

NO. 49304-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

CARLOS LIMA,

Appellant.

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

The Honorable Melissa Hemstreet, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Prosecutorial misconduct during the cross-examination of a key defense witness denied the appellant a fair trial as to his assault conviction.

2. The appellant's two convictions for possessing the same controlled substance, contemporaneously, violate the prohibition on double jeopardy.

3. The trial court lacked statutory authority to impose a school zone enhancement on the charge of delivery in lieu of a controlled substance.

4. The appellant's sentence for second degree assault exceeds the statutory maximum for the offense.

Issues Pertaining to Assignment of Error

1. Before trial, the State moved to preclude any witness from opining regarding another witness's credibility. The trial court granted the motion. The prosecutor then failed to abide by the court's ruling, and violated clearly established law, by asking the appellant's wife—a witness to the alleged assault—about an out-of-court statement indicating she believed the State could prove the assault charge, despite the appellant's self-defense claim. Although defense counsel properly objected, the

damage resulting from the prosecutor's question was complete when the question was asked.

By introducing the wife's opinion on the appellant's guilt—also an opinion on the appellant's credibility—the prosecutor committed misconduct. The misconduct was prejudicial, and it denied the appellant a fair trial on the assault charge. Should this Court therefore reverse the appellant's conviction on that count?

2. The appellant was charged with possession of heroin based on constructive possession of heroin located in two nearby locations, on the same date at the same time.

Based on well-established law regarding the unit of prosecution for possession of a controlled substance, do the appellant's two convictions for possession of heroin violate the prohibition on double jeopardy?¹

3. Under RCW 69.50.435, a 24-month school zone sentence enhancement may be alleged and imposed where an accused is convicted of violating certain statutes. The appellant was not convicted of violating one of those statutes. The charging document did not even allege that the enhancement applied to the charged crime. Yet the court imposed a school

¹ The facts related to this issue are set forth in the argument section of this brief rather than the statement of the case.

zone enhancement. Because it was not authorized by statute, must the school zone enhancement be stricken?

4. Where the appellant's 124-month sentence for second degree assault exceeds the 120-month statutory maximum for the offense, is remand for resentencing required?

B. STATEMENT OF THE CASE²

1. Charges, verdicts, and sentence

The State charged Carlos Lima with first degree assault (assault with intent to inflict great bodily harm, committed with a firearm or other means likely to produce great bodily harm or death) (Count 1). CP 9; RCW 9A.36.011(1)(a). As an alternative charge, the State charged Lima with second degree assault (assault with a deadly weapon) (Count 2). CP 10; RCW 9A.36.021(1)(c); see 8RP 1124-25 (State's closing argument clarifying charges are based on same alleged act). The State alleged a firearm enhancement on Counts 1 and 2. CP 9-10. The complainant as to each charge was Derrick Brasier. CP 9-10.

As to those charges, Lima's defense at trial was that he acted to defend himself from attack by Brasier, who had accompanied his fiancée to

² This brief refers to the verbatim reports as follows: 1RP – 6/27/16; 2RP – 6/28/16; 3RP – 6/29/16; 4RP – 6/30/16; 5RP – 7/1/16; 6RP – 7/6/16; 7RP – 7/7 and 7/8/16; 8RP – 7/11/16; and 9RP – 7/29/16 (sentencing). All but 9RP are consecutively paginated.

confront Lima about selling the fiancée fake heroin. CP 52-54 (jury instructions); 7RP 963-66 (Lima's trial testimony); 8RP 1140, 1148 (defense closing argument).

Lima was also charged with five additional counts. The State charged Lima with second degree unlawful possession of a firearm based on a prior second degree theft charge (Count 3). CP 11; RCW 9.41.040(2)(a)(i). Lima was also charged with delivery "in lieu of a controlled substance" (Count 4) related to the sale of fake heroin. CP 11; RCW 69.50.4012. The State alleged a school zone enhancement as to that charge. CP 12; RCW 69.50.435. Lima was also charged with maintaining a premises for using, or keeping or selling, controlled substances (Count 5).³ CP 12; RCW 69.50.402(1)(f). Finally, the State charged Lima with two counts of possession of heroin, both alleged to have occurred on December 12, 2015 (Counts 6 and 7).⁴ CP 13; RCW 69.50.4013.

³ Under RCW 69.50.402(1)(f), "[i]t is illegal for any person to . . . [k]nowingly to keep or maintain any store, shop, warehouse, dwelling, building, vehicle, boat, aircraft, or other structure or place, which is resorted to by persons using controlled substances in violation of this chapter for the purpose of using these substances, or which is used for keeping or selling them in violation of this chapter."

⁴ Each of the other counts was alleged to have occurred on December 11 or 12, 2015, with the exception of Count 5 (maintaining a premises) which reflected a date range of August 28 through December 12, 2015. CP 12.

A jury acquitted Lima of Count 1, first degree assault, but convicted him of Count 2 and the remaining counts. The jury also found the firearm and school zone enhancements applied to the pertinent counts. CP 75-81.⁵ The court sentenced Lima to a total of 130 months of incarceration, reflecting the high end of the standard range for second degree assault (70 months) plus 36 months for the firearm enhancement on that count, as well as 24 months for the Count 4 school zone enhancement. CP 83-84. The court also sentenced Lima to serve 18 months of community custody for second degree assault, reflecting a total sentence of 124 months on that charge. CP 85.

Lima timely appeals. CP 95.

2. Trial testimony

a. Testimony of Maleisa Bennett and complainant Brasier

Brasier's fiancée Maleisa Bennett met Lima's wife Nataly on a ferry around September of 2015. Nataly was smoking heroin in a restroom stall, and Bennett smelled the smoke. The two women struck up a conversation and exchanged phone numbers. 3RP 384.

⁵ Special verdict form "D" asked whether the jury found Lima guilty of "maintaining a premises" based on use of heroin, or based on keeping or selling heroin. The jury could not agree on the former allegation, but it unanimously agreed as to the latter. CP 81.

Bennett called Nataly a few days later looking for heroin, and Nataly introduced Bennett to her husband.⁶ 3RP 385. From that point on, Bennett frequently purchased heroin from Lima. 3RP 386.

Lima and Nataly lived at 107 ½ South Wycoff Avenue in Bremerton. Their home was a small freestanding “mother-in-law” residence located behind the main house at that address. 3RP 389. The home, located near the intersection of Wycoff and First Street, was accessible from Wycoff, as well as from an alley that ran behind Wycoff. 3RP 389; 5RP 632. The heroin transactions occurred at Lima’s home, Bennett’s home, or while riding in the gold Honda sedan that Lima drove frequently. 3RP 386-87.⁷ Bennett’s driver’s license was suspended. 4RP 456.

⁶ Bennett testified she completed a detoxification program shortly before trial and was not using heroin during the trial. 4RP 405-06, 453.

⁷ Relating to Count 5, two of the Limas’ neighbors testified they saw frequent vehicle traffic in the alley behind the home. 6RP 733-34, 747. Some cars stayed for hours, but others stopped for only a few seconds. 6RP 733-34. Most of the activity occurred late at night. 6RP 744. One neighbor believed she had seen hand-to-hand transactions in the street. 6RP 733, 751-52. The other neighbor testified she had seen Lima get into a car, ride down the hill, get out of the car, and walk back to his house. 6RP 744. That neighbor also saw individuals “[f]iring bowls,” *i.e.*, smoking from pipes, in the Limas’ house. 6RP 745-46, 750.

Bennett contacted Lima on December 11, 2015 to purchase \$60 worth of heroin. 3RP 391-92. Bennett arranged for the Limas to drive her to her bank to get the money. 3RP 392-93; 4RP 457. Bennett testified she was in a hurry because her Brasier was coming home for the weekend; the Limas were similarly rushed because they were going to Tukwila to get more heroin. 3RP 393, 395-96. Bennett directed the Limas to drop her off at a 7-Eleven store near her home on the east side of Bremerton. 3RP 393.

In the parking lot, Lima handed Bennett a cigarette box and told her it contained heroin. 3RP 393. Bennett peeked into the box but did not examine the substance. She placed the box in her purse. 4RP 409.⁸ Back at home, Bennett “cooked” and injected the purported heroin. But it was not heroin. 3RP 394-95; 4RP 464. According to Bennett, the substance tasted like sugar. 4RP 406.

Bennett believed Lima had sold her fake heroin a few weeks earlier. 4RP 406-07. On that occasion, Bennett contacted Lima, he apologized, and he replaced the fake heroin with real heroin. 4RP 407.

