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

STATE OF WASHINGTON, Respondent

v.

BRANDON KENNETH GORHAM, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.16-1-01915-3

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. **The State presented sufficient evidence that Gorham intended to inflict great bodily harm.**
- II. **Gorham waived his challenge to the sufficiency of his *Miranda* warnings.**
- III. **The prosecutor's closing argument did not amount to misconduct because the prosecutor did not express his personal opinion.**

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Brandon Kenneth Gorham was charged by second amended information with Attempted Murder in the First Degree of Zachary Lucore, Hit and Run (Injury), and Assault in the First Degree against Zachary Lucore for an incident occurring on or about September 10, 2016. CP 56-57. The case proceeded to a jury trial before the Honorable Scott Collier on September 5, 2017 and concluded on September 8, 2017 with the jury's verdict convicting Gorham of Assault in the First Degree and Hit and Run, but acquitting him of the Attempted Murder. RP 1-471; CP 186-88. The trial court sentenced Gorham to a standard range sentence of 124 months confinement. RP 483-86; CP 213-223, 226-27. Gorham filed a timely notice of appeal. RP 486-87; CP 208-09.

B. STATEMENT OF FACTS

During the day of September 10, 2016, Zachary Lucore was hoping to spend some time over at his parents' house. RP 145-46, 158. Because of Mr. Lucore's drug addiction,¹ his family did not want him at the house. RP 145-46, 158-160. Mr. Lucore may have used methamphetamine on the day in question though he denied doing so. RP 158-59, 337-39.² Because he was not wanted at his parents' home, Mr. Lucore began walking over to a friend's house on Fredericksburg Way in Vancouver, Washington. RP 146. Mr. Lucore's friend did not answer the door and he did not see her around back so he returned to the front of her house and attempted to connect his phone to her Wi-Fi network. RP 146.

At the same time, and across the street, Brandon Gorham was at the house he shared with his mother, Helene Guinette, and his good friend, Richard Rigney. RP 244, 251, 260, 350. Ms. Guinette was inside with her friend Gina Woods as the two were planning on drinking mimosas and watching a movie. RP 246-48, 250. Meanwhile, outside on the front porch, Gorham, Mr. Rigney, and another friend were all sitting around in lawn

¹ Mr. Lucore is also a diagnosed schizophrenic who suffers from bipolar disorder. RP 164-65.

² Dr. Brett Jensen, an emergency medicine physician, testified that Mr. Lucore's urine screen was positive for methamphetamine and noted that "there is actually quite a wide range of the duration of time that methamphetamines will stay positive in a urine test. That's generally accepted to be 24 to 48 hours with a maximum duration in the literature of 60 to 72 hours. . . ." RP 326, 338. Thus, he could not say with certainty if Mr. Lucore used methamphetamine the day he arrived at the hospital or the day before. RP 339.

chairs, listening to music, and drinking beer. RP 246-48, 257, 261-62, 267-68, 352.

At that point, a woman from the Gorham residence, likely Ms. Guinette's friend Ms. Woods, yelled out to Mr. Lucore and told him to keep walking or keep moving multiple times and in a very rude manner. RP 147-48, 161, 353, 368. This irritated Mr. Lucore and he responded by saying something like "[w]hat the fuck else am I supposed to do?". RP 161-62, 354. Mr. Lucore then heard a male voice say something about "fucking hoodlums" and making other derogatory statements, all of which Mr. Lucore believed was directed at him. RP 148-49, 162-63. This turned into an argument between the man, who turned out to be Brandon Gorham, and Mr. Lucore. RP 148-151, 162-63, 169.

The two men each hurled threats at the other and used foul language, and though there was general agreement as to the sequence of events and the content of the argument, there was some dispute as to the exact statements made. RP 148-151, 162-63, 169, 263, 354-55, 368-69. In the midst of the argument Gorham told Mr. Lucore that he was going to "run you over with my fucking truck." RP 149, 151, 163, 169. In response, Mr. Lucore, who was carrying a straight razor, told Mr. Gorham that he would "cut you with my fucking knife," and then retrieved the razor from

his backpack, but did not brandish it. RP 149-150, 163, 169, 263. At around that point, Mr. Lucore decided to discontinue the altercation and walk away. RP 149, 151-52, 163, 166, 264, 355. He headed north on Fredericksburg Way and turned left (west) onto Tennessee Lane. RP 149, 152, 264.³

As Mr. Lucore was walking on Tennessee Lane, he put some Bluetooth headphones into his ears and began to play some music in an attempt to calm himself down. RP 153-54, 170. Also present on Tennessee Lane were the Martinez-Rodriguezes, Maria and her brothers Manuel and Armando.⁴ RP 61, 78. Maria's home is near the corner of Tennessee Lane and Garrison Road. Maria was near her home's front door, Manuel was in the front yard next to the mailbox smoking a cigarette, and Armando was on the north side of Tennessee working on a car that was parked in the street. RP 61, 78, 102-03. As Mr. Lucore passed by he appeared calm to the Martinez-Rodriguezes and said hello to Manuel and Armando and complimented Armando's dog. RP 61, 66-67, 103.

