

FILED
Court of Appeals
Division III
State of Washington
1/2/2020 2:50 PM

NO. 37088-7-III

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY R. GALLO,

Appellant.

BRIEF OF APPELLANT,
ANTHONY R. GALLO

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SPOKANE COUNTY
THE HONORABLE JOHN O. COONEY, JUDGE

STEPHANIE TAPLIN
Attorney for Appellant
Newbry Law Office
623 Dwight St.
Port Orchard, WA 98366
(360) 876-5567

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ASSIGNMENTS OF ERROR 2

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 2

IV. STATEMENT OF THE CASE..... 3

V. ARGUMENT 8

 A. Mr. Gallo’s Convictions Violate Double Jeopardy..... 9

 B. No Rational Jury Could Have Convicted Mr. Gallo..... 11

 C. The State Committed Flagrant and Repeated
 Misconduct, Depriving Mr. Gallo of a Fair Trial. 15

 1. The prosecutor committed prejudicial misconduct
 by leading the state’s key witness and by repeatedly
 asking the same question. 16

 2. The prosecutor committed misconduct during
 closing argument, which prejudiced Mr. Gallo. 22

 3. Mr. Gallo was prejudiced when the state’s witness
 connected him to the “U.S. Marshal’s task force”
 that locates “the most violent people.” 25

 D. Cumulative Error Denied Mr. Gallo a Fair Trial. 26

VI. CONCLUSION..... 28

TABLE OF AUTHORITIES

Cases

<i>Estelle v. Williams</i> , 425 U.S. 501, 96 S.Ct. 1691 (1976).....	15
<i>In re Pers. Restraint of Francis</i> , 170 Wn.2d 517, 242 P.3d 866 (2010).....	10, 11
<i>In re Pers. Restraint of Glassman</i> , 175 Wn.2d 696, 286 P.3d 673 (2012).....	25, 26
<i>In re Pers. Restraint of Orange</i> , 152 Wn.2d 795, 100 P.3d 291 (2004).....	9, 10
<i>Locken v. United States</i> , 383 F.2d 340 (9th Cir. 1967)	17
<i>State v. Alexander</i> , 64 Wn. App. 147, 822 P.2d 1250 (1992).....	27
<i>State v. Byrd</i> , 125 Wn.2d 707, 887 P.2d 396 (1995).....	12
<i>State v. Coe</i> , 101 Wn.2d 772, 684 P.2d 668 (1984).....	26, 27
<i>State v. Corbett</i> , 158 Wn. App. 576, 242 P.3d 52 (2010).....	21
<i>State v. Davenport</i> , 100 Wn.2d 757, 675 P.2d 1213 (1984).....	15, 24
<i>State v. Delmarter</i> , 94 Wn.2d 634, 618 P.2d 99 (1980).....	12
<i>State v. Dhaliwal</i> , 150 Wn.2d 559, 79 P.3d 432 (2003).....	22

///

<i>State v. Estill</i> , 80 Wn.2d 196, 492 P.2d 1037 (1972).....	23
<i>State v. Finch</i> , 137 Wn.2d 792, 975 P.2d 967 (1999).....	15
<i>State v. Freeman</i> , 153 Wn.2d 765, 108 P.3d 753 (2005).....	9, 11
<i>State v. Furman</i> , 122 Wn.2d 440, 858 P.2d 1092 (1993).....	25
<i>State v. Gotcher</i> , 52 Wn. App. 350, 759 P.2d 1216 (1988).....	24
<i>State v. Greiff</i> , 141 Wn.2d 910, 10 P.3d 390 (2000).....	26
<i>State v. Homan</i> , 181 Wn.2d 102, 330 P.3d 182, 185 (2014).....	12
<i>State v. Ish</i> , 170 Wn.2d 189, 241 P.3d 389 (2010).....	21
<i>State v. Knight</i> , 162 Wn.2d 806, 174 P.3d 1167 (2008).....	9
<i>State v. Michielli</i> , 132 Wn.2d 229, 937 P.2d 587 (1997).....	9
<i>State v. Rose</i> , 62 Wn.2d 309, 382 P.2d 513 (1963).....	22
<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	12
<i>State v. Schierman</i> , 192 Wn.2d 577, 438 P.3d 1063 (2018).....	22
<i>State v. Sibert</i> , 168 Wn.2d 306, 230 P.3d 142 (2010).....	12

