NO. 43075-4-II

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

STATE OF WASHINGTON, Respondent

v.

TANYA NADINE QUINATA, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.10-1-01713-5

BRIEF OF RESPONDENT

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A. RESPONSE TO ASSIGNMENTS OF ERROR

I. RCW 9A.36.011 IS NOT UNCONSTITUTIONAL.

II. THE ADMISSION OF THE VICTIM'S STATEMENTS TO HIS PSYCHIATRIST, MADE FOR THE PURPOSE OF DIAGNOSING AND TREATING HIM, DID NOT VIOLATE THE CONFRONTATION CLAUSE AND DID NOT VIOLATE ER 803 (a) (4).

III. THE PROSECUTOR DID NOT COMMIT MISCONDUCT.

B. STATEMENT OF THE CASE

On October 14, 2010 Tanya Quinata stabbed Samuel Kama in the heart with a kitchen knife. Quinata and Kama were in a dating relationship and lived together at the time of the stabbing. RP 309-310. They had been arguing prior to the stabbing. RP 137, 309. Quinata initially lied to the police and to the 911 dispatcher, claiming that Mr. Kama stabbed himself in an effort to commit suicide. RP 135, 347. She also told the police and 911 dispatcher that Mr. Kama said that he would say she stabbed him. RP 141, 347. However, Mr. Kama told one of the paramedics that he did not stab himself. RP 66. Mr. Kama suffered a lacerated artery in his ribs as well as a puncture in his heart. RP 127. Specifically, he had

> a collection of blood in the pericardial sac meaning that there was bleeding collecting under in like a balloon...there was a stab wound that penetrated through the pericardium,

> that's the sac surrounding the heart, into the right ventricle. That was repaired. Several drains had to be put in place. [H]e also had an intercostal artery that was lacerated. So, he has a sternotomy. They went through the main bone here, opened him up, repaired the right ventricle and there was some arterial bleeding in the chest wall that was repaired.

RP 305. He required surgery. RP 305. The injury was life-threatening. RP 305.

In the hosptial Mr. Kama was examined by a psychiatrist because it was feared, based on what had been reported, that he was suicidal. RP 307. Mr. Kama denied that he was suicidal or that he had stabbed himself. RP 307. He said that his girlfriend stabbed him. Id. Specifically, he said that he came "around the corner" and "was poked. I do not even know I was hurt until I saw the blood." RP 310. He also said "I did not even know if I died on the operating table. I did not even know I was going to end up here." RP 310.

The police were unable to locate or identify the knife the defendant used to stab Mr. Kama. RP 158-62. The defendant testified that while eating dinner that night she asked Mr. Kama to leave. RP 489. She claimed she was eating a sandwich with a knife and fork. RP 488. She testified that as he was carrying his stuff out, "he turned the corner and I turned the corner at the same time, I—I poked him with the knife. And, I knew I poked him and he—but he continued to walk outside. And then,

come back in and get more stuff and then continue to go back outside again where he collapsed around the corner." RP 489-90. She later altered the tale a bit and said that Mr. Kama "walked into" the knife. RP 503. The defendant testified that she lied to the police and told them that Mr. Kama tried to commit suicide. RP 501. She said that she didn't want to get in trouble. Id. Asked how she could get into trouble, she replied " [b]ecause he was screaming that I was trying to kill him and that's not what happened...He turned and I poked him with the knife. RP 502. The defendant testified she knew that the police were looking for the knife but didn't tell them where they could find it because she was scared. RP 504. The defendant is 5'1". RP 515. Mr. Kama is 5'7". RP 517. She also testified that while she was on the phone with 911 Mr. Kama had her by the hair and was hitting her. RP 496-97. However, she testified a few moments later that she had to put the telephone up to his ear (to speak to 911) because he couldn't move his arms. RP 498. She could not explain this inconsistency. Id. At several points during her direct examination the defendant's attorney pointed out to the jury that the defendant had been hearing and seeing the testimony and evidence throughout the trial, and the defendant's testimony often times focused on explaining facts that were testified to by others. RP 494, 489, 500-502, 504, 506, 507, 508. She

also used the word "poke," a word the physician's assistant used when quoting what Mr. Kama told his psychiatrist. RP 489, 492, 500-503.

Quinata was convicted of assault in the first degree with a deadly weapon enhancement. CP 23-24. This timely appeal followed.