Meanwhile, Gorham was angry and rushed into his home to grab the keys to his truck, a Ford F-250. RP 209, 248-49, 355; Ex. 2, Ex. 3. His

³ The State will designate a number of exhibits to assist in illustrating the sequence of events and the setting of the crime. Ex. 14, Ex. 15, Ex. 16, Ex.17, Ex. 18, Ex. 20, Ex. 21, Ex. 22, Ex. 23, Ex. 26, Ex. 27, 28, Ex. 29, Ex. 32, Ex. 39.

⁴ For the purposes of clarity I will be referring to each by their first name. No disrespect is intended.

mother ran after him as he exited the house and jumped into his truck. RP 249-50, 252, 263-64. Ms. Guinette pleaded with him to stop, but Gorham took off down Tennessee after Mr. Lucore. RP 249-50, 252, 264. He was driving at a rapid pace and followed in the direction that Mr. Lucore went. RP 264, 355-56. In fact, the speed at which he was travelling and the noise of his engine was immediately noticed by the Martinez-Rodríguezes. RP 62-64, 78, 91,103-04, 107.

At this point, Mr. Lucore had turned right at the intersection of Tennessee Lane and Garrison Road and headed north. RP 149, 152. Because there is no sidewalk on the eastside of Garrison, Mr. Lucore was walking on the street but next to the curb—perhaps about 3 feet from it. RP 67, 71, 105-06, 272. At no point, however, did Mr. Lucore run or move into the middle of the road. RP 69, 106. No vehicles were parked on the eastside of Garrison between the stop sign and where Mr. Lucore was walking, though one car was parked a bit farther north. RP 64, 69, 71, 74-75, 104-06; Ex. 15; Ex. 17.

Mr. Gorham's truck rumbled down Tennessee at a high rate of speed, he turned right onto Garrison without stopping, accelerated towards the curb and into Mr. Lucore, ran him over—Mr. Lucore went under the truck and was ejected out the back—swerved leftwards back into the lane

of travel to avoid the parked car mentioned above without slowing or stopping, and then entered the oncoming lane of travel and almost hit another car driving south on Garrison. RP 62-64, 78, 91, 96-99, 103-04, 107. Adrianna Garcia who was driving that car said that Gorham continued to accelerate past her. RP 66, 97-99. Mr. Lucore lay in the street crumpled and seriously injured amongst his property and a couple feet south of the car parked on the curbside. RP 153. Mr. Lucore could not remember getting hit. RP 153-55. He could remember hearing a word or two of music and then waking up about 10 to 15 feet from where he was originally standing on Garrison with this stuff scattered everywhere. RP 153-55. He then blacked out again and came to at the hospital with his family all around him and unable to move his lower half. RP 153-55.

Gorham took another right (Mill Plain Blvd.), turned right again onto Fredericksburg Way, and returned straight home where he parked in his driveway and headed inside. RP 86-89, 96-97, 252-53, 264. Gorham was angry. RP 253, 363. He told his mother nothing and informed Mr. Rigney that he had chased down Mr. Lucore. RP 253, 265-66.

The Martinez-Rodríguezes called 911. RP 64-66, 80-85. On the call Mr. Lucore can be heard screaming in pain. RP 80-85. He was semi-conscious when medical personnel arrived on the scene. Mr. Lucore was

then taken to the hospital. When he arrived he was critically injured and in clinical, traumatic shock with potentially life-threatening injuries to both his chest and pelvis. RP 328-29, 337. He suffered from six total rib fractures, a punctured lung, vertebral fractures (sacrum and transverse process), multiple pelvic fractures, a penis tear, an anal tear, a ruptured bladder, and a fracture of the orbital floor, all of which called for multiple surgical interventions culminating with his urethra finally being reattached in the days before the trial. RP 144-45, 156-57, 329-336. Mr. Lucore would remain in the hospital for three months and five days. RP 343. It would take him about six months before he was able to walk normally. RP 156-57.

Officer Jeffery Starks of the Vancouver Police Department was the investigating officer and is the lead collision investigator for the department. RP 173-74. Days after the incident he ended up at Gorham's house, spoke to Ms. Guinette, Mr. Rigney, had Gorham's truck towed, and arrested Gorham. RP 192-93, 195, 270. At the police station Gorham told Ofc. Starks that "[h]e had a bad weekend and he had gotten into a fight." RP 270.

After Ofc. Starks arrested Gorham, and while the case was pending, Gorham made a number of incriminating phone calls. RP 175-

189. In one, Gorham stated in reference to the incident: “What I do is what I do for a good fucking reason . . . and I did what I did for a good reason . . . and I got threatened.” RP 183, 361-62, 429-430.⁵ In another, Gorham states: “something in me came out that day, the devil was riding on my shoulder and I should not have done what I did and I’m sorry . . . and he also should not have, you know, threatened me.” RP 186. On another jail call he discussed interacting with his mother just prior to driving off after Mr. Lucore and said the following: “[s]he tried stopping me . . . I didn’t stop. I mean – I can say this on the phone because I don’t give a fuck right now . . . guy threatened me, so that’s what happened and you already know that.” RP 181-82, 428.⁶ In a later call, Gorham remarks that “[y]eah, well I was a bad boy to somebody and I regret it very seriously.” RP 187-88, 432.

