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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

KURT R. KILLIAN, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Bryan E. Chushcoff

No. 18-1-02985-8

Brief of Respondent

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INTRODUCTION

In July 2018, appellant, Kurt Killian, was subject to a domestic violation protection order prohibiting him from having any contact with C.W. Despite his knowledge of this order, and despite having been convicted at least twice before of violating protection orders, Killian knowingly initiated contact with C.W.

On July 28, 2018, a week after he was released from the Pierce County Jail, Killian went to C.W.'s mobile home park, opened the gate to her property, and began ascending the steps. When C.W. saw Killian, she was terrified and told him he should not be there. Killian told C.W. that he needed to talk to her and that "it had expired." C.W. fled to a neighbor's home to call 9-1-1 while Killian went to a nearby park to await police.

Killian makes numerous claims on appeal. None of which withstand scrutiny.

The trial court properly exercised its discretion in allowing the prosecution to reopen its case to allow the prosecutor to introduce a previously agreed to stipulation and Killian suffered no prejudice as a result of that decision. Likewise, the trial court properly exercised its discretion when it allowed Killian's counsel time to find a Bible to use when being sworn in, but not omit the word "affirm" from the oath. As

Killian testified and demonstrated no prejudice, any “error” the trial court may have made committed was harmless. Further, the prosecutor’s comments during opening statement, taken in context, were a reasonable comment on what he expected the evidence to show and there was no substantial likelihood that any of his comments affected the jury’s verdict.

Here, too, more than sufficient evidence was presented at trial for a rational jury to find beyond a reasonable doubt that Killian knowingly contacted C.W. The jury likely found C.W.’s version of events more credible than Killian’s story that he did not know where C.W. lived, and, in fact, thought she was dead, and then simply happened to be walking down the street past C.W.’s mobile home while she was on her porch.

Furthermore, Killian’s counsel rendered effective assistance at sentencing. Killian is unable to demonstrate that his defense counsel performed deficiently based on the record and, even if counsel should have more specifically argued “diminished capacity” as a mitigating factor, there is no substantial likelihood that the trial court would have imposed a different sentence. Finally, Killian has not demonstrated that an accumulation of any of these alleged “errors” actually and substantially prejudiced him and denied him his right to a fair trial.

This Court should deny Killian’s claims and affirm the judgment, conviction, and sentence.

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Did the trial court properly deny Killian's motion to dismiss and grant the State's motion to reopen its case-in-chief to allow the prosecutor to enter into evidence the previously agreed upon stipulation that Killian had two prior convictions for violating a protection order?
2. Was Killian's right to free exercise of religion prejudicially violated when the trial court allowed defense counsel time to locate a Bible, but denied Killian's request to allow him to omit the word "affirm" from his oath, and when Killian ultimately testified after taking the oath that all of the other witnesses had taken?
3. Was the prosecutor's opening statement proper when no objection was made by the defense, the prosecutor's statements were tied to the evidence, and the trial court instructed the jury that what the attorneys say is not evidence?

4. Was sufficient evidence presented at trial for a rational jury to find that Killian knowingly violated the protection order?
5. Did Killian's defense counsel render ineffective assistance at sentencing by introducing the testimony from Killian's siblings that Killian suffered from mental illness and was prone to hallucinations when not on his medication, but not specifically arguing "diminished capacity" as a mitigating factor?
6. Did Killian demonstrate that he was actually and substantially prejudiced and denied his right to a fair trial under the cumulative error doctrine?

B. STATEMENT OF THE CASE

1. PROCEDURE

On July 30, 2018, the Pierce County Prosecuting Attorney's Office filed an Information charging Killian with one count of violating a domestic violence court order. CP 3-4. On November 2, 2018, following a jury trial before the Honorable Bryan E. Chushcoff, the jury found Killian guilty as charged. CP 97. The jury also found true the allegation that Killian and the victim, C.W., were members of the same family or

household. CP 98. On November 9, 2018, the trial court sentenced Killian to a standard range sentence of 60 months confinement. CP 109-122.

2. FACTS

Killian and C.W. were in a romantic relationship from 2013 until 2017. 2RP 49-50. However, they had known each other for many years and had an adult child together. 2RP 69-70. After their relationship ended, C.W. obtained a domestic violence restraining order against Killian in April 2017. 2RP 50-51.

While incarcerated in the Pierce County Jail in October 2017, Killian received a phone call from his daughter who told him that C.W. had been killed when she was hit by a vehicle while riding her bicycle. 3RP 160-162. However, a day or two later, Killian received a call from his sister telling him that his daughter lied – C.W. was not dead. 3RP 162-164. Killian testified that he ultimately believed his daughter because she lived only a quarter of a mile from C.W., whereas his sister lived “in the south.” 3RP 164-165, 183, 186, 192.

On July 28, 2018, a week after being released from jail, Killian entered the Brookdale Mobile Home Park in Spanaway. He opened the gate to C.W.’s mobile home and began climbing the steps toward her door. 2RP 54-56. Killian knew that C.W. had moved to the Brookdale

Mobile Home Park and was familiar with C.W.'s son's car, which was parked next to C.W.'s mobile home that day. 2RP 60-62, 81, 83; 3RP 177-182.

As C.W. stepped out of her mobile home, she saw Killian on the second to the bottom step of her stairway. 2RP 54-56. She immediately told Killian that he should not be there and needed to leave. Rather than expressing surprise that C.W. was alive, Killian told her that he wanted to talk to her and that "it had expired." 2RP 56-58. C.W. was terrified and fled to her neighbor's house to call the police. As she left, Killian said, "Okay, I will leave," and headed toward nearby Gonyea Park. 2RP 56-58, 87-89, 125.