C. ARGUMENT

I. RCW 9A.36.011 IS NOT UNCONSTITUTIONAL.

The Washington Constitution, article II, section 19 provides that no bill "shall embrace more than one subject, and that shall be expressed in the title." See *State v. Lanphar*, 124 Wn.App. 669, 672, 102 P.3d 864 (2004). This constitutional provision "contains two prohibitions: (1) no bill shall embrace more than one subject (single subject rule) and (2) that the bill's title shall express the bill's subject (subject-in-title rule)." *State v. Stannard,* 134 Wn.App. 828, 833, 142 P.3d 641 (2006).

Titles may be general or restrictive. *State v. Thomas*, 103 Wn.App. 800, 807, 14 P.3d 854 (2000), *review denied,* 143 Wn.2d 1022 (2001). "A general title is one which is broad rather than narrow." *Lanphar* at 673; *Citizens for Responsible Wildlife Mgmt. v. State,* 149 Wn.2d 622, 632-33, 71 P.3d 644 (2003); *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 207, 11 P.3d 762 (2000).

The constitutionality of statutes is presumed. *State v. Simmons*, 117 Wn.App. 682, 688, 73 P.3d 380 (2003). A party challenging a statute on constitutional grounds bears the "heavy burden of proving the statute unconstitutional beyond a reasonable doubt." *Lanphar* at 673; *Simmons* at 688. "In determining whether an initiative violates article II, section 19, we first consider whether the ballot title is general or restrictive." *Stannard* at 835. "A general title broadly allows subjects that are 'reasonably germane' to its title to be contained in the bill's body and even 'incidental subjects or subdivisions' may be allowed." *Lanphar* at 674; citing *Citizens for Responsible Wildlife* at 632-33.

> [A] title complies with the constitution if it gives notice that would lead to an inquiry into the body of the act, or indicate to an inquiring mind the scope and purpose of the law." *Wash. Fed'n of State Employees v. State*, 127 Wn.2d 544, at 555, 901 P.2d 1028 (1995) (quoting *Young Men's Christian Ass'n v. State*, 62 Wn. 2d 504, 506, 383 P.2d 497 (1963)).

Lanphar at 674. "Where a legislative act's title expresses a single general subject, the act may include all matters that are naturally and reasonably connected with the title and all measures that may facilitate accomplishing the title's stated purpose." *Stannard* at 836; *Amalgamated* at 210.

General titles are given liberal construction. "The title need not be an index to the bill's contents or detail the bill's provisions. All that is required is that there be some 'rational unity' between the general subject

and the incidental subdivisions." *Lanphar* at 674, citing *Wash Fed'n* at 556 (other internal citations omitted). A restrictive title, in contrast, is not afforded liberal construction. *State v. Broadaway*, 133 Wn.2d 118, 127, 942 P.2d 363 (1997). "A restricted title encompasses ""a particular part or branch of a subject...carved out and selected as the subject of the legislation."" *Lanphar* at 674, citing *Broadaway* at 127.

The State disagrees with Quinata's contention that the 1986 legislation (Laws of 1986, Chapter 257) contained a restrictive rather than a general ballot title. But even if it did, Quinata acknowledges that an article II, section 19 violation can be cured by a subsequent amendment or enactment "to properly titled legislation." See *Morvin v. Harrell*, 161 Wn.2d 226, 228, 164 P.3d 495 (2007). Quinata argues that the 1997 amending statute itself contains a defective title, but she is incorrect. The 1997 title to the legislation states is as follows: "AN ACT Relating to crimes; amending RCW 9A.36.011, RCW 9A.32.010, RCW 70.24.034, and RCW 70.24.105; and reenacting and amending RCW 9A.36.021 and RCW 9A.04.080." The title is not merely "AN ACT relating to crimes..." as Quinata states in her brief.

Quinata's entire argument is predicated on the idea that procedural changes to civil detention hearings for HIV infected people who engage in behaviors endangering public health is not rationally related to the

legislative title. But the legislative title clearly states that it relates to amendments to RCW 70.24. While Quinata doesn't state whether she believes the 1997 legislative title is general or restrictive, as is her burden to do, the legislative title comports with article II, section 19 under either analysis. RCW 9A.36.011 is not unconstitutional.

