borg</u> , 145 Wn.2d 329, 36 P.3d 546 (2001).....	40
<u>State v. Coleman</u> , 155 Wn. App. 951, 231 P.3d 212 (2010).....	39
<u>State v. Embry</u> , 171 Wn. App. 714, 287 P.3d 648 (2012).....	39
<u>State v. Emery</u> , 174 Wn.2d 741, 278 P.3d 653 (2012).....	25
<u>State v. Grisby</u> , 97 Wn.2d 493, 647 P.2d 6 (1982).....	46
<u>State v. Ish</u> , 170 Wn.2d 189, 241 P.2d 699 (1984).....	39
<u>State v. Jasper</u> , 174 Wn.2d 96, 271 P.3d 876 (2012).....	13, 14, 22
<u>State v. Jones</u> , 168 Wn.2d 713, 230 P.3d 576 (2010).....	22
<u>State v. Koslowski</u> , 166 Wn.2d 409, 209 P.3d 479 (2009).....	19, 21
<u>State v. Lindsay</u> , 180 Wn.2d 423, 326 P.3d 125 (2014).....	26, 39
<u>State v. Magers</u> , 164 Wn.2d 174, 189 P.3d 126 (2008).....	25
<u>State v. McWilliams</u> , 177 Wn. App. 139, 311 P.3d 564 (2013).....	17
<u>State v. Powell</u> , 166 Wn.2d 73, 206 P.3d 321 (2009).....	26
<u>State v. Reed</u> , 102 Wn.2d 140, 684 P.2d 699 (1984).....	29

State v. Russell, 125 Wn.2d 24,  
882 P.2d 747 (1994)..... 26

State v. Swan, 114 Wn.2d 613,  
790 P.2d 610 (1990)..... 26, 44

State v. Thorgerson, 172 Wn.2d 438,  
258 P.3d 43 (2011)..... 25, 26, 37, 39

Other Jurisdictions:

State v. Mayhorn, 720 N.W.2d 776 (Minn. 2006) ..... 30

State v. Spencer, 81 Conn. App. 320 (2005) ..... 30

Constitutional Provisions

Federal:

U.S. Const. amend. VI ..... 13

Rules and Regulations

Washington State:

ER 803 ..... 11

**A. ISSUES PRESENTED**

1. A statement is not testimonial under the Confrontation Clause if circumstances objectively show that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. The trial court admitted the present sense impressions of a bystander who called 911 and described, in real-time, the defendant robbing the victim as the attack unfolded in public. Did the trial court properly reject Robinson's argument that the call was testimonial simply because the caller himself was not personally the party being attacked?

2. A prosecutor improperly aligns himself with the jury by using the term "we know" to suggest that the government has special knowledge of evidence not presented to the jury, to imply a guarantee of a witness' truthfulness, or to draw a socioeconomic divide between the defendant and a unified jury/prosecution. Here, the defendant failed to object to the prosecutor's use of phrases such as "we do know from [victim]'s testimony . . ." during closing argument. Where the prosecutor consistently linked the term "we know" to the evidence introduced at trial and offered neither a guarantee of truthfulness nor an invitation to draw socioeconomic boundaries, has the defendant

waived any claim of error and failed to establish flagrant and ill-intentioned misconduct?

3. A prosecutor improperly vouches for a witness' credibility when he places the prestige of his office behind a witness or implies special knowledge of evidence not before the jury. Here, the defendant objected when the prosecutor argued in closing argument that the victim, who had no prior relationship with the defendant, "ha[d] no reason to lie" and "no motive to fabricate" his testimony regarding the robbery. Has the defendant failed to establish prosecutorial misconduct?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS.**

Defendant Wallace Robinson, Jr. was charged by amended information with Count I: Robbery in the Second Degree, and Count II: Attempted Robbery in the Second Degree. CP 6-7. The State alleged that Robinson robbed Hector Aguayo of his cell phone after punching him in the face. CP 3. The jury convicted Robinson as charged on both counts. CP 13-14. Count II was dismissed pursuant to the State's motion at sentencing. CP 41.

## 2. SUBSTANTIVE FACTS.

On October 27, 2013, Portland resident Hector Aguayo came to Seattle to attend a music festival at the WaMu Theatre in the downtown stadium district. RP 78-79.<sup>1</sup> Wearing a Halloween costume for the impending holiday, he met a large group of friends at the concert and left at around 3:00 a.m. RP 80. Aguayo intended to take a cab to West Seattle to spend the night with friends, but got separated from his group after the concert. RP 84-85. He reached his friend, Chris Steele, who agreed to return from West Seattle to pick him up at a parking lot in downtown Seattle. RP 86.

Aguayo, who was unfamiliar with much of Seattle, believed that Steele was picking him up near Pike Place Market, so an acquaintance named Brandon dropped him off on the corner of First Avenue and Pike Street. RP 82-83, 86-90. Aguayo used his iPhone to call Steele to see where he was. RP 88-90. It was then that defendant Robinson approached Aguayo, mumbling incoherently and telling Aguayo that he wanted to help him. RP 91. Aguayo, whose Halloween costume consisted only of sheer leggings with no shirt, a bowtie, cufflinks, black and white trucker hat, zebra mask and

---

<sup>1</sup> The verbatim report of proceedings consists of eight consecutively numbered volumes, which will be referred to as RP.

sunglasses, became uncomfortable because he felt that he was “not dressed very appropriately to be in a very strange place at 3:00 a.m.” RP 90-91, 98-99.

Aguayo had never met or seen Robinson before. RP 95. Still on the phone with Steele, Aguayo attempted to be “nice and polite, but avoid everything,” and he declined help while walking away from Robinson. RP 90-92. Robinson became aggressive, repeatedly calling Aguayo a “faggot.” RP 92-93. Aguayo continued to tell Robinson “No, thank you, I’m trying to talk to my friend right now.” RP 92-93, 95. Aguayo walked farther into the parking lot, across an alley, and into a breezeway next to a condominium complex at 1521 Second Avenue in an attempt to get to a well-lit area. RP 95-96, 100. This area was covered by surveillance cameras, which captured the next few minutes of the incident. RP 96-97, 100, 166; Ex. 3, 4, 10.

Aguayo narrated the activity alongside the surveillance video at trial, describing how he had walked to the far eastern end of the breezeway, which opened up onto Second Avenue, where Robinson could be seen yelling at him. RP 101-02; Ex. 4, 10. Attempting to placate Robinson, Aguayo continued to be “polite” and “just try[] not to cause any trouble whatsoever.” RP 102. Robinson suddenly began gesturing toward him and said, “Where are you going, faggot?”

RP 100. At this point, Robinson's tone was "very angry," "very strong," and "very assertive." Aguayo began to panic, imploring to Steele on the phone that he needed him now. RP 101. He turned back to the west end of the breezeway because "I just need to get away . . . and go back . . . towards the lit area and just maybe he'll leave me alone." RP 102.

Aguayo made sure to keep the phone to his ear because "I wanted to make it clear that I was on a phone with someone, thinking, oh, nothing's going to happen if they know I'm on the phone."

