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Court of Appeals
Division III
State of Washington

No. 33571-2-III,
consolidated with No. 33624-7-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

LUIS GUADALUPE RODRIGUEZ-PEREZ,

WILLIAM MARTINEZ, Appellants.

AMENDED BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

ISSUES PRESENTED BY ASSIGNMENTS OF ERROR

- A. Have appellants failed to meet their burden of establishing both improper conduct during the prosecutor's closing argument and resulting prejudice that could not have been cured?
- B. Did WPIC 4.01 allow the parties to argue their theories of the case, without misleading the jury, and properly inform the jury of the applicable law?
- C. Did the court correctly find that gang-related evidence was not relevant and that any prejudicial effect outweighed any probative value?
- D. Was the trial court's decision not to admit expert testimony regarding cross-racial identifications a tenable exercise of discretion based upon the facts of the case?
- E. Should appellate costs be imposed?
- F. Should the costs of incarceration be waived for Rodriguez-Perez?

II. STATEMENT OF THE CASE

The appellants, Luis Guadalupe Rodriguez-Perez and William Martinez, were both charged with second degree murder for the death of Da'Marius Morgan and first degree assault for the assault on Isaiah Prince, who was shot in his leg. CP 16-17, Martinez CP 79-80.¹ Martinez was also charged with unlawful possession of a firearm based on his possession of a gun while having a prior felony conviction for residential burglary. Martinez CP 4-5, 9-10, 29-30.

¹ There were two sets of clerk's papers designated by each appellant. To distinguish the two, "CP" will be used to refer to the clerk's papers designated by Rodriguez-Perez and "Martinez CP" will be used to refer to the clerk's papers designated by Martinez.

The charges stemmed from the following facts:

On March 22, 2014, the Seasons Performance Hall in Yakima held an event to promote local rap artists and singers. RP (3/9/15) 702-3. Bands came from all over town, with multiple artists performing. RP (3/9/15) 703-4; RP (3/13/15) 1323-4.

During the music event, Da'Marius Morgan, an African-American male, was involved in a fistfight outside the event. RP (3/13/15) 1325; RP (3/16/15) 1651. The altercation involved 40 to 50 individuals. RP (3/16/15) 1651. At one point, Mr. Morgan punched another male in the head. RP (3/13/15) 1327; RP (3/19/15) 2102; RP (3/27/15) 2883. Shortly thereafter, gunshots went off and Mr. Morgan fell to the ground. RP (3/19/15) 2102-3. Mr. Morgan's friends ran to his aid. RP (3/10/15) 2103; (3/24/15) 2441. Mr. Morgan was taken to the hospital where he died from a fatal gunshot wound to his chest. RP (3/19/15) 2136; RP (3/20/15) 2196, 2200. During an autopsy, Dr. Jeff Reynolds, a forensic pathologist, found a .40 caliber slug in Mr. Morgan's body. RP (3/20/15) 2190.

During the same altercation, Isiah Prince, who was also outside the concert, was struck in the leg by a bullet. RP (3/23/15) 2376. Mr. Prince was treated for a gunshot wound and released from the hospital. RP (3/19/15) 2088. Mr. Prince did not see who shot him and did not know if

the defendants shot him. RP (3/23/15) 2367-8. Nor did he know who killed Mr. Morgan. RP (3/23/15) 2368.

Estevan Montero, a security officer for the music event, saw the shooting from inside the Seasons Performance Hall. RP (3/9/15) 710-1. He was inside and closed the door when a fight broke out outside. RP (3/9/15) 709-11. Through the window he witnessed three individuals by the bed of his truck. RP (3/9/15) 719. He saw one of them shoot a handgun towards an African-American male. RP (3/9/15) 727. He saw the muzzle flash and heard four to five shots. RP (3/9/15) 727. Shortly after the shots fired, the African-American male fell to the ground. RP (3/9/15) 712, 729. The three suspects then ran down an alley towards Yakima Avenue and Mr. Montero lost sight of them. RP (3/9/15) 729.

Aaron Adams, a full-time student, was at the concert to see a friend perform. RP (3/12/15) 1322-3. His friend was in the last act. RP (3/12/15) 1324. While waiting, he saw a fight and watched it through the windows near the front entrance of the Seasons. RP (3/12/15) 1324. It started as an argument between two groups. RP (3/12/15) 1325. Mr. Adams saw Mr. Morgan swing at a male and knock him down. RP (3/12/15) 1327. He then witnessed two males run behind a truck, pull out semiautomatic pistols, and fire simultaneously at Mr. Morgan who was by himself in the middle of the street. RP (3/12/15) 1328-9, 1366. He saw

one male shoot three or four rounds and the other male shoot two to three rounds. RP (3/12/15) 1329. Immediately after they fired, they ran into an alley. RP (3/12/15) 1349.

Police officers responded to the shooting at around 11:20 pm. RP (3/10/15) 884; RP (3/13/15) 1435. Several individuals directed officers to run down an alley because that is where they saw the shooters go. RP (3/16/15) 1529.

Washington State Patrol Sergeant Couchman responded to the shooting and went to an alley east of the Seasons Performance Hall. RP (3/13/15) 1434-6. Shortly after arriving at that alley, a group of agitated individuals started yelling and ran towards a bush. RP (3/12/15) 1187; RP (3/13/15) 1438, 1440, 1448; RP (3/17/15) 1821. Two males from the group started kicking two other males that were crouched down hiding behind the bush. RP (3/10/15) 937-9; RP (3/12/15) 1187; RP (3/13/15) 1440, 1448; RP (3/18/15) 1882-3; RP (3/27/15) 2901. Sergeant Couchman and Trooper Cortez pulled the two males out of the bush and took them into custody. RP (3/12/15) 1187; RP (3/13/15) 1440, 1442; RP (3/18/15) 1824. The two males were identified as the appellants, William Martinez and Luis Rodriguez-Perez. RP (3/13/15) 1442.

At a show-up, Mr. Montero, and Mr. Adams, identified Martinez as the shooter. RP (3/10/15) 888; RP (3/13/15) 1338, 1415; RP (3/24/15)

2542. Another concertgoer, Daniel Cerda, did not make an identification but said of Martinez, “that guy is so close to him.” RP (3/10/15) 974; RP (3/11/15) 981; RP (3/24/15) 2542. Mr. Adams said that Rodriguez-Perez could have been the shooter if he ditched his hat before the show-up. RP (3/12/15) 1343, 1416; RP (3/13/15) 1421.

During police interviews, Martinez claimed Rodriguez-Perez was the shooter. RP (3/27/15) 2944. He turned over a video on his phone that showed Rodriguez-Perez holding a pistol and pointing it at the camera. RP (3/23/15) 2308-10.

Numerous Smith & Wesson .40 caliber shell casings were found at the crime scene. RP (3/17/15) 1858-9. Three were near Mr. Montero’s truck. RP (3/10/15) 812-4. One was found in a yard in front of a church and one was found in the middle of an alley by a dumpster. RP (3/12/15) 1188, 1192; RP (3/18/15) 1898, 1926. A bullet slug was found near Mr. Montero’s truck. RP (3/17/15) 1845. A black jacket, white shirt, red cap, and cell phone were also found in the bushes where Martinez and Rodriguez-Perez were hiding. RP (3/12/15) 1153; RP (3/18/15) 1906-16, 1933.

Shortly after the incident, a man who was walking his dog found a firearm. RP (3/12/15) 1194-5; RP (3/25/15) 2074-5. The firearm was a small black semi-automatic .40 caliber handgun. RP (3/12/15) 1196-8; RP

(3/23/15) 2317-9. The rounds in the weapon matched the shell casings found earlier. RP (3/23/15) 2380-1. After a forensic examination, it was determined that a bullet from the crime scene and the one from the victim's body were both fired from the firearm that was found. RP (3/25/15) 2629. It was also determined that the shell casings were fired from the same firearm as well. RP (3/25/15) 2632. A fingerprint lifted off the firearm matched known prints of Rodriguez-Perez. RP (3/26/15) 2665, 2670. The gun was also consistent with the gun held by Rodriguez-Perez in the video supplied to police by Martinez. RP (3/25/15) 2595.

After the incident, the police also obtained videos from numerous sources, including local surveillance videos, COBAN video from officers who arrived on the scene, and a cell phone video made by concertgoer William Telakish. RP (3/19/15) 2159; RP (3/23/15) 2297-2308. In one of the surveillance videos, a male is seen extending his arm towards a bush where the firearm was subsequently found. RP (3/25/15) 2452.

Prior to trial, the court heard numerous pretrial motions. The appellants moved to sever their cases, but the court denied the motion. RP 9/10/14) 87-95. Martinez sought admission of expert testimony from Dr. Loftus regarding eyewitness identifications. Ex. DE-BBB. The State objected, but the court allowed Dr. Loftus to testify. The court excluded specific testimony regarding cross-racial identifications. RP (3/2/15) 67.

In addition, Rodriguez-Perez moved to exclude gang-related evidence as irrelevant and the State agreed. CP 27. Martinez sought admission of certain gang-related evidence but the Court ruled it was inadmissible because there was no nexus shown, and the prejudice outweighed any probative value of the evidence. RP (3/27/15) 2862.

Martinez testified and called three witnesses, Dr. Loftus, Kayleah Goodspeed, and Sgt. Dave Cortez. Rodriguez-Perez did not testify, and called three witnesses, detectives Casey Hampton, Michael Durbin, and Drew Shaw.

Both defendants were convicted of second degree murder, but acquitted of the first degree assault charge. CP 124, 127; Martinez CP 360. Martinez was also convicted of unlawful possession of a firearm. Martinez CP 366. Each defendant was sentenced to 210 months plus a 60 month firearm enhancement on the murder charge. Martinez was sentenced to 34 months on the firearm charge. Martinez CP 382. Both appealed their convictions, and on the State's motion, the appeals were consolidated.