II. THE ADMISSION OF THE VICTIM'S STATEMENTS TO HIS PSYCHIATRIST, MADE FOR THE PURPOSE OF DIAGNOSING AND TREATING HIM, DID NOT VIOLATE THE CONFRONTATION CLAUSE AND DID NOT VIOLATE ER 803 (a) (4).

The defendant objected to the admission of the victim's statements to a psychiatrist who evaluated him at the hospital on the basis that they were not made for the purpose of medical diagnosis and treatment and therefore were therefore hearsay and not admissible under the "hearsay rule." RP 8-11. He did not object on confrontation grounds. His hearsay objection was limited to his assertion that the statements in question were not made for the purpose of medical diagnosis and treatment under ER 803 (a) (4). Id; RP 307. He did not specifically object on the ground that the document containing this information was not a business record, and he did not object on the ground that the transcription of the psychiatrist's notes was an additional level of hearsay (with the transcriber playing the

role of declarant in this scenario).[1] This claim is made for the first time on appeal, as is the claim that the trial court erred in treating the record containing the victim's statements as a business record. To the extent the assignment of error suggests that the defendant objected to this document being treated as a business record, or that the defendant objected to this document because the transcriber was herself a declarant and thus created an additional level of hearsay, the assignment of error is incorrect.

a. CONFRONTATION CLAUSE

As an initial matter, the State contends that Quinata should be precluded from raising this claim for the first time on appeal. "The general rule in Washington is that a party's failure to raise an issue at trial waives the issue on appeal unless the party can show the presence of a 'manifest error affecting a constitutional right.' *State v. Robinson*, 171 Wn.2d 292, 304, 253 P.3d 292 (2011), quoting *State v. Kirwin*, 165 Wn.2d 818, 823,

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[1] At page 308 of the transcript, the prosecutor misspoke and asked the physician's assistant, Cassandra Sappington, "Did he tell *you* exactly how the stab wounds occurred?" The parties had already discussed the fact that the statements at issue were made to the psychiatrist, not the physician's assistant, and were contained within the business record, so this was a clear inadvertent misstatement on the prosecutor's part. The statement drew an objection from defense counsel who stated "Objection, Your Honor. We have already established that this was information given to a third party. This person was not the person that the information was given to." The prosecutor then rephrased the question, stating "Did he indicate--did he make a statement about what happened on that day?" RP 308. The objection lodged by defense counsel was not an objection to the admission of the statement on the ground that the document containing it was not a business record. Rather, it was an objection to the prosecutor's misstatement. Notably, the objection was not renewed after the prosecutor rephrased the question. Id.

203 P.3d 1044 (2009) and *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). The rule requiring issue preservation at trial encourages the efficient use of judicial resources and ensures that the trial court has the opportunity to correct any errors, thereby avoiding unnecessary appeals. *Robinson* at 305, *McFarland* at 333; *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). "[P]ermitting appeal of all unraised constitutional issues undermines the trial process and results in unnecessary appeals, undesirable retrials, and wasteful use of resources." *Robinson* at 305.

In *State v. O'Cain*, 169 Wn.App. 228, 279 P.3d 926, Division One of this Court held that confrontation errors must be raised in the trial court in order to preserve the issue for appeal. In so holding, the Court of Appeals relied on the United States Supreme Court's opinions in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527 (2009) and *Bullcoming v. New Mexico*, 131 S.Ct. 2705, 180 L.Ed. 2d 610 (2011). The *O'Cain* Court quoted extensively from *Melendez-Diaz* in concluding that the right to confrontation must be asserted at trial or else it is waived. The Court further observed that the decision whether to lodge a confrontation objection lies with the defendant or his counsel, not the trial court:

> Requiring the defendant to assert the confrontation right at trial is also consistent with other Sixth Amendment jurisprudence. Indeed, were this not the defendant's burden, the trial judge would be placed in the position of sua sponte interposing confrontation objections on the defendant's behalf—or risk knowingly presiding over a trial headed for apparent reversal on appeal. Such a state of affairs is obviously untenable. Trial judges should be loathe to interfere with the tactical decisions of trial counsel—the delegation of which lies at "the heart of the attorney-client relationship." *Taylor v. Illinois*, 484 U.S. 400, 417, 108 S.Ct. 646 (1988). As our state Supreme Court has noted, it would be "ill-advised to have judges... disrupt trial strategy with a poorly timed interjection." *State v. Thomas*, 128 Wn.2d 553, 560, 910 P.2d 475 (1996). Indeed, such interjections could impermissibly "intrude into the attorney-client relationship protected by the Sixth Amendment." *In re Personal Restraint of Lord*, 123 Wn.2d 296, 317, 868 P.2d 835 (1994).