⁸ Relating to the Count 4 school zone enhancement, Paul Andrews, a geographic information systems analyst for Kitsap County, created a map indicating that View Ridge Elementary School is located within a 1,000-foot-radius circle with the center of the 7-Eleven store as its center point. 4RP 497-503. A transportation supervisor for the Bremerton school district testified the map showed the correct location for the school. 6RP 660-62.

Hoping for a similar outcome, Bennett called and texted Lima, but he did not respond. 4RP 409. Around 1:50 a.m., Bennett convinced Brasier to drive her to the Limas' residence. 4RP 410-13. The Limas did not know Brasier, who was not a heroin user. 4RP 431, 467, 483-84.

At the Limas' home, Bennett knocked on the kitchen door. When there was no answer, Bennett knocked on a window. Nataly peered out the window but then closed the curtains. 4RP 414. Undeterred, Bennett returned to the door, which Nataly eventually opened. 4RP 414.

Nataly let Bennett and Brasier into the house, but she explained that the family (including the Limas' young son) was sleeping. 4RP 414, 508. Bennett demanded to talk to Lima. 4RP 415. But Nataly explained the Limas did not have anything for Bennett. Nataly and Lima had spent Bennett's \$60 on gas and diapers, as well as a small amount of heroin the Limas used themselves to support their own addictions. 4RP 417-18.

Bennett still wanted her money, so she went down the hall to the bedroom, where Lima was sleeping. 4RP 419, 424-25. Bennett ordered Lima to come out and talk to her. 4RP 474.

Lima, still in bed, began yelling for Nataly to bring him his "pistol." 4RP 422-23. Lima complained that Bennett and Brasier had woken his

son.⁹ 4RP 424. Nataly said did not know where the gun was. 4RP 426. Lima got out of bed and began searching various drawers in his bedroom. 4RP 424-25.

Bennett told Lima the situation was “not that serious” and she and Brasier just wanted to talk. 4RP 426. Brasier (who had remained near the entryway) told Lima, “You don’t need a gun” but urged Lima to “[g]et [his] butt out here.” 5RP 544.

As Lima attempted to “charge” past Brasier, Brasier—who was larger than Lima—grabbed Lima’s shirt and held him immobile. 4RP 431-32, 476, 479. According to Brasier, he was trying to stop Lima from getting a gun, although Brasier was not sure where the gun might be. 4RP 512-13; 5RP 546.

After Lima agreed to talk to Bennett, Brasier released his hold on Lima. 4RP 432. Lima asked Bennett and Brasier to sit on the living room couch so the three could talk. 4RP 433. But Bennett and Brasier refused to sit down and again demanded money. 4RP 433-34; 5RP 546.

Bennett told Brasier she didn’t think Lima had a gun. She directed Brasier to “handle” the situation. 4RP 428. This was meant to suggest that Brasier should harm Lima physically. 4RP 429. But, according to Bennett,

⁹ The child remained asleep and did not wake up during the ensuing altercation. 4RP 424.

she made the statement primarily to intimidate Lima. 4RP 429-30. In any event, Brasier testified he did not hear Bennett's command. 4RP 431; 5RP 549.

At that point, Lima grabbed his gun from the top of the refrigerator and told Bennet and Brasier to "get the fuck out" of his house. 4RP 477, 513-14. Lima fired a warning shot into the living room past Bennett and Brasier. 4RP 434-35. Bennett and Brasier s agreed that Lima did not aim at them. 4RP 482; 5RP 550.

Bennett and Brasier offered to leave. 4RP 435. According to Bennett, she went out the alley door first, followed by Lima, and then Brasier. 4RP 436, 516. Bennett testified that once outside, Lima hit Brasier on the head with the gun. 4RP 436-37. According to Brasier, the blow struck him in the ear.¹⁰ 4RP 516.

Brasier put his hands in the air, and Lima fired a "warning" shot into the hillside behind the alley. 4RP 437; 5RP 552. At that point, according to Bennett, Brasier attempted to wrest the gun from Lima. 4RP 437.

Brasier, on the other hand, denied touching the gun. 5RP 554. Rather, he grabbed Lima's arms after he saw Lima take a swing at Bennett.

¹⁰ A treating physician testified that when he examined Brasier early the next morning, Brasier's ear was scratched and his face showed bruising. 6RP 666-67.

4RP 517. Bennett did not recall Lima attempting to strike her. Instead, she testified, Lima attempted to run past her to get back in the house, but she blocked his path. 4RP 438, 487

After Brasier attacked Lima, the men struggled, and Bennett heard a gun go off. 4RP 437. Brasier said, "ow ow," and fell to the ground. 4RP 438, 487. Brasier testified that Lima pushed the gun toward Brasier's hip and shot him. 4RP 517. Brasier lost feeling in that leg and fell to the ground. Brasier did not realize he had been shot, believing instead that he had been tased. 4RP 518; 5RP 555.

According to Bennett, it was at that point that Lima tried to run past her. 4RP 438, 487. When Lima could not, he ran around the side of the house and into the house through another door. 4RP 438. Bennett went to a window and urged Nataly, who was still inside, to calm Lima. 4RP 439-41. Bennett acknowledged that, at that point, she was still hoping to get money or drugs from Lima. 4RP 441.

Brasier began pounding on the Limas' door, demanding that Lima come out.¹¹ 4RP 492. Bennett threw a flower pot at the windshield of the gold Honda, breaking the windshield. 4RP 445. Bennett and Brasier

¹¹ Police officers later observed a shoe impression on the Limas' door. 5RP 633.

discussed whether Lima's gun was real. Concluding it was, Bennett urged Brasier to leave. 4RP 445. Brasier, however, wanted to stay and continue fighting with Lima. 4RP 445-46, 4RP 490-91.

Bennett convinced Brasier to give her his car keys. 4RP 446. As Bennett headed for the car, the gold Honda "whizzed" by on Wycoff. 4RP 447. Bennett, in Brasier's car, followed the Honda to a coffee shop parking lot. There, Lima threw what appeared to be a gun out of the car. 4RP 448.

Brasier testified that after Bennett took the car keys, Lima "hobble[d]" down a set of stairs to the gold Honda. Lima began backing the car toward Wycoff. But then he saw Brasier and pulled forward, striking Brasier. 4RP 519-20. Brasier rolled onto the hood and off the side of the car. 4RP 522. Angry, Brasier yanked one of the side mirrors off the Honda as it drove away. 5RP 557.¹²

Bennett eventually retrieved Brasier, and they returned to the coffee shop parking lot, where they called the police. 4RP 449. Becoming impatient, they left before the police arrived and returned to Bennett's

¹² At trial, Lima denied driving the car at Brasier. Rather, an agitated Brasier jumped on Lima's hood and smashed the windshield with what appeared to be a brick. 7RP 971-72. Lima hit the brakes, and Brasier struck the windshield. Then, when Lima hit the gas to back up, Brasier rolled off the car. But, Lima agreed, Brasier broke off a side mirror as Lima was attempting to drive away. 7RP 972. The State did not charge any assault related to Brasier's interactions with the Honda.

home. 4RP 449. Once there, Brasier realized he had been shot, and Bennett drove him to the hospital. 4RP 451, 488-89, 523.

Brasier was treated for a bullet wound. He did not require surgery. 6RP 671. However, the bullet remained in his body, near his spine. 4RP 523; 6RP 669.

Brasier soon returned to his job, and he was able to continue participating in recreational sports. 4RP 523; 5RP 540-41. Seven months after being shot, Brasier still suffered numbness and tingling in his upper leg, but the symptoms were slowly improving. 4RP 524; 5RP 540.

b. Arresting officer's testimony

Bremerton police officer Jordan Ejde received a report of gunshots and men fighting in an alley near Wycoff. 5RP 565. Ejde saw the gold Honda near that location and followed it. 5RP 99-600. Ejde stopped the Honda in the alley behind the Limas' residence. 5RP 566.

Ejde arrested the driver, Lima, and read him Miranda¹³ warnings. Lima agreed to talk. He told Ejde that a woman he knew, Maleisa, had arrived at his home that night with a man Lima did not know. They threatened Lima and his family, and the man struck Lima. 5RP 567. The fight moved outside, where the man damaged the Honda. 5RP 569. Ejde

¹³ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

confirmed the windshield was cracked. But he also noticed a bullet and shell casing on the ground in the alley. 5RP 570-71.