III. ARGUMENT

A. THE APPELLANTS HAVE FAILED TO MEET THEIR BURDEN OF ESTABLISHING BOTH IMPROPER CONDUCT DURING THE PROSECUTOR'S CLOSING ARGUMENT AND RESULTING PREJUDICE THAT COULD NOT BE CURED.

A defendant alleging prosecutorial misconduct bears the burden of first establishing “the prosecutor’s improper conduct and, second, its prejudicial effect.” *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). Courts review allegations of prosecutorial misconduct during closing argument in light of the entire argument, the issues in the case, the evidence discussed during the argument, and the court’s instructions. *State v. Sakellis*, 164 Wn. App. 170, 185, 269 P.3d 1029 (2011).

1. THE PROSECUTOR EXPRESSED REASONABLE INFERENCES FROM THE EVIDENCE, INCLUDING INFERENCES ABOUT CREDIBILITY.

Rodriguez-Perez argues on appeal and for the first time that the prosecutor vouched for a witness’s credibility during closing argument.

The State has wide latitude in drawing and expressing reasonable inferences from the evidence, including inferences about credibility. *State v. Thompson*, 169 Wn. App. 436, 496, 290 P.3d 996 (2012). But a prosecutor commits misconduct by personally vouching for a witness’s credibility. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). The

defendant has the burden of establishing that (1) the State acted improperly, and (2) the State's improper act prejudiced the defendant. *State v. Emery*, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). Misconduct is prejudicial if there is a substantial likelihood it affected the verdict. *Id.* at 760-1.

But a defendant who fails to object to the State's improper act at trial waives any error, unless the act was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011). In making that determination, the courts "focus less on whether the prosecutor's misconduct was flagrant or ill-intentioned and more on whether the resulting prejudice could have been cured." *Emery*, 174 Wn.2d at 762.

Improper vouching occurs if the prosecutor (1) places the prestige of the government behind the witness, or (2) indicates that evidence not presented at trial supports the witness's testimony. *State v. Robinson*, 189 Wn. App. 877, 892-93, 359 P.3d 874 (2015). However, there is a difference between the prosecutor's personal opinion, as an independent fact, and an opinion based upon or deduced from the evidence. *State v. McKenzie*, 157 Wn.2d 44, 53, 134 P.3d 221 (2006). Misconduct occurs only when it is clear and unmistakable that the prosecutor is not arguing

an inference from the evidence, but is expressing a personal opinion. *Id.* at 54.

Rodriguez-Perez argues that the prosecutor was vouching because of these three sentences in closing argument: “[Martinez] knew Luis had the pistol. He knew Luis intended to fire. Luis fired the pistol at Morgan, that fool.” Appellant’s brief at 13. This was within the prosecutor’s wide latitude in drawing and expressing reasonable inferences from the evidence, including inferences about credibility. The prosecutor did not make a personal comment about Martinez’s credibility or indicate that other information not presented to the jury supported his credibility. He did not say or imply that he personally believed Martinez or that Martinez must be telling the truth. As such, the prosecutor did not improperly vouch for Martinez.

Here, Rodriguez-Perez objected only on the basis that the prosecutor was arguing inconsistent theories of prosecution. RP (3/31/15) 3305. He did not lodge any objection based on the rule against vouching. As such, he has waived any claim of improper vouching on appeal. In order to preserve errors for appeal, a timely and specific objection must be placed on the record so that the trial judge can rule on it, and if necessary, cure any errors.

But even if Rodriguez-Perez had lodged an objection based on improper vouching, it would have been overruled. The prosecutor did not vouch for any witness in his closing argument. He did not comment on anybody's credibility. In fact, the prosecutor prefaced his statements by telling the jury that these were reasonable conclusions that they should draw. RP (3/31/15) 3304. And just a few paragraphs before the alleged improper argument, the prosecutor told the jury to reject a statement by Martinez and reminded the jury that they were the sole judges of witness credibility:

He tells you that he didn't know that Luis intended to fire, but you are the sole judges of the credibility of the witnesses. You should reject that statement by Martinez.

RP (3/31/15) 3304. In fact, when going through Martinez's testimony during closing, the prosecutor reiterated four other times that the jurors were the sole judges of credibility. RP (3/31/15) 3297, 3299, 3301, 3303. And the prosecutor pointed out numerous statements made by Martinez that the jury should reject. RP (3/31/15) 3297, 3299, 3301, 3303.

And after the defense objection to the allegedly improper argument, the court made a cautionary statement to the jury as follows:

Again, the jury is reminded that the lawyer's remarks, statements and argument are intended to help you understand the evidence and apply the law. They are not

evidence, however, and you should disregard any remark, statement or argument that is not supported by the evidence in this case.

RP (3/31/15) 3305. So had the defense objected based on vouching, any prejudice was cured by the court's warning to the jury.

As to the prosecutor's theory of the case, the prosecutor stated in closing that Martinez "either did it as a principal or an accomplice, but he was in it and he knew it." RP (3/31/15) 3309. He pointed out that, "There is evidence that [Martinez] was the shooter. The witnesses testified that he was the shooter." RP (3/31/15) 3313. In the State's rebuttal, the prosecutor again argued that the jury should accept as credible the testimony of witnesses who identified Martinez as the shooter. RP (3/31/15) 3382. The prosecutor argued:

There was testimony given by Mr. Martinez, and Mr. Martinez said I'm not the shooter. Mr. Rodriguez-Perez is the shooter. I'm not going to just ignore that testimony because you will decide this case. I don't know what you're thinking. When I make these arguments to you about Mr. Martinez, I'm not telling you just disregard what all the witnesses said that I called to the witness stand. What I'm saying is this: Even if you accept what Mr. Martinez says that he is not the shooter and the shooter is Mr. Rodriguez-Perez, my position to you is that it doesn't make any difference. Mr. Martinez is still guilty as an accomplice.

...

So whether you accept the testimony of the identification witnesses...or whether you find some credibility in what Mr. Martinez says, it doesn't make any difference. They did it together as a team.

RP (3/31/15) 3382-3. It was clear from the prosecutor's closing and rebuttal that he was not vouching for any one version of events. He was leaving it up to the jury to decide what to believe. He made that point very clear on numerous occasions. He was just going through the evidence. In addition, the prosecutor was very critical of Martinez's testimony as he went through it. In fact, he mostly criticized the testimony. To argue that he "adopted Martinez's testimony as the truth" is inaccurate.

Rodriguez-Perez claims that the prosecutor assured Martinez was the shooter in his opening statement. However, an opening statement is just an outline of what a party expects the evidence to show. The State is not required to prove anything that is mentioned in the opening statement. Evidence and testimony change all the time. The prosecutor, here, made, in good faith, statements as to what he anticipated the evidence to be at that time. Furthermore, changing one's theory does not amount to vouching for the credibility of a witness.

In sum, the State never personally vouched for Martinez's credibility. Assuming, *arguendo*, that there was any misconduct, and it

was properly objected to, any prejudice was cured by the numerous references to the jurors being the sole judges of credibility, the numerous times the prosecutor criticized Martinez's testimony, and the court's cautionary statements to the jury. As such, the defense has not met the burden of showing first, improper vouching on the part of the prosecutor and, second, its prejudicial effect. As such, this court should hold that prosecutor's statements were not improper.

2. BY FAILING TO OBJECT, THE APPELLANTS WAIVED THE RIGHT TO ASSERT PROSECUTORIAL MISCONDUCT WITH RESPECT TO POWERPOINT SLIDES USED DURING CLOSING ARGUMENT.

Martinez and Rodriguez-Perez claim that the prosecutor committed misconduct because PowerPoint slides used during closing argument contained inflammatory text or captions emphasizing the State's theory of the case. Martinez also claims that the prosecutor committed misconduct by conveying his personal opinion on PowerPoint slides regarding Martinez's credibility and guilt.

However, there was no objection to the PowerPoint slides that were used during closing argument. As such, the appellants waived the right to assert prosecutorial misconduct unless the misconduct was so "flagrant and ill intentioned" that it caused enduring and resulting prejudice that a curative instruction could not have remedied. *State v.*

Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995). The absence of an objection by defense counsel “strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.” *State v. McKenzie*, 157 Wn.2d 44, 53 n.2, 134 P.3d 221 (2006) (citations omitted).

“Attorneys may use multimedia resources in closing arguments to summarize and highlight relevant evidence, and good trial advocacy encourages creative use of such tools.” *State v. Walker*, 182 Wn.2d 463, 476-7, 341 P.3d 976 (2015). In order to help the jury more easily understand other evidence, modern visual aids can and should be utilized. *Id.* at 480. Graphics can be a legitimate tool to summarize detailed information or to highlight express quotes from the record. *State v. Hecht*, 179 Wn. App. 497, 506, 319 P.3d 836 (2014). In addition, closing arguments are an opportunity for counsel to argue reasonable inferences from the evidence. *Walker*, 182 Wn.2d at 477. They provide an opportunity to draw the jury’s attention to the evidence presented. *Id.* at 478.

a. The State’s PowerPoint slides contained arguments based upon or deduced from the evidence and testimony in the case.

Martinez claims that the prosecutor displayed four PowerPoint slides (numbers 44, 47, 50, and 56) conveying his personal opinion

regarding Mr. Martinez's credibility and guilt. There was no objection to any of these slides.

In *State v. McKenzie*, 157 Wn.2d 44, 56, 134 P.3d 221 (2006), our Supreme Court declined to hold that a prosecutor's assertions of the defendant's guilt amounted to misconduct, because they occurred during rebuttal in responses to defense counsel's repetitive theme [that the defendant was innocent], and in each instance the deputy prosecutor was either rebutting defense counsel's interpretation of the evidence or emphasizing facts supporting the State's theory of the case. The court thus held that the defendant could not show that the assertions of guilt constituted "a 'clear and unmistakable' expression of the deputy prosecutor's personal opinion, divorced from the evidence." 157 Wn.2d at 56-57 (quoting *State v. Papadopoulos*, 34 Wn. App. 397, 400, 662 P.2d 59 (1983)).