Additionally, Ofc. Starks examined the truck, the physical evidence left at the scene of the collision, took many photographs, and completed a total station scene diagram. RP 195-206; Ex. 32. Ofc. Starks also measured the dent on Gorham’s truck left from impacting Mr. Lucore. RP 202-03. From right side of truck to the dent was 21 inches—

⁵ This clip is transcribed differently each time it is played. The State can provide the audio/video copy of the record if requested.

⁶ This clip is also transcribed slightly differently the two times it is played.

just off from the center of the hood. RP 202; Ex. 2, 7, 8. From the ground to the top of the dent was 48 inches. RP 202.

Based on Ofc. Starks' training and experience he opined that the tire marks observed on the roadway on Garrison, which led to where Mr. Lucore was found injured, were acceleration marks from a tire. RP 208-09. He explained that the acceleration mark showed that there was a "hard right turn" with the weight of the truck all "loaded up on this front right tire, and that's what's making the mark as he's going through there because he's accelerating." RP 209, 220. There were no brake marks present where the incident took place. RP 208.⁷ This was consistent with testimony of Manuel and Armando as well as their observations that there was no vehicle of any kind parked between the stop sign and where Mr. Lucore was hit.

Ofc. Starks also observed and described scuff and scrape marks that were present on the pavement and explained that these scuff marks were the result of a pedestrian being drug along the roadway while the scrape marks were likely the result of "buckles, backpacks, or belts" being drug. RP 209-211, 218-19. Ofc. Starks explained that the marks left from

⁷ The responding officer testified to the same, i.e., he did not observe any skid marks from braking. RP 138-39.

clothing, which was still present days later, was consistent with clothing that Mr. Lucore was wearing. RP 211.

Gorham testified at trial. RP 350-370. In a lot of ways his testimony was consistent with the facts listed above. RP 368-69. He admitted that he got into an argument with Mr. Lucore, got angry with him, ran inside his home to get his keys, got into his truck and sped after Mr. Lucore, ran over Mr. Lucore, failed to stop or summon help for Mr. Lucore, and then immediately drove home where he remained angry and did not tell anyone that he had been in an “accident.” RP 353-58, 362-65, 368-69. Gorham testified differently, however, in three key ways: (1) he claimed that he did not say to Mr. Lucore that he would run him over or hit him with his truck; (2) he claimed that he did not intend to run over Mr. Lucore, but was only trying to find him to fight him; and (3) he claimed that there was a yard maintenance truck with a trailer back that was parked on the corner of Tennessee and Garrison and that Lucore was in between that truck and the car parked farther north such that his view

was so obscured that he did not see Mr. Lucore until he had hit him.⁸ RP 355, 357, 359, 366-67, 369.

ARGUMENT

I. The State presented sufficient evidence that Gorham intended to inflict great bodily harm.

Evidence is sufficient to support a conviction if, when viewed in a light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992). Accordingly, in order to determine whether the necessary quantum of proof exists, the reviewing court “need not be convinced of the defendant’s guilt beyond a reasonable doubt but only that substantial evidence supports the State’s case.” *State v. Gallagher*, 112 Wn.App. 601, 51 P.3d 100 (2002) (citations omitted).

“A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Salinas*, 119 Wn.2d at 201. This means that “these inferences ‘must be drawn in favor of the State and interpreted most strongly against the defendant.’” *State v.*

⁸ This claim also seems to presuppose that Mr. Lucore jumped or ran into the middle of the road as otherwise he would have been protected by remaining in between the vehicles. RP 357. Notably this is different than the photographs of the scene and the testimony of the other witnesses—both as to Mr. Lucore’s actions and to existence of a yard maintenance truck with a trailer back being parked at the corner at the time of the collision.

Homan, 181 Wn.2d 102, 330 P.3d 182 (2014) (quoting *Salinas*, 119 Wn.2d at 201). Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 618 P.2d 99 (1980).

The reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Camarillo*, 115 Wn.2d 60, 794 P.2d 850 (1990); *State v. Walton*, 64 Wn. App. 410, 824 P.2d 533 (1992). In other words, an appellate court does not “reweigh the evidence and substitute [its] judgment for that of” the fact finder. *State v. McCreven*, 170 Wn.App. 444, 284 P.3d 793 (2012) (citation omitted). Furthermore, “specifics regarding date, time, place, and circumstance are factors regarding credibility . . .” and, thus, matters a fact finder best resolves. *State v. Hayes*, 81 Wn.App. 425, 914 P.2d 788 (1996) *rev. denied* 130 Wn.2d 1013 (1996).

When intent is an element of a crime the “specific criminal intent of the accused may be inferred from the conduct where it is plainly indicated as a matter of logical probability.” *Delmarter*, 94 Wn.2d at 638; *State v. Woods*, 63 Wn.App. 588, 821 P.2d 1235 (1991). In fact, where “the inferences and underlying evidence are strong enough to permit a rational fact finder to find guilt beyond a reasonable doubt, a conviction may be

properly based on pyramiding inferences.” *State v. Bencivenga*, 137 Wn.2d 703, 974 P.2d 832 (1999) (quotation omitted).