Deputies responded to Gonyea Park and found Killian lounging under a tree. 2RP 98. Killian explained that he was walking through the area toward the Jiffy Lube at 138th and Pacific, where his daughter worked, to obtain the money that he had loaned her earlier. 2RP 101; 3RP 159-160, 166-167, 170. He stated that he saw C.W. standing on a porch but did not speak to her. He stated that C.W. told him that she would be right back and then went into her home. Killian left immediately; he said he knew he would be contacted by police, so he went to the park to wait for them. 2RP 101; 3RP 171-173.

At trial, Killian testified that before he saw C.W. that day, he still thought that she was dead. 3RP 170-171. Although he admitted being aware of the protection order, Killian denied going onto C.W.'s property; he maintained that he did not intend to contact her or even know where she lived. 3RP 171-173, 176, 177.

According to Deputy Bradley Crawford, the arresting officer, Killian never told him that he thought C.W. was dead. 2RP 104, 107; 3RP 177-182. Deputy Crawford also testified that based on where Killian was found, his path of travel was not consistent with him travelling to the Jiffy Lube. 2RP 105.

Killian was arrested for violating a domestic violence court order. 2RP 97, 102; 3RP 177.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY DENIED KILLIAN'S MOTION TO DISMISS AND ALLOWED THE STATE TO REOPEN ITS CASE-IN-CHIEF TO INTRODUCE THE PREVIOUSLY AGREED UPON STIPULATION

Prior to trial, the prosecution and defense stipulated that Killian had two prior felony convictions for violating protection orders. However, that stipulation was not entered into evidence during the prosecution's case-in-chief. Defense counsel moved to dismiss the charge of felony violation a domestic violence protection order. Specifically, counsel

argued that because the prosecution “failed to prove” that Killian had prior convictions for violating protection orders, it failed to establish the elements necessary to elevate a violation of a domestic violence protection order from a misdemeanor to a felony. Brief of Appellant at 11-13. The trial court denied the defense motion and allowed the prosecution to reopen its case-in-chief and enter the stipulation into evidence. Killian claims that the trial court prejudicially erred in doing so. Killian’s claim should be denied because the trial court properly exercised its discretion in allowing the state to reopen its case-in-chief to enter this stipulation and Killian suffered no prejudice as a result of this decision.

“A motion to reopen a proceeding for the purpose of introducing additional evidence is addressed to the sound discretion of the trial court.” *State v. Sanchez*, 60 Wn. App. 687, 696, 806 P.2d 782 (1991). A trial court abuses its discretion only if its decision is based on untenable grounds or untenable reasons. *Id.* To demonstrate reversible error based on a trial court’s ruling on a motion to reopen proceedings, the appealing party must show *both* a manifest abuse of discretion *and* resulting prejudice. *State v. Brinkley*, 66 Wn. App. 844, 848, 837 P.2d 20 (1992).

In *Brinkley*, the court recognized that “Washington courts have upheld trial court decisions allowing the prosecution to reopen to present further evidence after the defense has moved for dismissal on the basis of

insufficiency of the evidence.” *State v. Brinkley*, 66 Wn. App. at 848. Exercising its discretion, a trial court may allow the prosecution “to present additional evidence to resolve deficiencies in its case pointed out by the defendant.” *Id.* The “determination of whether the trial court’s decision to allow the State to reopen constitutes an abuse of discretion depends to some extent on the potential for unfairness to the complaining party,” apart from any unfairness inherent in permitting the State to present additional evidence. *Id.* at 850. Applying that standard, the court in *Brinkley* held that the trial court did not abuse its discretion by granting the State’s motion to reopen:

There is no indication that the State took the action it did to put [the defendant] at a disadvantage. Nor is there any indication that it engaged in trickery or made a calculated decision to hold evidence back. In short, [the defendant] was faced with evidence which could have been presented during the State’s case in chief and there is no suggestion that the impact of this additional evidence was intensified due to the timing of its presentation.

Id. at 851.

Here, prior to trial, defense counsel and the prosecutor agreed that the following stipulation would be read to the jury at trial:

On July 28th, 2018, beyond a reasonable doubt, the defendant had two previous convictions for violating court orders issued under Revised Code of Washington, Chapters 10.99 or 26.50. [C.W.] was not the subject in the two previous orders.

1RP 21-22, 26-27; 3RP 155-157. After the stipulation was agreed to, the trial court said to the parties, "Let me know when you want the court to read [the stipulation] to the jury." 1RP 27.

During the prosecution's case-in-chief, the prosecutor did not ask the trial court to read the agreed-to stipulation. After the prosecution rested, defense counsel moved for a dismissal of the charge because "the State failed to meet their burden [of proving] the underlying convictions," which is a required element for a felony violation of a protection order. 2RP 138-139. In response, the prosecutor stated:

Your Honor, I have only had a limited experience with stipulations. I have had the -- in my prior experience, I've had the court read the stipulation before closing argument. That's my fault. I would ask the court to allow me to reopen my case in order to have the court read that. I think it is -- I think it would be unfair when it has been stipulated to that the court throw this case out on a technicality because it was not read at a particular time.

2RP 139.

When asked by the trial court if there would be any prejudice to Killian if it allowed the prosecution to reopen its case "beyond the obvious one," e.g., that the trial continues, defense counsel answered, "No." 2RP 140. The trial court then denied Killian's motion to dismiss and allowed the prosecution to reopen its case-in-chief:

. . . I don't think that there is any prejudice to the defense by allowing the State to reopen. No other information has been provided to the jury. The information does not require going

to find a witness and bringing them back here. There is no delay in the court proceedings. All of the evidence is already in the court's presence because we have the signed stipulation.

I don't see any prejudice to the defense, and I will allow the State to reopen to present the stipulation.

2RP 141-142.