When Ejde asked if the dispute involved drugs, Lima acknowledged he had sold Maleisa fake heroin the day before. 5RP 575. When Ejde pressed Lima about whether a gun was involved, Lima said he had been convicted of a felony and was reluctant to talk about it. 5RP 575-76. But Lima eventually acknowledged using his gun to fire a warning shot inside his home. 5RP 576-77. Once outside, however, the man accompanying Maleisa attacked Lima, and that man was shot in the ensuing struggle. 5RP 577.

Lima said he drove to the coffee shop and threw the gun out of the car. 5RP 578. Lima showed Ejde where he had thrown the gun. The gun, a .22-caliber Ruger pistol, was eventually recovered by a police dog. 5RP 578-80, 620-22. Lima said he had only had the gun for a few days. 5RP 583-84; 7RP 931 (Lima's trial testimony).

c. Lima's version of events

Detective Matthew Thuring interviewed Lima at the police station following the arrest. 6RP 788. Lima's statement to Thuring mirrored his

testimony at trial.¹⁴ Lima said he woke up early that morning because he heard Bennett arguing with Nataly. 6RP 789; 7RP 944 (Lima's trial testimony). After Brasier pushed him against a wall, Lima grabbed his gun and fired a warning shot. 6RP 789-90, 804; see also 7RP 950-51, 955 (trial testimony). Lima was fearful because he had been assaulted in his home a few months earlier.¹⁵ 6RP 794-95; see also 7RP 948 (trial testimony). Moreover, Brasier was significantly larger than Lima. 7RP 948 (trial testimony); see also 7RP 843 (Nataly's testimony).

Lima led Bennett and Brasier outside. 6RP 790. Once outside, Brasier attacked Lima, and the men ended up struggling over the gun. 6RP 792-93; 7RP 961 (trial testimony). During the struggle, the gun went off accidentally and struck Brasier in the leg. 6RP 793; see also 7RP 966-67 (Lima's trial testimony that gun went off as Brasier attempted to pull it from Lima's hand); 8RP 1029-31 (same).

After the gunshot, Lima entered his home through another door and told Nataly he planned to lure Bennett and Brasier away from the house. 6RP 793. Lima later decided to get rid of his gun because he had been

¹⁴ Lima's testimony differed from Detective Thuring's account in one significant respect. According to Thuring, Lima said that, in the house, he pushed Brasier first. Lima denied this at trial. 7RP 984.

¹⁵ In that attack, Lima suffered a serious injury to his jaw, which had to be wired shut. The injury was still healing on December 12. 7RP 920-21.

convicted of a felony and did not want to get in trouble. 6RP 794; 7RP 982 (trial testimony).

At trial, Lima acknowledged he was addicted to heroin and, although he previously smoked it, he had started “shooting up” a few months before the incident. 7RP 914. Being an addict, he knew where to get heroin, and he sold to friends to support his and his wife’s addictions. 7RP 915, 917-18.

d. Nataly Lima’s testimony and prosecutor’s misconduct

Nataly testified she and Lima had been married for four years. They had a three-year-old son. 7RP 818. Nataly had met Bennett on a ferry the summer before the incident. Nataly was a regular heroin user. 7RP 818-19. Nataly and Lima socialized with Bennett at their home and Bennett’s home, but their primary activity together was using heroin. 7RP 820.

On December 11, Bennett texted that she wanted to buy heroin. 7RP 821, 824. Lima and Nataly supplied Bennett with fake heroin at the 7-Eleven. They had no money to buy real heroin because Nataly had lost her job. 7RP 822.

Around 2:30 a.m., Nataly was awakened by banging on the bedroom window. 7RP 826. An agitated Bennett demanded that Nataly get Lima.

7RP 827. Bennett charged past Nataly to the couple's bedroom and woke Lima, who was upset about it. 7RP 830.

Earlier that night, while Nataly and her son were in the living room, Lima had fired his gun in the bedroom. 7RP 839-40. Nataly feared Lima had shot himself, although that had not occurred. 7RP 839. After Lima fell asleep, Nataly placed the gun on top of the refrigerator. 7RP 840, 870. Nataly was unfamiliar with guns and did not like having one in the house. 7RP 908-09.

After being woken by Bennett, Lima led Bennett and Brasier to the living room. 7RP 831. Bennett demanded money or heroin. 7RP 842. Lima said he didn't have any money. 7RP 842. Bennett told Brasier to "do it."¹⁶ 7RP 842.

Brasier grabbed Lima by the shoulder and pushed him into a wall. 7RP 842. At that point, Lima saw the gun on top of the refrigerator and grabbed it. 7RP 843. Lima told Bennett and Brasier to get out of the house and fired the gun toward the ceiling. 7RP 844. Bennett and Brasier followed Lima out the door to the alley. 7RP 844.

Nataly watched from the doorway. 7RP 845. Brasier moved toward Lima, and Lima fired a shot into the hillside. 7RP 848. Lima tried to run

¹⁶ Lima said he did not hear Bennett's directive to Brasier. 7RP 951.

back into the house, but Bennett blocked him. 7RP 848. Brasier grabbed Lima from behind, and they fell to the ground. 7RP 849. As the two men wrestled, Nataly closed and locked the door to protect her son. 7RP 850.

Nataly eventually let Lima in the other door. 7RP 850. She could hear Brasier kicking at the alley door. 7RP 850.

Lima left the house. After the noises stopped, Nataly fled with her son and delivered the child to Nataly's mother. 7RP 851-52.

When Nataly returned to the home, she spoke with responding police officers. But she lied about various aspects of incident because she did not want Lima to get in trouble. 7RP 854, 860-61.

Nataly later participated in interviews with the prosecutor and a defense investigator. 7RP 861-62. In a continuing attempt to protect Lima, she did not tell the whole truth in those interviews, either. 7RP 862.

Nataly finally told the truth at trial. She revealed, for the first time, that heroin had played a role in the altercation. She had to tell the truth about heroin because Lima told her Bennett had come clean about her heroin use when she testified at trial. 7RP 865-67. Nataly maintained that, despite her evolving story, her testimony regarding the details of the fight was accurate. 7RP 866, 876-78, 881-83, 885-87, 907.

On cross-examination, the prosecutor asked a number of questions about changes in Nataly's story. The following exchange occurred:

Q. And we went through some of the jail calls, things that you've discussed with your husband and your discussions regarding your testimony. And you agree that since you were originally contacted by Detective [Ryan] Heffernan¹⁷, up until today, your story has had some changes?

A. Yes.

Q. And in part that's due to your discussion with your husband?

A. I mean a little bit, yes.

Q. Okay. In fact, when you were . . . talking to your husband about your testimony, . . . it was frustrating for you; right? Because he was asking why you were saying these things and you were trying to explain yourself to him?

A. Yes.

Q. In fact, one of the calls you were starting to cry when you were talking to him?

A. Yes.

Q. And he told you – in one call, when you were starting to cry, you were explaining yourself to him and telling him that you couldn't handle this and he said, "Okay. Well[,] I'm just saying, when you take the stand and testify on my behalf, you need to clarify what the fuck you're saying. You know what I mean?"

A. Yes.

¹⁷ Heffernan spoke with Nataly during the early morning hours following the incident. By trial, her account of the altercation changed significantly. See 5RP 603-04 (Nataly's statements to Heffernan that two men came to the door, that Nataly left out the back door and did not see anything, and that she had never seen Lima with a gun).

Q. And I referred to [defense investigator] Jim Harris earlier[?]

A. Yes.

Q. [Whom] you did an interview with [a]nd that was actually the first real statement that you provided?

....

A. Yes.

Q. And you -- since the incident took place, you've had numerous occasions to talk to your husband about what happened; right?

Q. And confirm what you were going to tell Jim Harris?

A. Yes.

Q. Okay. And so the first time that your husband called you after I interviewed you, and he was asking you about . . . what I asked you. And he asked you, "Then you told them the same shit you told the investigator; right?"

A. Yes.

Q. He didn't say -- his words weren't, so you told her the truth; right? . . . He said, "You told them the same shit you told the investigator."

A. Yes.

Q. And then again on another call, he talks to you again more in depth about our interview and how it went. And again, you're frustrated about what to tell me. And he says, "I need you to say [say] the same thing you told Jim." And you told him, "I will"?

A. Yes.

Q. In the interview that I did with you last week, we talked about your husband having the gun and the fact that you . . . didn't tell him it was on the fridge because you didn't want him to have it. And then you had indicated, "When he grabbed it and shot the first shot into the ceiling" and I asked you, "What did you think at that point?" And isn't it true that you told me, "I didn't know what to think, I had never even heard a gun before"?

