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Division III
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COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH MARIO ZAMORA,

Appellant

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

1. Counsel was ineffective for failing to challenge the seizure of Mr. Zamora.

2. Counsel was ineffective for not attempting to introduce evidence of charges against the police officer for an unrelated incident.

3. The trial court erred in excluding evidence of a prior internal investigation.

4. Counsel was ineffective for failing to provide a jury instruction defining excessive force.

5. There was insufficient evidence to sustain the convictions for third degree assault.

6. The prosecutor committed misconduct in voir dire by discussing the rule of law as it relates to immigration.

7. The State failed to prove, by a preponderance of evidence, Mr. Zamora's offender score.

II. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. If a person is unlawfully seized, does that give him a right to assault the officer?

2. If a person is unlawfully seized and then makes a self-defense claim that is sufficient to go to the jury, does that give him the right to assault the officer?

3. Is counsel ineffective for correctly acknowledging the rules of evidence render other alleged bad acts of an officer inadmissible?

4. Does the trial court error by excluding evidence of an internal affairs investigation that would invade the province of the jury and confuse the issues in the case?

5. Was counsel ineffective for failing to request a jury instruction to define a common term that would have hurt his theory of the case?

6. Was there sufficient evidence to sustain the conviction?

7. Did the prosecutor commit misconduct by seeking information from jurors on feelings about the rule of law when relevant to the case at hand?

8. Does the State meet its burden to establish offender score when the defendant affirmatively acknowledges his score?

III. STATEMENT OF THE CASE

On a dark, cold, snowy winter night Brandi Moncada saw someone lurking around the cars on her dead-end street, carrying something and looking into vehicles. RP 296-300, 309. She told him he was on private property and he needed to leave or she would call the police. RP 299-300. The person just stood there. *Id.* Ms. Moncada called the police. RP 301.

Officer Kevin Hake was the first officer to respond. RP 316. The roads were icy, but he was nearby. RP 317. Mr. Zamora came towards Officer Hake. RP 321. He stared right through Officer Hake. RP 451. Officer Hake asked Mr. Zamora who he was and where he was going. There was no response. RP 322. Mr. Zamora was fiddling with something in his pocket. RP 323. Mr. Zamora turned away. Officer Hake told him he was not free to leave. *Id.* Officer Hake felt uncomfortable and called for assistance, since it would take time for other officers to get to his location given the weather conditions. RP 324. Mr. Zamora was carrying a boot, which he let fall as he turned away and Officer Hake was trying to talk to him. RP 326. It was clear that Mr. Zamora was going for something in his left pocket. RP 327. Officer Hake tried to grab Mr. Zamora as he twisted away. *Id.* Officer Hake was unable to grab Mr. Zamora and then pushed him away forcefully near a truck. RP 344. Officer Hake believed Mr. Zamora was going for a weapon and chose to reengage Mr. Zamora, rather than draw his firearm. RP 344. As they struggled partway underneath the pickup Mr. Zamora wrapped Officer Hake's microphone cord around the Officer's neck. RP 346.

As the struggle continued Officer Hake managed to get on top of Mr. Zamora. RP 358. Mr. Zamora showed unusual strength for someone his size. *Id.* Early on Officer Hake pepper sprayed Mr. Zamora to gain

compliance, but Mr. Zamora only fought harder. RP 363. During the struggle, Mr. Zamora alternatively attempted to take Officer Hake's gun and reach back into his own pocket. RP 359. Mr. Zamora defeated two out of the three safeties holding Officer Hake's firearm in its holster. RP 359-60. At one point Officer Hake tore Mr. Zamora's hand off his gun and Officer Hake drew it. RP 369. Officer Hake stuck the gun in Mr. Zamora's ear, then eye, telling Mr. Zamora to stop or he would kill him. RP 370. Mr. Zamora bit down on the gun. *Id.* Officer Hake was about to shoot when he heard a siren of other police cars responding to his distress call. RP 373. He decided he could maintain the fight until help arrived. *Id.*

Officer Welsh arrived and ran up to help Officer Hake. RP 374. Officer Welsh also tried pepper spray, which was ineffective on Mr. Zamora, but effective on Officer Hake. *Id.*, RP 631. Eventually six officers arrived but it still took three or four minutes to get handcuffs on Mr. Zamora. RP 376. During the struggle Mr. Zamora kicked back and kicked Officer Welsh in the chest. RP 637. Mr. Zamora showed unnatural strength and stamina. RP 638. Officers tried to tase Mr. Zamora in drive stun mode to gain compliance, but that failed. RP 693. As soon as the officers had restrained Mr. Zamora they stood up and summoned medical aid. RP 641. The officers eventually looked in Mr. Zamora's jacket

pocket where he kept trying to reach and found a blue handled folding knife with the blade locked open. RP 388, 711.