Here, the State presented overwhelming evidence that Gorham intended to inflict great bodily harm when he intentionally accelerated towards and ran over Mr. Lucore with his Ford F-250 truck. This claim is especially true given the standard of review. Gorham told Lucore that he was going to run him over with his truck, got into his truck and sped after him, ran a stop sign while turning right and veering towards the curbside—leaving an acceleration tire mark—where Lucore was located, hit him almost straight on and at hood level, and then ran him over, and sped away without ever hitting his breaks.

Then, once Gorham is in jail, he states in a jail call: “[w]hat I do is what I do for a good fucking reason . . . and I did what I did for a good reason . . . and I got threatened.” RP 183, 361-62, 429-430. Gorham admitted he was referencing the incident in this phone call; this is an admission of the necessary intent. RP 632. Gorham also explained on a jail call that on “that day the devil was riding on my shoulder and I should not have done what I did.” RP 186. This is another admission. All of the admitted jail calls lend themselves to fair inferences of his intent to do the specific act that constituted the crime and *none* of them provide support for the idea that he acted accidentally since (1) Gorham never once claims

he acted accidentally or laments his bad luck in that the guy he wanted to beat up just happened to jump in front of his truck; and (2) he continually references the threat to justify his actions.

Furthermore, Gorham's strained explanation as to how he could have accidently run over Mr. Lucore is contradicted by the physical evidence and eye witness testimony.⁹ Nobody who was at the scene of the crime testified that they saw a yard maintenance truck with a trailer back parked at the corner of Tennessee and Garrison, some witnesses explicitly testified that no other vehicle was parked there, while Manuel specifically stated that the "landscaping trailer" was not parked where Gorham claimed, and it was not present in scene pictures taken that day. Moreover, right before Mr. Lucore was run over by Gorham, Manuel and Armando put Mr. Lucore about 3 feet from the curb, stopped waiting to cross the road or walking north with his back turned, respectively. Neither saw him move towards or into the regular lane of travel. Finally, acceleration tire marks show that had a yard maintenance truck with a trailer back been parked at the corner of Tennessee and Garrison then Mr. Gorham would have smashed into it when he took his hard right turn at Garrison without stopping. The conclusion is straightforward, the truck was not there and

⁹ Gorham argues that the eye witnesses did not testify that he intentionally ran over Mr. Lucore. Br of App. at 13. But they were not asked to impermissibly speculate as to what was going on in Gorham's head.

Gorham steered intentionally, while accelerating right at Mr. Lucore who was near the curb.

When Gorham's words and actions are combined and the inferences from that evidence is taken in a light most favorable to the State, the case supporting his intent to inflict great bodily harm is overwhelming.

II. Gorham waived his challenge to the sufficiency of his *Miranda* warnings.

Because Gorham did not challenge the introduction of his statements in the trial court, he waived the right to argue that his statements were improperly admitted. The general rule is that an issue, theory, or argument not presented at trial will not be considered on appeal. RAP 2.5(a); *State v. Hayes*, 165 Wn.App. 507, 265 P.3d 982 (2011) (citing *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995)). This “rule reflects a policy of encouraging the efficient use of judicial resources. The appellate courts will not sanction a party’s failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal . . .” *State v. Scott*, 110 Wn.2d 682, 757 P.2d 492 (1998) (citation omitted).

This rule also applies to suppression motions as, “[e]ven if a defendant objects to the introduction of evidence at trial, he or she ‘may assign evidentiary error on appeal only on a specific ground made at

trial.”” *State v. Hamilton*, 179 Wn.App. 870, 320 P.3d 142 (2014) (quoting *State v. Kirkman*, 159 Wn.2d 918, 155 P.3d 125 (2007)); *State v. Higgs*, 177 Wn.App. 414, 311 P.3d 1266 (2014); *State v. Garbaccio*, 151 Wn.App. 716, 214 P.3d 168 (2009) (holding that because defendant’s “present contention was not raised in his suppression motion, and because he did not seek a ruling on this issue from the trial court, we will not consider it for the first time on appeal”). Accordingly, to “preserve a *Miranda* waiver advisement issue for appeal, a defendant must raise the issue at his ‘CrR 3.5 hearing or the fact-finding portions of the proceedings.’” *State v. Campos-Cerna*, 154 Wn.App. 702, 710, P.3d 185 rev. denied 169 Wn.2d 1021 (2010) (quoting *State v. Spearman*, 59 Wn.App. 323, 796 P.2d 727 (1990)); *State v. Wallace*, 1 Wn.App 1067, 2018 WL 332969 at 3; *State v. Jackson*, 191 Wn.App. 1023, 2015 WL 7356456 at 3.¹⁰

An exception to this rule exists, however, for manifest errors affecting a defendant’s constitutional rights. RAP 2.5(a)(3); *Hayes*, 165 Wn.App. at 514. Nevertheless, “RAP 2.5(a)(3) does not permit all asserted constitutional claims to be raised for the first time on appeal, but only certain questions of ‘manifest’ constitutional magnitude.” *Kirkman*, 159

¹⁰ *Wallace* and *Jackson* are unpublished. GR 14.1(a) states that “unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities . . . and may be accorded such persuasive value as the court deems appropriate.”