RP 104. At that point, the video shows Robinson suddenly lunging at Aguayo and punching him hard on the side of the head, sending him stumbling sideways into a garage door. Ex. 4, 10. Aguayo attempts to put the iPhone back to his ear but Robinson yanks Aguayo's hand downward and then grabs both of Aguayo's wrists, dragging him back and forth across the breezeway and wrestling him for the cell phone. RP 105; Ex. 4, 10. Something can be seen in Aguayo's other hand; he testified that he had been holding a debit card and possibly his black-and-white zebra mask.<sup>2</sup> RP 98-99, 106; Ex. 4.

During the struggle, an item can be seen falling to the ground, which Robinson reaches down and swipes away. Ex. 4. Robinson

---

<sup>2</sup> The video supports this, showing Aguayo no longer wearing the mask. Ex. 4.

later theorized at trial that this was the cell phone. RP 277. The video then depicts Robinson appearing to snatch something from Aguayo's hand, at which point Robinson finally breaks into a run with Aguayo in pursuit. Ex. 4, 10. Although Chris Steele later testified that he thought he could hear the phone drop and the call end after Aguayo's calls for help, he clarified that it was his "assumption" that the phone had fallen because "I suppose when you're talking with someone. . . and you hear sort of a loud noise and then call ends, that's pretty much what I heard." RP 235, 239-40. Steele testified that he immediately called Aguayo back; the phone rang normally the first time before going to voicemail, but then went directly to voicemail without ringing the second and third time. RP 240.

Aguayo recalled being hit and then hearing the sound of the metal garage door as he stumbled into it. RP 104. His cell phone was in his right hand, and he testified that this was when he began yelling at Steele for help on the phone. RP 104. Steele confirmed this, testifying that he had been trying to pinpoint his location on the phone with Aguayo when he "heard [Aguayo] get interrupted. There was -- he yelled stop, what are you doing, no, and then he yelled my name, Chris. And he sounded very distressed, distraught." RP 235.

Aguayo testified that Robinson was grabbing at Aguayo's bracelets, which broke, and other items, and although he was "a little bit hazy" about the point at which Robinson succeeded in taking the phone from him, he knew that Robinson "ha[d] a hold of my phone [the] majority of the time," which Aguayo would not release, and that it was the only item over which they were wrestling. RP 105-06.

Aguayo did not see anything fall to the ground while wrestling with Robinson besides his hat, sunglasses, and some bracelets. RP 106. While Aguayo initially speculated that the item on the ground that was swept away by Robinson in the video was "probably my cell phone," he later clarified on cross-examination that he was "a little fuzzy" immediately after the punch to his head and that it could have "potentially" been his phone. RP 189. After Robinson took the phone and fled, Aguayo chased him back into the parking lot abutting the breezeway, and demanded it back. RP 107-09; Ex. 3. Robinson denied having it, then hit Aguayo again as they rounded the far corner of the parking lot, outside the scope of the surveillance video. RP 108-09.

The breezeway's surveillance video shows a male figure standing in the background at the entrance to Second Avenue, facing Aguayo and Robinson and observing the altercation. Ex. 4. This

man was later revealed to be Leslie Caldwell, the concierge at the condominium complex abutting the breezeway, who called 911 to report the robbery. RP 210-16; Ex. 5. On the call, Caldwell describes the event in real-time as it unfolds in the breezeway and the items he finds on the ground, saying, "Right now I have his sunglasses. I have his hat and some other . . . I don't know what it is. Something that he -- I guess it was attached to his [Indecipherable]." RP 213; Ex. 5. The video corroborated these details. Ex. 4.

Aguayo continued chasing Robinson until they reached the Starbucks at First Avenue and Pike Street. RP 89, 110. There, Aguayo testified that Robinson "pulls out my phone, has it in his hand, pulls it out in front of me, even shows it to me." RP 110. Aguayo then described how, despite his earlier denials, Robinson then "takes my cell phone case off, sets it on one of the coffee tables that's there right outside the Starbucks for the public and keeps on walking. And then it turns into a run." RP 110. Aguayo stressed that he was "certain" and "positive" that Robinson held both cell phone and the case in his hand, because he had spent a "pretty penny on my Coach case, and I know when my phone came out, there's my Coach case along with it. There's no doubt it's on my phone. Plus

my phone even had its little sticker on the home button that I put on there, just to make my phone more customized.” RP 111.

Intent on retrieving the phone still in Robinson’s hand, Aguayo followed him up and down First and Second Avenues, where Robinson at one point slid under a garbage truck to try to evade Aguayo. RP 166-75. During the lengthy pursuit, Robinson stopped to talk to someone he knew as Aguayo yelled that Robinson had just robbed him. RP 170-73. Three men finally stopped Robinson until the police arrived. RP 174-75.

Seattle Police Officers Rene Miller and Terry Dunn and Sergeant William Edwards responded to the scene at Spring Street and Second Avenue. RP 66-67, 128-29, 141. Edwards had received information from dispatch that the robbery suspect was a black male in his 40s wearing a red jacket. RP 66, 74. When Edwards arrived, he saw Robinson throw his red jacket to the ground and approach him, announcing unsolicited, “Sarge, I didn’t touch anybody; I don’t have anything.” RP 69-72

Dunn noticed that Aguayo had some blood on his face, was “very upset” and crying. He described Aguayo as oriented to place and circumstance but believed that he smelled alcohol on Aguayo’s breath; he saw no signs of impairment like slurred speech and

testified that Aguayo was "definitely not super intoxicated."

RP 144-45. Aguayo testified that he had not drunk anything that night, including the concert because of the extra alcohol fee, nor had he taken any drugs. RP 80-81. Chris Steele was unaware whether Aguayo had drunk anything when they were at the concert but said that Aguayo was "definitely not" under the influence. RP 233.

Officers Dunn and Miller took Aguayo to look for his cell phone, as Robinson no longer had it on his person. RP 133, 136. They retraced the route of the chase from the breezeway at 1521 Second Avenue to the site of Robinson's arrest. RP 133, 146, 149. Although Aguayo was unfamiliar with Seattle, he gave the officers "the best directions he could" as to the direction that Robinson took after stealing the phone, including various alcoves and doorways where Robinson had tried to hide. RP 133, 149. Although they were unable to find the cell phone, they recovered the phone case at the Starbucks at First Avenue and Pike Street where Aguayo had told them that Robinson had discarded it. RP 134-35, 149-50. Aguayo showed the case to the jury and demonstrated how "if you apply enough pressure, the case just kind of comes right off." RP 111, 196-97, 217; Ex. 9.

**C. ARGUMENT**

**1. THE 911 CALLER'S STATEMENTS WERE NOT TESTIMONIAL.**

Robinson contends that the present sense impressions of 911 caller Leslie Caldwell were "testimonial" because Caldwell was not the party personally facing harm during the ongoing emergency. This argument should be rejected. The Confrontation Clause does not limit the admissibility of statements to those of victims of an ongoing emergency or require that the declarant personally be at risk.