After Mr. Zamora was restrained he was moaning on the ground. RP 681. Later it was noticed he had stopped breathing when the EMT's assessed him. RP 798. Officers removed his restraints so he could be treated. RP 675-76, 798. He was resuscitated and taken to the hospital. RP 847.

The Doctor who treated Mr. Zamora described the symptoms of methamphetamine intoxication, which matched the symptoms described by Officer Hake. RP 568-71. After hearing what happened, Dr. Frank believed that Mr. Zamora was under the effect of a stimulant and was in a delirium. RP 580-81, 585. Mr. Zamora had methamphetamine, amphetamine and THC in his system. RP 585. Dr. Frank concluded that Mr. Zamora's cardiac arrest was secondary to severe metabolic derangement, due to the effects of methamphetamine overdose. RP 600-01.

The Moses Lake Police Department conducted a use of force review and officers involved made *Garrity*¹ statements. RP 418. The investigation found no wrong doing on the part of the officers. RP 423.

¹ *Garrity v. State of N.J.*, 385 U.S. 493, 87 S. Ct. 616, 17 L. Ed. 2d 562 (1967).

The State moved in limine to prevent the defense from mentioning an internal affairs investigation, although the defense could use the statements for any purpose permitted under the rules of evidence. RP 231.

The court granted that motion. RP 430.

IV. ARGUMENT

A. Counsel was not ineffective.

1. *Standard of review for ineffective assistance of counsel.*

Mr. Zamora frames some of his arguments in the guise of ineffective assistance of counsel. Ineffective assistance of counsel claims are analyzed based on well-established principles. A court reviews ineffective assistance of counsel claims de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). A defendant claiming ineffective assistance of counsel has the burden to establish that (1) counsel's performance was deficient and (2) the performance prejudiced the defendant's case. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The burden is on the defendant to show from the record that defense counsel provided ineffective assistance of counsel. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). An appellant who asserts ineffective assistance of counsel must satisfy a two-part test: (1) that his counsel's assistance was objectively

unreasonable and (2) that he suffered prejudice as a result of counsel's deficient assistance. *Strickland v. Washington*, 466 U.S. 668, 690–91, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Failure to establish either prong is fatal to an ineffective assistance of counsel claim. *Id.* at 700.

Counsel's performance is deficient if it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). Our scrutiny of counsel's performance is highly deferential; we strongly presume reasonableness. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). Appellate courts presume counsel was effective. *State v. Gomez Cervantes*, 169 Wn. App. 428, 434, 282 P.3d 98 (2012). "Because the presumption runs in favor of effective representation, the defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel." *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251, 1257 (1995). "To show prejudice, the appellant need not prove that the outcome would have been different but must show only a "reasonable probability"—by less than a more likely than not standard—that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *State v. Jones*, 183 Wn.2d 327, 339, 352 P.3d 776 (2015) (citing *Strickland*, 466 U.S. at 694; *State v. Hendrickson*, 129 Wn.2d 61, 77–78, 917 P.2d 563 (1996)).

“A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.” *Grier*, 171 Wn.2d at 34. A defense attorney is not deficient for failure to anticipate changes in the law. *State v. Brown*, 159 Wn. App. 366, 372, 245 P.3d 776 (2011). Nor is a defense attorney ineffective for failing to pursue avenues unlikely to succeed. *Id.* at 371. Mr. Zamora fails to show both the deficient performance and the prejudice prongs of the test.

2. *Counsel was not ineffective for not moving to suppress because the lawfulness of the stop was irrelevant.*

Mr. Zamora was convicted of two counts of assault of a police officer. CP 313. It has long since been established that an unlawful stop does not provide a justification for assaulting an officer. It is easy to see why this is so. If a citizen, who is entitled to act upon appearances in defending himself, could assault a police officer to resist an arrest he believed was unlawful, and officers, knowing they could be assaulted with impunity if a citizen believed they were being unlawfully restrained, were to confront one another on the street, anarchy and violence would result. The justification of murder would depend on the nuances of suppression law, with the surviving party there to give his side of the story.

Suppression law has been the subject of literally millions of pages of court decisions and commentary over the decades. It is simply not reasonable to expect lay citizens and officers to be making a decision of what is a good stop on the street with life and death consequences. That is why the exclusionary rule and statutes like 42 U.S.C. 1983 exist, to provide redress. Suppression of evidence that comes into existence after an illegal stop occurs was never the purpose of the exclusionary rule, and thus does not provide an excuse for unlawful behavior based on a bad stop. Simply put, two wrongs don't make a right.