<i>State v. Smith</i> , 104 Wn.2d 497, 707 P.2d 1306 (1985).....	22
<i>State v. Thomas</i> , 150 Wn.2d 821, 83 P.3d 970 (2004).....	12
<i>State v. Thorgerson</i> , 172 Wn.2d 438, 258 P.3d 43 (2011).....	15, 22
<i>State v. Torres</i> , 16 Wn. App. 254, 554 P.2d 1069 (1976).....	17
<i>State v. Venegas</i> , 155 Wn. App. 507, 228 P.3d 813 (2010).....	27
<i>State v. Walker</i> , 164 Wn. App. 724, 265 P.3d 191 (2011).....	21, 23
<i>State v. Whalon</i> , 1 Wn. App. 785, 464 P.2d 730 (1970).....	27
<i>Stevens v. Gordon</i> , 118 Wn. App. 43, 74 P.3d 653 (2003).....	17

Statutes

RCW 9A.36.021.....	12
RCW 9A.56.200.....	12

Constitutions

U.S. Const. amend. VI	15
U.S. Const. amend. XIV	15
Wash. Const. art. I, § 22.....	15

I. INTRODUCTION

On December 10, 2018, police attempted to conduct a controlled buy of heroin from Anthony Gallo. They used a confidential informant, Aliah Bowers, to perform the buy. Things did not go as planned. Ms. Bowers claimed that Mr. Gallo refused to sell her drugs, stole the money provided by police, and struck her with a handgun. Mr. Gallo did not have a firearm when arrested, and one was never found.

The state charged Mr. Gallo with first-degree robbery and second-degree assault. At trial, Ms. Bowers testified twice, and her testimony changed drastically each time. Initially, she said that she lied to police and Mr. Gallo did not have a gun or strike her. The next day, she said that she lied on the stand, and Mr. Gallo did have a gun. Throughout her testimony, the prosecutor asked leading questions, or asked the same question over and over. A jury convicted Mr. Gallo of both counts. At sentencing, the trial court determined that the offenses merged, but sentenced Mr. Gallo for each offense.

This case was replete with errors. Mr. Gallo's offenses merged, but the trial court still sentenced him for both convictions. The state presented insufficient evidence to convict Mr. Gallo. The prosecutor committed numerous instances of misconduct. Finally, cumulative error denied Mr. Gallo a fair trial. This Court must reverse.

II. ASSIGNMENTS OF ERROR

Assignment of Error 1: The trial court erred and violated double jeopardy by imposing multiple convictions for offenses that merged.

Assignment of Error 2: Insufficient evidence supported Mr. Gallo's convictions.

Assignment of Error 3: The prosecutor committed misconduct, prejudicing Mr. Gallo, by repeatedly asking leading questions of the state's key witness despite numerous sustained objections.

Assignment of Error 4: The prosecutor committed misconduct, prejudicing Mr. Gallo, by repeatedly asking Ms. Bowers if she was afraid of Mr. Gallo.

Assignment of Error 5: The prosecutor committed misconduct, prejudicing Mr. Gallo, by misstating the law and the facts during closing argument.

Assignment of Error 6: Mr. Gallo was denied a fair trial when a police officer suggested that he was a fugitive wanted by federal authorities and one of "the most violent people."

Assignment of Error 7: Cumulative error denied Mr. Gallo a fair trial.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Was double jeopardy violated when the trial court sentenced Mr. Gallo for both second-degree assault and first-degree robbery when these offenses merged?

Issue 2: Should Mr. Gallo's convictions be overturned when no rational

jury could find that he had or used a firearm during the alleged crimes?

Issue 3: Did the prosecutor commit misconduct, prejudicing Mr. Gallo, when he repeatedly asked Ms. Bowers leading questions despite numerous sustained objections?

Issue 4: Did the prosecutor commit misconduct, prejudicing Mr. Gallo, when he repeatedly asked Ms. Bowers if she was afraid of Mr. Gallo, even though she clearly answered “No”?

Issue 5: Did the prosecutor commit misconduct, prejudicing Mr. Gallo, by misstating the law and the facts during his closing argument?

Issue 6: Was Mr. Gallo denied a fair trial when a police officer suggested that he was a fugitive wanted by federal authorities and one of “the most violent people”?

Issue 7: Did cumulative error deny Mr. Gallo a fair trial?

IV. STATEMENT OF THE CASE

Aliah Bowers had a drug problem. RP at 93. In 2018, she was deep in addiction and got in trouble with the police. RP at 78. She made a deal to work as a confidential informant. *Id.* Police wanted to use Ms. Bowers to perform a controlled buy of heroin. *Id.* She identified Anthony Gallo as the person she would set up for the controlled buy. RP at 78-79.