**a. Relevant Facts.**

At trial, Robinson sought to exclude Caldwell's 911 call on both hearsay grounds and an alleged Confrontation Clause violation.<sup>3</sup> RP 44-62. Both the State and defense were unsuccessful in locating Caldwell. RP 12-14. Robinson's theory was that Caldwell had actually taken the phone after it dropped to the ground. RP 14. The State played the call for the trial court in conjunction with the corresponding surveillance video.<sup>4</sup> RP 19-27; Ex. 5 (Pretrial Ex. 1). On the call, Caldwell describes in real-time the events unfolding in front of him, stating that "I'm witnessing an assault. Some – a black

---

<sup>3</sup> Robinson concedes on appeal that the statements were properly admitted as present sense impressions under ER 803(a)(1).

<sup>4</sup> The call was not transcribed separately as an exhibit but can be found in the verbatim report of proceedings. RP 22-27, 210-16.

guy just assaulted a guy” and “He’s beating him up and stealing his phone.” RP 22. Other relevant excerpts include:

MR. CALDWELL: Right now they’re in the driveway, the garage, you know, where the cars go by in the front, yeah.

...

MR. CALDWELL: They have now gone to Second Avenue. You can still hear them screaming. The guy is still asking back for his phone.

RADIO: So are they north of your door or south of your door?

MR. CALDWELL: They’re now -- now they’re south of my door. So they’re in the back.

RADIO: They’re in the alley?

MR. CALDWELL: Right now they’re screaming.

RADIO: Are they in the alley, yes or no?

MR. CALDWELL: No, no, they’re not in the alley anymore. Now they’re just sort of going up and down the street.

...

MR. CALDWELL: Pike, they’re now on Pike. Now the guy’s running after the other guy for it. He’s really, this guy is not going to let him get away with his phone. He’s in costume. I guess he was in one of the Halloween parades.

OPERATOR: He’s in costume? Okay. Let’s get a better...

MR. CALDWELL: Okay. So right now he’s shirtless. He’s got a pair of suspenders on and pants.

OPERATOR: (Unintelligible.)

MR. CALDWELL: He’s got no shirt on, suspenders and pants. Right now I have his sunglasses, I have his hat, and some other. I don’t know what it is. Something (unintelligible). I guess it was attached to his --

...

MR. CALDWELL: Hang on. They’re so far away I can’t tell.

OPERATOR: What kind of costume was it? Was it something that is recognizable?

MR. CALDWELL: No, nothing that I could recognize. The guy is literally chasing him down the street.

RP 22-27. During the course of the conversation, the operator's questions focus exclusively on attempts to gain the location, direction and physical description of the suspect. RP 22-27.

The trial court denied Robinson's motion to suppress.

RP 60-61. The court found that the call described events as they were occurring, based on the recording that was "substantively in the present tense" and the accompanying video; that the call was not a structured interrogation but "an attempt to get the person to explain what was going on in some kind of a rational fashion"; that "the interrogation was clearly not formal"; and that the caller was reporting a threat of harm: "[T]here's somebody out there who is allegedly committing a strong armed robbery, which is a threat of harm not only to the victim but potentially to others." *Id.*

**b. The Statements On The 911 Call Are Not Testimonial.**

The Confrontation Clause of the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI. An alleged violation of the Confrontation Clause is reviewed de novo. *State v. Jasper*, 174 Wn.2d 96, 108, 271 P.3d

876 (2012). The Confrontation Clause prohibits the admission of testimonial statements unless the declarant was unavailable and the defendant had a prior opportunity for cross-examination. Crawford v. Washington, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). The Court declined to provide a comprehensive definition of “testimonial” in Crawford, offering only the basic definition of “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact” which, at a minimum, includes prior testimony and police interrogations. Id. at 51, 68.

The Court refined the definition of testimonial statements produced in the context of police interrogations in Davis v. Washington. 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006), holding that the testimonial nature of the statement depends on the primary purpose of the interrogation during which it was made:

Statements are nontestimonial when *made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency*. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Id. at 822 (footnote omitted) (emphasis added).

Davis elaborated on four factors to assist in this determination, noting that: (1) the victim in that case “was speaking about events as *they were actually happening*, rather than ‘describ[ing] past events’; (2) “any reasonable listener would recognize that . . . [the 911] call was a call for help against a bona fide physical threat”; (3) “the nature of what was asked and answered . . . was such that the elicited statements were necessary to be able to *resolve* the present emergency, rather than simply to learn . . . what had happened in the past; and (4) the victim’s “frantic answers were provided over the phone, in an environment that was not tranquil, or even . . . safe.”<sup>5</sup> Id. at 827 (emphases in original).

In Michigan v. Bryant, the Court clarified that the primary purpose test was a “highly context-dependent inquiry,” requiring an objective evaluation of “the circumstances in which the encounter occurs and the statements and actions of the parties.” \_\_\_ U.S. \_\_\_, 131 S. Ct. 1143, 1156, 1158, 179 L. Ed. 2d 93 (2011) (quotations omitted). Where an interrogation’s primary purpose is to respond to an ongoing emergency, its purpose is by definition “not to create a

---

<sup>5</sup> Washington courts have adopted the four-factor primary purpose test announced in Davis: “(1) the timing relative to the events discussed, (2) the threat of harm posed by the situation, (3) the need for information to resolve a present emergency, and (4) the formality of the interrogation.” State v. Beadle, 173 Wn.2d 97, 108, 265 P.3d 863 (2011) (internal quotations omitted).

record for trial.” Id. at 1155. The existence of an ongoing emergency is relevant because the emergency focuses the declarant on something other than proving past events potentially relevant to later criminal prosecution. Id. at 1157. “No ‘witness’ goes into court to proclaim an emergency and seek help.” Davis, 547 U.S. at 828.

The Court in Bryant cautioned against making its particular *application* of the four factors announced in Davis into an overly formulaic test, read without attention to the specific facts of that case; it noted, for example, that the contextually driven concept of an “ongoing emergency” depends on many factors, including the existence of domestic violence, weapons, and an unsecured and public location. Bryant, 131 S. Ct. at 1158-61. Read another way, simply because Bryant and Davis involved victims did not make it a *requirement* that a caller always be a victim.

Robinson’s sole basis for his claim of error is that Caldwell was not *personally* the party facing harm in the ongoing emergency. App. Br. 11. This argument should be rejected. The declarant in Crawford was not the party personally facing harm; Sylvia Crawford was the defendant’s wife and possible co-suspect in an assault case. 541 U.S. 38-40. But it was not her status as a non-victim that rendered her statements testimonial; the court in Davis determined

that she was not “facing an ongoing emergency” because she was sitting “calmly, at the station house” talking with police, hours after witnessing an assault that the police believed that she herself had facilitated. 547 U.S. at 822, 827; see also Crawford, 541 U.S. at 40, 65. None of those dynamics are present here. The trial court described it as a “strong armed robbery” happening right before Caldwell’s eyes, followed by an extended, chaotic chase through the streets presenting further danger to Aguayo and the public.