The Washington Supreme Court has recognized this. Mr. Zamora misstates the holding in several cases to argue otherwise. The Supreme Court discussed this issue in depth in *State v. Valentine*, 132 Wn.2d 1, 10, 935 P.2d 1294, 1298 (1997), and ruled that a defendant may not resist an arrest which only suffers loss of liberty, even an invalid one, by assaulting the police officer. Mr. Zamora cites *State v. Cormier*, 100 Wn. App. 457, 462-63, 997 P.2d 950 (2000), for the proposition that if a self-defense claim is available and there was an illegitimate stop, the evidence of the assault should be suppressed. *Cormier* does not make such a holding. "A person may not assault a police officer, even if the officer is illegally detaining, searching, or arresting that person." *Cormier*, at 463. *Cormier* does acknowledge that the right of self-defense remains if the officer uses

excessive force to effect the stop, legitimate or not, but the self-defense analysis is independent of the suppression analysis. Mr. Zamora was permitted to argue self-defense to the jury in this case; they simply rejected it.

3. *The attempt to frisk Mr. Zamora was a valid Terry frisk.*

“[T]here must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime.” *Terry v. Ohio*, 392 U.S. 1, 27, 88 S. Ct. 1868, 1883, 20 L. Ed. 2d 889 (1968). “[C]ourts are reluctant to substitute their judgment for that of police officers in the field. A founded suspicion is all that is necessary, some basis from which the court can determine that the [frisk] was not arbitrary or harassing.” *State v. Collins*, 121 Wn.2d 168, 173, 847 P.2d 919 (1993).

Here Officer Hake observed the defendant ‘stare though him,’ exhibit symptoms that gave an appearance of being under the influence of an intoxicant; refuse to respond to him; and reach into his pocket as if he was reaching for a weapon. The encounter was at night on icy, slippery ground. Officer Hake was the only officer present. Given Mr. Zamora’s

state simply turning and walking away was not a safe option for Officer Hake. A frisk for weapons was appropriate under the totality of the circumstances.

Mr. Zamora's attorney was not ineffective in moving to suppress the assault because the case law is clear, it would not have been suppressed. Defense counsel did not violate professional norms because he followed applicable case law. Nor has Mr. Zamora shown that the outcome would have been different had a motion to suppress been brought.

4. Counsel was not ineffective for not attempting to introduce evidence of Officer Hake's prior assault charge, as such evidence was inadmissible and the record is insufficient to evaluate how similar the assault charge was to this case.

Trial counsel correctly acknowledged that Officer Hake's prior assault four and disorderly conduct charges were irrelevant unless Mr. Zamora knew of them prior to the fight. Mr. Zamora now claims that they should have been offered to show that Officer Hake acted in conformity with what he assumes was the facts of the charge. When the record is insufficient to show ineffective assistance of counsel the remedy is to bring the claim in a personal restraint petition. *State v. McFarland*, 127 Wn.2d 322, 338, 899 P.2d 1251, 1258 (1995), as amended (Sept. 13, 1995).

Here the record details that Officer Hake faced charges of assault in the fourth degree and disorderly conduct by way of fighting words. RP 12. It does not reveal the detailed facts behind the charges. A person is guilty of assault in the fourth degree when he assaults another. RCW 9A.36.041. A person can assault another by actually causing a harmful or offensive contact, attempting to cause a harmful or offensive contact, or taking actions that put the victim in fear of immediately being subject to a harmful or offensive contact. Based on this record there is simply no way to know how close Officer Hake's behavior in that case was to his behavior in this case. It may be he was guilty of boorish behavior at a bar, slapping someone on the backside that lead to aggressive words. On this record we can only speculate. Mr. Zamora presumes it was some sort of major physical fight similar to the altercation with Mr. Zamora. The record does not support such an assumption.

Nor does the case Mr. Zamora cites support his proposition. *State v. York*, 28 Wn. App. 33, 34, 621 P.2d 784, 785 (1980), was a case about dishonest acts in an officer's past. The Court cited ER 608 and stated "The trial court, in its exercise of discretion, appears to have found the proffered testimony not to have been probative of truthfulness or untruthfulness. We must therefore question whether the trial court abused its discretion." *Id.* at 786. In *York*, the appellate court did find the

evidence was probative of truthfulness, therefore it should have been admitted.

Mr. Zamora does not, and cannot, assert that conduct leading to charges of assault four and disorderly conduct would be probative of truthfulness. There is no evidence in the record that the event involved dishonesty on Officer Hake's part. Thus ER 608 and *York* are inapplicable to this issue. Instead, Mr. Zamora argues that it should be admitted to show that Officer Hake acted in conformity with a prior violent event. This type of evidence is controlled by ER 404(b). "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." While there are innumerable exceptions to ER 404(b), Mr. Zamora does not show any of them apply or that trial counsel should have argued any of them. Trial counsel did raise one exception, to show reasonable fear of a person asserting self-defense when that person knew of the prior violent event. However, he correctly rejected that exception because the evidence would not support it.