A. Yes.

Q. Okay. And I asked you, "Were you scared of that situation?" And you [said yes]?

A. Yes.

Q. And I asked you, "Were you scared of Carlos having the gun then?" and you said, "Yeah."

A. Yes.

Q. Okay. Just one last thing – when you were talking to your husband this past week, you guys talked obviously about this case and what was going on, but you also talked about what he was charged with?

A. Yes.

Q. And you guys had some – a conversation about what he might be convicted of?

A. Yes.

Q. Because he's charge[d] with multiple charges?

A. Yes.

Q. And you discussed some possible outcomes of the situation?

A. Yes.

Q. *And isn't it true that you told your husband, "Yeah, but I think they're still gonna find -- . . . they're still gonna -- I think assault will still hold up though"?*

[Defense counsel]: *Your Honor, I'm objecting to that.*

THE COURT: Ladies and gentlemen of the jury, I'm going to ask that you step out for a few moments. We are going to need to have a discussion on this.

7RP 892-96 (emphasis added).

Following a discussion outside the jury's presence, the court ruled that the prosecutor's cross-examination was improper impeachment and, consistent with Lima's specific objection,¹⁸ that it improperly introduced Nataly's opinion on guilt. 7RP 896-98, 901-02.

The court informed the jury that the objection was sustained. 7RP 902.

C. ARGUMENT

1. PROSECUTORIAL MISCONDUCT DURING THE CROSS-EXAMINATION OF NATALY LIMA DENIED LIMA A FAIR TRIAL.

Before trial, the State moved to preclude any witness from testifying regarding another witness's credibility. Appendix A at 2-3 (designated as

¹⁸ Lima's counsel argued that the line of questioning was improper because it sought to introduce Nataly's opinion on Lima's guilt. 7RP 896.

supplemental clerk's papers). The parties agreed the motion was proper, and the court granted it. 1RP 16.

But the State failed to honor the court's ruling—and ignored the constitution and well-established case law—when it asked Nataly Lima about her out-of-court statement indicating that she believed the State could prove the assault charge against Lima. Although defense counsel raised a proper objection, the damage was done.

By injecting into the proceedings Nataly's opinion regarding her husband's guilt as to the assault charge, the prosecutor committed misconduct. This misconduct was prejudicial, and it denied Lima a fair trial. This Court should reverse Lima's second degree assault conviction and remand for a new trial on that charge.

- a. It is unconstitutional for a witness to opine as to the guilt of the accused or the credibility of a witness.

In Washington, witness opinion on the guilt of the accused is strictly prohibited. The role of the jury is "inviolable" under the Washington Constitution. CONST. art I, §§ 21, 22. The right to have factual questions decided by the jury is crucial to the jury trial right. U.S. CONST. amend. VI; CONST. art. I, §§ 21, 22; Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711 (1989). "To the jury is consigned under the constitution 'the ultimate power to weigh the evidence and determine the facts.'" State v.

Montgomery, 163 Wn.2d 577, 590, 183 P.3d 267 (2008) (quoting James v. Robeck, 79 Wn.2d 864, 869, 490 P.2d 878 (1971)). Washington courts likewise recognize that it is exclusively “the function of the jury to assess the credibility of a witness and the reasonableness of the witness’s responses.” State v. Demery, 144 Wn.2d 753, 762, 30 P.3d 1278 (2001) (plurality opinion).

ER 701 permits opinion testimony by a lay witness only when it is (1) rationally based on the perception of the witness, (2) helpful to the jury, and (3) not based on scientific or specialized knowledge. Therefore, no witness “may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference.” State v. Black, 109 Wn.2d 336, 348, 754 P.2d 12 (1987).

Nor may a witness “give an opinion on another witness’[s] credibility” or the “veracity of the defendant.” State v. Carlson, 80 Wn. App. 116, 123, 906 P.2d 999 (1995) (citing numerous cases). “Testimony regarding the credibility of a key witness” is improper “[b]ecause issues of credibility are reserved strictly for the trier of fact.” City of Seattle v. Heatley, 70 Wn. App. 573, 577, 854 P.2d 658 (1993).

Before opinion testimony is offered, the trial court must determine its admissibility. Montgomery, 163 Wn.2d at 591. Courts consider the circumstances of the case, including: (1) the type of witness involved, (2)

the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact. Id. Opinion testimony is “clearly inappropriate” in a criminal trial when it contains “expressions of personal belief[] as to the guilt of the defendant, the intent of the accused, or the veracity of witnesses.” Id.

In Demery, the trial court admitted a videotaped interview in which the police accused Demery of lying and said they did not believe his story. 144 Wn.2d at 756 n.2. Four justices held the taped statements were not opinion testimony, reasoning they were different from trial testimony, which bore an added “aura of special reliability and trustworthiness.” Id. at 763 (plurality opinion) (quoting United States v. Espinosa, 827 F.2d 604, 613 (9th Cir. 1987)). However, four justices concluded the taped statements were essentially the same as live testimony by an officer and were therefore inadmissible opinion testimony. Id. at 773 (Sanders, J., dissenting). The final justice found the videotaped statements to be impermissible opinion evidence but believed the error was harmless. Id. at 765-66 (Alexander, J., concurring). Thus, a majority concluded the officers’ taped statements that Demery was lying were inadmissible opinions on Demery’s credibility.

In State v. David D. Jones, Jones was convicted of unlawfully possessing a firearm. 117 Wn. App. 89, 90, 68 P.3d 1153 (2003). A police officer saw Jones making furtive movements and discovered the gun under

the passenger seat of the car where Jones was sitting. Id. During an interview, the officer repeatedly insisted Jones must have known about the gun. Id. at 91. At trial, the officer explained he “‘addressed the issue that, you know, I just didn’t believe him. There was no way that someone was sitting in that car, and everything that had transpired from my eyes.” Id. (quoting report of proceedings). On appeal, Jones argued the prosecutor committed flagrant and ill-intentioned misconduct by eliciting this testimony. Id. at 90-91.

After analyzing Demery, this Court found “no meaningful difference between allowing an officer to testify directly that he does not believe the defendant and allowing the officer to testify that he told the defendant during questioning that he did not believe him.” Id. at 92. Either way, “the jury learns the police officer’s opinion about the defendant’s credibility.” Id. This Court held the officer’s testimony that he believed Jones was lying during the interrogation constituted inadmissible opinion evidence. Id. The error was prejudicial and required reversal because the case hinged on Jones’s credibility. Id.

This Court’s decision in State v. Johnson, 152 Wn. App. 924, 219 P.3d 958 (2009), is also instructive. Rather than opinions of police officers, it involved, as in this case, the out-of-court statements of the wife of an accused.

In Johnson, this Court reversed Johnson's conviction for child molestation because of improper opinion evidence from Johnson's wife. Id. at 934. The case involved out-of-court statements by Johnson's wife indicating she believed the allegations of the complainant, a friend of the family. Id. at 931. The complainant (T.W.), her mother, and her stepfather all related an incident during which Johnson's wife confronted T.W. about the accusations and demanded T.W. prove it was true. Id. at 931-32. When T.W. recounted details of Johnson's intimate anatomy and sexual habits, his wife burst into tears, acknowledged it must be true, and hours later attempted suicide. Id. at 932-33.

This Court held it was manifest constitutional error to admit Johnson's wife's opinion and reversed despite the lack of objection below. Id. at 934. This Court reasoned that the evidence shed "little or no light on any witness's credibility or on evidence properly before the jury and really only tells us what [Johnson's wife] believed." Id. at 933. This Court further noted "the jury should not have heard collateral testimony that Johnson's wife believed T.W.'s allegations." Id. at 934. The testimony "served no purpose except to prejudice the jury," thereby denying Johnson a fair trial. Id.

As these cases illustrate, a wife's opinion that the State can prove its case against a husband constitutes "clearly inappropriate" opinion evidence.

Montgomery, 163 Wn.2d at 591. Because Lima asserted self-defense, it was also, in essence, an opinion on Lima's credibility. It was, therefore, also a clear violation of the court's pretrial ruling. As will be discussed below, moreover, the injection of Nataly's statement into the proceedings via cross-examination constituted prosecutorial misconduct requiring a new trial on the assault charge.

- b. The prosecutor committed misconduct by ignoring the court's ruling on the State's own motion and by introducing clearly prohibited evidence that Lima's own wife believed he was guilty of assault.