Appellate courts in Washington State and the Ninth Circuit have both recognized that the declarant need not be the party directly facing harm in order for the primary purpose of the interrogation to be to meet an ongoing emergency. In State v. McWilliams, a trial court properly admitted the 911 tape of a non-testifying store clerk as he described the defendant engaging in a fistfight with someone outside his store, then a gunshot that hit the store window and injured a different clerk. 177 Wn. App. 139, 156-57, 311 P.3d 564 (2013). The court held that the statements, admitted as present sense impressions, were made in the course of an ongoing emergency and were not testimonial. Id. at 157.

In United States v. Solorio, the Ninth Circuit held that the present-sense impressions of two non-testifying DEA agents

describing their surveillance of a defendant's drug dealing activities were properly admitted through other DEA agents. 669 F.3d 943, 953 (9<sup>th</sup> Cir. 2012). The court concluded that, even absent an armed suspect, it was a "high-risk situation" in which the agents had to relay information to one another in order to "stay ready to protect [the confidential informant] should it prove necessary" and that "objectively assessed, the 'primary purpose' of the agents' statements was assuring that the arrest effort both succeeded and did not escalate into a dangerous situation, not 'to create a record for trial.'" Id. at 953 (quoting Bryant, 131 S. Ct. at 1155). The fact that the non-testifying DEA agents personally faced no harm at the time was irrelevant. See also United States v. Liera-Morales, 759 F.3d 1105, 1110 (9<sup>th</sup> Cir. 2014) (holding that statements made at an officer's request by a kidnapping victim's mother to one of the kidnappers were nontestimonial even though the mother herself faced no harm).

The lack of the "victim requirement" proposed by Robinson makes sense. If Robinson's contention were taken to its logical conclusion, then any statement made to a 911 operator by someone seeing a violent crime unfold before his eyes would be considered testimonial, merely because he was not personally the object of the harm, and even though the purpose was to obtain assistance, not to

“create a record for trial.” “No ‘witness’ goes into court to proclaim an emergency and seek help.” Davis, 547 U.S. at 828. Moreover, if contemporaneity is one of the four primary purpose factors espoused by Davis and attendant Washington caselaw, a bystander will almost always be in a more likely position to give a truly real-time account of an ongoing violent attack than will a victim, who will understandably be less free to describe each blow as it occurs.

Robinson’s reliance on State v. Koslowski is misplaced. 166 Wn.2d 409, 209 P.3d 479 (2009). He quotes Koslowski as proof of the requirement that a declarant must personally be facing danger in order to pass testimonial muster: “[T]he relevant question is whether a reasonable listener could ‘conclude that the *speaker* was facing an ongoing emergency that required help.” App. Br. 11 (quoting Koslowski, 166 Wn.2d at 419 (emphasis added)).

While Robinson seizes up on this language in Koslowski, the case does not support the result he seeks. Koslowski was not resolving the question of *who* must face the ongoing emergency; it was addressing the existence of an ongoing emergency *based on the specific facts presented in that case*. Beyond the particular phrase appropriated by Robinson, there is no discussion or analysis of the significance of the declarant’s identity. A case that does not discuss

a legal theory is not controlling in a future case where the theory is properly raised. Berschauer/Phillips v. Seattle Sch. Dist. No.1, 124 Wn.2d 816, 824, 881 P.2d 986 (1994). See also Kucera v. Dep't of Transp., 140 Wn.2d 200, 220, 995 P.2d 63 (2000) (appellate court will not rely on case that fails to specifically raise or decide an issue).

Furthermore, a survey of recent caselaw demonstrates that the courts' use of the word "speaker" to define the subject of the ongoing emergency has been fluid, and not the established terminology that Robinson suggests. The most recent Washington State Supreme Court opinion to address the primary purpose test, for example, refers to the question of an ongoing emergency as simply "the threat of the harm posed by the situation." State v. Beadle, 173 Wn.2d 97, 108, 265 P.3d 863 (2011).

Robinson can point to no language in Davis, the source of the primary purpose test, that *mandates* that the speaker always be the victim of the harm. To the contrary, Bryant clarified that the evaluation of an ongoing emergency is highly context-specific, and emphasized that Davis spoke specifically to the facts of a domestic violence situation "for that was the case before us." 131 S. Ct. at 1156. Bryant dispelled the assumption that Davis presented a rigid, universal framework from which to determine the existence of

ongoing emergencies in all situations (noting that it was error to “assum[e] that Davis defined the outer bounds of ‘ongoing emergency.’”).<sup>6</sup> Bryant, 131 S. Ct. at 1158.

As in Bryant, the 911 call here took place in a highly informal and disorganized situation that “occurred in an exposed, public area.” 131 S. Ct. at 1160. The questions that were asked and answered - what and where the robbery was happening – were the “exact type of questions necessary to allow the police to assess the situation, the threat to their own safety, and possible danger to the potential victim and to the public” and to *resolve* the emergency, not establish facts for prosecution. Id. at 1166 (internal quotations omitted). And although Robinson was not armed, he was at large and hardly someone who “flees with little prospect of posing a threat to the public,” given his demonstrated persistence and willingness to beat someone in public hard enough to make him bleed.

Leslie Caldwell’s present sense impressions were properly admitted as nontestimonial statements. This Court should reject Robinson’s claim.

---

<sup>6</sup> Robinson also fails to recognize that Koslowski was decided two years *before* Bryant, and thus before the latter rejected the perception of Davis as “defin[ing] the outer bounds of ‘ongoing emergency.’” Bryant, 131 S. Ct. at 1158.

**c. Any Error Was Harmless Beyond A Reasonable Doubt.**

Even if this Court concludes that the admission of the 911 tape was proper, any error is harmless beyond a reasonable doubt.

Confrontation Clause errors are reviewed for constitutional harmless error. State v. Jasper, 174 Wn.2d 96, 117, 271 P.3d 876 (2012). Under this standard, the State must show “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” Id. A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result had the error not occurred. State v. Jones, 168 Wn.2d 713, 724, 230 P.3d 576 (2010).

Even absent the 911 call, the evidence against Robinson was overwhelming. There was a surveillance video of the assault and robbery, showing Robinson punching Aguayo forcefully in the face and then grabbing for his cell phone. Although Robinson argues that the video supports his version of the story as well (that the phone dropped and Leslie Caldwell stole it), the jury was given Exhibits 3, 4 and 10 to evaluate for themselves which version they believed. The State’s version is more credible; it shows Robinson lunging for the

phone and struggling with the victim over it. He reaches to grab something again and walks away quickly, indicating that he has obtained what he wanted and is now fleeing.

Although Aguayo said at one point that one of the three objects on the ground in the alleyway might have been his cell phone, he noted that the only items that he saw on the ground were his hat, his sunglasses and some broken bracelets, which matched the number of items on the ground. He had also been carrying a black and white zebra mask immediately prior to the assault. Steele noted that Aguayo's phone rang normally at first before going to voicemail and then started going straight to voicemail, indicating that Robinson was trying to turn it off after snatching it.