A prior assault by Officer Hake would be inadmissible under ER 404(b). *York* concerns prior acts of dishonesty under ER 608. This is an apples and oranges comparison trial counsel was correct not to make. In addition, assuming ER 404(b) does not apply, the record is insufficient to

conclude whether the prior conduct was sufficiently similar to the current conduct to be useful to the jury. Counsel was not ineffective in failing to object, and there is no showing the outcome would have been different if this evidence had been admitted.

5. Mr. Zamora's defense counsel's assistance was not objectively unreasonable in not requesting an "excessive force" definition jury instruction as there were legitimate strategic or tactical reasons for not requesting the instruction.

Mr. Zamora fails to meet his burden to show that his trial defense counsel was objectively unreasonable in not requesting a jury instruction defining "excessive force." There were legitimate strategic and tactical reasons why Mr. Zamora's trial defense counsel may not have wanted the civil jury instructions to assist the jury in deciding whether the officers used excessive force. *See McFarland*, 127 Wn.2d at 322. In his appellate brief, Mr. Zamora states that the civil jury instruction, WPI 342.03 defining unreasonable force, "guides a jury into making a fair decision." Br. of Appellant 48.

Mr. Zamora's argument fails for several reasons. First, the civil jury instruction actually undermines defense counsel's theory of the case. The instructions direct the jurors that "a police officer may only use such force as is objectively reasonable under all of the circumstances." WPI 342.03. Next the instructions admonish the jurors to, "judge the

reasonableness of a particular use of force from the perspective of a reasonable officer on the scene and not with 20/20 vision of hindsight.” *Id.* The instructions favor the officer’s perspective at the time under all the circumstances. The defense counsel may have in fact preferred not to have these jury instructions as he may have wanted the jurors to focus on excessive force from the perspective of the defendant with the benefit of 20/20 vision hindsight. The instructions would not have allowed for this. As such, the decision not to ask the court for a jury instruction on excessive force was a legitimate strategic decision as it allowed defense counsel more room to argue his theory of the case.

Defense counsel weaved the theory of his case throughout his closing argument. During closing argument, defense counsel stated, “I want you to think about the disparity in the force used.” RP 912. He also stated, “At no point in that prolonged fight does Mr. Zamora put [the police officer] in a position of disadvantage.” RP 912. Additionally, “I suggest to you, that’s a reasonable response to the assault of my client by [the police officer].” RP 913. Defense counsel further asked the jury, “Was it reasonable for my client to try and resist that awful beating by pushing Mr. Hake off?” RP 924. Defense counsel also asked the jury, “I want you to think of the other side of that. Who is on the receiving end of that? Mr. Zamora.” RP at 928. Finally, defense counsel stated, “I would

say that's a pretty reasonable response to that amount of force, that amount of violence, that level of abuse that he suffered.” RP 943. Defense counsel did not want to focus on the reasonableness of the officer’s actions under the circumstances, but wanted the jurors to focus on Mr. Zamora’s perspective.

Second, the defense counsel reasonably did not request the civil jury instruction WPI 342.03 because the requirements are opposite to Jury Instruction 11 which is based on WPIC 17.02.01. *See* CP 217. In Jury Instruction 11, the court instructed the jurors that a person may employ such force and means as a reasonably prudent person would under the same or similar circumstances. *See* CP 217. It was appropriate for defense counsel to want to keep the focus on the reasonableness of his client’s actions rather than adding a jury instruction, such as WPI 342.03, which switches the focus to whether the officer acted reasonably under all the circumstances based on the information the officer had at the time. *See* WPI 342.03.

Third, defense counsel was not obligated to request a jury instruction because there is no automatic constitutional error for failing to define a term within an element. *See State v. O’Hara*, 167 Wn.2d 91, 105–06, 217 P.3d 756, 764 (2009) (finding that including an element, but then merely failing to further define the element “does not create an error of

constitutional magnitude”). “Excessive force” is not an element of the case, but a term within an element.

Fourth, as a non-technical term “excessive force” did not require defining, and thus defense counsel did not error in not requesting a jury instruction defining it. Although Mr. Zamora argues that it is a technical term and does not have an ordinary meaning and is not self-explanatory, Mr. Zamora provides no legal authority to support his assertions. Br. of Appellant 47–48. Mr. Zamora cites to *In re Det. of Pouncy* which does indeed require technical words to be defined by the trial court. 168 Wn.2d 382, 390, 229 P.3d 678, 682 (2010) (citing *State v. Guloy*, 104 Wash.2d 412, 417, 705 P.2d 1182 (1985)). However, in *Pouncy*, the term at issue was “personality disorder” and the court found that because it is a term of art used in the Diagnostic and Statistical Manual of Mental Disorders, it was beyond the common usage and experience of the average juror. *Id.* at 391. Here, “excessive force” is a term within reach of the average juror unlike “personality disorder.” The term “excessive force” is more similar to the term “malice” which was only partly defined in *State v. O’Hara*, and yet the court found that not including the full definition was not manifest error. 167 Wn.2d at 108.