Wn.2d at 934 (citation omitted). A CrR 3.5 hearing that does not establish whether a defendant was advised of his *Miranda* rights *does not*, absent a challenge in the trial court, constitute an error of constitutional magnitude. *Campos-Cerna*, 154 Wn.App. at 710. This is because the purpose of CrR 3.5 is “to ward against the admission of *involuntary, incriminating* statements.” *State v. Williams*, 137 Wn.3d 746, 975 P.2d 963 (1999) (emphasis in original). Thus, even the “[f]ailure to hold a CrR 3.5 hearing . . . does not render a statement inadmissible when a review of the record discloses that there is no issue concerning its *voluntariness*.” *State v. Kidd*, 36 Wn.App. 503, 674 P.2d 674 (1983) (emphasis added) (citing *State v. Harris*, 14 Wash.App. 414, 542 P.2d 122 (1975)); *Williams*, 137 Wn.2d at 751-53; *State v. Lopez*, 67 Wn.2d 185, 406 P.2d 941 (1965).

The above follows from the fact that CrR 3.5¹¹ was “designed to enforce constitutional rights found by the United States Supreme Court” in *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964), which concerned the right to a “proper determination of *voluntariness* be made prior to the admission of the confession. . . .” *Williams*, 137 Wn.2d at 750-51 (emphasis added) (quoting *Jackson*, 378 U.S. at 395); *State v. Myers*, 86 Wn.2d 419, 545 P.2d 538 (1976); *State v. Taplin*, 66 Wn.2d

¹¹ Previously CrR 101.20W.

687, 404 P.2d 469 (1965).¹² And while CrR 3.5 has changed since its original enactment, “the constitutional command that is its foundation has not expanded.” *Williams*, 137 Wn.2d at 751. This is not surprising since the “prophylactic *Miranda* warnings . . . are ‘not themselves rights protected by the Constitution’ and the failure to ‘administer *Miranda* warnings is not in itself a violation of the Fifth Amendment.” *Oregon v. Elstad*, 470 U.S. 298, fn. 1, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985) (quoting *New York v. Quarles*, 467, U.S. 649, 104 S.Ct. 2626, 81 L.Ed.2d 550 (1984)) (internal quotation omitted); *Michigan v. Tucker*, 417 U.S. 433, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974).¹³

A defendant seeking appellate review of an issue or argument not presented to the trial court bears the burden of satisfying the strictures of RAP 2.5(a)(3). *State v. Knight*, 176 Wn.App. 936, 309 P.3d 776 (2013);

¹² “Our State constitution article I, section 9 is equivalent to the Fifth Amendment and should receive the same definition and interpretation as that which has been given to the Fifth Amendment by the Supreme Court.” *State v. Templeton*, 148 Wn.2d 193, 59 P.3d 632 (2002) (internal quotation omitted).

¹³ To be clear *Miranda* warnings are constitutionally required and derived from the Fifth Amendment, but the fact that a constitutional source exists does not change the analysis. See *State v. Trader*, 54 Wn.App. 479, 774 P.2d 522 (1989) (“The fact that the admissibility of certain evidence may be tested by constitutional standards when objected to does not create a constitutional issue when no objection is interposed. An analogy may be drawn to those situations in which a defendant seeks to suppress evidence allegedly seized in violation of the Fourth Amendment. It is fundamental that an unlawful search and seizure contention must be the subject of pretrial motion. . . .”) (quoting *State v. Williams*, 30 Wash.App. 558, 636 P.2d 498 (1981), rev’d on other grounds, 98 Wn.2d 428, 656 P. 2d 477 (1982)); See also *Missouri v. Seibert*, 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004) (noting the *Miranda* decision’s “constitutional character”); *Dickerson v. U.S.*, 530 U.S. 428, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000) (reaffirming that the *Miranda* decision is “constitutionally based”).

State v. Bertrand, 165 Wn.App. 393, 267 P.3d 511 (2011). More specifically, “[i]n order to benefit from this exception, ‘the [defendant] must identify a constitutional error and show how the alleged error actually affected the [defendant]’s rights at trial,’” i.e., show that the error is manifest. *State v. Grimes*, 165 Wn.App. 172, 267 P.3d 454 (2011) (alterations in original) (quoting *State v. Gordon*, 172 Wn.2d 671, 260 P.3d 884 (2011)) (quoting *State v. O’Hara*, 167 Wn.2d 91, 217 P.3d 756 (2009)). Consequently, a defendant cannot meet his burden if he “simply assert[s] that an error occurred at trial and label[s] the error ‘constitutional. . . .’” *Grimes*, 165 Wn.App. at 186.

To be manifest, the alleged error must have had “practical and identifiable consequences in the trial of the case.” *State v. Kronich*, 160 Wn.2d 893, 161 P.3d 982 (2007) (citing *State v. Stein*, 144 Wn.2d 236, 27 P.3d 184 (2001)). In other words, the defendant must show actual prejudice as it is this “prejudice that makes the error ‘manifest,’ allowing appellate review.” *McFarland*, 127 Wn.2d at 333 (citing *Scott*, 110 Wn.2d at 688). Accordingly, a “purely formalistic error will not be deemed manifest,” nor will an error that is not “unmistakable, evident, or indisputable.” *Kronich*, 160 Wn.2d at 899; *State v. Burke*, 163 Wn.2d 204, 181 P.3d 1 (2008) (citation omitted). In order to show actual prejudice regarding a suppression issue, the defendant “must show the trial court

likely would have granted the motion if made.” *McFarland*, 127 Wn.2d at 333-34. Moreover, “[i]f the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest.” *Id.* at 333.