O'Cain at 243-44. The O'Cain Court distinguished *State v. Kronich*, 160 Wn.2d 893, 161 P.3d 982 (2007), the sole authority relied on by Quinata, noting that *Kronich* pre-dates the United States Supreme Court's decisions in *Melendez-Diaz and Bullcoming. O'Cain* at 245-47. Relying on *Melendez-Diaz*, the *O'Cain* Court stated:

> A lot of importance is included within that last quotation. Most important is the clear statement that "[t]he defendant always has the burden of raising his Confrontation Clause objection." "Always" means always. It means every time. It means without exception. And it means always, every time, without exception, in the trial court.

O'Cain at 239.

The *O'Cain* Court noted that the decision in Kronich rested on Sixth Amendment grounds. Thus, the United States Supreme Court's subsequent holdings in *Melendez-Diaz* and *Bullcoming* necessarily overruled *Kronich. O'Cain* at 246-47 ("The sole authority advanced by *O'Cain* in support of this proposition is a citation to the now-discredited *Kronich* decision.") In a subsequent opinion in *State v. Fraser*, 170 Wn.app. 13, 26, 282 P.3d 152 (2012), Division One adhered to its decision in State v. *O'Cain*: "Under *O'Cain*, Fraser waived his confrontation clause argument about the cell phone records by failing to object, and we so hold." Perhaps to cover all bases, Division One acknowledged that RAP 2.5 could arguably be viewed as a procedural rule governing the exercise of confrontation clause objections and performed a RAP 2.5 analysis, finding it had not been satisfied. *Fraser* at 26-27. However, the Court adhered to the central premise of *O'Cain*, which was that *Kronich* has been overruled by *Melendez-Diaz. Fraser* at 25-26.

Like the defendants in *O'Cain* and *Fraser*, Quinata's counsel lodged an objection to the evidence she now complains of on appeal, except counsel chose to lodge the objection on hearsay grounds rather than confrontation grounds. Like the defendant in *O'Cain*, Quinata's counsel likely recognized that the weight of authority holds that statements such as those admitted here are clearly not testimonial and his best objection was a

state-rule based hearsay objection. Quinata should not be permitted to raise this issue for the first time on appeal, particularly where she has not even conducted an analysis under RAP 2.5 and merely cites *Kronich* for the blanket proposition that confrontation clause errors may be raised for the first time on appeal without a case-specific showing of prejudice.[2] She is incorrect and this Court should decline to review this claimed error.

Should this Court decide to review this claimed error for the first time on appeal, Quinata has failed to demonstrate error. The statements the victim made to his psychiatrist while confined to a hospital bed were not testimonial. Rather, they were made for the purpose of medical diagnosis and treatment.

Statements made to medical providers for purposes of diagnosis or treatment are non-testimonial and not subject to a confrontation clause objection. *O'Cain*, supra, at 249. Quinata has adequately explained the definition of testimonial hearsay and the State won't repeat it. It is axiomatic that if the victim's statements to his psychiatrist are deemed testimonial, and if this Court agrees that Quinata should be permitted to raise this error for the first time on appeal, the admission of the statement

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[2] There are three types of constitutional errors: Those that may be raised for the first time on appeal without case-specific RAP 2.5 (a) briefing, those that may be raised for the first time on appeal only after a case-specific showing of prejudice under RAP 2.5 (a), and those that may never be raised for the first time on appeal because they have been deemed by case law authority as not being "manifest."

was error. The victim did not appear at trial. There was no prior opportunity for cross-examination. See *Crawford v. Washington*, 541 U.S. 36, 68, 124 S.Ct. 1354 (2004).

A declarant's statements to a medical treatment provider are non-testimonial (1) where they are made for diagnosis and treatment purposes, (2) where there is no indication that the witness expected the statements to be used at trial, and (3) where the provider is not employed by or working with the State. *State v. Hurtado,* __Wn.App.__, 294 P.3d 838, 843 (2013); *State v. Sandoval*, 137 Wn.App. 532, 538, 154 P.3d 271 (2007); *State v. Moses*, 129 Wn.App. 718, 729-30, 119 P.3d 906, *review denied*, 157 Wn.2d 1006 (2006). A statement for medical diagnosis or treatment may include statements of fault in domestic violence cases because the identity of the abuser may affect the declarant's treatment. *Sandoval* at 538.