In front of the jury, the prosecution was allowed to reopen its case. The trial court then read the parties' stipulation to the jury. 3RP 155-157.

Although admitting at trial that he would not be prejudiced if the trial court allowed the prosecution to reopen its case-in-chief solely for the purpose of reading to the jury the previously agreed-upon stipulation (2RP 140), Killian now alleges that he was unfairly prejudiced by the trial court's decision. Brief of Appellant at 11-12.

In reference to what a court examines in order to determine whether prejudice results from allowing the State to reopen its case, Killian, citing *State v. Brinkley*, sets forth the following: (1) whether the defendant had excused witnesses who would have rebutted the new evidence; (2) whether the State had deliberately withheld evidence; (3) whether the defendant's case suffered more harm than had the evidence been offered at the proper time; (4) whether the trial court provided time for the defendant to continue the case, interview additional witnesses, and put on rebuttal witnesses; (5) whether the new evidence was highly

technical; and (6) whether the nature of the testimony and the stage of the trial might place undue emphasis on it. *Brinkley*, 66 Wn. App. at 850-851.

Here, Killian references only the sixth factor in his argument. Brief of Appellant at 12-13. Killian's sole argument here is that the trial court erred by allowing the prosecution to reopen its case "because the sequence of events in this case placed an undue emphasis on the felony stipulation." Brief of Appellant at 11. Specifically, Killian claims that allowing the jury to hear about his two previous felony convictions immediately before he testified prejudiced him by "undermining his credibility, unfairly placing him at a disadvantage." Brief of Appellant at 12-13.

The trial court properly exercised its discretion in denying Killian's motion to dismiss and allowing the prosecution to reopen its case for the limited purpose of reading the jury the previously agreed to stipulation, and Killian suffered no prejudice from its decision to do so. Here, the trial court simply allowed the prosecution to present additional evidence to resolve deficiencies in its case pointed out by Killian. *See State v. Brinkley*, 66 Wn. App. at 848. Furthermore, the admissibility of that evidence had already been agreed to by the defense.

Moreover, contrary to Killian's claim, the court's decision neither "placed an undue emphasis" on his felony violations nor "undermin[ed]"

his credibility.” First, even had the prosecution sought to enter the stipulation during its case-in-chief prior to resting, this stipulation would have been read immediately prior to Killian testifying. Thus, allowing the prosecution to reopen its case and read the jury the stipulation subjected Killian to no more prejudice than had the prosecution done so prior to resting in the first place. More importantly, however, is that Killian himself testified that he suffered the same convictions as set forth in the stipulation.¹ 3RP 158-159. Even had he not done so under direct-examination, the prosecution would have been able to elicit this admission from Killian on cross-examination or introduce evidence of such felony convictions, regardless of any stipulation. *See* Evidence Rule 609. Accordingly, Killian suffered no prejudice apart from any such “prejudice” inherent in permitting the State to present additional evidence. *See State v. Brinkley*, 66 Wn. App. at 850.

The State presented evidence after reopening its case that was available during its case in chief, and there is nothing indicating that the State’s evidence was intensified by the timing of its presentation. Because Killian has failed to demonstrate any abuse of discretion or prejudice, his claim should be denied.

¹ Prejudice is further alleviated by the fact that Killian testified that he was an inmate in the Pierce County Jail when he received the conflicting information about the supposed death of C.W. 3RP 160.

2. THE TRIAL COURT PROPERLY
ADMINISTERED THE OATH TO KILLIAN
PRIOR TO HIM TESTIFYING

Killian claims that the trial court's "refus[al] to allow [him] to swear an oath on a Bible before testifying" violated his right to free exercise of religion. Brief of Appellant at 13-20. Not so. The trial court specifically *permitted* Killian to swear an oath on a Bible; however, a Bible could not be found in the courthouse prior to Killian's testimony. Killian then requested that he be allowed to omit the word "affirm" in his oath. Brief of Appellant at 15-20. After further discussions with the trial court regarding the disjunctive nature of "swear or affirm" and the fact that all of the previous witnesses had taken the standard oath, Killian and his counsel agreed that Killian would take the standard oath. In any event, as Killian testified, any "error" committed by the trial court was harmless beyond a reasonable doubt.

Prior to calling Killian as a witness, defense counsel advised the trial court that Killian had just expressed to him his desire to be sworn in by actually placing his hand on the Bible. 3RP 149. The trial court stated that it had "no problem with Killian having a Bible," but the court did not have one at hand. 3RP 149. After Killian complained that he had a Bible but was prevented from bringing one in to the courtroom, the trial court explained:

As I say, if you had a Bible, I could say hand it to him and he could hold it. That is up to the security staff. I have no control over that. If we had known before, we could have got a Bible from [defense counsel]. [Defense counsel] could have had it, and we could have done this before.

...

I recognize this could be considered kind of a boosting -- maybe playing into some religious feelings among the jury. I don't think that's appropriate. I'm not going to stop him, but I'm not going to find a Bible for him. I would have no problem with him having a Bible, if he has one with him.

...

I'm perfectly fine with Mr. Killian holding a Bible when he takes the oath. I have no problem with it. I just don't have a Bible, not here anyway. I realize that there are different Bibles, and that might make a difference to some people. I don't know if that makes a difference to Mr. Killian or not.

If he said that he wanted to testify with some other kind of -- holding the Magna Carta or something, there's only a few of those in the world. I don't think that I could get it for him. There are lots and lots of Bibles published in the world, as far as I understand it.

I don't happen to have one here. I'm not sure that there is one in the building.

3RP 149-152.