Moreover, Robinson made clear his intent to introduce the surveillance videos as the crux of his defense, replaying them even after the State had already done so in its case-in-chief and arguing then, as he does now, that they proved that the phone had dropped in the struggle and that Caldwell had stolen it. RP 7, 12, 43-44, 56-57, 94-95, 217, 245, 272-82, 285. He ignores the fact that this would have entitled the State to introduce the 911 call to directly rebut his assertions.

Most importantly, Aguayo testified that he was “certain” that Robinson had the phone in his hand because he had seen his personalized decal sticker on its face as Robinson boldly showed it to him at Starbucks. Defense counsel acknowledged Aguayo’s favorable demeanor on the stand, speaking to his credibility. RP 274. Any error in admitting the 911 call was thus harmless beyond a reasonable doubt.

**2. ROBINSON FAILS TO ESTABLISH THAT THE PROSECUTOR COMMITTED MISCONDUCT.**

Robinson next argues that the prosecutor committed reversible misconduct by using phrases such as “we do know from Mr. Aguayo’s testimony” during closing argument. He also asserts that the prosecutor vouched for Aguayo’s credibility when he stated that Aguayo “had no reason to lie” or “motive to fabricate what he told you he saw.” Robinson’s contentions are without merit. The prosecutor’s use of the term “we know” was limited to instances in which he linked arguments to the actual evidence admitted at trial. Moreover, Robinson waived this challenge on appeal by failing to object at trial. Finally, the prosecutor’s brief reference to Aguayo’s lack of motive was grounded in permissible inferences about the testimony.

To establish prosecutorial misconduct, Robinson must show “that the prosecutor’s conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial.” State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011) (quoting State v. Magers, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)). Prejudice is established only if “there is a substantial likelihood [that] the instances of misconduct affected the jury’s verdict.” Thorgerson, 172 Wn.2d at 442-43.

“A prosecutor has wide latitude to argue reasonable inferences from the evidence, including evidence respecting the credibility of witnesses.” Thorgerson, 172 Wn.2d at 448. Moreover, in analyzing the impropriety and prejudicial impact of a prosecutor’s remarks, our Supreme Court has repeatedly stated that “we do not look at the comments in isolation, but in the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury.” State v. Emery, 174 Wn.2d 741, 764 n.14, 278 P.3d 653 (2012).

**a. The Prosecutor Did Not Align Himself With The Jury.**

Because Robinson did not object to the use of the word “we” at trial, he has waived that claim unless he can show that “the remark

was so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.”<sup>7</sup> Thorgerson, 172 Wn.2d at 443 (quoting State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994)).

The absence of a motion for mistrial at the time of the argument strongly suggests to a court that the argument or event in question did not appear critically prejudicial ... in the context of the trial. Moreover, counsel 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 a new trial or on appeal.

State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990) (internal quotations omitted). When applying this standard, our supreme court has noted that courts should “focus less on whether the prosecutor’s misconduct was flagrant or ill-intentioned and more on whether the resulting prejudice could have been cured.” State v. Lindsay, 180 Wn.2d 423, 431 n.2, 326 P.3d 125 (2014).

Robinson contends that the prosecutor impermissibly aligned himself with the jury by using the word “we” during closing arguments.

---

<sup>7</sup> Robinson does not address his failure to object to the prosecutor’s use of the word “we” during closing arguments and appears to assume that he correctly preserved his claim of “aligning” by lodging an objection on the grounds of “vouching.” This presumption is incorrect. Although his attorney objected at one point during the prosecutor’s argument, she did so on separate grounds from the one argued on appeal. RP 290. “A party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial.” State v. Powell, 166 Wn.2d 73, 83, 206 P.3d 321 (2009) (citations omitted). Robinson has therefore waived review on the grounds he now argues unless it is flagrant and ill-intentioned misconduct.

He relies solely on cases outside of this Court's jurisdiction.<sup>8</sup>

Although these cases lack precedential value as non-binding authority,<sup>9</sup> they also present meaningful distinctions on other bases.

In the primary case underpinning Robinson's argument, the Ninth Circuit stated that although a prosecutor's employment of the phrase "we know" in closing argument can invite ambiguity and "blurs the line between improper vouching and legitimate summary," its use is not improper if employed "to marshal *evidence actually admitted at trial and reasonable inferences from that evidence*, not to vouch for witness veracity or suggest that evidence not produced would support witness' statements." United States v. Younger, 398 F.3d 1179, 1191 (9th Cir. 2005) (emphasis added).

Robinson next cites United States v. Bentley, 561 F.3d 803, 812 (8<sup>th</sup> Cir. 2009), which, even more than Younger, weakens his argument under the facts of his own case. In Bentley, the prosecutor assembled "a Top Ten list' of things we learned during this trial," invoking the term "we know" prior to each point. 561 F.3d at 812. The court held that the phrase "is only improper when it suggests that

---

<sup>8</sup> There are no published cases in Washington state addressing the use of the term "we know" in closing arguments.

<sup>9</sup> This Court has previously stated that Washington state appellate courts are not obligated to follow Ninth Circuit precedent under the doctrine of *stare decisis*. Feis v. King Cnty. Sheriff's Dep't, 165 Wn. App. 525, 547, 267 P.3d 1022 (2011).

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.” Id.

Applying this context-driven analysis, the court noted approvingly that “in each instance that . . . the [prosecutor] stated that ‘we know’ a certain fact, [he] followed that claim with additional statements beginning with ‘based on’ or ‘because of’ to explain how the evidence supported that fact.” Id. The prosecutor thus used the phrase to “properly focus” on evidence presented to the jury and reasonable inferences drawn therefrom. Id. The court also rejected Robinson’s implication here that the number of invocations of the phrase “we know” renders it misconduct: “Bentley tallies the uses of ‘we know’ and ‘I submit’ in his brief. No such tallying is an indication of improper commentary nor can it measure the degree of impropriety if there is any.” Id. at n.5 (internal quotations omitted).

The concerns evoked by Bentley and Younger are not present here. Both Bentley and Younger stand for the proposition that while use of the word “we” during closing arguments is discouraged because of its *potential* for ambiguous interpretation, it violates no standard of conduct if its use is grounded in evidence actually introduced at trial.

Although no published Washington cases specifically discuss use of the word “we,” Robinson cites to State v. Reed for the general proposition that a prosecutor may not make comments “calculated to align the jury with the prosecutor and *against the [defendant].*” 102 Wn.2d 140, 147, 684 P.2d 699 (1984). Reed is factually inapposite for several reasons. First, defense counsel in Reed actually objected to the misconduct at trial. 102 Wn.2d at 144. Second, the case involved repeated and outrageous misconduct by the prosecutor, which included, *inter alia*, calling the defendant a liar at least four times and implying that the defense witnesses at the heart of the case should not be believed because they were from out of town and drove fancy cars. Reed, 102 Wn.2d at 145-46. The court held that “each of these statements was calculated to align the jury with the prosecutor *and against the petitioner.*” Id. at 147 (emphasis added).