The court relied on *State v. Armstrong*, quoting as follows:

While it is improper for a prosecuting attorney, in argument, to express his individual opinion that the accused is guilty, independent of the testimony in the case, he may nevertheless argue from the testimony that the accused is guilty, and that the testimony convinces him of that fact. . . . In other words, 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.

Id. at 53 (quoting *State v. Armstrong*, 37 Wash. 51, 54-55, 79 P. 490

(1905)). The court also relied on *State v. Papadopoulos*:

It is not uncommon for statements to be made in final arguments which, standing alone, sound like an expression 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.*

Id. at 53-4 (quoting *State v. Papadopoulos*, 34 Wn. App. 397, 400, 662 P.2d 59).

In contrast, our Supreme Court in *State v. Case*, 49 Wn.2d 66, 68, 298 P.2d 500 (1956), held the following remarks by the prosecutor to be improper:

I doubt that you haven't already made up your mind. Now, you must have, as human beings. But if you haven't, don't hold it against me, I mean, that is my opinion about what this evidence shows and how clearly

this evidence indicates that this girl has been violated.

Our Supreme Court could not “interpret the quoted statement, taken in context, as anything other than an attempt to impress upon the jury the deputy prosecuting attorney’s personal belief in the defendant’s guilt.” 49 Wn.2d at 68. Similarly, in *State v. Traweck*, the following statements were held to be improper:

You know what happened. I know what happened, and I know who did it, and there were three people involved in this. There are two of them on trial right now.

43 Wn. App. 99, 106, 715 P.2d 1148 (1986). The State, of course, conceded that the prosecutor should not have told the jury that he “knew” the defendants committed the crime. *Id.* at 107.

With this background in mind, the State turns to the facts of this case. Here, Martinez claims that the prosecutor conveyed his personal opinion of Martinez’s guilt and credibility with italicized text on some of the PowerPoint slides. However, a prosecutor may comment on a witness’s veracity as long as a personal opinion is not expressed and as long as the comments are not intended to incite the passion of the jury. *State v. Stith*, 71 Wn. App. 14, 21, 856 P.2d 415 (1993). In this case, the prosecutor never expressed his personal opinion of Martinez’s guilt. He linked the slides to the evidence presented. Therefore, the facts are

nothing like those of *Case* or *Traweek*, cases where the prosecutor's statements were found to be improper.

Slide 44

In slide 44, the italicized text reads “William knew why Luis left – to put the pistol back in the car!” Ex. SE-A (slide 44). The text came at the bottom of the slide after a summary of Martinez's testimony, and a quote from the jury instruction that informs jurors they are the sole judges of credibility. *Id.*

During the oral argument that accompanied slide 44, the prosecutor commented on Martinez's credibility, which is allowed, but never expressed his personal opinion.² The prosecutor even reminded them they are the sole judges of credibility. RP (3/31/15) 3297. The prosecutor stated:

Mr. Martinez says he didn't know why Luis went back from the door. I would suggest to you that this part of Mr. Martinez's testimony is not credible. You have a jury instruction that states in part that you are the sole judges of the credibility of each witness. In considering a witness' testimony, you may consider these things, and one of those things is any personal interest that the witness might have in the outcome of the issues, the reasonableness of the witness' statements in the context of all the other evidence. I suggest to you that this

² Because the prosecutor read the slides for portions of his argument, it is apparent which slides corresponded to his closing argument.

portion of Mr. Martinez's testimony where he says that he did not know why Luis went away from the door is not credible. He has a personal interest in the outcome of this proceeding. When you consider all the other evidence, the statement is not reasonable.

RP (3/31/15) 3297. The prosecutor then went on to point out facts from the record that supported his argument, such as the fact that Martinez knew Luis carried a gun in his waistband and that there was a metal detector at the concert. RP (3/31/15) 3297. These facts were testified to during the trial. *See* RP (3/27/15) 2918-9. It was clear that the prosecutor's argument was based on the evidence and was not his own personal opinion as to the Martinez's credibility. Throughout the PowerPoint slide presentation, it was also clear that the use of italicized text signaled a shift from a discussion of the facts of the case to the reasonable inferences one could draw from those facts.

Slide 47

In slide 47, the italicized text reads "William and Luis went together to get the pistol from the car." Ex. SE-A (slide 47). The text came at the bottom of the slide after a summary of Martinez's testimony, and a quote from the jury instruction that informs jurors they are the sole judges of credibility. *Id.* During the oral argument that accompanied the slide, the prosecutor commented on Martinez's credibility, which is

allowed, but never expressed his personal opinion. The prosecutor even reminded them again that they are the sole judges of credibility. RP

(3/31/15) 3297. The prosecutor stated:

You are the sole judges of the credibility of each witness. Consider the personal interest the witness might have and the reasonableness of the witness' statements. I submit to you when you think about Mr. Martinez and his close friendship with Mr. Rodriguez-Perez and the fact he always had the gun, had seen him with the gun before he went out the door, what he told Detective Cortez earlier that he knew that Mr. Rodriguez-Perez couldn't get into the Seasons with the gun and had to go back to Era's car to get rid of it, I suggest that you will find that William and Luis went together from the Seasons Performance Hall back to the car to get the pistol.

RP (3/31/15) 3299. Again, the prosecutor pointed out facts from the record that supported his argument. RP (3/31/15) 3299. It was clear that the prosecutor's argument was based on the evidence and was not his own personal opinion as why the defendant went back to the Seasons.

Slide 50

In slide 50, the italicized text reads, "William knew that Luis got the pistol; William helped Luis get pistol." Ex. SE-A (slide 50). The text came after a summary of Martinez's testimony, including Martinez's

claim that he did not know that Rodriguez-Perez got a gun. *Id.* The oral argument that went along with this slide is as follows:

Again, you are the sole judges of the credibility. I submit to you based on everything we've talked about a couple of times here, how he was close with his friend, knew his friend had a gun, knew he couldn't get into the Seasons, knew he took it back to the car. He knew his side was losing the fight. They had to go get the gun, and they went back together to get the gun. William knew that Luis got the pistol. He actually helped Luis get the pistol. That's why they went back at the same time. Out of all the time in the evening. Out of all the time in the evening they could have gone back to the car separately, they go back at virtually the same time. The reason is to get the pistol to shoot Mr. Morgan because he's just too big to fistfight.

RP (3/31/15) 3301. Again, the italicized text was not the personal opinion of the prosecutor as to what Martinez knew or did in this case. It was based on the testimony and evidence, and in the context of the oral argument, that was abundantly clear. It was a reasonable inference drawn from the trial testimony.

Slide 56

In slide 56, the italicized text reads, "Didn't know Luis intended to fire?" Ex. SE-A (slide 56). This came after a summary of of Martinez's testimony and yet another reminder that the jurors are the sole judges of

credibility. *Id.* While the slides were displayed, the prosecutor argued, “He tells you that he didn’t know that Luis intended to fire, but you are the sole judges of the credibility of the witnesses. You should reject that statement by Martinez.” RP (3/31/15) 3304. In support of his argument, the prosecutor relied on testimony that Martinez was very close to Rodriguez-Perez, that Martinez told a detective that he knew Rodriguez went back for his gun, and that the defendants went back to the victim’s location. Ex. SE-A (slide 56); RP (3/31/15) 3304. Like the previous slides, the prosecutor questioned Martinez’s testimony, but he did so based on testimony and evidence in the record, and that was clear by the oral argument. There was no expression of the prosecutor’s personal opinion.

In conclusion, in order to be prejudicial error, it must be *clear and unmistakable* that the prosecutor was expressing a personal opinion and not merely arguing an inference from the evidence. *See McKenzie*, 156 Wn.2d at 56-7. Here, that standard has not been met with respect to Martinez’s claim that slides 44, 47, 50, and 56 conveyed the prosecutor’s personal opinion. Furthermore, in the absence of any objection, Martinez waived the right to assert prosecutorial misconduct because the conduct was not so flagrant and ill-intentioned that it caused enduring and resulting prejudice that a curative instruction could not have remedied. *See Russell*, 125 Wn.2d at 24.

b. The prosecutor's slides did not contain inflammatory or prejudicial text, or phrases calculated to influence the jury's assessment of guilt or veracity of the appellants.

The defendants, for the first time on appeal, take issue with the State putting titles on power point slides. They argue that the State cannot display exhibits with captions during closing argument based on *In re the Pers. Rest. of Glasmann*, 175 Wn.2d 696, 286 P.3d 673 (2012). However, not all captions and titles require reversal.³

In *Glasmann*, the slides involved more than mere titles above copies of exhibits. The defendant's booking photo was a defense exhibit admitted at trial. 175 Wn.2d at 700. It was offered by the defense to show facial injuries that were sustained during arrest. *Id.* During the State's closing argument, the prosecutor used the photo in a PowerPoint presentation, along captions displayed above it that read "DO YOU BELIEVE HIM?" and "WHY SHOULD YOU BELIEVE ANYTHING HE SAYS ABOUT THE ASSAULT?" *Id.* at 706. There was also a sequence of booking photos with "GUILTY" on Glassman's face, or "GUILTY, GUILTY, GUILTY." *Id.* The court noted that the booking photos were altered by the addition of phrases "calculated to influence the jury's assessment of Glasmann's guilt or veracity." *Id.* at 705.

³ For persuasive authority, see the unpublished Division Two case of *In re Pers. Restraint of Olsen*, 2014 Wash. App. LEXIS 2432, No. 44984-6-II (filed October 7, 2014).