Here, Gorham argues that his statements should not have been admitted against him at trial because insufficient evidence established that he was read his *Miranda* rights. Br. of App. at 13, 17-18. More specifically, he claims that “the only evidence presented at the CrR 3.5 hearing concerning any advice of rights was the officer’s claim that he read the defendant ‘his constitutional rights’” and that “the trial court erred when it admitted the defendant’s statements into evidence over the *defendant’s objection.*” Br. of App. at 17-18 (emphasis added).

As a preliminary matter, these claims are inaccurate; the State presented evidence that Gorham was read his *Miranda* rights, albeit they were not each individually discussed,¹⁴ and, more importantly, Gorham did not object to the admission of his statements. First, the State asked Ofc. Starks about reading Gorham his *Miranda* rights:

[STATE:] Prior to speaking with him, did you read him his *Miranda* rights?

[STARKS:] I did.

¹⁴ Detailing each of the four advisements that are part of the *Miranda* rights, as discussed in Gorham’s brief, is undoubtedly the better practice and is perhaps a necessary one depending on the challenge to the admission of statements. Br. of App. at 17.

[STATE:] What's your general practice when read [sic] the Miranda rights to suspects?

[STARKS:] On that particular day, I was using a written form, which I read to him and asked him if he acknowledged his rights and he did so by signing.

[STATE:] Okay. So he acknowledged his rights both verbally and by signing on your form that you utilize?

[STARKS:] That's correct.

[STATE:] All right. And the Miranda form, does that track your standard Miranda language? Is there anything different about it?

[STARKS:] No, it tracks the standard Miranda.

RP 235.

Second, all of Gorham's statements to Ofc. Starks that were admitted into evidence are as follows:

[STATE:] Do you remember what he [(Gorham)] told you?

[STARKS:] He had a bad weekend and he had gotten into a fight.

RP 270. On the first day of trial, the trial court and defense discussed the admission of Gorham's statements and the need for a CrR 3.5 hearing:

THE COURT: Do we need to do a 3.5? I saw -- I saw in the brief that you seemed to indicate that he invoked early on, so we may not have a need to do a 3.5?

[DEFENSE]: Well, I think he invoked it, but there was something about after those were invoked, Your Honor. He said he'd gotten in a fight -- "I had a bad weekend. I got

into a fight. I want to talk to a lawyer.” I think that’s what the testimony would be. *I don’t have a problem with the “I had a bad weekend. I got into a fight.”*

THE COURT: Invoking the lawyer doesn’t come in.

[DEFENSE]: Yeah. That’s kind of what I figured.

THE COURT: He has his rights to invoke. So up to that point --

[DEFENSE]: Yeah.

THE COURT: -- in requesting – I’m assuming that’s after he was read his rights?

[DEFENSE]: That’s -- yeah, after – I’ve read in the police report, and I don’t expect that will be any different from the testimony.

THE COURT: That statement that “I had a bad weekend and got into a fight,” are you going to look to elicit that?

[STATE]: Yes, Your Honor

RP 6-7 (emphasis added). Later at the CrR 3.5 hearing, Gorham only cross examined Ofc. Starks by asking clarifying questions about when he wrote the police report that contained Gorham’s statements. RP 238-39.

Following the trial court’s advisement to Gorham about his right to testify at the hearing, his counsel indicated that he would not be testifying and that “and we’re just going to leave it at that.” RP 240. Thus, he declined to provide argument as to why the statements should not be admitted and

chose not to object, at any point, to the admission of the statements. RP 6-7, 234-242, 270.¹⁵

As a result, because Gorham failed to make his current argument for the suppression of his statements to the trial court and fails to address RAP 2.5(a)(3) or issue preservation at all, he has waived the right to have this Court consider his new argument. Instead, he “simply assert[s] that an error occurred . . . and label[s] the error constitutional.” *Grimes*, 165 Wn.App. at 186; Br. of App. at 18. This is insufficient. On the contrary, he has failed to preserve any “*Miranda* waiver advisement issue for appeal” since he did not “raise the issue at his ‘CrR 3.5 hearing or the fact-finding portions of the proceedings.’” *Campos-Cerna*, 154 Wn.App. at 710. Furthermore, there is no constitutional error regarding the voluntariness of his statements since Gorham has not claimed, and cannot claim, that his statements were involuntary since “a review of the record discloses that there is no issue concerning [] *voluntariness*.” *Kidd*, 36 Wn.App. at 509 (emphasis added) (citing *Harris*, 14 Wn.App. at 422).