The trial court then gave defense counsel time to locate a Bible in the courthouse. 3RP 152-153. After checking the building, including the law library, defense counsel advised the trial court that he could not locate a Bible. 3RP 153. Counsel then told the court that Killian was "ready to

proceed with the swearing in as normal” but wanted to take the oath without the “or affirm” language. 3RP 153. The trial court responded:

Here’s the problem with that -- personally, I don’t have a problem with it. What I’m concerned about is, since I’ve asked all of the – I always ask all of the witnesses to swear or affirm because some people don’t want to swear. By putting it in the alternative, you are either swearing or affirming, depending on how you subjectively feel about it.

If I say that Mr. Killian has to swear and not affirm, when I have done that to all of the other witnesses, it may appear to the jury that I’m singling him out in some way and that may strike some of the jurors as a comment by me on Mr. Killian’s truthfulness. I don’t want to do that.

...

I’m afraid of biasing against Mr. Killian, if I do that. That is my concern. Later on in an appeal, if he should be convicted, then that is something else that is fodder there.

My goal, of course, is to run this thing as error-free as possible. I’m not trying to disrespect Mr. Killian’s concern here or his preference, but I think by saying it in the alternative, to swear or affirm, in his mind, he can be swearing and not affirming.

3RP 154-155.

After hearing from the trial court, defense counsel stated, “I agree with the court. I would ask the court to swear [] Killian in no different than any other previous witness.” 3RP 155. The court responded:

I really do think that is best. I think, otherwise, I single him out, and it makes it look like I don’t believe him or something. I don’t want to send any kind of message like that to the jury.

3RP 155. Killian was then sworn in as a witness using the standard language. 3RP 157.

Killian argues that the trial court's actions in "refusing" to allow him to take his oath with a Bible and then "refusing" to change the language of the standard oath that all of the previous witnesses had used and allow him to just "swear" rather than "swear or affirm" violated his right to free exercise of religion and demands a reversal and new trial. Brief of Appellant at 13-20. As set forth above, however, the trial court did *not* refuse Killian's request to take his oath with a Bible. A Bible could not be found in the courthouse for Killian to use and Killian pressed the issue no further; neither Killian nor his defense counsel asked for further time or a continuance to obtain a Bible. 3RP 152-153.

Killian is correct that for a free exercise of religion challenge to be successful, the party must have a sincere religious belief, the challenged state action must burden the free exercise of religion, and, if the first two requirements are met, the state action must be narrowly tailored to advance a compelling state interest. *Munns v. Martin*, 131 Wn.2d 192, 199-202, 930 P.2d 318 (1997). Killian, however, fails to meet this test.

First, Killian has failed to demonstrate that he had a sincere religious belief that led to his desire to take his oath with a Bible or omit the "affirm" language in the oath. Although Killian stated that he wanted

to bring a Bible to court and that he felt his oath would be “hollow” without a Bible, the record is devoid of any evidence that a sincere religious belief on the part of Killian precipitated this desire. Although on appeal, Killian states he is a “devout Christian” (Brief of Appellant at 14), his record of terrorizing women belies this contention. *See* CP 112-113 (showing previous convictions for, among other things, multiple domestic violence assaults, multiple domestic violence harassments, multiple domestic violence malicious mischiefs, and multiple violation of protection orders).

However, even if this Court finds that Killian’s motivations were based on such a “sincere religious belief,” the trial court’s actions in no way burdened Killian’s free exercise of religion. As set forth above, the trial court gave Killian’s counsel the opportunity to locate a Bible for Killian to use; when one could not be located, neither Killian nor his counsel requested any additional time to locate one. In addition, the trial court understood and appreciated Killian’s desire to “swear” rather than “affirm” his oath and pointed out that the standard language of the oath the court gave to all other witnesses would accommodate Killian’s desire:

By putting it in the alternative, you are either swearing or affirming, depending on how you subjectively feel about it.

...

I'm not trying to disrespect Mr. Killian's concern here or his preference, but I think by saying it in the alternative, to swear or affirm, in his mind, he can be swearing and not affirming.

3RP 154-155.

Finally, even assuming that the first two prongs of the test were met, the trial court's decision passes strict scrutiny because it advanced a compelling state interest. As the prosecutor, the trial court, and even defense counsel recognized, if Killian were allowed to take his oath using words materially different from those of the previous witnesses, the jury may have taken that as an indication of how it should evaluate Killian's credibility:

If I say that Mr. Killian has to swear and not affirm, when I have done that to all of the other witnesses, it may appear to the jury that I'm singling him out in some way and that may strike some of the jurors as a comment by me on Mr. Killian's truthfulness. I don't want to do that.

...

I think, otherwise, I single him out, and it makes it look like I don't believe him or something. I don't want to send any kind of message like that to the jury.

3RP 154-155.

Since not singling out a witness, especially the defendant, and risk indicating to the jury that it should judge his credibility different than other witnesses, is a compelling state interest, and allowing Killian to, in his mind, "swear" rather than "affirm" does not burden his religious

beliefs, the trial court's actions were proper and Killian's claim should be rejected.

In any event, even if the trial court erred either in not procuring a Bible for Killian or not modifying the language of the oath and omitting the word "affirm," any such error was harmless. In the cases Killian sets forth to support his position on appeal, all involved situations in federal court where the defendant did not testify when he could not take the oath as he desired. *See United States v. Ward*, 989 F.2d 1015, 1017 (9th Cir. 1992) ("Ward did not testify and presented no witnesses"); *Ferguson v. C.I.R.*, 921 F.2d 588, 589 (5th Cir. 1991) ("Because Ms. Ferguson could only introduce the relevant evidence through her own testimony, Judge Korner then dismissed her petition for lack of prosecution"); *Moore v. United States*, 348 U.S. 966, 75 S. Ct. 530, 99 L. Ed. 753 (1955) ("Petitioner and witnesses tendered by him declined, because of religious scruples against oath-taking, to use the word 'solemnly' in affirming to tell the truth. The trial court refused to permit them to testify").