Thus, in *Glasmann*, our Supreme Court did not simply rely on the altered photographs, or the fact that they were captioned, in reaching its decision. In *Glasmann*, where the State used multiple slides displaying Glasmann's mug shot of him unkempt and bloody, the slides were used to trigger an "emotional reaction" from the jury. *Id.* at 706; 710 n.4. The conduct was improper because the prosecutor used his position of power and prestige to influence the jury and expressed in the captions a personal opinion regarding the defendant's guilt. *Id.* at 706.

Here, the PowerPoint slides did not contain inflammatory or prejudicial text, nor the prosecutor's personal opinion regarding guilt. Furthermore, they did not contain phrases calculated to influence the jury's assessment of guilt or veracity of the defendants. In addition, every photograph or screen capture shown was admitted at trial.

Slides 10 & 30

On Slide 10, the use of the title, "Fowler COBAN: Show-Up" above a still photo taken from Officer Fowler's COBAN video was simply used to signal what the prosecutor was showing to the jury, not calculated to improperly influence the jury. As the slide was displayed, the prosecutor stated, "This is a still photo, a screen capture from Fowler's COBAN." RP (3/31/15) 3287. The title was an accurate description of what was being shown and did not contain argument. It was based on the

testimony at trial. There was nothing inflammatory or prejudicial about the title and was not used to trigger an emotional reaction from the jury. Rodriguez-Perez claims that the caption was added to emphasize the State's theory of the case. However, it is clear that it was just an accurate description of a photo being shown to the jury and used to distinguish it from other photos being displayed.

Similarly, slide 30 was entitled, "COBAN SHOWUP" and had a screen shot from the COBAN video during a show-up. Ex. SE-A (slide 30). The prosecutor verbally summarized the slide as follows: "Again, we have the same COBAN screen capture, William Martinez here in red, Luis Rodriguez-Perez here in the black shirt." RP (3/31/15) 3291. Again, the title was simply used to tell the jury what the photograph contained.

Slide 18

Slide 18 was entitled, "WILLIAM MARTINEZ." Ex. SE-A (slide 18). The slide contained text and two photos, a screenshot from the cell phone video taken by concertgoer William Telakish and a photo of Martinez at the police station. *Id.* The text, in the top left of the slide, read as follows:

TESTIFIED ABOUT HIS CLOTHING

- Red hat
- Red shirt
- White shoes with red trim
- Camouflage jacket

Id. The text was an accurate description of what Martinez testified to about his clothing. RP (3/27/15) 2916. There were two photos of Martinez on the slide. Ex. SE-A (slide 18). While displaying this slide, the prosecutor stated:

You can see here, this is William Martinez. There's a photo of him. It's actually a screen capture on the left from the Telakish video. You can see he's wearing the red hat, the camouflage coat and the white shoes, exactly as Mr. Cerda described it. On the left of the screen you can see a picture of Mr. Martinez at the police station. You can see the curly black puffy hair. You can see the red T-shirt and the white patch on it, the camouflage coat and the white shoes. William Martinez testified about the clothing he was wearing that night. He said, I wore a red hat, red shirt, white shoes with red trim and a camouflage jacket.

RP (3/31/15) 3287. Martinez claims that the prosecutor added captions to emphasize the State's theory of the case. However, Martinez testified to what he was wearing that night. RP (3/27/15) 2916. The slide merely reflected what Martinez testified to and accurately depicted photos of his clothing, that were consistent with his testimony. There was nothing inflammatory or prejudicial about the text.

Slides 21 & 22

Slide 21 is titled, “SHOW UP: CHRISTIAN DELGADO,” and has a still photo of Christian Delgado lined up with three other people. Ex. SE-A (slide 21). Again, the title accurately described what the photo was and was used to signal what was being shown to the jury. There was nothing prejudicial about the prosecutor’s use of this title. Similarly, slide 22, titled, “CHRISTIAN DELGADO,” was a still image of Mr. Delgado taken from a video. Ex. SE-A (slide 21); RP 3289. The use of these simple titles was to signal what the prosecutor was showing the jury, not to appeal to sympathy or create any emotional reaction from the jury.

Slide 24

The title on Slide 24 was “NOT KLICK KLACK.” Ex. SE-A (slide 24). During this slide, the prosecutors stated, “You can see Mr. Klick Klack here, Justin Navarro, in the Telakish video. He’s wearing red, curly black hair, but he’s definitely not wearing a hat.” RP (3/31/15) 3289. The slide came after the prosecutor argued that Klick Klack was not the shooter because of testimony by Martin Gonzalez and surveillance video. RP (3/31/15) 3289. The previous slide explained how Martin Gonzalez testified that Klick Klack was not the shooter. Ex. SE-A (slide 23). It is clear that the prosecutor’s title on slide 24 was based on the testimony presented at trial from Mr. Gonzalez. While Rodriguez-Perez

claims the caption was added to emphasize the State's theory of the case, the caption was really just part of the prosecutor's summary of the evidence in the case. There was nothing inflammatory or prejudicial about the slide.

Slide 34

Slide 34, entitled, "HAT BEHIND BUSH," contained one photograph of articles of clothing found behind a bush. Ex. SE-A (slide 34). When this slide was displayed, the prosecutor stated, "You can see here where the officers, when they searched behind the bushes where they found William Martinez and Luis Rodriguez-Perez hiding, they found articles of clothing." RP (3/31/15) 3292-3. The prosecutor then pointed out that one of the items is a hat that matches the description of the hat worn by Rodriguez-Perez. RP (3/31/15) 3293. Like many other slides, the prosecutor's title on this slide was simply used to indicate what was being shown in the photograph and nothing more. It was based on facts elicited during the trial. It was not inaccurate, inflammatory, or prejudicial.

Slide 36

Slide 36 was entitled, "RODRIGUEZ-PEREZ WEARING HAT," and contained two screen shots from the video taken by concertgoer

William Telakish. Ex. SE-A (slide 36). When this slide was displayed, the prosecutor stated:

Here are the photos of the screen capture of Luis Rodriguez-Perez. This is from the Telakish video. You see the hat that he's wearing, red snapback hat, got some black and white. He's wearing the DSB shirt, black with a big white patch, and he's carrying a towel here in his arm. This is the concert photos, a screen capture from the concert. You can see Luis Rodriguez-Perez. He's wearing the hat, red here, white there, black in the back.

RP (3/31/15) 3294. While Rodriguez-Perez claims the caption was added to emphasize the State's theory of the case, the caption was really just part of the prosecutor's summary of the evidence in the case. There was nothing inflammatory or prejudicial about the slide.

Slide 39

Slide 39 contained two columns, one on the left entitled "WILLIAM MARTINEZ," and one on the right entitled, "LUIS RODRIGUEZ-PEREZ." Ex. SE-A (slide 39). There is one photo of Martinez on the left side and two photos of Rodriguez-Perez on the right side. *Id.* When this slide was shown to the jury, the prosecutor stated,

You see here, this is the Telakish video of William Martinez with the red hat, bushy black hair, camouflage coat, white shoes. You see here, another photo, the same photo we saw earlier of Mr. Rodriguez-Perez at the

concert wearing the red hat in front with some black. He's wearing it backwards. This is Mr. Rodriguez-Perez at the police station. A Hispanic male, young, short, neatly-trimmed hair, black shirt and big white patch that says DSM.

RP (3/31/15) 3297. Rodriguez-Perez claims the titles were added to emphasize the State's theory of the case. However, the names were simply used to distinguish which defendant was depicted in each photo. The prosecutor's use of the defendant's names, which was based on the testimony in the case, was part of his summary of the evidence. There was nothing inflammatory or prejudicial about these titles.

Slides 42 & 43

Slide 42 is entitled, "RODRIGUEZ-PEREZ POINTING PISTOL," and has a photograph of Rodriguez-Perez pointing a pistol. Ex. SE-A (slide 42). During this slide, the prosecutor stated, "You see here. This is a screen capture taken from a cell phone that belonged to William Martinez. You see here Mr. Luis Rodriguez-Perez sitting holding a pistol, pointing it at the camera as it takes the picture." RP (3/31/15) 3296. The photo was shown after the State summarized Martinez's testimony that Luis owned a pistol and had the pistol with him every time Martinez saw him. RP (3/31/15) 3296.

Slide 43 is entitled, “GOOD TIMES,” and has a photograph of Martinez sitting on a couch. Ex. SE-A (slide 43). The prosecutor stated, “On the same video you see William Martinez sitting on this chair. You can see the kind of bushy black curly hair and wearing camo pants. He described this as a good times video. That’s why he took it.” RP (3/31/15) 3296. The prosecutor continued, “Again, these two men are very, very close friends. They’re sitting in a room someplace. Mr. Perez is pointing the pistol at the camera. Here is Mr. Martinez taking it all in, having a good time.” RP (3/31/15) 3296.

The use of the phrase, “good times” was not used to disparage Martinez. It was how Mr. Martinez described what was happening in the photo. When asked why the photo was taken, he stated, “...I just wanted to save it just for good times, just remember us three, just a good time.” RP (3/27/15) 2964. When asked, “the day you took the pictures, was this a good time?” Martinez replied, “Yeah, I believe it was, just for the memories.” RP (3/27/15) 2964.

The defendants argue that slide 42 added a commentary providing the State’s theory of the case. However, the label “Good Times” was not the State’s theory. It was the testimony of Martinez, as opposed to the words of the prosecutor. This was not the case where the prosecutor made up his own description of what was happening in the photo.

Martinez also claims that the slide was designed to inflame the jury's passion and to depict Martinez in a negative light. However, the caption was merely a reflection of the testimony elicited by Martinez at trial, in which he said the photo reflected "good times" of him with his friends. *See* RP (3/27/15) 2964-5. Importantly, Martinez had voluntarily turned the photo over to detectives in order to show that Luis Rodriguez-Perez was the one who committed the crime, and not him. RP (3/27/15) 2945. Martinez wanted these photos admitted at trial in order to place blame on Rodriguez-Perez. In fact, he did not object when the State sought to admit the photographs. RP (3/23/15) 2312.