6. *Mr. Zamora was not prejudiced by defense counsel’s assistance when defense counsel did not request an excessive force definition jury instruction.*

Additionally, Mr. Zamora has not shown that he was prejudiced by the alleged failure. The proposed jury instruction, would likely have undermined the defense counsel's theory of the case, not helped it. The civil jury instruction Mr. Zamora proposes in his appeal, Br. of Appellant 48, focuses on the reasonableness of the officer rather than the reasonableness of the defendant. *See* WPI 342.03. Based on defense counsel's closing argument, which focused on Mr. Zamora's reasonableness under the circumstances, the proposed WPI would have undermined the defense counsel's strategy to have the jury focus on Mr. Zamora. Since the instruction would have undermined and not helped the defense counsel's theory of the case, Mr. Zamora was not prejudiced.

B. The trial court did not abuse its discretion in disallowing the questions about the nature of the *Garrity* Statements.

The Moses Lake Police Department (MLPD) conducted a use of force investigation and required the officers to give statements pursuant to *Garrity v. State of N.J.*, 385 U.S. 493, 494, 87 S. Ct. 616, 617, 17 L. Ed. 2d 562 (1967), which requires officers to give statements that may not be used against them in a criminal trial. These were duly turned over to the defense. The State agreed these statements themselves were useable for any purpose allowable under the evidence rules that pertain to prior

statements, but moved in limine to prevent reference to the internal affairs investigation. The trial court properly granted the motion.

ER 403 prohibits introducing evidence when its probative value is substantially outweighed by its prejudicial value. ER 402 prohibits the introduction of irrelevant evidence. Introduction of the fact that there was an internal affairs investigation is, at best, minimally probative, more likely completely irrelevant, invades the province of the jury and is unduly prejudicial. There is no indication in the record that the officers testified contrary to the *Garrity* statements made.

In disclosing that there was an internal affairs investigation the court would be telling the jury that another entity had examined the use of force in this case. This would lead the jury to speculate what the outcome of that analysis had been, especially since Officer Hake was no longer working for MLPD. To be fair then, the results of the internal investigation finding no wrong doing would have to be revealed to the jury. Either way, the jury speculating on the outcome of the investigation, or being told the outcome, would have led to the invasion of the province of the jury and introduce unnecessary and potentially prejudicial information to the jury.

Balancing this potential prejudice is the use the jury could have put the information to. It is difficult to see how the *Garrity* statements

affected the officer's testimony at trial. The officers did not have any sort of immunity at trial, and were still subject to the penalty of perjury or to prosecution for any crimes revealed on the stand. The fact that they had previously made statements that could not be used against them in a criminal trial that were completely consistent with statements that could have no reflection on their credibility.

The Court properly determined that the introduction of the fact that the officers made statements in an internal affairs investigation had little to no probative value, and were highly prejudicial and confusing to the jury. The trial court did not abuse its discretion in disallowing this evidence.

C. There was sufficient evidence to convict Mr. Zamora of two counts of assault in the third degree.

“To determine whether sufficient evidence supports a conviction, we view the evidence in the light most favorable to the State, and determine whether any rational fact finder could have found the elements of the crime beyond a reasonable doubt.” “To raise the claim of self-defense, the defendant must first offer credible evidence tending to prove self-defense. The burden then shifts to the State to prove the absence of self-defense beyond a reasonable doubt. To establish self-defense, a defendant must produce evidence showing that he or she had a good faith belief in the necessity of force and that that belief was objectively

reasonable.” *State v. Graves*, 97 Wn. App. 55, 61–62, 982 P.2d 627, 630–31 (1999). An arrestee may not use force to resist arrest unless he is actually about to be seriously injured or killed. *State v. Bradley*, 141 Wn.2d 731, 738, 10 P.3d 358, 361 (2000).

Mr. Zamora takes the facts in light most favorable to himself in arguing that the State did not disprove self-defense beyond a reasonable doubt. Mr. Zamora claims that he was afraid for his life because Officer Hake said he would kill him, citing Officer Welsh’s testimony at RP 644. Officer Hake also acknowledged he said he would kill Mr. Zamora. RP 370. However, what Mr. Zamora ignores is this statement came as Officer Hake and Mr. Zamora were struggling over Officer Hake’s gun, and after Mr. Zamora had tried to choke Officer Hake with his microphone cord, and tried to take his sidearm. RP 346, 359. Officer Welsh testified there was a gap between the initial call of resisting and the threat to kill and order to place his hand behind his back. RP 645. In other words, the assault of Officer Hake was already complete when Mr. Zamora was threatened, and the threat was caused by Mr. Zamora’s own assaultive behavior against Officer Hake.