Moreover, even assuming constitutional error, such error would not be manifest for two reasons. First, Gorham cannot meet his burden to show that had he made this argument to the trial court that “the trial court

¹⁵ At another point in his brief Gorham claims that there was a “short argument” following the testimony at the CrR 3.5 hearing. Br. of App. at 8. As mentioned, Gorham did not argue against the admission of his statements. RP. 239-242.

likely would have granted the motion. . . .” *McFarland*, 127 Wn.2d at 333-34. In response to the testimony by Ofc. Starks that he had read Gorham his *Miranda* rights and utilized a form that contained standard *Miranda* language the trial court concluded that Gorham “was read his rights and in fact, it was done in a written sheet and he acknowledged in writing on that sheet that he had been informed of his rights . . . [s]o with that, I have to find that the rights were given. As I just outlined, they were given as acknowledged on that signed acknowledgement.” RP 235, 241. Had Gorham made his argument to the trial court, then the State would have admitted into evidence that signed acknowledgement and/or presented the same information through Ofc. Starks. Furthermore, the trial court could have properly concluded, even absent additional evidence, that Gorham was properly advised because a 2016 police form that contains the standard *Miranda* language is likely¹⁶ to constitute a sufficient

¹⁶ The State bears the burden of showing a waiver of *Miranda* rights “by a preponderance of the evidence.” *State v. Athan*, 160 Wn.3d 354, 158 P.3d 27 (2007).

advisement.¹⁷ Consequently, Gorham cannot prove that had he made his motion in the trial court that it would have likely been granted.

Second, Gorham, again assuming error, cannot show that the error had “practical and identifiable consequences in the trial of the case,” i.e., he cannot establish actual prejudice. *Kronich*, 160 Wn.2d at 899; *McFarland*, 127 Wn.2d at 333. That’s because Gorham’s statements that he “had a bad weekend and he had gotten into a fight” concerned a part of the incident before *the crime* occurred that was undisputed and also corroborated by the testimony of his mother, Mr. Rigney, and Mr. Lucore. The issue was what Gorham intended when he drove his truck after Mr. Lucore after the fight, not whether a fight occurred in the first place. Thus, any error was not manifest, especially when combined with the additional evidence, as discussed above, and Gorham’s admission on the stand that his jail call in which he stated “I did what I did for a good reason” was about the incident with Mr. Lucore. RP 362. For the same reasons any error was harmless beyond a reasonable doubt as the untainted evidence of guilt was overwhelming.

¹⁷ There are no *Miranda* magic words, rather the “question is whether the warnings reasonably and effectively conveyed to a suspect his rights as required by *Miranda*.” *In re Woods*, 154 Wn.2d 400, 114 P.3d 607 (2005); see *State v. A.I.*, 199 Wn.App. 1006, 2017 WL 2229931 at 4, 7-8 (2017) (like here the testimony at the CrR 3.5 hearing concerned “*Miranda* warnings” instead of the individual advisements that make up *Miranda* and general averments that the form utilized tracked *Miranda*). *A.I.* is unpublished. GR 14.1(a) states that “unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities . . . and may be accorded such persuasive value as the court deems appropriate.”

III. The prosecutor’s closing argument did not amount to misconduct because the prosecutor did not express his personal opinion.

At trial, “[c]ounsel are permitted latitude to argue the facts in evidence and reasonable inferences” in their closing arguments. *State v. Smith*, 104 Wn.2d 497, 707 P.2d 1306 (1985). This latitude is wide and allows a prosecutor to “freely comment on witness credibility based on the evidence.” *State v. Lewis*, 156 Wn.App. 230, 233 P.3d 891 (2010). Improper vouching, however, “occurs when the prosecutor expresses a personal belief in the veracity of a witness. . . .” *State v. Thorgerson*, 172 Wn.2d 438, 258 P.3d 43 (2011); *State v. Ish*, 170 Wn.2d 189, 241 P.3d 289 (2010). Furthermore, the context of the contested argument is important as:

[i]t is not uncommon for statements to be made in final arguments which, standing alone, sound like an expression of personal opinion. However, when judged in the light of the total argument, the issues in the case, the evidence discussed during the argument, and the court's instructions, it is usually apparent that counsel is trying to convince the jury of certain ultimate facts and conclusions to be drawn from the evidence. Prejudicial error does not occur until such time as it is *clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion.*

State v. McKenzie, 157 Wn.2d 44, 134 P.3d 221 (2006) (emphasis in original) (internal quotation omitted). Thus, in *State v. Warren*, for example, our Supreme Court held that a prosecutor who argued that

certain details about which the complaining witness testified were a “badge of truth” and had the “ring of truth,” and that specific parts of the witness’s testimony “rang out clearly with truth in it” were properly based on the evidence presented rather than on personal opinion. 165 Wn.2d 17, 195 P.3d 940 (2008); *Lewis*, 156 Wn.App. at 240-41. Similarly, a prosecutor who uses the phrase “we know” does not commit misconduct when he or she uses the phrase to “marshal the evidence” and draw “reasonable inferences from that evidence.” *State v. Robinson*, 189 Wn.App. 877, 359 P.3d 874 (2015) (citation omitted).