Rodriguez-Perez also argues that the slides displayed derogatory images of him. However, the images were admitted at trial and the State is allowed to display those to the jury. He argues that purpose of the slides was to evoke a negative emotion. In support of his argument, he relies on the fact that slide 42 showed Rodriguez-Perez smiling while holding the pistol. However, the title of that photo simply states, "Rodriguez-Perez Pointing Pistol." Ex. SE-A (slide 42). It is was a description of what the photo depicted, based solely on the testimony of the trial. There was nothing derogatory about the title and the photo was already admitted in evidence.

Rodriguez-Perez argues that slide 43 was designed to inflame the jury's passion and prejudice and show Rodriguez-Perez in a negative light. However, slide 43 was a photograph of Martinez and accurately reflected how Martinez characterized what was happening at the time the photo was taken. There was nothing directed towards Rodriguez-Perez. By simply describing the photograph as the witness described it, it cannot be said that the slide was used to trigger an "emotional reaction" from the jury. *See Glasmann*, 175 Wn.2d at 706; 710 n.4.

Slides 48 - 60

Slide 48 is entitled "MARTINEZ RUNS TO CAR FOR PISTOL" and has screen captures from surveillance video. Ex. SE-A (slide 48); RP (3/31/15) 3299. While this slide was being displayed, the prosecutor stated:

At 11:24:58 you see William Martinez. At this point he is walking across the street. Here at 11:25:03 he breaks into a run. As you recall from watching this video, he ran up the sidewalk toward Naches where the car was parked. Why is he running? Because he is a man on a mission. He needs to find that gun because there's a fight going on in the street, and it's not going so well for the guys on their side. They need to get the gun.

RP (3/31/15) 3300.

Slide 49 has a screen shot of a video and is titled, “RODRIGUEZ-PEREZ WALKS TO CAR FOR PISTOL CAR.” Ex. SE-A (slide 49).

When this slide was shown, the prosecutor’s oral argument was as follows:

Right behind him at 11:25 and 14 seconds is Luis Rodriguez-Perez coming up the sidewalk. He’s wearing that white. You can see the white on the hat. You can see he’s carrying a white shirt there in his hand as he walks up the sidewalk. Again, another man on a mission. There’s a fight in the street. Things are not going well for their side. The reason is this: On the other side is a man who’s six foot six, 265 pounds. He’s just too big to fight. The only what they can get rid of him is to get the gun. That’s why they go back to the car, to get the gun.

RP (3/31/15) 3300.

Slide 51 is titled, “RODRIGUEZ-PEREZ HEADING TO CAR FOR PISTOL.” It contains text on the left side and a photo on the right side. Ex. SE-A (slide 51). The text on left summarizes Sergeant Dave Cortez’s testimony. The prosecutor’s argument while this slide was displayed was as follows:

Here’s a screen capture, again, Telakish video. Luis Rodriguez-Perez in the hat, the shirt and the towel walking back to get the pistol. Sergeant Dave Cortez testified that Mr. Martinez told him that Rodriguez-Perez retrieved the firearm from Era’s vehicle. There it is. That’s what Mr. William

Martinez told the police several hours after this happened. Rodriguez-Perez retrieved the firearm from Era's vehicle.

RP (3/31/15) 3301.

Slide 52 contains a screen shot from surveillance video and the title, "WALKING EAST ON PENDELTON...RETURNING WEST FROM CAR 11:16:07." Ex. SE-A (slide 52). The slide also has a video screen capture. *Id.* When slide 52 is displayed, the prosecutor states, "Now, another screen capture, 11:26:07, very shortly after these men walked to Naches. They're back. Here is Luis Rodriguez-Perez, and William Martinez is up here. They're coming at a different angle. You will see they hook up in the middle of the street." RP (3/31/15) 3301-2.

Slide 53 is entitled, "MARTINEZ RETURNS FROM CAR" and has a screen capture from the video taken by concertgoer William Telakish. Ex. SE-A (slide 53). During the display of that slide, the prosecutor states, "Here you've got screen capture, Telakish video. It's Mr. Martinez returning from the car. He's down in the middle of the street now." RP (3/31/15) 3302.

Slide 54 states, "BACK AT THE FIGHT," and has surveillance video screen shot. Ex. SE-A (slide 54). While this slide is displayed, the prosecutor's argument is as follows:

Back at the fight, 11:26:25, you can see right down here. Right there is William Martinez. Within a couple feet is Luis Rodriguez-Perez. They went to the car together. They came back together. Now, having retrieved the gun from the car they're standing right at the edge of the fight together.

RP (3/31/15) 3302.

Slide 59 states, "DEMARIUS MORGAN SHOT," and has another surveillance video screen shot. Ex. SE-A (slide 59). The State's argument at the time this slide was displayed was, "The surveillance video, 11:28:29, Da'Marius Morgan falls dead in the street, shot in the heart."

RP (3/31/15) 3305.

Slide 60 has two columns. Ex. SE-A (slide 60). The one on the left is titled, "MARTINEZ, RODRIGUEZ-PEREZ AND INIGUEZ RUN WEST." *Id.* The column on the right is titled, "RODRIGUEZ-PEREZ THROWS PISTOL IN BUSHES." *Id.* Under each title is a different surveillance screen shot, one from 11:28:32 PM and one from 11:28:35 PM. *Id.* While this slide was displayed, the prosecutor went through the chronology of events:

Martinez, Rodriguez-Perez and the third man, maybe Iniguez, run west at 11:28 and 32 seconds. In other words, three seconds after Da'Marius Morgan falls dead in the street these three guys, Martinez, Luis Rodriguez-Perez and the third man, maybe Mr. Iniguez, are running westbound on

the south sidewalk of Pendleton Way.
At 11:28 and 35 seconds, which is only six
seconds after Mr. Morgan dies, is shot,
they're up here in the middle of the block.
You can see Luis Rodriguez-Perez making a
motion as he discards the firearm, hiding it
in the bushes.

RP (3/31/15) 3305-6.

The point of all of these slides (48 to 60) was to show the
chronology of what was happening on the date of the crime. The titles
were based on reasonable inferences from the testimony and evidence
admitted at trial. There was nothing derogatory or prejudicial about the
captions. The captions were simply signals as to what the prosecutor was
going to be talking about next and were in no way designed to inflame the
passions and prejudices of the jury.

Slide 61, 62, & 63

Slide 61 is titled, "PISTOL," Slide 62 is titled, PISTOL &
BULLET, and Slide 63 is titled "FINGERPRINT." Ex. SE-A (slides 61-
3).

Slide 61 has a photo of the pistol and 2 bullet points:

- Augustin Biorato found pistol
- Det. Shaw recovered pistol

Ex. SE-A (slide 61). While the slide was being displayed, the prosecutor
explained, "The pistol was found by Augustin Biorato. Detective Shaw

recovered the pistol in the shrubbery in the exact spot where on the surveillance video you see Luis Rodriguez-Perez discarding the pistol as they run from the scene of the murder.” RP (3/315/15) 3306

Slide 62 has a photograph of the bullet and text summarizing the testimony of Detectives Shaw and Kristen Drury. Ex. SE-A (slide 62). While this slide was shown, the prosecutor explained, “Detective Shaw collected the bullet at autopsy that was removed from the body of Da’Marius Morgan by the pathologist, Dr. Reynolds. Kristen Drury, forensic laboratory supervisor tested the bullets, the firearm, and the shell casings. She testified that the pistol that was recovered, the pistol that Rodriguez-Perez threw in the shrubs, that pistol fired the bullet that killed Mr. Morgan.” RP (3/31/15) 3306.

Slide 63 contains a photo of the lift chart with two fingerprints, the latent print lifted from the gun and the known print of Rodriguez-Perez. Ex. SE-A (slide 63). The prosecutor verbally summarized the slide as follows: “She also testified that the latent fingerprint on the magazine in the pistol was identified to Luis Rodriguez-Perez. Again, the latent is on the magazine. It’s not just somewhere on the pistol itself. It’s in a very intimate place of that weapon, showing that that pistol is very closely connected to Rodriguez-Perez.” RP (3/31/15) 3306.

As to these three slides, the short and simple titles were simply identifying what was being depicted in the photographs. On slide 62, the prosecutor summarized the testimony of Detective Shaw and lab supervisor Kristen Drury. However, the text did not add anything derogatory or prejudicial. It accurately summarized the testimony admitted at trial. Nothing about the slide captions can be said to have been designed to trigger an emotional reaction from the jury.

Slides 65-68

Slide 65 is titled, “FLIGHT ON PENDLETON WAY,” and contains a screen capture of surveillance video. Ex. SE-A (slide 65). During the display of this slide, the prosecutor stated, “The flight on Pendleton Way surveillance camera 11:28 and 46, you can see them running down the street here, the three of them, Mr. Rodriguez-Perez, Mr. Martinez, and the third man. They run down the alley, down the street toward the alley to get away from the police, as Mr. Morgan lies dying on street, his friends trying to help him to no avail.” RP (3/31/15) 3307.

Slide 66 is titled, “OFFICER TORY ADAMS,” and contains two COBAN screen shots. Ex. SE-A (slide 66). During the display of this slide, the prosecutor’s oral argument is as follows: “Officer Tory Adams arrived on the scene a little too late. His COBAN time is 11:07 and 56 seconds. As you see on the screen capture, it’s hard to see. At the very

side of this picture here, you can see that white shirt flapping as Mr. William Martinez rounds the corner from the street to flee down the alley.” RP (3/31/15) 3307-8.

Slide 67 is titled, “FLIGHT IN THE ALLEY,” and contains a video screenshot and text that reads, “Alley Camera 11:28:14-11:28:57 Martinez Rodriguez-Perez and third man run down alley toward Yakima Avenue.” Ex. SE-A (slide 67). During this slide, the prosecutor verbally argued, “The flight in the alley, you see Mr. Martinez, Mr. Rodriguez and their friend are still up on Pendleton Way getting rid of the firearm.” RP (3/31/15) 3308.