Mr. Zamora also relies on the testimony of Mr. Torres in support of his claim. But Mr. Torres indicated he had a bias against police, RP 834, his son was dating Mr. Zamora’s niece, RP 835, they had a child in

common, and he observed the fight in the dark from 15 feet away through a window in the dark. RP 830-31. He also did not describe seeing the several minutes Officer Hake and Mr. Zamora spent wrestling around on the ground, claiming he did not see it. RP 835. The jury could easily discount Mr. Torres' testimony as biased and unreliable.

In addition the jury instructions stated that "a person may employ such force and means as a reasonably prudent person would use under the same or similar circumstances." CP 237. Under these circumstances a reasonably prudent person would not have used any force, but would have surrendered to law enforcement, thereby ending the fight. Once six officers were on the scene there was no reasonable probability of Mr. Zamora winning the fight, nor was there a reasonable probability of one rouge officer inflicting serious bodily injury on Mr. Zamora if he stopped resisting. Mr. Zamora clearly was not a reasonable and prudent person, having ingested drugs which lead to his cardiac arrest. A juror could easily reject Mr. Zamora's self-defense claim, and they did.

D. Zamora Prosecutorial Misconduct Issues

1. Standard of Review

"Allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard." *State v. Lindsay*, 180 Wn.2d 423, 430, 326

P.3d 125 (2014) (quoting *State v. Brett*, 126 Wn.2d 136, 174–75, 892 P.2d 29 (1995)).

2. *Legal Analysis*

Prosecutor misconduct claims are reviewed “in the context of the total argument, the evidence addressed, the issues in the case, and the jury instructions.” *State v. Rafay*, 168 Wn. App. 734, 824, 285 P.3d 83 (2012) (citing *State v. Boehning*, 127 Wn. App. 511, 519, 111 P.3d 899 (2005)). When claiming prosecutorial misconduct, the proponent bears the burden of proving the prosecutor’s conduct was first improper and if so, then demonstrate that it was prejudicial. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011); *State v. Emery*, 174 Wn.2d 741, 756, 759, 760, 278 P.3d 653 (2012). In order to prevail on the prejudicial prong, there must have been “substantial likelihood” that the misconduct affected the jury’s verdict. *Rafay*, 168 Wn. App. at 824 (citing *State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359 (2007)).

Mr. Zamora concedes that defense counsel waived error in this matter. Br. of Appellant 52. As such, “Where the defense fails to object to an improper comment, the error is considered waived ‘unless the comment is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.’” *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221, 226 (2006)

(citing *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)). “[T]he absence of an objection strongly suggests that the argument did not appear critically prejudicial to the appellant in the context of trial.” *State v. Gauthier*, 189 Wn. App. 30, 37, 354 P.3d 900, 904 (2015) (citing *State v. McKenzie*, 157 Wash.2d 44, 53 n. 2, 134 P.3d 221 (2006)). “[C]ounsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal.” *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610, 635 (1990) (quoting *Jones v. Hogan*, 56 Wn.2d 23, 27, 351 P.2d 153 (1960)).

3. *Defendant did not meet the required burden to demonstrate prosecutorial misconduct when the prosecutor asked questions to decide whether to use preemptory challenges on jurors and discussed the individualized defense witness’s bias towards law enforcement.*

There was no prosecutor misconduct when the prosecutor questioned jurors about security—using border security as a jumping off point—when security was an issue in the case, or drug busts in Nogales when defense counsel brought up the topic of drugs and drugs were an issue in the case.

One of the purposes of voir dire, is for parties to gain knowledge that would “enable an intelligent exercise of preemptory challenges.” CrR 6.4(b). Additionally, during voir dire parties may question prospective

jurors on anything that touches their qualifications, “subject to the supervision of the court as appropriate to the facts of the case.” *Id.* In the case at hand, since law enforcement initially contacted Mr. Zamora due to an individual’s concern about their security, RP 249–50, the issues of people’s perspectives of security and law enforcement were extremely important and relevant. Defense counsel’s strategy was to attack law enforcement’s use of force as excessive in this case. RP 242. As such, the prosecutor did not error in addressing border security as a way to open the discussion with jurors regarding security concerns and law enforcement to enable an intelligent exercise of preemptory challenge.

Furthermore, the prosecutor’s comment about a drug bust in Nogales, RP 139–40, occurred in voir dire in the context of a discussion on drugs, which defense counsel originally brought up. RP 136–41. As the case involved an issue of the defendant being under the influence of drugs, *see* RP 136, defense counsel and the prosecutor were well within CrR 6.4(b) in addressing the topic.

4. *The prosecutor did not commit prosecutorial misconduct when in closing he talked about a witness who did not want to talk with the police.*

Other than the witness having a Hispanic surname, Mr. Zamora can point to nothing that indicates the prosecutor’s comments in the closing arguments were race-based. *See* Br. of Appellant 54–55. Mr.