Here, there were dual considerations at play. First, the victim, based on the defendant's statements, was thought to be possibly suicidal. The physician's assistant testified that "there was a question of suicidal ideation." RP 307. In order to rule that out, he was evaluated by a psychiatrist. Id. Due to the nature of the injury, it would have been impossible for the victim to disprove that he was suicidal without making a blaming statement--in other words, without telling the psychiatrist that he had been stabbed by his girlfriend rather than having inflicted the

wound on himself. The psychiatrist stated in the medical record that the victim "absolutely denies this was a suicide attempt and he had not had suicidal ideations...The patient states that this was his 'girlfriend' that stabbed him." RP 307. These statements were indisputably made for the purpose of diagnosing whether the victim was suicidal and potentially treating that condition. Although it is ironic that it was the defendant's own lie that caused the victim to be examined by a psychiatrist in the first place, the fact remains that these statements are a classic example of statements made for the purpose of medical diagnosis.

Second, these statements were made by a victim of domestic violence and they were relevant to providing both current and future care to the victim. The victim and the defendant were residing together at the time the defendant stabbed him. The responsibility of the medical providers does not end with suturing Mr. Kama's stab wound. They had an obligation to ensure that he was not in continuing danger.

Quinata complains in her brief that the State failed to lay the proper foundation for this testimony by not demonstrating who *wasn't* with the victim and his psychiatrist when he was medically evaluated. Quinata believes that the State must demonstrate that no police officers were present when the statement was made or else the State will have failed, as a matter of law, in demonstrating that the statement is non-

testimonial. See Brief of Appellant at 21. But Quinata cites no authority for this argument as required by RAP 10.3 (a) (6). Moreover, to allow the defendant to raise a foundational objection for the first time on appeal allows the defendant "to sit on [her] rights, bet on the verdict, and then, if the verdict is adverse, gain a retrial by asserting [her] rights for the first time on appeal." *O'Cain,* supra, at 243. ER 103 provides that "[e]rror may not be predicated on a ruling which admits or excludes evidence unless a substantial right of the party is affected, *and*...a timely objection or motion to strike is made, stating the specific ground of objection..." The purpose of this rule is obvious: If the defendant truly cared about the proper foundation being laid for this testimony, as opposed to simply lying in wait for appeal, she would have lodged a proper objection so that the trial court could rule upon it. Assuming the court agreed with Quinata, it could have instructed the State to lay further foundation before admitting the statement. As already noted, not only did Quinata not object to this testimony on the ground that the State failed to lay a proper foundation, she didn't object to this testimony on confrontation grounds at all. The proper foundation was laid for this testimony.

Finally, Quinata's claim that the there is a second declarant here, to wit: the transcriber who transcribed the psychiatrist's notes, is made for the first time on appeal and without citation to authority. The transcriber is

merely a conduit of a statement already made, much like the CD on which a 911 call is recorded. The CD itself is not a declarant. The transcriber's transcription, in and of itself, is not an assertion. Quinata's claim that the victim's statement to his psychiatrist (necessitated by the defendant's lie that he was suicidal) was testimonial fails.

b. *THE VICTIM'S STATEMENT TO HIS PSYCHIATRIST WAS ADMISSIBLE UNDER ER 803 (a) (4).*

Under ER 803 (a) (4):

> Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

As noted above, the defendant's hearsay objection below was limited to her assertion that the victim's statements to his psychiatrist were not made for medical diagnosis or treatment. Because any error in admitting hearsay is not constitutional in nature, much less "manifest" constitutional error, her claim of error here is limited to that which she raised at trial. See *State v. Sims*, 77 Wn.App. 236, 240-41, 890 P.2d 521 (1995) ("Sims made not effort in the trial court to challenge the admissibility of Bellinger's hearsay statements on the ground that her motivation was something other than the hospital context would suggest. We will not consider this argument for the first time on appeal.") Her

additional claims raised for the first time in this appeal that the medical record was not a business record[3] and that the transcription of the psychiatrist's notes created an additional level of hearsay[4] are not reviewable.