The prosecutor committed misconduct by ignoring well-established case law, as well as the trial court's pretrial ruling, and introducing evidence suggesting that his wife believed he was guilty of assault. Because Nataly witnessed the most crucial portions of the incident, and because her trial testimony regarding the incident supported her husband's self-defense claim, the introduction of the inadmissible evidence particularly prejudicial.

A prosecutor is a quasi-judicial officer who has a duty to ensure an accused person is given a fair trial. State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). "A prosecutor must enforce the law by prosecuting those who have violated the peace and dignity of the state by breaking the law." State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). At the same time, a prosecutor "functions as the representative of the people in a quasijudicial capacity in a search for justice." Id. A prosecutor fulfills neither role by securing a conviction based on proceedings that violate a defendant's right to a fair trial. Rather, such convictions undermine the integrity of the criminal justice system as a whole. State v. Walker, 182 Wn.2d 463, 476, 341 P.3d 976 (2015). When

a prosecutor commits misconduct, he may deny the accused a fair trial. Id. at 518; U.S. CONST. Amend. 14; CONST. art. 1, § 3.

Where, as here, there is an objection to the act constituting misconduct, an accused will prevail on appeal if he establishes the impropriety of the prosecuting attorney's actions and their prejudicial effect. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)).

It is misconduct for a prosecutor to violate a court order regarding the admissibility of evidence. State v. Smith, 189 Wash. 422, 428-29, 65 P.2d 1075 (1937). A prosecutor also commits misconduct by asking clearly objectionable questions that seek to elicit inadmissible testimony from a witness. State v. Jerrels, 83 Wn. App. 503, 507-08, 925 P.2d 209 (1996); see also United States v. Shapiro, 879 F.2d 468, 471-72 (9th Cir. 1989) (government committed misconduct by asking the defendant about his prior convictions after stipulating before trial that it would not introduce such evidence); United States v. Sanchez, 176 F.3d 1214, 1221-22 (9th Cir. 1999) (prosecutor committed misconduct when, "under the guise of 'artful cross-examination,'" the prosecutor revealed to the jury the substance of inadmissible evidence).

Smith is instructive. 189 Wash. 422. There, the trial court ruled before trial that the prosecutor could not question Smith about his discharge

from the armed forces under “discreditable” circumstances. Id. at 428. Despite this ruling, the prosecutor questioned Smith about the prohibited subject matter during cross-examination. Id.

The Supreme Court held that this was error. “In propounding the question, [the prosecutor] clearly violated the ruling of the court theretofore made. *The question was highly prejudicial and of such a nature that the prejudice largely consists in the mere asking of the question.*” Id. (emphasis added). The Supreme Court concluded that a new trial was required. Id. at 428-49.

Jerrels, another misconduct case, is also instructive. There, the State charged Jerrels with raping his daughter and two stepchildren. 83 Wn. App. at 504. During trial, the prosecutor asked Jerrels’s wife, the mother of the three children, if she believed the children were telling the truth about Jerrels’s actions. Id. at 506-07. This Court found the mother’s opinion as to her children’s veracity could not easily be disregarded and reversed Jerrels’s convictions, even where there was no objection. Id. at 508.

Here, the State committed misconduct by introducing Nataly’s clearly inadmissible opinion that her husband was guilty of assault. Unlike in Smith and Jerrels, defense counsel objected, and the objection was sustained. As in Smith, however merely asking the question placed the inadmissible evidence before the jury. The damage from such a question

could not be ameliorated by preventing the witness from answering. Indeed, the prosecutor was asking questions based on a transcript of telephone calls between Nataly and Lima, and presenting Nataly with direct quotations. E.g. 7RP 865, 893. There would have been no question in jurors' minds that Nataly had, in fact, made the statement.¹⁹ It was misconduct for the prosecutor to ask the question in light of clear authority providing that a witness may not comment on the veracity of another witness or the guilt of the accused. Jerrels, 83 Wn. App. at 507-08 (collecting cases).

Although defense counsel did not request a curative instruction, it would have been futile to do so, given the nature of the question. See State v. Babcock, 145 Wn. App. 157, 164, 185 P.3d 1213 (2008) (curative instruction inadequate based on the nature of stricken evidence); State v. Suleski, 67 Wn.2d 45, 51, 406 P.2d 613 (1965) (so holding, and noting that “where evidence is admitted which is inherently prejudicial and of such a nature as to be most likely to impress itself upon the minds of the jurors, a subsequent withdrawal of that evidence, even when accompanied by an instruction to disregard, cannot logically be said to remove the prejudice[e]).

¹⁹ Cf. State v. Whitney, 78 Wn. App. 506, 516, 897 P.2d 374 (1995) (finding no prejudice based on improper question, which improperly suggested that witness had identified the accused, where witness had not identified the accused and the court sustained objection to improper question).

. . . We are not assured that the evidentiary harpoon here inserted could effectively be withdrawn. It was equipped with too many barbs.”).

In any event, the error was preserved by counsel’s objection on appropriate legal grounds. State v. Padilla, 69 Wn. App. 295, 300, 846 P.2d 564 (1993), as amended on denial of reconsideration (Apr. 14, 1993); State v. Barrow, 60 Wn. App. 869, 876-77, 809 P.2d 209 (1991). The question becomes, therefore, whether the misconduct could have affected the jury’s verdict.

c. The misconduct affected the verdict as to the second degree assault conviction.

The misconduct was prejudicial as to the second degree assault conviction. Reversal is necessary where there is a substantial likelihood the prosecutor’s misconduct affects a jury’s verdict. See Padilla, 69 Wn. App. at 299 (in case hinging on competing credibility of police officer and defendant, reversal was required where prosecutor improperly elicited defendant’s opinion that police officer must be lying). Here, the prosecutor’s misconduct affected the verdict on the assault count.

To support a second degree assault conviction, the State was required to prove beyond a reasonable doubt that Lima intentionally assaulted Brasier with a deadly weapon. CP 15 (Count 2 to-convict instruction); CP 8 (assault definition); RCW 9A.36.021(1)(c). Because

Lima met the burden of production, the State was also required to prove, beyond a reasonable doubt, that Lima's use of force against Brasier was *not* lawful. CP 17 (defense-of-self instruction); State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). This required the State to prove that Lima did *not* reasonably believe he was about to be injured and that the force he used *was* more than necessary under the circumstances as they appeared to Lima at the time. CP 52 (Instruction 17)

Lima's theory was that he acted in self-defense whether it believed the gun went off accidentally or he somehow pulled the trigger during the struggle. In either case, Lima was acting to defend himself from Brasier's sudden attack. See 8RP 1148. For obvious reasons, Lima would have understood he needed to keep the gun out of the hands of his assailant.

There were various conflicting accounts regarding the events immediately preceding the wounding gunshot. As such, the case came down to the credibility of the witnesses, and in particular, Nataly.

Like her husband, Nataly testified that Brasier was shot after, unprovoked, the much larger Brasier attacked Lima from behind. 7RP 848-49. Brasier presented a different version of events, one in which his attack on Lima was provoked by Lima's aggression. 4RP 516-17.

Bennett's testimony was consistent with Brasier's testimony in some respects, but it conflicted in others. For example, Bennett testified

Lima appeared to be trying to get past her to get in the house, rather than attempting to assault her. Moreover, Bennett believed Brasier was trying to wrest the gun from Lima. 4RP 437-38, 487.

Nataly's testimony was therefore critical to corroborating Lima's self-defense claim. But Nataly's credibility was in dispute due to the fact that her story had evolved over time, as well as the fact that she had been convicted of theft, a crime of dishonesty. 7RP 892; CP 5 (jury instruction stating that conviction could be used to assess Nataly's credibility).

But the prosecutor's improper questioning informed the jury in no uncertain terms that Nataly believed the State could prove the assault charge. This was devastating to Nataly's trial testimony and, ultimately, to Lima's self-defense claim.

Because, under these circumstances, there was a "substantial likelihood" the prosecutor's misconduct affected the jury's verdict, the assault conviction should be reversed. Padilla, 69 Wn. App. at 299.