Torres made comments that he does not talk to the police and that he was biased against the police. RP 835. In context of the closing argument, the comments that the prosecutor offered from the defense's witness, Javier Torres, went to demonstrate that the witness was biased against the officers and thus there was a credibility issue. *See* RP 902–03.

State v. Monday, does not help Mr. Zamora. *See* 171 Wn.2d 667, 257 P.3d 551 (2011).

In *Monday*, the prosecutor found to have committed prosecutorial misconduct “intentionally and improperly imputed [] antisnitch code to black persons only” even though the “‘no snitching’ movement is very broad.” *Id.* at 678. However, the prosecutor in *Monday* did not stop there. He proceeded to discount several witnesses’ testimonies on race alone thereby “taint[ing] nearly every lay witness’s testimony.” *Id.* at 678, 681.

Unlike the prosecutor in *Monday*, the prosecutor in Mr. Zamora’s case did not make any comments regarding the defense witness’s race. *See* RP 902–03. There was no racial taint. *See id.* Instead the argument was personal to Mr. Torres based on his testimony. As such, the defendant’s argument must fail.

5. *Mr. Zamora has not met his burden of proof to demonstrate a substantial likelihood of prejudice when defense counsel told the jury that Mr. Zamora was a U.S. Citizen and appropriately discussed a witness’s self-*

proclaimed bias against law enforcement without discussing race.

Even if there were prosecutorial misconduct there was not a substantial likelihood of prejudice. Mr. Zamora did not suffer any prejudice from the border security voir dire questions because defense counsel during opening statements told the jury:

One of the things that I wanted to address right off the bat was yesterday in voir dire you were asked some questions, specifically about a border wall, cross border crime, immigrants coming in and committing crime, and I had a concern that that might put in your minds that there's an issue of immigration in this case. There is not. I don't want you to waste any more time thinking about that or wondering when you're going to hear evidence of that. **My client is a U.S. citizen** and so that is not at issue in this trial. [Emphasis added]

RP 265. Since defense counsel told the jury that Mr. Zamora was a U.S. citizen, and the prosecutor never disputed that fact, a discussion of border security did not prejudice Mr. Zamora.

Furthermore, Mr. Zamora's claims of prosecutorial misconduct must fail because Mr. Zamora asks the court to make the leap that the voir dire discussion of security, which included border security, was egregious because he has a Hispanic surname. *See* RP 56. However, if Mr. Zamora is Hispanic, the State is not aware that the name Joseph Zamora is a common Hispanic name so that jurors would know, or even conjecture, that Mr. Zamora was Hispanic. The court introduced Mr. Zamora as "Mr. Joseph

Zamora” to the jurors. RP 35. Further undermining the claim of prejudice based on Mr. Zamora’s last name is that the jury heard during direct examination of a witness that Mr. Zamora had a family connection with an extremely non-Hispanic sounding name, specifically, he had a niece named Alyssa Murphy. RP 825.

In addition, Mr. Zamora did not suffer prejudice due to the prosecutor appropriately discussing the defense witness’s bias of being anti-law enforcement. *See* RP 902–03. This case is similar to *State v. Rafay* where the court found the defendant was not prejudiced by the prosecutor’s closing argument referencing terrorist beheading when the defendant was Pakistani and had a Middle Eastern sounding name. 168 Wn. App. 734, 825–27, 285 P.3d 83 (2012). Although in *Rafay*, the court found the comparisons improper, the court noted that when viewed in context of the entire lengthy closing argument, the portions referencing the beheadings were minor and the prosecutor did not compare the defendants directly to the terrorists or elaborate on political motivations of the terrorists. *Id.* at 831–32.

When discussing, border security and security, and drug busts in Nogales in voir dire in Mr. Zamora’s case, RP 71–100, 139–40, the discussion occurred as only a minor part of the entire trial. These comments were limited to voir dire and did not occur during the

prosecutor's co-counsel's opening statements, RP 248–64, the presentation of evidence, PR 279–752, 780–802, 820–55, prosecutor's co-counsel's closing arguments, RP 890–906, or the prosecutor's rebuttal statement. RP 949–65. Furthermore, similar to *Rafay*, the prosecutor did not directly compare the defendant to illegal immigrants or indicate that he was one. *See* RP 71–100.

Also of note in *Rafay*, the court found that the prosecutor's comments about terrorist beheadings “had at least the potential to resonate with any racial, religious, or ethnic prejudice among jurors,” but they “were not an open call to convict the defendants on the basis of racial, ethnic, or religious prejudices.” 168 Wn. App. at 829–30. The court ultimately found that the comments did not trigger the race-based heightened standard adopted in *Monday*. *Id.* at 831.