Here, the statements made by the victim to his psychiatrist unquestionably fall within the allowable statements under ER 803 (a) (4). This hearsay exception allows for statements made for psychological diagnoses as well as physical diagnoses. See *State v. Woods*, 143 Wn.2d 561, 23 P.3d 1046 (2001) (the physician needed to hear the circumstances surrounding how the victim incurred injuries in order to assess the potential for stress and to arrange for counseling). The victim was being evaluated to determine *whether or not he was suicidal*. The suggestion that he was suicidal arose from the defendant's contention that the knife wound

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[3] In *State v. Alexander*, 64 Wn.App. 147, 822 P.2d 1250 (1992) the Court of Appeals held that the admission of a medical report containing the victim's statements made for the purpose of medical diagnosis and treatment was proper because the medical report was a business record.

In *State v. Garrett*, 76 Wn.App. 719, 887 P.2d 488 (1995) a child's medical file was admissible as a business record where the child's physician did not testify at trial.

[4] Professor Karl Tegland notes "It is immaterial whether the record is traditional ink-on-paper or an electronic record. The hearsay exception is unquestionably broad enough to cover both. A record that exists only in electronic form must normally be printed for courtroom purposes—to satisfy the best evidence rule, and to have a tangible exhibit for the record." See Washington Practice, Courtroom Handbook on Evidence, Karl B. Tegland, 2012-2013 Edition, at page 450. Here, Quinata appears to be claiming that if the State had simply played a recording of the dictation by the psychiatrist that would be fine, but when the psychiatrist submitted her dictation to a medical transcriber so that her dictation could be reduced to ink-on-paper form it created an additional declarant in the hearsay chain. Quinata cites no authority for this proposition.

that nearly killed him was self-inflicted. It would have been impossible for him to disabuse his psychiatrist of that notion without revealing that he was actually stabbed by someone else--his live-in girlfriend. Finally, as noted above, this was a case of domestic violence as well, where the parties shared a home. This also renders the statement admissible under ER 803 (a) (4). See *Sims*, supra, at 239 ("The physician generally must know who the abuser was in order to render proper treatment because the physician's treatment will necessarily differ when the abuser is a member of the victim's family or household.")

The trial court did not err in admitting the statement that the victim made to his psychiatrist under ER 803 (a) (4).

III. THE PROSECUTOR DID NOT COMMIT MISCONDUCT.

Quinata argues that the prosecutor committed misconduct by arguing that Quinata tailored her testimony to fit the evidence and by responding in kind to Quinata's argument that the State should have called an expert to testify about the degree of force used in making the stab wound to rebut her claim of accidental stabbing. Quinata's claim is meritless.

Quinata did not object to any of the arguments she now complains of on appeal. In order to prevail on a claim of prosecutorial misconduct for

a remark or argument that was not objected to a trial, the defendant bears the burden of demonstrating that the remark was so flagrant and ill-intentioned that is causes enduring prejudice and could not have been remedied by a curative instruction. *State v. Boehning*, 127 Wn.App. 511, 518, 111 P.3d 899 (2005); *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994) , cert. denied, 514 U.S. 1129 (1995). "In determining whether the misconduct warrants reversal, we consider its prejudicial nature and its cumulative effect." *State v. Suarez-Bravo*, 72 Wn. App. 359, 367, 864 P.2d 426 (1994). The reviewing court does not view allegedly improper comments out of context; rather, they must be viewed in the context of the entire argument. *State v. Larios-Lopez*, 156 Wn.App. 257, 261, 233 P.3d 899 (2010); *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009).

"The prosecutor, as an advocate, 'is entitled to make a fair response to the arguments of defense counsel.'" *Russell*, supra, at 87.

Quinata's counsel, in arguing that the stabbing was an accident, told the jury:

> We have no evidence of the actual wound itself. The State failed to bring in the surgeon to tell you anything about the wound, anything at all. There is no evidence what kind of wound; what *kind of force it would take.* Do you have any evidence here to talk about force. Counsel argues it would have taken a lot of force. Well, I submit to you that if a medical doctor was up there and said, "It would take a lot of force for a knife of that size to go through and puncture a

> heart," then you have that evidence. But, we don't have that. And, it takes that.

