

No. 48259-2-II

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

V.

ELMER APAEZ-MEDINA, APPELLANT

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Appeal from the Superior Court of Mason County  
The Honorable Daniel L. Goodell, Judge

No. 15-1-00288-1

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**BRIEF OF RESPONDENT (Amended)**

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A. STATE'S COUNTER-STATEMENTS OF ISSUES  
PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. The prosecutor did not express his personal belief, but instead argued reasonable inferences from the evidence, when he described the victim's testimony as truthful and when he used the word "ridiculous" when attempting to rebut defense counsel's argument that the victim was not credible.
2. During closing argument the prosecutor mistakenly began to read from a letter that was marked as an exhibit but had not been admitted into evidence, but the prosecutor only read the first few words before he was stopped by an objection from defense counsel, and the first few words read aloud by the prosecutor were of no evidentiary value. Therefore, no prejudice occurred from the mistaken but aborted attempt to read the letter.
3. Because the prosecutor did not commit reversible misconduct, the trial court did not err by denying the defendant's motion for a mistrial.
4. None of the errors alleged by the defendant amount to prejudicial prosecutorial misconduct, nor do all the alleged errors combined amount to reversible misconduct.

B. FACTS AND STATEMENT OF THE CASE

On or about June 20, 2015, the defendant, Elmer Apaez-Medina, beat his romantic partner, Donna Homan, and in the process broke her nose. RP 42-43, 45, 46, 49, 51, 53, 59-60, 68, 74. The State charged Apaez-Medina with one of count of assault in the second degree with a special allegation of domestic violence, alleging that Apaez-Medina

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intentionally assaulted Ms. Homan and thereby recklessly inflicted substantial bodily harm. CP 120-21.

On October 14 and 15, 2015, the case was tried to a Mason County jury. RP 31-120. After receiving the evidence, the jury returned a verdict of guilty and found that the assault was a crime of domestic violence. RP 119.

C. ARGUMENT

1. The prosecutor did not express his personal belief, but instead argued reasonable inferences from the evidence, when he described the victim's testimony as truthful and when he used the word "ridiculous" when attempting to rebut defense counsel's argument that the victim was not credible.

The State's response to Apaez-Medina's assertion that the prosecutor vouched for the credibility of the witness-victim Ms. Homan is addressed in section 3, below. Because this argument is addressed throughout the defense brief, rather than repeat the State's response, the State instead respectfully refers the Court to section 3 of the State's argument, below.

During the State's rebuttal closing argument, the prosecutor, when referring to defense counsel's closing argument, used the word "ridiculous" before defense counsel interrupted with an objection. RP 107. The prosecutor's choice of word was in response to defense

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counsel's suggestion that the victim did not know who broke her nose. *Id.* In the context of the testimony and evidence of the whole case, it was obvious that the victim knew exactly who broke her nose. RP 42-63. She expressed confusion about the timeline of what had occurred, but she was unequivocal that it was Apaez-Medina who punched her and broke her nose. RP 46, 51, 53, 59, 68. Probably the prosecutor should have argued that the defense theory was unsupported by logical inferences from the evidence, but under the stress of the moment he reached for, found, and used the word "ridiculous" instead. RP 107.

The trial court judge sustained an objection to use of the word. RP 107. The trial court judge then instructed the jury to disregard the prosecutor's comment. *Id.* The jury is presumed to follow the trial court's instructions. *State v. Yates*, 161 Wn.2d 714, 787, 168 P.3d 359 (2007). To prevail on a claim of prosecutorial misconduct, a defendant must show that the prosecutor's conduct was improper and that it caused prejudice. *In re Pers. Restraint of Glassman*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). To show prejudice, defendant must show that there is a substantial likelihood that misconduct affected the jury's verdict. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). Apaez-Medina has not shown

the single use of the word “ridiculous” caused any prejudice or had any affect on the jury’s verdict.

2. During closing argument the prosecutor mistakenly began to read from a letter that was marked as an exhibit but had not been admitted into evidence. The prosecutor only read the first few words before he was stopped by an objection from defense counsel, and the first few words read aloud by the prosecutor were of no evidentiary value. Therefore, no prejudice occurred from the mistaken but aborted attempt to read the letter.

During the defense cross-examination of Ms. Homan, defense counsel produced a hand-written letter authored by Ms. Homan and had it marked as defense exhibit 2. RP 61. Counsel cross-examined Ms. Homan about the letter, bringing out that in the letter Ms. Homan stated that she, too, was “in the wrong.” RP 62. Counsel then questioned Ms. Homan about a certain statement in the letter and had her affirm that she wrote the following statement: “Please accept my honesty as I tell you now this would not be right if this man was to be convicted.” RP 62; Ex. 2.

During closing argument, defense counsel brought up the letter and argued to the jury that it was grounds for acquittal. RP 105, 107. In rebuttal closing argument, the prosecutor then addressed the letter as follows:

The letter that [defense counsel] referred to. You saw Ms. Homan up on the stand, her testimony, and you heard her say she

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loves the defendant still. Obviously, those feelings overcome, but she got up there and she told the truth. What possible motive would she have to not tell the truth, to say – or to tell the truth when she loves the defendant? I mean, why would she – why wouldn't she just say, no, nothing happened? Of course that's what she would say. But she's telling the truth even though she loves him. She doesn't want him prosecuted, but that's not up to you. The State was the one who filed these charges. Ms. Homan didn't file these charges. The State was the one who did based upon all the evidence.