In the instant case, however, defense counsel ultimately *agreed* with the trial court's decision and rationale:

I agree with the court. I would ask the court to swear []
Killian in no different than any other previous witness.

3RP 155. Killian then took his oath and testified.

As there is no evidence in the record, and Killian makes no such assertion on appeal, that Killian's testimony was affected in any way by taking the oath as proscribed and without a Bible, any "error" the trial court may have committed did not prejudice Killian and was harmless beyond a reasonable doubt. *See State v. Coristine*, 177 Wn.2d 370, 380, 300 P.3d 400 (2013); *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). Killian's claim should therefore be denied.

3. THE PROSECUTOR'S OPENING STATEMENT
WAS PROPER

Killian claims that the prosecutor committed misconduct during his opening statement by expressing his "personal opinion" that Killian was guilty of the crime charged. Brief of Appellant at 20-25. However, Killian forfeited his ability to raise this claim on appeal because defense counsel failed to object at any point to the prosecutor's opening statement. Even if cognizable on review, this claim should be rejected because the prosecutor reasonably commented on what the State's evidence was intended to show. In any event, even if improper, Killian was not prejudiced as there was not a substantial likelihood that any "improper" comment during opening statement affected the jury's verdict.

To prevail on a claim of prosecutorial misconduct, an appellant bears the burden of establishing the impropriety of the prosecutor's comment and its prejudicial effect. *State v. Allen*, 182 Wn.2d 364, 373,

341 P.3d 268 (2015). A reviewing court evaluates the propriety of the comments in the context of the entire argument, the issues in the case, the evidence addressed in the argument, and the instructions given. *State v. Warren*, 165 Wn.2d 17, 28, 195 P.3d 940 (2008).

If the defendant did not object to the alleged misconduct, he 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, 760–61, 278 P.3d 653 (2012). “Under this heightened standard, the defendant must show that (1) ‘no curative instruction would have obviated any prejudicial effect on the jury’ and (2) the misconduct resulted in prejudice that ‘had a substantial likelihood of affecting the jury verdict.’” *Id.* at 761 (quoting *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)).

A prosecutor may not express a personal belief as to the credibility of a witness or the guilt of a defendant. *State v. Allen*, 57 Wn. App. 134, 142, 788 P.2d 1084 (1990). However, during opening statement, a prosecutor may comment on what the State's evidence is intended to show. *State v. Brown*, 132 Wn.2d 529, 563, 940 P.2d 546 (1997). “The prosecutor is permitted a reasonable latitude in arguing inferences from the evidence, including references to a witness's credibility.” *State v. Graham*, 59 Wn. App. 418, 429, 798 P.2d 314 (1990).

In fact, the very purpose of opening statements is to permit the parties to give an outline of the anticipated evidence and the reasonable inferences to be drawn from the evidence. *State v. Campbell*, 103 Wn.2d 1, 15–16, 691 P.2d 929 (1984). Testimony may be anticipated so long as counsel has a good faith belief such testimony will be produced at trial. *State v. Grisby*, 97 Wn.2d 493, 499, 647 P.2d 6 (1982).

During the prosecutor’s opening statement here, the prosecutor first outlined what he “think[s] that the facts are going to show in this case” from the testimony of the four prosecution witnesses. 10/31/18 RP 15-17. The prosecutor concluded by asking the jury to find the defendant guilty after hearing the evidence:

Ladies and gentlemen, this is going to be a very straightforward case. We have had some fun during jury selection. We have had some laughs, but it’s time to get serious at this point. A crime has been committed.

At the end of the State’s case, after you see the evidence and the testimony in this case, the State will ask you to find the defendant guilty of violating a domestic violence restraining order. I believe that the only answer is the defendant is guilty. Thank you.

10/31/18 RP 17.

Although on appeal, Killian takes issue with the prosecutor’s statements, “A crime has been committed” and “I believe that the only answer is the defendant is guilty,” defense counsel did not object to any part of the prosecutor’s opening statement. Prosecutorial misconduct

cannot be raised for the first time on appeal unless the misconduct is so flagrant and ill-intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct. *See State v. Zeigler*, 114 Wn.2d 533, 540, 789 P.2d 79 (1990). Here, Killian has not shown that any potential prejudice based on the prosecutor's statements could not have been obviated by a curative instruction. In addition, the prosecutor's brief, isolated, and non-repeated statements were far from flagrant and ill-intentioned. *Compare In re Personal Restraint of Glasmann*, 175 Wn.2d 696, 705-707, 286 P.3d 673 (2012) (finding the prosecutor's actions "flagrant and ill-intentioned" when he "intentionally presented the jury with copies of Glasmann's booking photograph altered by the addition of phrases calculated to influence the jury's assessment of Glasmann's guilt and veracity").

Even if Killian's claim is cognizable on appeal, the prosecutor's comments during opening statement were proper. Some statements, standing alone, may sound like an expression of a personal opinion by the prosecutor. *State v. McKenzie*, 157 Wn.2d 44, 53, 134 P.3d 221 (2006). However, a prosecutor's comments during opening statement are reviewed in context of the entire opening and a prosecutor can comment on what the State's evidence is intended to show. *State v. Warren*, 165 Wn.2d at 28; *State v. Brown*, 132 Wn.2d at 563. Here, the prosecutor outlined what he

thought “that the facts are going to show in this case” from the testimony of the four prosecution witnesses. 10/31/18 RP 15-17. He then went on to summarize the expected testimony and then *asked* the jury that at the end of the case, *after* it had evaluated the evidence, to find the defendant guilty. 10/31/18 RP 17. The prosecutor’s comments “A crime has been committed” and “I believe that the only answer is the defendant is guilty” were only, *in context*, telling the jury what he thought its decision should be *based on the evidence*. 10/31/18 RP 17. Accordingly, because the prosecutor’s comments were tied to the evidence and not an independent personal opinion, the comments were proper. *See McKenzie*, 157 Wn.2d at 53 (internal quotations omitted) (“there is a distinction between the individual opinion of the prosecuting attorney, as an independent fact, and an opinion based upon or deduced from the testimony in the case”).