2. THE TWO CONVICTIONS FOR POSSESSION OF HEROIN VIOLATE THE PROHIBITION ON DOUBLE JEOPARDY.

The prosecution of Lima for two counts of possession of heroin, occurring on the same date at the same time, violates the prohibition on double jeopardy. One of the counts must be vacated and the case remanded for resentencing based on a corrected offender score. See CP 82-83

(sentence imposed based on offender score of eight, with each possession charge counting in the offender score).

a. Facts related to double jeopardy argument

On December 12, police searched the Limas' residence. 6RP 653. On the bedroom's night stand, police officers found a small black nylon case that, according to a police officer, contained a "drug kit." 6RP 656-57. This consisted of a tourniquet, several syringes, and a baggie containing a dark brown substance suspected to be heroin. 6RP 656-57.

A forensic scientist from the state crime lab testified the substance contained heroin. 6RP 774-75. The State relied on this evidence to support the Count 6 possession charge. 8RP 1128.

Officer Steven Forbragd searched the gold Honda, which was seized by police on December 12. 6RP 688. Forbragd recovered a "tooter," a repurposed ball point pen tube, which is used to inhale smoke from a burning substance. Forbragd also recovered from the car a Gerber multi-tool with a tar-like substance on the knife blade. 6RP 689-92, 695-97. Lima was the last person seen driving the car. 6RP 723.

The forensic scientist testified residue found in the tube contained heroin. 6RP 774. The State relied on this evidence to support the Count 7 possession charge. 8RP 1128.

- b. Lima's two convictions for possession of heroin violate the prohibition on double jeopardy.

“The double jeopardy clauses of the Fifth Amendment and article I, section 9 of the Washington Constitution prohibit multiple punishments for the same offense.” State v. Lynch, 93 Wn. App. 716, 723, 970 P.2d 769 (1999). Where the government charges multiple violations of the same statute, double jeopardy analysis focuses on the “unit of prosecution.” In re Pers. Restraint of Davis, 142 Wn.2d 165, 172, 12 P.3d 603 (2000).

Legislative intent determines the appropriate unit of prosecution. Id. at 172 (citing State v. Adel, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998)). The first step in this analysis is to examine the statutory language. To the extent there is an ambiguity, it is construed in favor of lenity. Davis, 142 Wn.2d at 172.

Lima was charged in counts 6 and 7 with violating RCW 69.50.4013, which provides that, with certain exceptions, “[i]t is unlawful for any person to possess a controlled substance.” RCW 69.50.4013(1).

In Adel, the Supreme Court reversed one of Adel’s two convictions for simple possession of marijuana where marijuana was found in Adel’s car and in his store. 136 Wn.2d at 631. The State argued that Adel violated the possession statute multiple times simply because he constructively possessed the drug in two different places. Id. at 636. The Court noted that

under the State's argument, an accused could be convicted of three counts of possession if the controlled substance was found in a defendant's sock, pants pocket, and purse, with each location being a "separate" place. Id.

The Court roundly rejected the State's argument. Because "[a]ll of the drugs found . . . were within Adel's dominion and control," he could be convicted of only one count of possession of a controlled substance. Id. The Court concluded that, under such circumstances, the controlled substance possession statute authorized a single unit of prosecution. Id.; see also State v. Jerry Lee Jones, 117 Wn. App. 721, 725-26, 72 P.3d 1110 (2003) (double jeopardy barred convictions for possession of cocaine and attempted possession of cocaine); State v. Lopez, 79 Wn. App. 755, 904 P.2d 1179 (1995) (double jeopardy barred two convictions for possession with intent to deliver where Lopez purchased cocaine during a controlled buy, and that cocaine was found in his car, and additional cocaine, unrelated to the purchase, was found on his person), disapproved of by Adel, 136 Wn.2d 329 (approving of result, but clarifying that Court of Appeals should have employed "unit of prosecution" rather than "same evidence" test).

In Davis, 142 Wn.2d at 176, the Supreme Court distinguished Adel, but in doing so it recognized that case's continued viability. There, the Court determined that two counts of possession with intent to deliver or manufacture based on two separate marijuana grow operations did not

violate double jeopardy. Under facts of that case, “[b]y setting up two wholly self-contained grow operations, a ‘separate and distinct’ intent to manufacture marijuana at each location [was] evident.” Id. But the Davis Court explicitly distinguished its statutory analysis from that applicable to simple possession, which is a “strict liability offense” and therefore does not require intent. Id.

Adel controls the result here because it is legally and factually indistinguishable from the present case. Lima was convicted of two contemporaneous counts of simple possession of a single controlled substance, heroin, based on heroin found in his bedroom and heroin residue found in a car parked within yards of his bedroom. Even where a substance is located in two separate locations, it constitutes a single unit of prosecution of possession of a controlled substance. Adel, 136 Wn.2d at 636. One of Lima’s convictions for heroin possession must be vacated. Id. at 632.

3. THE COUNT 4 SCHOOL ZONE ENHANCEMENT
MUST BE STRICKEN BECAUSE IT WAS NOT
AUTHORIZED BY STATUTE.

The Count 4 school zone enhancement under RCW 69.50.435 must be stricken.

This Court analyzes the applicability of sentence enhancement statutes based on their plain language. State v. McGrew, 156 Wn. App. 546, 554, 234 P.3d 268 (2010). On Count 4, the State charged Lima with

delivery in lieu of controlled substance, a violation of RCW 69.50.4012, based on the transaction in the 7-Eleven parking lot. CP 11-12. But RCW 69.50.435 applies only to violations of RCW 69.50.401 and RCW 69.50.410. CP 12.²⁰ Because, by its plain terms, RCW 69.50.435 does not apply to the offense of conviction, a violation of RCW 69.50.4012, the school zone enhancement must be stricken. See State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (collecting ample authority and observing that illegal sentences may be challenged for first time on appeal).

4. LIMA'S SENTENCE FOR SECOND DEGREE ASSAULT EXCEEDS THE STATUTORY MAXIMUM FOR THE OFFENSE.

The sentencing court exceeded the statutory maximum for second degree assault by sentencing Lima to a combined total of 106 months of incarceration plus 18 months of community custody,²¹ reflecting a total sentence of 124 months. CP 84-85.

Even where a firearm enhancement applies to the sentence, the statutory maximum sentence for second degree assault, a class B felony, is

²⁰ Indeed, the charging document indicates the enhancement is applicable to convictions under RCW 69.50.401 and does not mention .4012. CP 12.

²¹ See RCW 9.94A.701(2) (18-month community custody term applies to “a violent offense that is not considered a serious violent offense”); RCW 9.94A.030(55)(a)(viii) (second degree assault is considered a “violent offense”).

120 months. RCW 9A.36.021(2); RCW 9A.20.020(1)(b); RCW 9.94A.533(3)(g).

Under RCW 9.94A.701(9), “[t]he term of community custody specified by this section shall be reduced by the court whenever an offender’s standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.”

When the trial court imposes a sentence in violation of this statute, remand to that court is necessary to amend the community custody term or for resentencing consistent with the statute. State v. Boyd, 174 Wn.2d 470, 473, 275 P.3d 321 (2012).

This Court should remand for resentencing because the sentence for second degree assault exceeds the statutory maximum for the offense.

5. THIS COURT SHOULD NOT AWARD THE COSTS OF APPEAL.

As a final matter, Lima asks that no costs of appeal be authorized under title 14 of the Rules of Appellate Procedure.

Under RAP 14.2, a party *may* be entitled to costs if it “substantially prevails on review.” (Emphasis added.) But in the event that Christian does not substantially prevail on appeal, this Court should not assess appellate costs against him.

This Court has ample discretion to deny the State’s request for costs. For example, RCW 10.73.160(1) states the “court of appeals . . . *may* require an adult . . . to pay appellate costs.” (Emphasis added.) “[T]he word ‘may’ has a permissive or discretionary meaning.” Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000).

Trial courts must make individualized findings of current and future ability to pay before they impose LFOs. State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d (2015). Only by conducting such a “case-by-case analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” Id.

The existing record establishes that any award of appellate costs would be unwarranted in this case. Lima is serving a 130-month sentence. When he is released, he will have limited employment prospects as a felon.

But, he has a child he must help support. 7RP 818. In addition, Lima suffers from heroin addiction and, like all people who suffer from substance addiction, will face an uphill battle recovering from this disease. 7RP 914; 9RP 15.

In addition, the trial court found Lima to be indigent for purposes of appeal and found that he could not contribute anything to the costs of appellate review. CP 96-98 (Order of Indigency). The court waived all non-mandatory LFOs in the judgment and sentence. CP 89. But Lima is, nonetheless, liable for over \$18,000 in restitution. Appendix B (designated as supplemental clerk's papers). This amount may accrue substantial interest while he is incarcerated. CP 89; Blazina, 182 Wn.2d at 836 (interest rate of 12 percent means that even persons "who pay[] \$25 per month toward their LFOs will owe the state more 10 years after conviction than they did when the LFOs were initially assessed").