RP 108-09. The prosecutor then began to read from the letter, which was marked as Exhibit 2 but had not been admitted into evidence, as follows:

“I Donna Homan, would like for the courts to accept my statement. I hereby now write – I ask for any and all ---” RP 109; Ex. 2. The prosecutor's reading of the letter was at that point interrupted by an objection from defense counsel, and no further portion of the letter was read. RP 109. The trial court judge sustained the objection and instructed the jury that it was to disregard the “last portion of reading” by the prosecutor. RP 109.

Apaez-Medina contends that reversible error occurred based upon his assertion that the prosecutor committed misconduct by mistakenly reading from an exhibit that had not been admitted into evidence. Br. of Appellant at 11-13. To prevail on a claim of prosecutorial misconduct, a defendant must show that the prosecutor's conduct was improper and that

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it caused prejudice. *In re Pers. Restraint of Glassman*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). To show prejudice, defendant must show that there is a substantial likelihood that misconduct affected the jury's verdict. *State v. Dhaliwal*, 150 559, 578, 79 P.3d 432 (2003).

But there is no likelihood that the few words of the letter read by the prosecutor had any affect on the jury's verdict. First of all, it was defense counsel who introduced the letter and had Ms. Homan affirm that she had written that she, too, was at fault and that she asked the reader to "[p]lease accept [her] honesty" and to believe that it "would not be right if [Apaez-Medina] was to be convicted." RP 62. The few additional words read by the prosecutor stated only what the jury already knew, that it was Ms. Homan who wrote the letter, and that she "would like for the courts to accept [her] statement." RP 109.

Still more, the trial court judge instructed the jury to disregard what the prosecutor read from the letter. RP 109. "In the absence of evidence to the contrary," juries are presumed to follow the trial court's instructions. *State v. Yates*, 161 Wn.2d 714, 787, 168 P.3d 359 (2007). Here, there is no evidence that the jury did not follow the trial court's instructions. And given that the few words read by the prosecutor before he was interrupted by an objection had no substantive value, there is no

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likelihood that those few words can have affected the jury's verdict. As such, reversible error did not occur on these facts. *In re Pers. Restraint of Glassman*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012); *State v. Dhaliwal*, 150 559, 578, 79 P.3d 432 (2003).

3. Because the prosecutor did not commit reversible misconduct, the trial court did not err by denying the defendant's motion for a mistrial.

Apaez-Medina contends that the prosecutor erred by vouching for the credibility of Ms. Homan, by using the word ridiculous, and by mistakenly reading aloud during closing arguments the first words of a letter that had been marked as an exhibit by the defense and discussed with a witness but had not been admitted into evidence. Br. of Appellant at 6-14.

But nowhere in the record does the prosecutor vouch for the credibility of Ms. Homan. Instead, the prosecutor only argues reasonable inferences from the evidence in support of Ms. Homan's testimony. RP 108-09. Vouching occurs when a prosecutor puts the prestige of the office or a personal belief behind a personal assertion that a witness is truthful. *State v Allen*, 161 Wn. App. 727, 746, 255 P.3d 784 (2011). No such conduct occurred in this case.

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“A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury.” *State v. Jones*, 144 Wn. App. 284, 290, 183 P.3d 307 (2008), quoting *State v. Boehning*, 127 Wn. App. 511, 519, 111 P.3d 899 (2005). Here, the prosecutor properly argued inferences from the evidence in support of Ms. Homan’s credibility. A prosecutor may freely comment on witness credibility based on the evidence. *State v. Allen*, 161 Wn. App. at 746. Reviewing courts will not find prejudicial error unless it is “clear and unmistakable” that counsel is expressing a personal opinion” rather than arguing an inference from the evidence. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), quoting *State v. Sargent*, 40 Wn. App. 340, 344, 698 P.2d 598 (1985).

Apaez-Medina’s other two contentions of error on this point are addressed in other sections of the State’s brief under topic headings 1 and 2.

The State agrees that Apaez-Medina, like all defendants, has a right to a fair trial under the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington Constitution. *See, In re Pers. Restraint of Glassman*, 175 Wn.2d 696, 703, 286 P.3d 673 (2012). But Apaez-Medina has not suffered any prejudice

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from any error he alleges in this case, and accordingly, the State contends that his trial was fair and that because he received a fair trial no reversible error occurred based on his assertions of error.

4. None of the errors alleged by the defendant amount to prejudicial prosecutorial misconduct; nor do all the alleged errors combined amount to reversible misconduct.

Generally, under the cumulative error doctrine a reviewing court may reverse a defendant's conviction if the combined effect of trial errors denied him or her a fair trial. *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2002). As argued in section 3, above, the prosecutor did not vouch for the credibility of any witness. And, even if it was error for the prosecutor to use the word "ridiculous" and to read to the jury in closing argument a few words from an exhibit that was not admitted into evidence, neither of these two alleged errors caused any prejudice to Apaez-Medina when taken separately; nor do they cause prejudice when considered in combination.

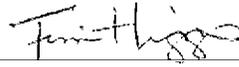
Because the claimed errors are less than few (only two), and because they cannot have had any affect on the jury's verdict, the cumulative error doctrine does not apply. *Id.*

D. CONCLUSION

Apaez-Medina has not shown that he suffered any prejudice, either separately or cumulatively, from any instance of prosecutorial error that he alleges. Review of the entire record shows that Apaez-Medina received a fair trial. Accordingly, the State asks that this Court deny Apaez-Medina's appeal and affirm the conviction in this case.

DATED: August 16, 2016.

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# MASON COUNTY PROSECUTOR

**August 17, 2016 - 10:34 AM**

## Transmittal Letter

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### Comments:

Attached, please find a copy of the State's amended brief to replace the copy filed yesterday. A motion for permission to file an amended brief will follow.

Sender Name: Tim J Higgs - Email: [timh@co.mason.wa.us](mailto:timh@co.mason.wa.us)

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