Furthermore, even if somehow “improper,” the prosecutor’s now-objected-to comments during opening statement did not affect the jury’s verdict. The trial court instructed the jury that “the lawyers’ statements are not evidence . . . You must disregard any remark, statement, or argument that is not supported by the evidence of the law in my

instructions.”² CP 84. Juries are presumed to follow instructions. *State v. Johnson*, 124 Wn.2d 57, 77, 873 P.2d 514 (1994).

Furthermore, at the end of his closing argument, the prosecutor stated:

Ladies and gentlemen, this is a straightforward case, as I told you in opening statement. The State has proven each of the elements on Instruction 7 beyond a reasonable doubt. As a result, the State would ask that you find the defendant guilty.

3RP 213. This argument focused the jury on the evidence and the law and asked the jury to return a guilty verdict based on those. Killian has the burden of proving a substantial likelihood that the prosecutor’s brief, isolated, and non-repeated comments during opening statement affected the jury’s verdict, but he has in no way demonstrated that he was prejudiced by any of those comments. Accordingly, Killian’s claim of prosecutorial misconduct should be denied.

4. SUFFICIENT EVIDENCE WAS PRESENTED AT TRIAL TO SUPPORT KILLIAN’S CONVICTION FOR VIOLATING THE DOMESTIC VIOLENCE PROTECTION ORDER

Killian claims that the State presented insufficient evidence to support Killian’s conviction. Specifically, Killian contends that there was insufficient evidence to demonstrate that Killian knowingly or willfully

² Defense counsel reiterated this in his closing argument. 3RP 216 (“Remember, statements, comments of the attorney is not evidence”).

violated the domestic violence order protecting C.W.; instead, Killian argues that the evidence showed that his contact with C.W. was only accidental and that he terminated contact immediately. Brief of Appellant at 25-28. Killian's claim should be rejected. More than sufficient was presented to support a rational jury's finding that Killian knowingly or willfully violated the protection order.

Evidence is sufficient to support a criminal conviction if, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182 (2014). In evaluating a sufficiency of the evidence claim, a reviewing court assumes the truth of the State's evidence and all reasonable inferences drawn from that evidence. *Id.* at 106. The appellate court defers to the trier of fact's resolution of conflicting testimony, credibility, and evaluation of the persuasiveness of the evidence. *Id.* In evaluating the sufficiency of the evidence, circumstantial evidence is considered as reliable as direct evidence. *State v. Smith*, 185 Wn. App. 945, 957, 344 P.3d 1244, *review denied*, 183 Wn.2d 1011 (2015).

The State charged Killian with one count of domestic violence court order violation, pursuant to RCW 26.50.110. CP 3-4. To convict a defendant under this statute, the jury needs to find beyond a reasonable

doubt that (1) there is a valid domestic violence court order in place prohibiting contact between the defendant and another person, (2) the defendant knows about that court order, (3) the defendant knowingly violates the provisions of the court order, and (4) the defendant has at least two prior convictions for violation of that or similar domestic violence court orders. RCW 26.50.110(1), (5). The sole issue here is whether there is sufficient evidence of the third element: whether Killian knowingly violated the protection order. Brief of Appellant at 27.

A person acts knowingly if “he or she is aware of a fact, facts, or circumstances or result described by a statute defining an offense.” RCW 9A.08.010(1)(b)(i). A person does *not* knowingly violate a contact prohibition in a situation in which the defendant “accidentally or inadvertently contacted [the protected party] but immediately broke it off.” *State v. Sisemore*, 114 Wn. App. 75, 78, 55 P.3d 1178 (2002).

Assuming the truth of the State’s evidence and viewing it in the light most favorable to the prosecution, the evidence supports a rational jury’s finding beyond a reasonable doubt that Killian knowingly violated the protection order. While Killian claims that his contact with C.W. was accidental, as he was simply walking by C.W.’s home on his way to his daughter’s workplace, and that he ended the contact as soon as he saw

C.W., the evidence overwhelmingly demonstrates that this contact was no accident or coincidence.

In July 2018, a protection order existed prohibiting Killian from contacting C.W. and Killian was aware of this order. 2RP 50-51; 3RP 177. C.W. testified that she told Killian that she was moving to the Brookdale Mobile Home Park. 2RP 60-61, 83. She also testified that Killian knew the car that her son drove and that her son's car was parked at her mobile home on the date Killian had contact with her. 2RP 61-62; *see also* 3RP 182. When C.W. saw Killian open her gate and stand on the stairs leading to her home, she told him he should not be there and had to leave. Instead of leaving, Killian told her that he wanted to tell her something and that "it was expired." 2RP 54-56. C.W. then fled to her neighbor's home to seek help. 2RP 56-57.

During his testimony, Killian claimed that he did not know where C.W. lived and just happened to see her while walking down a public street. As soon as he saw C.W., Killian testified that he immediately left the area and went to a nearby park. 3RP 168-172.

Killian also testified that while he was incarcerated, he got conflicting information about C.W. – his daughter told him she was dead, while his sister told him that C.W. was alive. He testified that he believed his daughter over his sister because while his sister lives "down south," his

daughter “works a quarter of a mile away from [C.W.’s] house or whatever.” 3RP 164-165.

Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have easily found Killian guilty of knowingly violating the protection order. The jury obviously believed C.W.’s version of events over Killian’s story that his contact with C.W. came about only because of a coincidence of epic proportions. This credibility determination is left for the jury, as is the evaluation of the evidence in front of it. Here, Killian knew the name of the mobile home park where C.W. live and, even though he may have not known the exact address, he knew the car C.W.’s son drove and that car was parked at C.W.’s home. In his own testimony, Killian acknowledged that he believed his daughter over his sister because his daughter lived closer to C.W., which belies Killian’s assertion that he did not know where C.W. lived.³ Moreover, Killian’s whole story that he thought C.W. was dead could easily be discounted by the jury as Killian never expressed any

³ Although Killian went on to testify that he did not find out where C.W. lived “until later,” the whole basis for his believing his daughter over his sister appears to be based on his daughter’s credibility given her proximity to C.W.’s home. 3RP 164-165.

surprise to either C.W. or the police upon seeing that C.W. was alive.⁴
1RP 56, 104, 107; 3RP 180.

Simply put, the jury believed C.W. over Killian – a call the jury gets to make. According to C.W., Killian knew the name of the mobile home park in which she lived and knew what her son’s car looked like. She testified that Killian opened her gate, began ascending her steps, and told her he needed to talk to her and that “it had expired.” More than sufficient evidence supported a finding that Killian knowingly violated the order. Killian’s claim to the contrary should be rejected.

5. KILLIAN’S COUNSEL DID NOT RENDER
INEFFECTIVE ASSISTANCE AT SENTENCING

Killian claims that his trial counsel rendered ineffective assistance at sentencing. Specifically, Killian argues that because Killian’s siblings informed the trial court at sentencing that Killian had mental health issues requiring medication and that he hallucinated when not medicated, defense counsel was obligated to argue “diminished capacity” as a mitigating circumstance. Brief of Appellant at 28-33. Not so.

To prevail on a claim of ineffective assistance of counsel, a defendant must show that “(1) defense counsel’s representation was

⁴ Killian’s “Statement of Additional Grounds” filed with this court on June 3, 2019, further casts suspicion upon Killian’s story. There, Killian states, in part, that while he was incarcerated, he talked to a manager at Key Bank who told him that C.W. had emptied his bank account.

deficient in that it fell below an objective standard of reasonableness and (2) the deficient performance prejudiced the defendant.” *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009); *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Legitimate trial strategy cannot serve as the basis for a claim of ineffective assistance of counsel. *State v. Aho*, 137 Wn.2d 736, 745–46, 975 P.2d 512 (1999). An appellate court presumes that the defendant was properly represented and that performance was not deficient. *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). The burden is on the defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below. *State v. McFarland*, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995). Prejudice results when there is a reasonable probability that, but for counsel’s errors, the result of the trial would have been different. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). If either part of the test is not satisfied, the inquiry ends. *Lord*, 117 Wn.2d at 883–84; *State v. Fredrick*, 45 Wn. App. 916, 923, 729 P.2d 56 (1986).

Here, based on Killian’s current conviction and criminal history, his standard range sentence was 60 months, which was both the minimum and maximum of the range. CP 113; 5RP 243. Prior to the imposition of sentence, defense counsel argued that the court should consider mitigating

circumstances, including that the violation of the protection order here was brief and non-violent. 5RP 244-246.

The court also heard from Killian's brother and sister. Killian's brother, Michael Perdue, told the court that Killian suffers from mental illness. 5RP 246. He stated that when Killian is on his medication, he sees demons but knows they are not real; when off his medication, Killian believes these demons are real. 5RP 246-247. When Killian was released from custody, he did not have his medication, had no place to go, and had no way to make a phone call.⁵ Killian's sister, Jennifer Lee, also told the court that Killian suffers from mental illness and would benefit from mental health treatment. 5RP 248.

After noting that Killian behaved "completely appropriately" during trial, the court sentenced Killian to 60 months in prison:

Part of the problem, Mr. Killian, I don't really have a lot of discretion here. Your standard range sentence is 60 to 60. I mean, the low end is the same as the high end, which is 60 months, which happens to be the statutory maximum.

Mr. Burgess points out, and it is true that the things that are mitigating circumstances for the court to deviate downward that are listed in the statute are not exclusive. The court could at least consider other things. One of the problems here is -- and then in doing that, the court needs to be convinced that it would not further the policies of the

⁵ It should be noted that Killian seemed to have no difficulty making and receiving phone calls while incarcerated. *See* 3RP 160-164.

Sentence Reform Act to sentence according to the standard range.

...

Part of the problem, Mr. Killian, in sort of considering a less restrictive or a lesser sentence is the fact that this isn't the first violation of a no-contact order. That's one of the reasons why it's as serious as it is. There have been multiple violations of the protection orders in the past.

I do think -- there is no real basis for me to deviate downward. I will follow the statutory mandate here, which is 60 months. . .

5RP 252-253.

Here, the trial court *did* consider mitigating circumstances, and the "other things" the court referred to could very well have been the statements from Killian's siblings. In any event, while defense counsel did not specifically argue "diminished capacity" as a mitigating factor, he presented Killian's siblings whose statements were almost exclusively about Killian's mental illness. There was no other reason for counsel to present these witnesses if not to inform the court about potential mitigating factors. The fact that counsel did not more specifically argue for diminished capacity as a mitigating factor was presumably because counsel recognized that while mental conditions may constitute mitigating factors supporting an exceptional sentence below the standard range, the record must establish not only the *existence* of the mental condition, but also the requisite *connection* between the condition and significant

impairment of the defendant's ability to appreciate the wrongfulness of his conduct or to conform his conduct to the requirement of the law. *See State v. Rogers*, 112 Wn.2d 180, 185, 770 P.2d 180 (1989); *State v. Hobbs*, 60 Wn. App. 19, 23, 801 P.2d 1028 (1990). Since the particular type of mental illness Killian potentially suffers from does not appear to have any connection to his ability to refrain from violating a protection order, defense counsel properly did not further advance this argument.