Finally, indigence is presumed to continue throughout the appeal. State v. Sinclair, 192 Wn. App. 380, 393, 367 P.3d 612 (citing RAP 15.2(f)), review denied, 85 Wn.2d 1034 (2016).²²

²² Moreover, an amendment to RAP 15.2(f) will soon take effect, providing that the trial court's

finding of indigency remains in effect, pursuant to RAP 15.2(f) unless the commissioner or clerk [of this Court] determines by a preponderance of the evidence that the

For the foregoing reasons, any request for appellate costs by the State should be denied.

Moreover, “[i]f there is no substantially prevailing party on review, the commissioner or clerk will not award costs to any party.” RAP 14.2. If Lima prevails on some but not all of the above issues, the State will not be the substantially prevailing party. For this reason as well, any request for costs should be denied.

offender’s financial circumstances have significantly improved since the last determination of indigency.

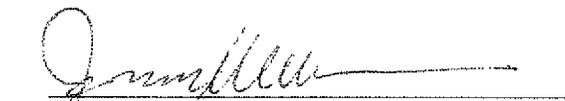
D. CONCLUSION

The prosecutor's misconduct denied Lima a fair trial on the second degree assault charge. This Court should reverse and remand for retrial on that charge. Moreover, the two convictions for possession of heroin violate double jeopardy, and one of the convictions must be vacated. This will likely require resentencing based on a reduced offender score. In addition, the school zone enhancement as to Count 4 must be stricken as it was not authorized by statute. Finally, the sentence imposed for second degree assault exceeds the statutory maximum for the offense, and resentencing is required.

DATED this 30TH day of January, 2017.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER WINKLER

WSBA No. 35220
Office ID No. 91051

Attorney for Appellant

APPENDIX A

ORIGINAL

RECEIVED AND FILED
IN OPEN COURT
JUN 28 2016
DAVID W. PETERSON
KITSAP COUNTY CLERK

- I deposited this document in the mails of the United States of America with a properly stamped and addressed envelope, by first class mail, postage prepaid, directed to the following person--
- This document was placed in the recognized system for interoffice written communication with local law offices, directed to the following person--

Craig Gordon Kibbe

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge, information and belief

Dated: June 16, 2016

Place: Port Orchard, WA

[advocate name]

IN THE KITSAP COUNTY SUPERIOR COURT

STATE OF WASHINGTON,)	
)	No. 15-1-01459-3
Plaintiff,)	
)	PROSECUTION'S MOTIONS IN LIMINE
v.)	
)	
CARLOS ALEXANDER LIMA,)	
Age: 26; DOB: 09/25/1989,)	
)	
Defendant.)	

COMES NOW the Plaintiff, STATE OF WASHINGTON, by and through its attorney, BREANNA N. PETERSON, Deputy Prosecuting Attorney, with the following motions in limine for trial in the above-entitled matter--

1. Filing of jury instructions on or before the first day of trial. Kitsap County Superior Court Local Rule 51.
2. Exclusion of witnesses so that they cannot hear the testimony of other witnesses, with the exception of lead investigator, Detective Thuring of the Bremerton Police Department. ER 615.
3. The Court to direct the attorneys for each party to clearly instruct their witnesses that they "are not to discuss the case or what their testimony has been or would be or what occurs in the courtroom with anyone other than counsel for either side." *United States v. Buchanan*,¹ citing ER 615.

¹ *United States v. Buchanan*, 787 F.2d 477, 485 (10th Cir. 1986), *grant of post-conviction relief reversed*,



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SUB(52)

1 4. No reference or description of a character trait of a person, unless previously approved by
2 the Court via offer of proof. ER 404(a), 404(b), 405(a), 405(b), 608.

3 a. The scope of this motion includes evidence that Defendant is a “law-abiding” citizen
4 or opinions of the Defendant’s character, as discussed in *State v. Mercer-Drummer*²–

5 Character is an “essential element” in comparatively few cases. In
6 criminal cases, character is rarely an essential element of the charge,
7 claim, or defense. For character to be an essential element, character
must itself determine the rights and liabilities of the parties.^[3]

8 Because character does not determine a party’s rights and liabilities incident to an
9 assault, obstruction of a law enforcement officer, or resisting arrest, character
10 therefore is not an essential element of any charge, claim, or defense to the
11 crimes with which Mercer-Drummer was charged. Thus, the trial court correctly
12 excluded Mercer-Drummer’s evidence of being a “law abiding citizen” under ER
13 405(b) ...

14 ER 405(a) does not permit proof of character in the form of an opinion,
15 especially a defendant’s own opinion. “The rule requires, therefore, the proof be
16 by evidence of reputation” in the community.^[4]

17 b. If the Court admits reputation evidence, the prosecution asks the Court to require the
18 procedure cited in Karl Tegland’s courtroom handbook, with modifications–

19 Before inquiring about a witness’s reputation, counsel must lay a foundation by
20 asking the impeaching witness questions designed to show that the witness
21 knows of the reputation of the witness to be impeached, that the reputation to be
22 described relates solely to truth and veracity, that the reputation to be described is
23 in the community of the witness to be impeached, and that the reputation to be
24 described is not simply the witness’s own opinion. The time-honored script is:

25 Q. *Yes or no*, do you know the general reputation at the present time of
26 William Witness, in the community in which he lives, for truth and veracity?

27 A. Yes.

28 Q. *What is it, good or bad?*

29 A. It is bad.^[5]

30 5. No examination inviting one witness to comment on another witness’ accuracy or
31

32 891 F.2d 1436 (10th Cir. 1989), *cert. denied*, 494 U.S. 1088, 110 S.Ct. 1829, 108 L.Ed.2d 958 (1990).

33 ² *State v. Mercer-Drummer*, 128 Wn.App. 625, 116 P.3d 454 (Div. 2 2005).

34 ³ *Mercer-Drummer*, 128 Wn.App. at 632 (citing *State v. Kelly*, 102 Wn.2d 188, 196-97, 685 P.2d 564
35 (1984) (citations omitted)).

36 ⁴ *Mercer-Drummer*, 128 Wn.App. at 632 (citing *State v. O’Neill*, 58 Wn.App. 367, 370, 793 P.2d 977
37 (1990)).

38 ⁵ 5D Karl B. Tegland, *Washington Practice: Courtroom Handbook on Washington Evidence*, at 301
39 (2006), modified by *State v. Argentieri*, 105 Wash. 7, 177 P.690 (1919). [modifications in italics]



- 1 credibility. ER 404, ER 405; *State v. Wright*.⁶
- 2 6. No reference to the witness', Maleisa Bonnet, alleged prior drug and/or alcohol use or
3 addiction, unless previously approved by the Court via offer of proof. ER 403, ER 607;
4 *State v. Tigano*.⁷
- 5 7. No reference to Defendant's self-serving hearsay statements to potential witnesses,
6 including but not limited to Nataly Lima, unless previously approved by the Court via
7 offer of proof. ER 801(1)(a)(b)(c), ER 802. Such statements do not qualify under the
8 admission exception to the hearsay rule (ER 801(d)(2)) unless offered by the State as
9 statements against a party opponent, as held in *State v. Finch*.⁸

10 Out-of-court admissions by a party, although hearsay, may be admissible
11 against the party if they are relevant. However, if an out-of-court admission by a
12 party is self-serving, and in the sense that it tends to aid his case, and is offered
13 for the truth of the matter asserted, then such statement is not admissible under
the admission exception to the hearsay rule.⁹

- 14 8. No reference to consequences of punishment from conviction or of answering a special
15 verdict in the affirmative under Washington law. ER 401, 402, 403. This includes
16 arguments such as "Defendant's life is in your hands" or "Defendant's freedom is at
17 stake." Argument concerning punishment is limited to the scope of WPIC 1.02, which
18 reads in pertinent part—

19 You have nothing whatever to do with any punishment that may be imposed in
20 case of a violation of the law. The fact that punishment may follow conviction
cannot be considered by you except insofar as it may tend to make you careful.

- 21 9. No reference to the term "sentence enhancement". The term "special verdict" is legally
22 accurate and discourages juror speculation about punishment. ER 401, 402, 403.
- 23 10. No reference to the procedural history of this action, including but not limited to
24 amendments to the charging document, if any, plea negotiations or the amount of any
25 time the Defendant or any other person spent in custody pending trial. ER 401, 402, 403,
26 410.