RP at 610 (emphasis added). Defense counsel renewed this argument seven pages later. RP 617-18.

In response, the prosecutor argued:

> The only question you have now is do you believe the very unreasonable story about this being an accident? It's not physically...reasonable...The State does not—did not bring in a—a person to testify about how much force it would take for someone to accidentally stab someone in the chest because the State did not know that the Defendant was going to change her story until today, until you sat here today. That was the first time. So, there was no witness to come in and talk about force. But, you know what? There are twelve of you, there's the jury that gets to use your common sense.

RP 632. This argument was a fair reply to Quinata's argument. Because Quinata's story that she accidently "poked" the victim, or that the victim "walked into" her knife was so preposterous, and the injury received by the victim was so severe, the prosecutor was arguing that it was reasonable for the State not to have procured a witness who would testify about the level of force needed to puncture someone's heart and ribs. The State also did not bring in any witnesses to testify that space aliens descended upon the Kama/Quinata kitchen and stabbed Mr. Kama. However, accusing space aliens of committing the crime is roughly on par with the story Quinata gave, at least with respect to its absurdity and unexpectedness. Moreover, defense counsel did not object to this argument, suggesting that

he also viewed it as a fair reply. "[T]he absence of an objection by defense counsel strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." *State v. Edvalds*, 157 Wn.App. 517, 525-26, 237 P.3d 368 (2010), citing *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990). The prosecutor did not commit misconduct.

The prosecutor also did not commit misconduct when she argued that Quinata tailored her testimony. Quinata did tailor her testimony. It would be difficult to imagine a more obvious case of tailoring that that which occurred in this case. "[T]he state may suggest that a defendant 'tailored' his testimony based on what he heard at trial if the defendant opens the door to that suggestion." *State v. Wallin*, 166 Wn.App. 364, 365, 269 P.3d 1072 (2012); see also *State v. Martin*, 171 Wn.2d 521, 536-38, 252 P.3d 872 (2011).

Perhaps recognizing both that Quinata obviously tailored her testimony and that her counsel was the one who opened the door to the accusation, Quinata couches her complaint in terms of the prosecutor having expressed "her personal belief" about Quinata's credibility.

"It is improper for a prosecutor personally to vouch for the credibility of a witness. … Prosecutors may, however, argue an inference from the evidence, and prejudicial error will not be found unless it is 'clear

and unmistakable' that counsel is expressing a personal opinion." *State v. Brett*, 126 Wn.2d 136, 175, 829 P.2d 29 (1995) (internal quotation marks omitted) (quoting *State v. Sargent*, 40 Wn. App. 340, 344, 698 P.2d 598 (1985)). "[P]rosecutors may argue inferences from the evidence, including inferences as to why the jury would want to believe one witness over another. The same rule has been applied as to credibility of a defendant." *State v. Copeland*, 130 Wn.2d 244, 290-91, 922 P.2d 1304 (1996) (citation omitted). "[P]rejudicial error does not occur until it is clear that the prosecutor is not arguing an inference from the evidence, but is expressing a personal opinion." *State v. Swan*, 114 Wn.2d 613, 664, 790 P.2d 610 (1990); see also *Brett* at 175.

Here, it is clear that the prosecutor was asking the jurors to draw inferences from the evidence and to evaluate the defendant's testimony. It was not an expression of personal opinion. And again, defense counsel did not object which strongly suggests he did not view these remarks as improper.

Finally, if any error occurred it was harmless. The evidence supporting the charge of assault in the first degree was overwhelming. The victim identified Quinata as the person who stabbed him. He suffered a horrific injury which any person, employing common sense, would know could not have been sustained through an accidental "poking." This is

particularly so where the defendant is 5'1" and the victim is 5'7" and the victim was stabbed in the heart (as opposed to the lower abdomen). The defendant admitted to lying to the police about accusing Mr. Kama of a failed suicide attempt. She also deliberately failed to hand over the knife she used to stab Mr. Kama despite admitting that she knew they were searching for it. If any argument constituted error it could have easily been remedied by a curative instruction and it could not have impacted the outcome of the trial. There was no prosecutorial misconduct. Quinata's conviction should be affirmed.

D. CONCLUSION

Quinata's conviction should be affirmed.

DATED this 29th day of April, 2013.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By: _____
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CLARK COUNTY PROSECUTOR

May 02, 2013 - 10:01 AM

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