Moreover, there is no evidence in the record that defense counsel did *not* investigate the possibility of arguing diminished capacity as a mitigating factor and *then* decide not to call an expert at sentencing or further pursue this avenue. *See State v. Crane*, 116 Wn.2d 315, 335, 804 P.2d 10, *cert. denied*, 501 U.S. 1237, 111 S. Ct. 2867, 115 L. Ed. 2d 1033 (1991) (where a claim of ineffective assistance of counsel is brought on direct appeal, the reviewing court will not consider matters outside the trial record"); *accord State v. Stockton*, 97 Wn.2d 528, 530, 647 P.2d 21 (1982) (matters referred to in the briefing but not included in the record cannot be considered on appeal).

In any event, Killian suffered no prejudice by his counsel's decision not to more specifically argue diminished capacity as a mitigating circumstance at sentencing. Here, as the court explained, it had little discretion, given that both the minimum and maximum standard range

sentence was 60 months. However, the court also recognized that mitigating circumstances could justify a lower sentence and it was aware, through Killian's siblings, of Killian's alleged mental illness. However, the court was clear that because of Killian's extensive criminal history, including a history of violating protection orders, any exceptional sentence downward would not be warranted under the Sentence Reform Act. Therefore, even if defense counsel had made a more specific argument regarding diminished capacity, and even assuming he could connect that diminished capacity to Killian's crime, there is no reasonable possibility that Killian would have received a lesser sentence.

Here, Killian's counsel did not render deficient performance and, even if he had, any such deficiency did not prejudice Killian. Accordingly, Killian's claim of ineffective assistance of counsel should be denied.

6. KILLIAN IS NOT ENTITLED TO RELIEF UNDER THE CUMULATIVE ERROR DOCTRINE AS HE CANNOT SHOW THAT ANY PREJUDICIAL ERROR OCCURRED, LET ALONE AN ACCUMULATION OF SUCH ERRORS

Killian claims that cumulative error denied him a fair trial. Brief of Appellant at 33-34. No so. Killian fails to show that any error occurred, much less an accumulation of errors which deprived him of a fair trial. His claim to the contrary should be denied.

The doctrine of cumulative error recognizes the reality that sometimes numerous errors, each of which standing alone might not have been prejudicial, can combine to deny a defendant not only a perfect trial, but also a fair trial. *In re Personal Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994); *State v. Coe*, 101 Wn.2d 772, 789, 681 P.2d 1281 (1984); *see also State v. Johnson*, 90 Wn. App. 54, 74, 950 P.2d 981 (1998) (“although none of the errors discussed above alone mandate reversal....”).

The test for whether cumulative errors require reversal of a defendant’s conviction is whether the totality of the circumstances substantially prejudiced the defendant, depriving him of a fair trial. *In re Personal Restraint of Cross*, 180 Wn.2d 664, 690, 327 P.3d 660 (2014), *abrogated on other grounds by State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018). The defendant bears the burden of showing multiple trial errors and that the accumulated prejudice affected the outcome of the trial. *Id.* The cumulative error doctrine does not apply where the errors are few and have little or no effect on the outcome of the trial. *State v. Venegas*, 155 Wn. App. 507, 520, 228 P.3d 813 (2010).

Reversals for cumulative error are reserved for egregious circumstances when a defendant is truly denied a fair trial, either because of the enormity of the errors, (*see, e.g., State v. Badda*, 63 Wn.2d 176, 385

P.2d 859 (1963) (holding that failure to instruct the jury (1) not to use codefendant's confession against Badda, (2) to disregard the prosecutor's statement that the State was forced to file charges against defendant because it believed defendant had committed a felony, (3) to weigh testimony of accomplice who was State's sole, uncorroborated witness with caution, and (4) to be unanimous in their verdicts as to cumulative error), because the errors centered around a key issue, (*see, e.g., State v. Coe*, 101 Wn.2d 772, 684 P.2d 668 (1984) (holding that four errors relating to defendant's credibility, combined with two errors relating to credibility of State witnesses, amounted to cumulative error because credibility was central to the State's and defendant's case)), or because the same conduct was repeated, some so many times that a curative instruction lost all effect (*see, e.g., State v. Torres*, 16 Wn. App. 254, 554 P.2d 1069 (1976) (holding that seven separate incidents of prosecutorial misconduct was cumulative error and could not have been cured by curative instructions)). The defendant bears the burden of proving an accumulation of errors of such magnitude that retrial is necessary. *State v. Yarbrough*, 151 Wn. App. 66, 98, 210 P.3d 1029 (2009).

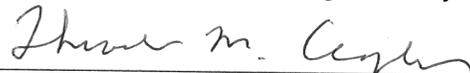
As Killian has failed to show actual and substantial prejudice that denied him the right to a fair trial, he is not entitled to relief under the cumulative error doctrine. This court should reject Killian's claim.

D. CONCLUSION

For the foregoing reasons, this Court should deny Killian's claims and affirm the judgment, conviction, and sentence.

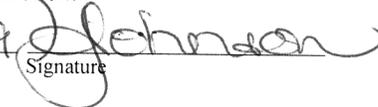
DATED: July 29, 2019

MARY E. ROBNETT
Pierce County Prosecuting Attorney


THEODORE M. CROPLEY
Deputy Prosecuting Attorney
WSB # 27453

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The undersigned certifies that on this day she delivered by ^{2 File} ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

7/29/19 
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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