28 ⁶ *State v. Wright*, 76 Wn.App. 811, 821, 888 P.2d 1214, review denied, 127 Wn.2d 1010 (1995)

29 ⁷ *State v. Tigano*, 63 Wn.App. 336, 344, 818 P.2d 1369 (1991), review denied, 118 Wn.2d 1021 (1992).

30 ⁸ *State v. Finch*, 137 Wn.2d 792, 824, 975 P.2d 967, cert. denied, 528 U.S. 922 (1999).

31 ⁹ *Finch*, 137 Wn.2d at 824 (citations omitted); see also, *State v. Pavlik*, 165 Wn.App. 645, 653, 268 P.3d 986 (2012) which states, "a party's statement could be offered against him, but the party could not offer his own statements on his own behalf," citing *Finch*.



1 11. No reference to charging decisions relating to this police investigation. ER 401, 402, 403;
2 RCW 9A.28.020(6).¹⁰

3 12. No argument regarding a "missing witness" or a party's "failure to produce a witness",
4 unless previously approved by the Court with instruction under WPIC 5.20. *State v.*
5 *Blair*,¹¹ (missing witness rule applies to the defense as well as to the prosecution); *see*
6 comment to WPIC 5.20 (2nd ed. 1994).¹²

7 13. No use of "speaking objections", or of objections stating more than the basic grounds for
8 the objection. ER 611. Regarding speaking objections, Karl Tegland writes:

9 The term *speaking objection* is not a precisely defined term of art, but is
10 generally taken to mean an objection that is phrased in a manner intended to
11 intimidate the witness, or to otherwise influence the witness's answer. An
12 example might be, "Objection, the witness cannot possibly answer that question
13 without speculating." Or, "Objection, the witness has already been through this
14 before. Do we really need to hear it again?"

15 Speaking objections are neither authorized nor prohibited by the Evidence
16 Rules. The rules leave it to the individual trial judge to decide the propriety of a
17 speaking objection. As a practical matter, most trial judges believe speaking
18 objections should be used sparingly, if at all. Most trial judges prefer that
19 attorneys phrase objections in terms of the applicable rule of evidence-- hearsay,
20 opinion on character, privilege, or the like. In addition, a speaking objection,
21 without referring to a specific rule of evidence, is unlikely to provide a sufficient
22 foundation for later challenging the court's ruling by post-trial motion, or on
23 appeal.¹³

24 14. Ruling that the defense not be allowed to offer testimony regarding the Defendant getting
25 assaulted on August 28, 2015, because it is not relevant to the case at hand. Joshua
26 Stottlemeyer contacted the defendant on August 28, 2015 at 12:25hrs in regards to the

27 ¹⁰ RCW 9A.08.020(6) provides: "A person legally accountable for the conduct of another person may be
28 convicted on proof of the commission of the crime and of his complicity therein, though the person
29 claimed to have committed the crime has not been prosecuted or convicted or has been convicted of a
30 different crime or degree of crime or has an immunity to prosecution or conviction or has been
31 acquitted."

¹¹ *State v. Blair*, 117 Wn.2d 479, 488, n.1, 816 P.2d 718 (1991); *see e.g. State v. French*, 101 Wn.App. 380,
4 P.3d 857 (Div. 3 2000), review denied sub nom. in *State v. Barraza*, 142 Wn.2d 1022, 20 P.3d 945
(2001).

¹² Comment to WPIC 5.20 provides these limitations to the missing witness rule for failure of a party to call
a particular witness: (1) the witness must be peculiarly available to the party; (2) the testimony must
relate to an issue of fundamental importance as contrasted to a trivial or unimportant issue; and (3) the
circumstances must establish, as a matter of reasonable probability, that the party would not knowingly
fail to call the witness in question unless the witness' testimony would be damaging.

¹³ 5 Karl B. Tegland, *Washington Practice, Evidence* § 103.8 (4th ed. 1999).



1 defendant being assaulted by Frankie L. Lowe. The Defendant stated that he was in his
 2 home and Lowe came through the front door and began to punch him. The Defendant has
 3 injuries to his face and medical personnel relayed to him that his jaw may be broken. The
 4 Defendant was agitated and reluctant to speak to Officer Stottlemeyer and refused to
 5 provide any specific information about the interaction with Lowe. The Defendant
 6 declined further assistance from law enforcement or medical staff (BPD report B15-
 7 006844). The State anticipates the defense will offer this testimony to support their self-
 8 defense claim. The evidence of a prior assault should be excluded because is more
 9 prejudicial than probative. The prior incident did not in any way involve Derrick Brasier
 10 or Maleisa Bennett. ER 403.

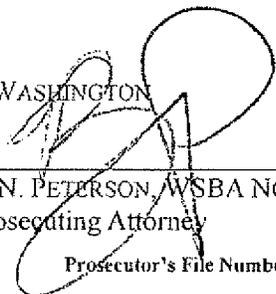
11 15. Ruling that the defense not be allowed to offer instructions pertaining to self-defense and
 12 that the defense not be allowed to refer to "self-defense" or "defending himself/his
 13 family" or to make any other similar assertions during opening, as the defense has not
 14 met its burden on a showing supporting a claim of self-defense. See also supplemental
 15 brief re: self-defense.

16 16. Ruling on admissibility of 404(b) evidence: That the Defendant previously sold Maleisa
 17 Bennett heroin approximately 20 times and that at least one time he sold her fake heroin.

18 17. Ruling by the Court on admissibility of adult convictions or juvenile adjudications
 19 pursuant to ER 609. The Plaintiff is aware of the following convictions of persons
 20 identified as potential lay witnesses:

Criminal History For Nataly Lima (d.o.b. 1/16/1991)	Date of Crime	Date of Sentence	Sentencing Court	Juv (x)
Theft in the Third Degree	11-15-14	11-24-15	Kitsap County District Ct	

24
 25
 26 DATED this 16th day of June, 2016.

27 STATE OF WASHINGTON

 28
 29 BREANNA N. PETERSON, WSBA NO. 43023
 Deputy Prosecuting Attorney
 30
 31 Prosecutor's File Number-15-118566-11

PROSECUTION'S MOTIONS IN LIMINE; Page 5 of 5



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APPENDIX B

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Amount	Name	Address
\$18,463.62	The Rawlings Company LLC, ATTN: Monique L. Wheat, File #73208188	PO Box 2000, LaGrange, KY 40031-2000

\$18,463.62 Total

DONE IN OPEN COURT this 4 day of Nov, 2016.

JUDGE [Signature] Hull

PRESENTED BY--

APPROVED FOR ENTRY--

STATE OF WASHINGTON

[Signature] for
BREANNA N. PETERSON, WSBA NO. 43023
Deputy Prosecuting Attorney

[Signature]
Kibbe WSBA No. 31692
Attorney for Defendant

Prosecutor's File Number-15-118566-11



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11/10/16

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

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 49304-7-II
)	
vs.)	NOTICE OF
)	ERRATA
CARLOS LIMA,)	
)	
Appellant.)	
_____)	

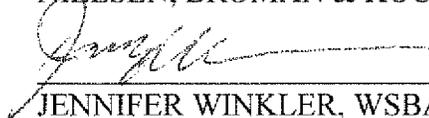
Comes now appellant Carlos Lima, by and through attorney Jennifer Winkler, and notifies the Court and counsel of the following errata appearing in the Brief of Appellant:

- Page 27, next to last line, omits the word “case” after “its.” The sentence should read “[A] wife’s opinion that the State can prove its **case** against a husband constitutes ‘clearly inappropriate’ opinion evidence.”
- Page 34, first line of first full paragraph, contains the surplus words “it believed.” The sentence should read “Lima’s theory was that he acted in self-defense whether the gun went off accidentally or he somehow pulled the trigger during the struggle.”

DATED this 4th day of April, 2017.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER WINKLER, WSBA No. 35220

Office ID No. 91051

Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
April 05, 2017 - 12:23 PM
Transmittal Letter

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Case Name: Carlos Lima

Court of Appeals Case Number: 49304-7

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Affidavit

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Court of Appeals Case Number: 49304-7

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Other: _____

Comments:

copy sent to : Carlos Lima, 392682 Clallam Bay Corrections Center 1830 Eagle Crest Way Clallam Bay, WA 98326

Sender Name: John P Sloane - Email: sloanej@nwattorney.net

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