This is a key distinction. The aspect of the prosecutor’s argument most troubling in Reed was not his use of the phrase “we know” but a deeper, highly inflammatory intention to alienate the jury by grouping the prosecutor with relatively small-town jurors *against the defendant and his team of outsiders.* That concern is plainly not present here, where there was no defense witness to align against as a group, no entreaty to do so on socioeconomic grounds, and no

posing of diametric opposites between Robinson and the jury. The word “we” was used simply to describe all who were present in the courtroom who could view the exhibits being played and who had heard Aguayo's testimony.

The remaining out-of-state cases cited by Robinson are distinguishable on similar grounds. In State v. Mayhorn, a racially-tinged case, a Minnesota court found that the prosecutor's argument that “we're not really accustomed to this drug world” constituted error because, “to the extent it is permissible to describe a ‘drug world’ of which the jury is not a part, it does not follow that a prosecutor may describe herself and the jury as a group of which the defendant is not a part.” 720 N.W.2d 776, 790 (Minn. 2006). The prosecutor in State v. Spencer also wove a tale pitting the defendant against a unified jury and prosecution, claiming that the defendant was “trying to mislead us.” State v. Spencer, 81 Conn. App. 320, 337 n.6 (2005). This type of impropriety was not evoked in Robinson's case; the prosecutor here was not drawing a socioeconomic divide between Robinson and himself and the jury, or claiming that he and the jury were collectively being tricked by the defendant.

While Robinson cites to numerous parts of the record where the prosecutor said the word “we” or “us,” he analyzes only two specific examples. The first instance occurred in the initial argument:

We don't know what Mr. Robinson and the evidence hasn't been able to establish what Mr. Robinson did with his cell phone after taking the cover off and putting it on the table at Starbucks, *but what we do know from Mr. Aguayo's testimony is that at that point, Mr. Robinson had it and was fleeing with it.*

RP 267 (emphasis added).

This passage shows on its face that the prosecutor properly tied the phrase “we know” to actual evidence admitted at trial: “what we do know *from Mr. Aguayo's testimony.*” Aguayo testified at trial that he had personally observed Robinson holding the phone in his hand, his certainty underscored by the fact that he had seen the unique decal sticker that he had placed there earlier specifically to personalize it. By attributing the phrase “we do know” directly to Aguayo's testimony on this subject, the prosecutor adhered to the type of permissible conduct in Bentley in which “the [prosecutor] stated that ‘we know’ a certain fact, [and] followed that claim with additional statements beginning with ‘based on’ or ‘because of’ to explain how the evidence supported that fact.” 561 F.3d at 812.

The second instance occurred in rebuttal after defense counsel spent considerable time attacking Aguayo's credibility in terms of his honesty and memory:

[Prosecutor]: What fell to the ground, whether it was the cell phone that fell to the ground or the mask -- Ms. Hecklinger would like to believe it was the cell phone. Mr. Aguayo even speculated that it may have been his cell phone. *But what we do know from Mr. Aguayo's testimony* -- and Mr. Aguayo has no reason to lie about this. He has no reason --

[Counsel]: Objection, Your Honor. Vouching for the credibility of a witness.

RP 289-90.

This specific fragment ("But what we do know from Mr. Aguayo's testimony") is not improper for several reasons. First, the prosecutor never even completed the sentence -- as illustrated by the dash in the transcript, he stops before identifying what "we do know," and then uses the word "and" to begin a wholly different line of argument about Aguayo's lack of a motive to lie. This clear break is also demonstrated by defense counsel's sudden objection to the new line of argument and her objection on grounds ("vouching") different from the one asserted now; this contrasts sharply with her silence during the prosecutor's earlier uses of the word "we" in argument.

Robinson nevertheless contends that the prosecutor's interrupted train of thought constitutes a single argument; that the

sentence actually, in essence, reads as follows: “But what we do know from Mr. Aguayo’s testimony and Mr. Aguayo has no reason to lie about this.” This not only lacks grammatical sense but defeats Robinson’s own argument under Bentley and Younger, for whether one reads the sentence as actually written or through Robinson’s altered lens, the prosecutor clearly stated, “[W]hat we do know *from Mr. Aguayo’s testimony . . .*” He therefore directly tied any argument about “what we do know” about Aguayo’s lack of motive to the actual evidence admitted at trial: Aguayo’s testimony.

At trial, Aguayo testified that he had never met Robinson before and had no personal connection to him. These facts established a reasonable inference that Aguayo had no motive to fabricate testimony against a total stranger. As in Younger, the prosecutor therefore used the phrase “we know” to “marshal evidence actually admitted at trial and reasonable inferences from that evidence, not to vouch for witness veracity or suggest that evidence not produced would support witness’ statements.” By attributing “what we do know” directly to Aguayo’s testimony, he argued properly in the same manner as the prosecutor in Bentley.

Robinson states conclusively, without specific analysis, that all other instances of “we” and “us” used in argument were “not simply a

marshalling of evidence.” App. Br. 17. A close reading shows that in each instance the prosecutor properly employed the word “we” to focus on testimony and evidence presented to the jury at trial, noted in italics and bold below:

He continued to follow Mr. Aguayo through the breezeway . . . and wouldn't relent, wouldn't relent as Mr. -- *we saw it **on the tape**. And we'll **watch a little bit of that tape in a moment**.*

RP 263 (referencing Exhibits 3 and 4).

*[W]e all saw it as plain as day **on the video, and we're going to watch it** in a second . . . Mr. Robinson hauled off and hit Mr. Aguayo, and then there was . . . a struggle over the cell phone. We know there's no question that after that happened, Mr. Aguayo pursued Mr. Robinson . .*

RP 263-64 (referencing Exhibits 3 and 4).

*We know it was Mr. Robinson, **because Mr. Aguayo, according to the testimony of the police officers who arrested Mr. Robinson while Mr. Aguayo was there, Mr. Aguayo told you that he never lost sight of Mr. Robinson**, that he followed him, he pursued him right up to the point that he was arrested.*

RP 264 (referencing the testimony of Aguayo and Officers X and Y).

***[W]hat Mr. Aguayo told us** is that when they got to the corner of First and Pike where the Starbucks was, Mr. Robinson was like hey, man, look, stop following, stop following me, and he showed him.*

RP 266-67 (referencing Aguayo's testimony).

*But we don't just have **Mr. Aguayo's testimony**. We had **the 911 call**. And let me play the first part of that . . . *when**

**we listened to the whole thing at trial, you can hear Mr. Caldwell** kind of follow Mr. Aguayo . . .

RP 268-69 (referencing and playing Exhibit 5).

*What we do know* is that the cover to the cell phone was found out on the Starbucks table later **when Mr. Aguayo went back with the police officers, and Mr. Aguayo identified that as his cell phone cover**. So *we do know that*. *What we also know, if you listen to the 911 call*, is that Mr. Caldwell tells them, I have three things, I have his hat, I have his sunglasses, and I have some other thing. And *we know that Mr. Aguayo had a mask of some sort* on him at the time.

RP 269-70 (referencing Aguayo's testimony and Exhibit 5).