Similar to *Rafay*, the prosecutor's comments in Mr. Zamora's case were not an open call to convict the defendant based on race. The comments about border security did not have anything to do with Mr. Zamora, other than the prosecutor trying to assess in voir dire, how the jurors perceived security and law enforcement. Additionally the comments on the drug bust in Nogales were in the context of a discussion on the issue of drugs where both defense counsel and the prosecutor were attempting to gauge people's perspectives and biases.

6. *The prosecutor's comments were not so flagrant and ill-intentioned that they could not have been neutralized by a curative instruction.*

Since defense counsel did not object to the comments due to tactical reasons, RP 223–24, and believed that it actually provided an advantage to the defendant in closing arguments, the defendant did not suffer prejudice, and even if there were prejudice it was not “so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.” *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221, 226 (2006) (citing *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)). Any remaining prejudice that the defendant may have suffered after defense counsel stated that Mr. Zamora was a U.S. citizen, RP 265, could have been neutralized by a curative instruction to the jury. Jurors are presumed to follow the court’s instruction. *See State v. Warren*, 165 Wn.2d 17, 28, 195 P.3d 940, 945 (2008).

Furthermore, Mr. Zamora essentially admits that the prosecutor’s closing argument comments regarding Mr. Torres’s testimony are not flagrant. Merriam –Webster defines “flagrant” as “conspicuously offensive.” *Flagrant*, Merriam-Webster.com (last visited July 20, 2020). Mr. Zamora alleges that the prosecutor’s comments invited the jury to, “slip comfortably into an unconscious bias.” Br. of Appellant 55.

Comments that only cause people to “slip” into an “unconscious bias” are not “conspicuously offensive” and thus not flagrant. Here again, the prosecutor did not make any direct racial comments about Mr. Torres. If there were any prejudice under the circumstances, a curative instruction would have sufficed to neutralize any prejudice.

E. Offender Score

“In determining the proper offender score, the court ‘may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing.’ *State v. Zamudio*, 192 Wn. App. 503, 508, 368 P.3d 222, 225 (2016). Mr. Zamora signed an acknowledgment of his offender score. CP 311-12. This means the State met its burden to prove the offender score. *State v. Gray*, ___ Wn. App. 2d ___ (July 28, 2020)(unpublished)(slip op. at 5-6).²

Nor can it be told from this record whether there was a legal error. Only Mr. Zamora’s felony convictions are listed. CP 315-16. Misdemeanor convictions will prevent a crime from washing out.

² Cited pursuant to GR 14.1 This decision has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate. *Crosswhite v. Wash. Dep’t of Social and Health Services*, 197 Wn. App. 539, 544, 389 P.3d. 731 (2017)

Therefore the State met its burden because Mr. Zamora acknowledged his offender score, and the record does not reveal clear legal error.

However, Mr. Zamora later filed a CrR 7.8 motion, since withdrawn pending the outcome of this appeal, that shows there was a different legal error in his offender score. If an individual is resentenced both sides may submit new evidence at the new sentencing hearing. RCW 9.94A.530(2), *State v. Jones*, 182 Wn.2d 1, 11, 338 P.3d 278, 283 (2014). While Mr. Zamora's claims in this appeal should be rejected as not supported by the record, the State has no objection to a new sentencing hearing in general.

V. CONCLUSION

There can be no doubt this case involved a violent struggle that escalated far beyond what should have happened when a lone officer confronted a suspicious trespasser on a cold, icy winter night. However, Mr. Zamora reaching into his pocket when confronted by Officer Hake for what turned out to be a knife, violently resisting Officer Hake's attempt to control him, and his methamphetamine use are what led to this unfortunate outcome.

Defense counsel was not ineffective in not moving to suppress evidence, as he clearly would have lost the suppression hearing. There was no applicable exception to ER 404(b) that would have allowed Officer

Hake's alleged prior bad acts to come in, and even if there was, the record is insufficient to show that it was similar enough to this case to be useful to the jury. Counsel was not ineffective for failing to request a definition of excessive force, nor did any of these alleged errors by counsel prejudice Mr. Zamora. The trial court also correctly concluded that evidence of an internal investigation was irrelevant.

Mr. Zamora fails to show prosecutorial misconduct, or that he was prejudiced in any way by the alleged misconduct. There was sufficient evidence to convict Mr. Zamora of the crimes charged. The State also met its burden to prove the offender score, although there are other problems with it. The trial court should be affirmed in all respects.

Dated this 13th day of August 2020.

Respectfully submitted,

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DECLARATION OF SERVICE

On this day I served a copy of the Brief of Respondent in this matter by e-mail on the following parties, receipt confirmed, pursuant to the parties' agreement:

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Dated: August 17, 2020.



Kaye Burns

GRANT COUNTY PROSECUTOR'S OFFICE

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