Slide 68 is titled, “5 MEN RUN IN ALLEY,” and contains two video screen shots of men running down the alley at 11:28:35 PM and 11:28:43 PM. Ex. SE-A (slide 68). The prosecutor’s argument at the time of this slide was, “There were five other man who ran down the alley before them. Clearly these men are not the people with the gun who shot Mr. Morgan. The reason is at the time these people are running down the alley Mr. Martinez, Mr. Rodriguez and their friend are still up on Pendleton Way getting rid of the firearm.” RP (3/31/15) 3308.

Slides 65-68 were a continuation of the prosecutor summarizing the testimony and exhibits that were admitted at trial. The titles were not

designed to influence the jury. They were simply used as cues or road signs as to what the prosecutor was going to talk about next.

In summation, the appellants have not established that the State acted improperly with respect to PowerPoint slides displayed during closing argument. The prosecutor in this case used a modern visual aid to draw the jury's attention to the evidence presented at trial, one of the primary purposes of any closing argument. The slides contained accurate descriptions of testimony and exhibits presented at trial or statements that represented the State's arguments based on reasonable inferences from the record.

And unlike *Glasmann*, no photos or exhibits were deliberately altered in order to influence the jury's deliberations. The titles used were not highly inflammatory and prejudicial. There were no improper visual "shouts" of guilty. And unlike *Glasmann*, there was no superimposed or overlaid message that emphatically and repeatedly conveyed the prosecutor's belief to the jury that the defendant was guilty. As such, the presentation in this case did not constitute flagrant and ill-intentioned misconduct.

c. Assuming, *arguendo*, that there was any error, any resulting prejudice could have been cured.

Without having lodged any objection to the slides, in order to arise to the level of prejudicial error, the prosecutor's acts must be so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. *See Thorgerson*, 172 Wn.2d at 438. Our Supreme Court has made clear that “[r]eviewing courts should focus less on whether the prosecutor’s misconduct was flagrant or ill-intentioned and more on whether the resulting prejudice could have been cured.” *State v. Emery*, 174 Wn.2d 741, 762, 278 P.3d 653 (2012). Thus, the focus is on the misconduct and its impact. *Glasmann* 175 Wn.2d at 711. The criterion is whether such a feeling of prejudice has been engendered or located in the minds of the jury as to prevent a defendant from having a fair trial. *Emery*, 174 Wn.2d at 762.

Critical to the Supreme Court’s decision in *Glasmann* was the fact that the PowerPoint was “full of imagery that likely inflamed the jury” and the several other repetitive instances of misconduct that cumulative caused prejudice sufficient to warrant reversal.” 175 Wn.2d at 709. Nothing here rises to the level of misconduct found in *Glasmann*.

In holding that *Glasmann* had shown a “substantial likelihood that the misconduct affected the jury verdict,” the *Glasmann* court relied in

part on the fact that the evidence presented and instructions given could have supported convictions for lesser degrees of the charged crimes. 175 Wn.2d at 708. The *Glasmann* court found the misconduct at issue there “so pervasive that it could not have been cured by an instruction,” noting that “the cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect.” 175 Wn.2d at 707 (quoting *State v. Walker*, 164 Wn. App. 724, 737, 265 P.3d 191 (2011), review denied, 177 Wn.2d 1026 (2013)).

Assuming, *arguendo*, that any slides in this case were improper, the appellants bear the burden of showing a curative instruction futile. *Glasmann*, 175 Wn.2d at 704. They have not carried that burden. A timely objection and proper instruction from the court could have remedied any prejudice stemming from the misconduct here.⁴ Had the defense objected, the Court could have limited the prosecutor’s use of certain PowerPoint slides during his closing argument and provided a curative instruction. Defense counsel may have strategically elected not to

⁴ For persuasive authority, see the unpublished Division I case, *State v. Hollingworth*, 2015 Wash. App. LEXIS 1703, No. 71614-0-I (filed July 27, 2015), in which the court gave a curative instruction during closing arguments that “the document that you previously viewed on the screen was intended to be a visual aid only.”

object to the slides to avoid emphasizing them. Because the appellants chose not to object, any improper slides do not warrant a new trial.

In addition, the defendants have not shown a substantial likelihood that any of the slides affected the jury's verdict. Both defendants were caught very close to the scene of the crime, hiding in the bushes shortly after the victim was shot. The firearm used to kill the victim had Rodriguez-Perez's fingerprints on it, RP (3/25/15) 2665, and an eyewitness said that Rodriguez-Perez could have been the shooter if he had ditched his hat before the show-up, RP (3/12/15) 1343, 1416. A hat was found in the bushes where he was hiding. Another eyewitness described the shooter's clothing in a way that matched what Rodriguez-Perez was wearing. RP (3/12/15) 1260; RP (3/23/15) 2301-2303. Martinez was also identified by multiple eye-witnesses as a shooter. RP (3/9/15) 739-42, 793; RP (3/10/15) 953-60); RP (3/10/15) 886, 910-11; RP (3/11/15) 1013; RP (3/12/15) 1349; RP (3/19/15) 2163. This was a strong case, with many unbiased witnesses who were all at the scene of the crime, and a lot of videos admitted from police cars, surveillance cameras, and even a concertgoer. This overwhelming evidence is what led the jury to return guilty verdicts against the defendants.⁵

⁵ Rodriguez-Perez claims that the length of the jury deliberations confirms that there wasn't overwhelming evidence of his guilt. For purposes of appeal, nothing may be inferred from the length of the jury deliberations. It is possible that the jury decided

In addition, the trial court instructed the jury to decide the facts based on the evidence presented to it and that the lawyer's remarks, statements, and arguments were not evidence. Martinez CP 324. Jurors are presumed to follow the court's instructions. *State v. Kalebaugh*, 183 Wn.2d 578, 586, 355 P.3d 253 (2015). On top of this, the prosecutor reiterated numerous times that the jurors are the sole judges of credibility, RP (3/31/15) 3297, 3299, 3301, 3303, and displayed that jury instruction five times during his PowerPoint presentation, *see* Ex. SE-A (slides 44, 47, 50, 55, 69). Given the evidence presented at trial and the trial court's instruction, it cannot be said that the PowerPoint slides so infected the entire trial that the convictions violate due process. As such, the defendants have not demonstrate actual prejudice.

B. WPIC 4.01 allowed the parties to argue their theories of the case, did not mislead the jury, and properly informed the jury of the applicable law.

Courts review a challenge to the language of a jury instruction de novo, in the context of the instructions as a whole. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007); *In re Pers. Restraint of Hegney*, 138 Wn. App. 511, 521, 158 P.3d 1193 (2007). Jury instructions are upheld on appeal if they allow the parties to argue their theories of the

Rodriguez-Perez was guilty of first degree murder within the first few hours of deliberations.

case, do not mislead the jury, and properly inform the jury of the applicable law. *Bennett*, 161 Wn.2d at 307.

Here, the reasonable doubt jury instruction was taken verbatim from WPIC 4.01. *See* 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01, at 85 (3d ed. 2008). WPIC 4.01 states in pertinent part:

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. *[If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.]*

The defendants argue that the last sentence of this instruction infringed on their rights to due process because it focused the jury on a search for the truth.

Jury instruction language of an abiding belief or an abiding conviction in “the truth of the charge” has withstood challenge in Washington for more than a half century. In *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988), Division Three upheld an almost identical concluding statement in WPIC 4.01, as revised in 1982. The court emphasized that, when reviewing reasonable doubt instructions, courts refuse to isolate a particular phrase and instead construe the

instruction as a whole. 51 Wn. App. at 25. The court concluded that when construed as a whole, the instruction adequately instructs the jury on the State's burden of proving each element of the offense beyond a reasonable doubt. *Id.*

In *State v. Pirtle*, 127 Wn.2d 628, 904 P.2d 245 (1996), our Supreme Court addressed a challenge to a trial court's modification of the concluding sentence of WPIC 4.01 to sharpen the focus on a juror's doubt. The modification read: "If, after such consideration[,] you *do not* have an abiding belief in the *truth* of the charge, [then] you *are not* satisfied beyond a reasonable doubt." 127 Wn.2d at 656 (emphasis added) (first alteration in original). The high court upheld the revised instruction:

Without the last sentence, the jury instruction here follows WPIC 4.01, which previously has passed constitutional muster. The addition of the last sentence does not diminish the definition of reasonable doubt given in the first two sentences, but neither does it add anything of substance to WPIC 4.01. WPIC 4.01 adequately defines reasonable doubt. Addition of the last sentence was unnecessary but was not an error.

Pirtle, 127 Wn.2d at 658.

The defendants rely on of *State v. Emery*, 174 Wn.2d 741, 278 P.3d 653 (2012). In *State v. Emery*, our Supreme Court held that the prosecutor committed misconduct when, in argument, he asked the jury to

solve the case. The jury’s role, according to the State Supreme Court is to determine if the State proved guilt beyond a reasonable doubt, not to determine the truth of what happened.

The last sentence of WPIC 4.01 does not instruct the jury to “solve the case” or “find the truth.” *State v. Pirtle* remains controlling authority that the pattern instruction adequately defines reasonable doubt and that inclusion of the optional sentence “does not diminish the definition.” *Pirtle*, 127 Wn.2d at 658.

In *State v. Fedorov*, 181 Wn. App. 187, 324 P.3d 784, *review denied*, 181 Wn.2d 1009, 335 P.3d 941 (2014), Division One rejected an argument similar to the one made here. In that case, the Court of Appeals held that when “read in context, the ‘belief in the truth’ phrase accurately informs the jury its ‘job is to determine whether the State has proved the charged offenses beyond a reasonable doubt.’” 181 Wn. App. at 200 (quoting *State v. Emery*, 174 Wn.2d at 760).