*We also know a bit about the intent of – of Mr. Robinson by virtue of the video that we watched. And these are Exhibits 3 and 4*, I believe. If I could just -- Exhibit 4 in particular is the video looking at the breezeway.

**Let's just take a moment and look at that again**. We see here **Mr. Aguayo walking into the frame**. He's talking to Mr. Steele on his phone, and Mr. Robinson is following him. **We can see that he's** -- Mr. Robinson is animated. **Consistent with what Mr. Aguayo testified to** that he's talking with, he's calling him really what amount to nothing more than pejorative terms. And he won't leave him alone . . . **In this freeze frame right after the assault** -- and we can hear -- **you can see Mr. Aguayo's hand is still up** at his -- and you'll have this to watch as well -- that Mr. Aguayo's hand is still up at his head with his cell phone. **You can see Mr. Roger -- or Mr. Robinson reaching for the cell phone**. **We know from the testimony of Mr. Steele** that Mr. Steele on the other end of the line, and he hears Mr. Aguayo say no, no.

RP 270 (referencing the testimony of Aguayo and Chris Steele, and Exhibits 3 and 4).

But it's not just a simple assault . . . *Right now what we're witnessing in Exhibit 4 is a struggle*, a struggle over an item, the item in the right hand of Mr. Aguayo, his cell phone. It goes on and on. ***You can see Mr. Robinson trying to wrestle it away.*** And on and on and on.

RP 271 (referencing Exhibit 4).

In each of the above instances, the prosecutor is plainly referencing the evidence admitted at trial – the 911 tape, surveillance video and witness testimony – as he replays or recounts them in court when using the word “we,” not implying the special knowledge of “hidden” evidence, guarantee of witness veracity, or personal opinion regarding witness credibility that was forbidden in Bentley and Younger. Indeed, the prosecutor interchangeably uses the words “we” and “you [the jury]” to describe what is being heard or seen in the audio and video tapes in Exhibits, 3, 4 and 5 as he replays them.

Because of a prosecutor's wide latitude in closing argument to draw and express reasonable inferences from the evidence, even if the use of the phrase “we know” is disfavored, its use as a rhetorical device here to refer the jury to the exhibits and testimony admitted at trial was not flagrant and ill-intentioned does not warrant reversal. The jury was properly instructed that the lawyers' statements were not evidence and that the jurors were the sole

judges of credibility. RP 252; CP 18-19. Juries are presumed to follow the trial court's instructions. Thorgerson, 172 Wn.2d at 444.

Moreover, not only did defense counsel fail to object to any of the prosecutor's uses of the phrase "we know" in closing argument, she herself repeated the very type of phrasing of which Robinson now complains on appeal. This is relevant because it demonstrates the inoffensive nature of the words as used by both counsel: a simple rhetorical device to point to the evidence at hand. Taking into consideration the record and all the circumstances of the trial, Robinson cannot credibly argue that he suffered prejudice when his own counsel employed the same benign phrasing in front of the jury that he belatedly finds objectionable today:

He made a very poor judgment that evening in assaulting Mr. Aguayo. And what the reason is really the issue here on some level, and *we may not ever know the answer as to why* (Indecipherable.)

But I think it's clear that what the reason isn't was to deprive him of his phone. And ***the reason that we know that is because we have video footage that shows us that.***

RP 274 (emphasis added).

***[L]ook at Exhibit 4***, which the state admitted. And, again, *we don't have audio, so we don't know what was being said.*

RP 278-79 (emphasis added).

If anything, defense counsel's use of the word "we" sometimes presented a far more robust example of "aligning" oneself with the jurors, asking them to invoke "our" "common experiences" with cell phones when evaluating whether the phone in question hit the ground, or the standard of reasonable doubt versus a preponderance of the evidence:

*I think we've all had those experiences, and that's something that you can judge from your own experience of maybe dropping a phone to the ground or maybe heard somebody else on the phone say that they dropped their phone and they pick it up and you ask them what happened. I think that's a common experience, and we can all understand that that's something that we can assess.*

RP 280-81 (emphasis added).

*We talk about [reasonable doubt] in jury instructions or in voir dire, that there are lots of different things we -- in our life that we don't do -- make a decision on beyond a reasonable doubt.*

RP 284 (emphasis added).

[Preponderance] is a very high level. *We take that into consideration, the importance of a parent-child relationship. And yet our law says worse than having your child taken away from you permanently that you have to come to a higher level, not just proof of a reasonable doubt, but proof beyond a reasonable doubt.*

RP 285 (emphasis added).

Even if the prosecutor's argument was prejudicial misconduct, Robinson has not demonstrated that an instruction could not have

neutralized the prejudice. This was not flagrant and ill-intentioned conduct so enduring that no curative instruction could have obviated prejudice. Robinson could have objected to the wording of which he now complains and easily cured any prejudice by requesting the judge to admonish the prosecutor or to repeat instructions that the lawyers' arguments were not evidence. Because he did not object, this Court should conclude that the issue has been waived.

**b. The Prosecutor Did Not Vouch For The Victim's Credibility.**

A prosecutor impermissibly vouches for a witness' credibility when he: (1) expresses a person belief as to the witness' veracity, State v. Ish, 170 Wn.2d 189, 196-97, 241 P.2d 699 (1984); (2) places the prestige of his office behind a witness, State v. Embry, 171 Wn. App. 714, 752, 287 P.3d 648 (2012); see also State v. Coleman, 155 Wn. App. 951, 957, 231 P.3d 212 (2010); or (3) indicates that evidence not before the jury supports the witness' testimony, Thorgerson, 172 Wn.2d at 443; Coleman, 155 Wn. App. at 957.

"Allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard." State v. Lindsay, 180 Wn.2d 423, 430, 326 P.3d 125 (2014) (quotations omitted). When reviewing a trial court's decision for abuse of discretion regarding claims of

prosecutorial misconduct, a reviewing court will not substitute its own opinion for that of the trial court's first-hand view of alleged errors. State v. Borg, 145 Wn.2d 329, 336, 36 P.3d 546 (2001) ("The trial court is in the best position to survey the effect of a remark on the defendant's right to a fair trial.").

Robinson asserts that the following statements made by the prosecutor during closing argument constituted impermissible vouching by placing the prestige of the government behind Aguayo and implying a special knowledge of his credibility:<sup>10</sup>

[Prosecutor] [Statement A]: What fell to the ground, whether it was the cell phone that fell to the ground or the mask -- Ms. Hecklinger would like to believe it was the cell phone. Mr. Aguayo even speculated that it may have been his cell phone. But what we do know from Mr. Aguayo's testimony -- *and Mr. Aguayo has no reason to lie about this.* He has no reason --

[Counsel]: Objection, Your Honor. Vouching for the credibility of a witness.

[Court]: Overruled.