Any allegedly improper statements by the State in closing argument “should be viewed within the context of the prosecutor’s entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions.” *State v. Dhaliwal*, 150 Wn.2d 559, 79 P.2d 432 (2003) (citing *State v. Brown*, 132 Wn.2d 529, 940 P.2d 546 (1997)). Juries are presumed to follow jury instructions absent evidence to contrary. *Kirkman*, 159 Wn.2d at 928 (citing *State v. Davenport*, 100 Wn.2d 757, 675 P.2d 1213 (1984)).

If the defendant can establish that misconduct occurred, the determination of whether the defendant was prejudiced is subject to one of the two standards of review: “[i]f the defendant objected at trial, the defendant must show that the prosecutor's misconduct resulted in

prejudice that had a substantial likelihood of affecting the jury's verdict. If the defendant did not object at trial, the defendant is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice." *State v. Emery*, 174 Wn.2d 741, 278 P.3d 653 (2012) (citations omitted).

Simply put, a defendant who objects at trial must first establish a prosecutor engaged in misconduct and then show that the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict. *Id.* at 760-61; *State v. Glasmann*, 175 Wn.2d 696, 286 P.3d 673 (2012). Importantly, "[t]he absence of a motion for mistrial at the time of the argument strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." *State v. Swan*, 114 Wn.2d 613, 790 P.2d 610 (1990) (citations omitted).

Prior to the closing arguments in this case the jury was properly instructed that "[y]ou are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness." RP 391; CP 112. Then, in context, the State argued:

And then you have Helene Guinette and Richard Rigney.

Now a person could say they would be biased, that they would be biased towards Mr. Gorham, but I submit that they came in and did their absolute best to tell the truth about what happened as well. They had every opportunity while this case was pending to, you know -- and while they testified, to shade what they remembered to, you know, to give Mr. Gorham the benefit of the doubt where maybe he didn't deserve it. But instead, they came in and quite sternly, but strongly, you know, stuck to the memory that they have today about what happened.

So when Mr. Gorham is telling you he had -- that there was three 18-packs of beer and he had been drinking all day, weigh that against what his mother and Richard Rigney said, where they -- his mother was adamant that he had worked that day. Would it have been easier for her to say, "Well, I could definitely be wrong about that today. I might not know if he worked that day or not. He perhaps had been drinking all day"? That would have been easy -- that would have been the easy thing for her to do, but she told the truth, and she --

MR. RAMSAY: Objection, Your Honor; comment on the truth of what witnesses say.

THE COURT: You will determine what the truth is.

MR. BARTLETT: Correct. Well, obviously. Sorry, Your Honor. She did her best to tell the truth and that was what she remembered, that on that -- on the day in question, and she was adamant it was a Saturday and that's what all the testimony has been, it's been a Saturday, that Brandon worked, so he couldn't have been home drinking all day.

RP 418-19.

Here, "[w]ithin the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions" it was not "clear and unmistakable that counsel [wa]s not

arguing an inference from the evidence, but [wa]s expressing a personal opinion.” *Dhaliwal*, 150 Wn.2d at 578; *McKenzie*, 157 Wn.2d at 54-55. Instead, the argument above was an inference from the evidence, that is, Ms. Guinette’s steadfast refusal to change her recollection in the face of cross-examination regarding Gorham’s drinking on the day in question, combined with the other evidence, was indicative of her credibility. RP 256-58, 419-20 (additional context regarding the argument and Gorham’s drinking). If in *Warren*, the arguments in closing that the complaining witness’s testimony was said to have a “badge of truth,” the “ring of truth,” and that specific parts “rang out clearly with truth in it” were properly based on the evidence presented rather than on personal opinion, then the State’s argument here was proper especially in light of the greater context. 165 Wn.2d at 30. In other words, the State did not express a personal belief in the veracity of a witness. Consequently, the State did not commit prosecutorial misconduct in its closing argument.

Even assuming error, Gorham cannot establish prejudice that had a substantial likelihood of affecting the jury verdict. Gorham’s mother’s credibility on Gorham’s drinking on the day in question was a tertiary issue at best. For one, his level of intoxication was barely relevant to the sequence of events and the crime that occurred. For another, Gorham himself—despite claiming to drink what seems like a very large amount of

beer—refuted on multiple occasions the notion that he was highly intoxicated as he had developed “a pretty high alcohol tolerance.” RP 353, 367. And finally, like Gorham’s mother, Gorham’s friend Mr. Rigney contradicted Gorham as to the amount of alcohol he had to drink. RP 261-62, 268. Furthermore, upon objection, the trial court reminded the jury consistent with the court’s instructions that “[y]ou will determine what the truth is.” RP 419. When combined with Gorham’s jail calls, the eye witness testimony, the physical evidence, and the testimony of Mr. Lucore, the evidence was overwhelming as to Gorham’s guilt and there is no chance, let alone a substantial likelihood, that an improper comment regarding Ms. Guinette’s credibility on the issue of Gorham’s drinking affected the jury’s verdict.

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CONCLUSION

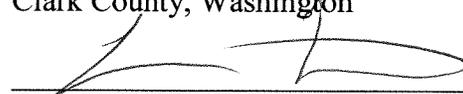
For the reasons argued above, this Court should affirm Gorham's convictions.

DATED this 21 day of April, 2018.

Respectfully submitted:

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