Courts have also upheld WPIC 4.01’s “reasonable doubt” language. In *State v. Bennett*, the Supreme Court wrote:

Even if many variations of the definition of reasonable doubt meet minimal due process requirements, the presumption of innocence is simply too fundamental, too central to the core of the foundation of our justice system not to require adherence to a clear, simple, accepted, and uniform instruction.

We therefore exercise our inherent supervisory power to instruct Washington trial courts not to use the *Castle* instruction. We have approved WPIC 4.01 and conclude that sound judicial practice requires that this instruction be given until a better instruction is approved. Trial courts are instructed to use the WPIC 4.01 instruction to inform the jury of the government's burden to prove every element of the charged crime beyond a reasonable doubt.

161 Wn.2d at 317-18.

Washington courts have approved the relevant language of WPIC 4.01 as constitutionally sound for decades. As noted in *State v. Thompson*, 13 Wn. App. 1, 4, 533 P.2d 395 (1975), the phrase “a doubt for which a reason exists” does not direct the jury to assign a reason for any doubt, but merely mentions that doubt must be based on reason and not something vague or imaginary. In *State v. Emery*, 174 Wn.2d at 759-60 (2012), the court approved the State's argument that identified reasonable doubt as a doubt for which a reason exists.

Most recently, the Washington Supreme Court in *State v. Kalebaugh*, 183 Wn.2d 578, 355 P.3d 253 (2015) reaffirmed that WPIC 4.01 is the correct legal instruction on reasonable doubt. In *Kalebaugh*, a trial judge misstated the meaning of “reasonable doubt” in his preliminary remarks to the jury venire prior to jury selection. However, the error was

harmless because the jury was also given correct verbal and written instructions based on WPIC 4.01 throughout the case. *Id.* at 582, 586.

In sum, the court should find that WPIC 4.01 is constitutional and does not equate the jury's job to a search for the truth. WPIC 4.01 allows the parties to argue their theories of the case, does not mislead the jury, and properly informs the jury of the applicable law.

C. THE COURT CORRECTLY FOUND THAT GANG-RELATED EVIDENCE WAS NOT RELEVANT AND THAT ANY PREJUDICIAL EFFECT OUTWEIGHED ANY PROBATIVE VALUE.

Martinez argues that the court violated his right to present a defense by excluding gang-related evidence. Specifically, he claims that Martinez had a right to inform the jury that the shooting was part of a gang-related rumble.

During pre-trial hearings, Rodriguez-Perez made a motion in limine regarding gang-related evidence. CP 27, RP (3/2/15) 29. The State had no objection. RP (2/24/15) 544. Rodriguez-Perez argued that there was no evidence that the shooting was gang-related and that any testimony that any rap performer or group was gang-affiliated should be excluded because it is not relevant. CP 27. On February 24, 2015, Martinez reserved on the issue, stating that he may join in the motion made by

Rodriguez-Perez, but wanted to see how the evidence unfolds. RP
(2/24/15) 553, 565.

On March 16, 2015, the gang issue was heard. Martinez's attorney
made an offer of proof regarding the evidence that he wanted to admit:

...Gonzalez stated that it began inside during the concert when several subjects began to exchange words for an unknown reason but thought it had something to do with gangs or rap. Gonzalez explained that there were several rap groups playing tonight, that one of the rap groups named DSB, Down Since Birth, is affiliated the FB's, Fun Boys, a Norteño gang in Yakima. Gonzalez stated two large groups that consisted of West Side Hustlers and FB's then went outside to rumble and began to square off. He talks about it from there. Then he goes on discussing it further and says in the third paragraph that a subject that was with the FB's brandished a pistol and shot about three times. Then he describes what that person looked like, a Hispanic male about 5' 7", medium build, wearing a zip-up jacket or hoody with a T-shirt that had white or light brown on it and a red and black snapback cap. He indicated he thought he could recognize that person if he saw him again.

RP (3/16/15) 1559. Martinez's attorney described the significance of the
testimony as follows:

So I think it's potentially a significant issue of identification that Gonzalez is telling him that the person that he saw brandish the pistol was affiliated with the FB's and that

Sergeant Gonzalez⁶ says he knew Luis Rodriguez-Perez to be a Fun Boys gang member and had dealt with him on two occasions when he was in the company of other FB gang members.

RP (3/16/15) 1560. Essentially, Martinez wanted to elicit information that Rodriguez-Perez was a member of the Fun Boys gang because Gonzalez said the person brandishing the pistol was affiliated with the Fun Boys gang. Rodriguez-Perez objected, noting that the court heard Martinez's testimony and that there was no information that this was a gang-related shooting. RP (3/16/15) 1566. The trial judge reserved ruling on the issue and stated, "there is no ruling at this point on gang evidence." RP (3/16/15) 1573. Martinez indicated he was comfortable with the court reserving on the issue. RP (3/16/15) 1575. The court also told Martinez's attorney that he could recall Sgt. Cortez. RP (3/16/15) 1580.

Later during the trial, after the State had rested, the court asked for an offer of proof regarding gang-related evidence. RP (3/27/15) 2855. Martinez's attorney reiterated that according to Sgt. Cortez's report, Gonzalez stated "it began inside during the concert when several subjects began to exchange words for an unknown reason but thought it had something to do with gangs or rap." RP (3/27/15) 2857. Gonzalez stated

⁶ It is clear from the context that Martinez's attorney meant to say Sergeant Cortez, whose testimony they were discussing.

that two large groups went outside to rumble and square off. RP (3/27/15) 2857. A subject with West Side Hustlers (WSH) threw a punch at a Fun Boys (FB) rapper. RP (3/27/15) 2858. Someone with the Fun Boys then started shooting. RP (3/27/15) 2858. Gonzalez did not know if he was shooting anyone in particular or just into the crowd. RP (3/27/15) 2858. Martinez's attorney indicated that Rodriguez has gang-related tattoo and was a member of the Fun Boys, while Martinez was not part of a gang. RP (3/27/15) 2858-9.

The court also had the benefit of Gonzalez's testimony during the trial. Gonzalez testified that he was working security at the Seasons Performance Hall. RP (3/12/15) 1231. He stated that he saw two large groups fighting in the street. RP (3/12/15) 1263. Eight to ten individuals wearing red and black, and the rest were dressed normal. RP (3/12/15) 1239. When a large group of people were fighting, he closed the doors and told a friend to call 911. RP (3/12/15) 1239. He looked out the window, saw someone get punched, and then saw someone firing shots. RP (3/12/15) 1239-5. He did not identify Martinez or Rodriguez-Perez as the shooter. RP (3/12/15) 1271.

The trial court ruled that there must be a connection between the crime and gang affiliation before the evidence becomes relevant. RP (3/27/15) 2862. Based on the offer of proof, the court found that Martinez

did not show the required nexus. *Id.* The court was not able to conclude that the acts of the defendants were made to advance gang values or the purposes of the gang. *Id.* The court found that there was not enough to establish that the shooting was to advance a particular gang purpose or value and that the prejudicial effect outweighed any probative value. *Id.*

Gang evidence falls within the scope of ER 404(b). *State v. Yarbrough*, 151 Wn. App. 66, 81-82, 210 P.3d 1029 (2009). ER 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

A trial court's ER 404(b) ruling is reviewed for an abuse of discretion. *State v. Guloy*, 104 Wn.2d 412, 429-30, 705 P.2d 1182 (1985); *State v. Campbell*, 78 Wn. App. 813, 821, 901 P.2d 1050 (1995).

Based on the offer of proof made by Martinez on two occasions, there was little to no relevance of the gang evidence to a material issue in this case. Gonzalez said that the shooter was a member of the Fun Boys but he did not identify either defendant as the shooter. Martinez wanted to elicit testimony that Rodriguez-Perez was a gang member to suggest that

he was the shooter. The offer of proof provided by Martinez was simply insufficient to admit evidence of gang affiliations. According to the offer of proof, Mr. Gonzalez stated that words were exchanged for “unknown reasons” and that he did not know if the shooter was shooting anyone in particular or just shooting into the crowd. As such, there was no nexus between the crime and gang affiliation.

Because the proposed evidence was not relevant, it would not be admissible even if the defendants had been severed for trial. And because the evidence was not relevant, the trial court did not need to consider its prejudicial effect.

Martinez claims that the court erred by prioritizing judicial economy over the right to present a defense. Brief at 20. However, the trial court’s decision was not based on concerns of judicial economy. Martinez cites to RP (3/27/15) 2859-2862 of the record. If one looks at the court’s ruling, the judge never mentions judicial economy or prioritizing it. RP (3/27/15) 2859-2862. The court’s entire ruling was based on the lack of any nexus that would have made the evidence relevant in the first place.

In the court’s ruling, the court indicated that the decision boiled down to relevance. RP (3/27/15) 2862. The court set forth the first step:

What *State v. Scott* tells us is that, first of all, there must be a connection between the crime and the affiliation before the evidence becomes relevant.

RP (3/27/15) 2860. The court then went thru the analysis:

In this particular circumstance, this court from the offer of proof, Mr. Krom, simply can't conclude that there's any evidence that the acts of the defendants in this case were in any fashion made to advance gang values or the purposes of the gang itself. The court is not convinced that there is a nexus. The evidence so far indicates that the shooting arose out of the conflict between two groups, which started out as yelling and rose to the level of a fistfight. There is simply not enough evidence in this case to establish that the shooting was to advance a particular gang purpose or value.

RP (3/27/15) 2861.

The court did not spend as much time on the prejudice prong because of the initial determination that the evidence was not relevant. The court correctly pointed out that, "there has got to be a nexus between the crime and gang membership. If there is that nexus, in other words, there is that connection, then and only then does the court measure the evidence under 404(b)." RP (3/27/15) 2860. Here, it was clear from the ruling that the court found no relevance for the evidence, and that the relevance prong was the basis for the court's decision. *See* RP (3/27/15) 2859-2862.