[Prosecutor] [Statement B]: *Mr. Aguayo has no motive to fabricate what he told you he saw Mr. Robinson do at the Starbucks, which was remove his phone. And it wasn't Mr. Robinson's phone as Ms. Hecklinger would have you speculate. It was his phone. He said I recognized it, because it had that special detail on the button. And then placed that*

---

<sup>10</sup> Robinson does not argue that the prosecutor expressed a personal belief as to Aguayo's veracity, although he appears to conflate the two doctrines of vouching and aligning with the jury. App. 16-18.

cover on the -- on the table. *Mr. Aguayo had no motive to fabricate that.*

[Counsel]: Objection, Your Honor.

[Court]: Overruled. That's not a personal opinion.

[Prosecutor] [Statement C]: Mr. Aguayo then continued to pursue Mr. Robinson. *He had no motive to pursue Mr. Robinson if the cell phone wasn't the focus of Mr. Robinson's intent*, if all of Mr. Robinson's conduct up to that point had [sic] been about getting that cell phone.

RP 290 (emphasis added).

With respect to Statement A, Robinson again relies on a reading that conflates the initial phrase "we do know" with a new sentence ("—and Mr. Aguayo has no reason to lie about this."). For the reasons explained *supra*, this Court should not accept this flawed reading. Even if this court adopts Robinson's reading, he fails to explain how it implied special knowledge of Aguayo's credibility or placed the prestige of the government behind Aguayo. Robinson's version of the statement ("But what we do know *from Mr. Aguayo's testimony* – and Mr. Aguayo had no reason to lie about this") still refers to Aguayo's testimony of seeing Robinson with the cell phone in his hand, as described immediately afterwards in Statement B ("Mr. Aguayo has no motive to fabricate *what he told you* he saw Mr. Robinson do at the Starbucks").

In both Statement A and B, the prosecutor made a permissible inference about Aguayo's lack of bias based on the evidence. Aguayo testified that he was from out of town, unfamiliar with much of Seattle, and had never met Robinson before. RP 86, 90-92, 180. This evidence established that Aguayo had no personal relationship with Robinson and thus no personal motive to fabricate the details of the robbery. Immediately prior to the prosecutor's closing argument, the court instructed the jury that "in considering a witness's testimony, you may consider . . . any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown." The language in the jury instruction contemplates any potential motives to lie that may have arisen during trial. None was raised in the case at bar. Aguayo's lack of a motive to fabricate details was therefore a permissible inference.

Although defense counsel argued that Aguayo "wants his phone back . . . [h]e wants to be compensated for the phone," RP 283, there was no evidence presented to the jury that Aguayo would receive his phone back by testifying. In the absence of any evidence supporting a motive for Aguayo to lie, the prosecutor was permitted to argue that Aguayo had no reason to fabricate his sighting of the phone in Robinson's hand during the pursuit.

Statement C (“*He had no motive to pursue Mr. Robinson if the cell phone wasn’t the focus of Mr. Robinson’s intent*”) properly draws the reasonable inference that Robinson was carrying the cell phone because Aguayo testified that he continued to chase after him after the struggle in the alley. If Robinson had not still possessed the cell phone, Aguayo would have had no reason to chase him.

Robinson has failed to meet his burden of establishing that these statements placed the prestige of the government behind Aguayo or implied a special knowledge of his credibility. The prosecutor properly argued the lack of a motive to lie in the absence of any evidence of bias on Aguayo’s part, and drew proper inferences from evidence of Aguayo’s pursuit of Robinson that Robinson still had the phone in his hand.

**c. The Defendant Has Failed To Establish Prejudice.**

Even if this court finds that the prosecutor’s statement regarding Aguayo’s lack of bias was improper, Robinson has not established “a substantial likelihood” that the State’s remarks affected the jury’s verdict because of the weight of the evidence against him. Robinson’s failure to request a curative instruction or move for a mistrial strongly suggests that the State’s remarks did

not appear "critically prejudicial" in context. Swan, 114 Wn.2d at 661.

Evidence of Robinson's guilt was considerable. The robbery was captured on video surveillance, accompanied by a 911 call corroborating the events unfolding in real-time. Robinson could be seen persistently following Aguayo even though Aguayo attempted to walk away from him, then striking Aguayo suddenly in the head so hard that he stumbled into a garage door.

Both the video and Aguayo's testimony relayed how Robinson then immediately reached for the cell phone in Aguayo's hand, demonstrating his intent to steal it. Robinson's grabbing of the cell phone was corroborated by Chris Steele, who described hearing the attack unfolding during his conversation with Aguayo. As Aguayo and Robinson struggled visibly over the phone on the videotape, various items verified by Aguayo could be seen dropping to the ground. The 911 caller describes these items as Aguayo's sunglasses, hat and "some other thing" that attached to something. Given Aguayo's description of the mask he was wearing, this could have been the mask or the torn-off bracelets.

Although counsel argued that the last item was the cell phone, and Aguayo assented that this could have been a possibility, Aguayo

testified to seeing the phone later in Robinson's hand, noting the unique decal sticker on the face of the phone as Robinson took its distinctive Coach case off next to Starbucks. This detail made Aguayo "certain" and "positive" that the phone was still in Robinson's hand after the struggle in the alleyway: "There's no doubt [the case is still] on my phone." RP 110-11.

Robinson argues that because his theory of the case was that the 911 caller took the phone and Aguayo was the only eyewitness who testified, Aguayo's credibility "hung in the balance." App. Br. 21. This statement ignores the video surveillance of the crime itself, the present sense impressions of the 911 caller, and Chris Steele's corroborating testimony about what he heard on the phone during the struggle. Robinson argues that the video supports both the State's and his theory of events, thus zeroing the scale and again making Aguayo's credibility crucial. The fact that Robinson's theory relies on a different interpretation of the surveillance video does not establish a substantial likelihood that the prosecutor's brief comment about Aguayo's lack of bias affected the verdict. The jury watched the video and simply rejected Robinson's version.

Further, the prosecutor's comments about Aguayo's lack of bias were brief and represented a small part of the State's overall

argument. Immediately before closing arguments, the trial court also instructed the jurors that they were the sole judges of the credibility of each witness and that the lawyers' statements were not evidence. RP 252; CP 18-19. Juries are presumed to follow instructions. State v. Grisby, 97 Wn.2d 493, 499, 647 P.2d 6 (1982).

The challenged comments do not warrant reversal of Robinson's conviction. The State's remarks were reasonably drawn from the evidence, particularly when viewed in the context of the total argument, the issues in the case, the court's instructions, and the evidence addressed in argument. This Court should find that there was not a substantial likelihood that these remarks affected the jury's verdict.

**D. CONCLUSION**

For the foregoing reasons, the State respectfully asks this Court to affirm Robinson's conviction.

DATED this 3 day of December, 2014.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
\_\_\_\_\_  
NAMI KIM, WSBA #36633  
Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to MARY T. SWIFT, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. WALLACE ROBINSON, JR., Cause No. 71929-7-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

  
\_\_\_\_\_  
Name  
Done in Seattle, Washington

12-03-14  
\_\_\_\_\_  
Date

RECEIVED  
12/3/14  
12:00 PM  
CLERK OF COURT  
COURT OF APPEALS  
DIVISION I  
SEATTLE, WA