It is also important to point out that during pre-trial hearings, Martinez took no position on the codefendant's motion in limine regarding gang evidence. He wanted to see how the evidence unfolded. RP (2/24/15) 553, 565. His first offer of proof regarding the evidence that he wanted to admit was made in the middle of trial, RP (3/16/15) 1559, long after the motion to sever had been denied, RP (9/10/14) 87-95.

For the first time on appeal, Martinez also claims that the "the gang evidence would have informed the jury that Mr. Cerda might be biased in favor of the Fun Boys gang, and therefore at least potentially had a reasons to pin the shooting on Mr. Martinez, who was not a member of the gang." Appellant's brief at 20. Specifically, Martinez claims that Mr. Cerda's son was affiliated with the Fun Boys. However, this claim is nowhere to be found in the record. At trial, Mr. Cerda testified that his son was one of the performers that night at the Seasons Performance Hall. RP (3/11/15) 1003. There were multiple acts performing that night, with bands coming from all over town. RP (3/9/15) 703-4; RP (3/13/15) 1323-4. Mr. Cerda never said that his son was a member of the group DSB or affiliated with the Fun Boys gang. The claim that Mr. Cerda's son was affiliated with a gang is wholly unsupported by the record.

Furthermore, during the trial, Martinez never sought to impeach Mr. Cerda with any gang information. Mr. Cerda testified that he was not

connected to anybody and was simply attending a performance at the Seasons Performance Hall where his son was performing. RP (3/11/15) 1002-3, 1081-2. He described a confrontation between two groups but stated that his identification of the shooter was based primarily on clothing and hairstyle. RP (3/11/15) 1069. Martinez's attorney cross-examined Mr. Cerda at length. RP (3/11/15) 1034-59, 1068-9, 1091-6, 1101-4, 1107-8. He even raised issues outside of the presence of the jury that he wanted to impeach Mr. Cerda with. RP (3/11/15) 1060-6, 1068-9. But he never mentioned anything about impeaching Mr. Cerda with gang-related information. After getting a ruling on the issues that he did raise, he told the court that there were no other issues to take up. RP (3/11/15) 1067. As such, Martinez is precluded from raising this issue for the first time on appeal.

In conclusion, the trial court correctly held that evidence of gang affiliations was not relevant and that any prejudicial effect outweighed any probative value. Furthermore, Martinez never sought to impeach Mr. Cerda with questions as to his biases for or against any gangs.

D. THE TRIAL COURT’S DECISION NOT TO ADMIT EXPERT TESTIMONY REGARDING CROSS-RACIAL IDENTIFICATIONS WAS A TENABLE EXERCISE OF DISCRETION BASED ON THE FACTS OF THIS CASE.

Martinez argues that the court erred by prohibiting him from presenting expert testimony regarding the unreliability of cross-racial eyewitness identifications. The court ruled as follows:

There is no showing in this particular circumstance of any bias of any particular witness in this case that may be influenced by cross-racial identification. We have one individual who testified that he appeared to be a light-skinned African American. We have another individual, Daniel Cerda -- excuse me -- not Daniel Cerda but Aaron Adams, who was the only one who was Caucasian that identified the shooter as being Latino or Hispanic. There is no showing in this particular case that that had any influence upon their identification. Even in the letter that’s submitted by Dr. Loftus, he doesn’t show any facts or desire to demonstrate any specific reasons why cross-racial identification may have an impact upon identification.

RP (3/2/15) 67.

ER 402 provides that “all relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, [the Rules of Evidence], or by other rules or regulations applicable in the courts of this state.” ER 401 defines “relevant evidence” as

“evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 403 then provides that relevant evidence may nonetheless “be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

ER 702 provides that “if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” In the case of scientific testimony, the expert (1) must qualify as an expert, (2) the expert’s opinion must be based upon a theory generally accepted in the relevant scientific community, and (3) the testimony must be helpful to the trier of fact. *State v. Allery*, 101 Wn.2d 591, 596, 682 P.2d 312 (1984); *State v. Moon*, 45 Wn. App. 692, 696, 726 P.2d 1263 (1986) (quoting *Allery*). And, of course, the testimony must be relevant. *State v. Atsbeha*, 142 Wn.2d 904, 917-18, 16 P.3d 626 (2001). Admissibility of expert testimony under ER 702 is within the trial court’s discretion. *State v. Kalakosky*, 121 Wn.2d 525, 541, 852 P.2d 1064 (1993); *Moon*, 45 Wn. App. at 696.

As such, the question of admissibility of expert testimony on the reliability of eyewitness identification is within the discretion of the trial court, reviewed under an abuse of discretion standard. *State v. Cheatam*, 150 Wn.2d 626, 646, 81 P.3d 830 (2003). As held in *Cheatam*:

We conclude...that where eyewitness identification of the defendant is a key element of the State's case, the trial court must carefully consider whether expert testimony on the reliability of eyewitness identification would assist the jury in assessing the reliability of eyewitness testimony. In making this determination the court should consider the proposed testimony and the specific subjects involved in the identification to which the testimony relates, such as whether the victim and the defendant are of the same race, whether the defendant displayed a weapon, the effect of stress, etc. This approach corresponds with the rules for admissibility of relevant evidence in general and admissibility of expert testimony under ER 702 in particular.

Id. at 649.

In this case, Martinez sought to admit the expert testimony of Dr. Loftus on the issue of eyewitness identifications. At the pretrial hearing on February 24, 2015, Martinez set forth his arguments why his expert was needed in this case:

...the problem with this witness and most of the witnesses that have falsely identified my client is that they focus on the clothing and the red hat in particular.

...
Virtually everyone that made a mistaken
identification made it strictly based on
clothing or hair style.

RP (2/24/15) 484, 493-4. The court reserved at that time because Dr.
Loftus hadn't written a report yet. RP (2/24/15) 528-30, 542.

Dr. Loftus later wrote a report, Ex. DE-BBB, which summarized
his proposed testimony on the issue of cross-racial identifications:

6. Effects of cross-racial identification on
perception and memory. A good deal of
evidence has demonstrated that people are
less able to recognize members of other
races than members of their own race (e.g.
Malpass & Kravitz, 1969; Meissner &
Brigham, 2001). This is relevant because
Mr. Martinez and Mr. Rodriguez Perez are
Hispanic whereas Mr. Adams, the witness
who most strongly identified Mr. Martinez
as the shooter, is Caucasian.

Ex. DE-BBB, p. 7. In the same report, there is a description of how Mr.
Adams identified Mr. Martinez:

Aaron Adams who is Caucasian and who
was attending the concert to watch one of
his friends, picked Mr. Martinez as the
shooter on the basis of Mr. Martinez's being
"dressed all in red," i.e. on his clothing.

Ex. DE-BBB, p. 2. Similarly, in the defense's "Declaration in Response
to Motion to Exclude Testimony of Geoffrey Loftus, PhD," a summary is
presented of how Mr. Adams identified Martinez:

.....he said that shooter 1A had a red shirt and a red hat, and he had a sweater...He says he's 100% sure of the guy he picked (Martinez) because he had the "exact same color of hat."

Martinez CP 180-1.

During the court hearing, Martinez's lawyer stated:

Aaron Adams is Caucasian. He indicated that he picked Mr. Martinez primarily because he was dressed all in red. So it was based on clothing that he was making his identification.

RP (3/2/15) 51. The trial court concluded that, "There is no showing in this particular circumstance of any bias of any particular witness in this case that may be influenced by cross-racial identification." RP (3/2/15) 67.

Applying the *Cheatam* case, the court considered the proposed testimony and found it would not assist the jury. Here, according to both the defense attorney and the defense expert, Mr. Adams identified the defendant primarily based on the color of his clothing. Ex. DE-BBB, p. 2; Martinez CP 181. The paragraph describing Dr. Loftus's proposed testimony was very brief and had no explanation of how the identification made by Mr. Adams may have been inaccurate or weakened because of his race and the appellant's race. As such, the trial court's decision not to

admit Dr. Loftus's testimony under the facts of this case was a tenable exercise of discretion.

E. THE STATE IS NOT SEEKING APPELLATE COSTS IN THESE CASES.

The State is not seeking appellate costs in these cases.

F. THE COSTS OF INCARCERATION SHOULD BE WAIVED FOR RODRIGUEZ-PEREZ.

On the judgment and sentence for Rodriguez-Perez, incarceration fees were not waived. The State agrees his case should be remanded for the sole purpose of striking this legal financial obligation.

IV. CONCLUSION

In sum, for the foregoing reasons, the State asks that the court affirm the convictions, and remand for the sole purpose of striking incarceration fees for Rodriguez-Perez.

Respectfully submitted this 20th day of March, 2017,

s/Tamara A. Hanlon
TAMARA A. HANLON, WSBA 28345
Senior Deputy Prosecuting Attorney

DECLARATION OF SERVICE

I, Tamara A. Hanlon, state that on today's date, March 20, 2017, by agreement of the parties, I emailed a copy of the Amended Brief of Respondent to Skylar Texas Brett and Lisa Elizabeth Tabbut at skylarbrettlawoffice@gmail.com and ltabbutlaw@gmail.com.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 20th day of March, 2017 at Yakima, Washington.

s/ Tamara A. Hanlon

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 Cost Bill / Objection to Cost Bill
 Affidavit
 Letter
 Electronic Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): ____
 Personal Restraint Petition (PRP)
 Response to Personal Restraint Petition / Reply to Response to Personal Restraint Petition
 Petition for Review (PRV)
 Other: ____

Comments:

CONSOLIDATED WITH STATE V. WILLIAM MARTINEZ, NO. 33624-7-III

Email service by agreement has been made to skylarbrettlawoffice@gmail.com and ltabbutlaw@gmail.com.

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