Ms. Bowers was a low-level drug user prior to becoming a confidential informant. She used about a half a gram to a gram of heroin a

day. RP at 93. Before the controlled buy, she had known Mr. Gallo for about five or six months. RP at 92. At most, she would buy a gram of heroin at a time from Mr. Gallo. RP at 94. When asked whether she owed him money, Ms. Bowers answered, “I’m sure.” RP at 94.

Police set up the controlled buy for December 10, 2018. RP at 38. They gave Ms. Bowers \$500, which could buy between 7 and 11 grams in heroin.¹ This was a huge jump in amounts compared to her previous dealings with Mr. Gallo. RP at 93-94. Police dropped Ms. Bowers off a few blocks from the meetup spot. RP at 63. Ms. Bowers walked to a silver Audi, got in the car, and tried to buy heroin from Mr. Gallo. RP at 64-65.

Police attempted to observe the controlled buy in the Audi. *Id.* However, the car was in a slightly different place than they anticipated. RP at 65, 108. Officers were able to see the car but could not make out what specifically occurred in the vehicle. RP at 43-44, 64-65, 107-08. They saw Mr. Gallo get in and out of the backseat, then get things out of the trunk. *Id.* Then police received a phone call from Ms. Bowers. RP at 154-55. They heard what appeared to be a scuffle, and then a woman say “stop.” RP at 155.

¹ Officer Brownell testified that Mr. Gallo offered to sell Ms. Bowers a quarter ounce of heroin, which is about 7 grams. RP at 55. However, Ms. Bowers testified that she was going to buy about 10.5 grams of heroin. RP at 93.

Ms. Bowers eventually exited the vehicle, without most of the cash and without any drugs. RP at 71, 85, 96. She left the area on foot and met up with police. RP at 67-68, 156. According to police officers, she was crying and appeared distressed. RP at 68, 155-157. Officers saw a mark on her face that was not visible before. RP at 72. Ms. Bowers told the police that Mr. Gallo refused to sell her drugs, grabbed the money, and struck her in the face with a handgun. RP at 97-99, 101-02. By this point, the silver Audi had left the scene and was driving away. RP at 69.

Police started searching for the silver Audi. RP at 70. Later that night, Officer Brooks located the vehicle driving on a back road. RP at 122. Officer Brooks was not on the scene earlier in the night during the attempted controlled buy. RP at 119. When asked why he went to work that night, he implied that Mr. Gallo was a dangerous criminal wanted by the U.S. Marshals, who search for “the most violent people.” RP at 120.

Officer Brooks followed the silver Audi for about ten minutes before backup arrived. RP at 122. Mr. Gallo was the passenger in the car. RP at 131. When backup arrived, the driver attempted to elude police. RP at 126-28. She drove into a field, where the vehicle was stopped and both occupants were arrested. RP at 128-29, 131. During the pursuit, Officer Brooks did not observe anything thrown from the car. RP at 136.

When Mr. Gallo was arrested, police did not find a firearm on his person or in the vehicle. RP at 137. Police found two holsters in the trunk, but the car belonged to someone else. RP at 133-35, 138-39. Police also searched the field with metal detectors but did not find a gun. RP at 137. No firearm was ever recovered. RP at 137, 142. Despite this, the state charged Mr. Gallo with first-degree robbery and second-degree assault and argued that he committed these crimes armed with a firearm. CP 1-2.

At trial, Ms. Bowers testified twice. RP at 77, 167. On the first day, she appeared to be under the influence. RP at 221. She could not remember how old she was or details about the events, including the date, the amount of money, and the names of police officers. RP at 78-80, 174.

Ms. Bowers' story also changed. On the first day, she denied that Mr. Gallo had a gun or struck her. RP at 88, 90, 98-99. She testified that she got her injuries from a domestic violence altercation with her boyfriend. RP at 97-98. She said that she wore makeup to cover up the injuries before the controlled buy, so police did not notice. RP at 88-89, 98. After the attempted buy, Ms. Bowers was worried because she did not have the money but also did not have drugs. RP at 98. She testified that she lied to police and told them that Mr. Gallo struck her with a gun because things had not gone as planned. RP at 98-99.

The next day, Ms. Bowers testified again, but her story changed completely. She said that she lied the previous day on the stand. RP at 173-75. This time, she testified that her original story to police was accurate. RP at 173. She said that Mr. Gallo struck her with a gun and took the money. RP 172-73.

Throughout Ms. Bowers' testimony, the prosecutor repeatedly asked leading questions despite sustained objections. RP at 87-88, 100-01, 172. He also asked Ms. Bowers over and over whether she was afraid of Mr. Gallo. RP at 90-91. Initially, Ms. Bowers answered "No" but eventually she changed her answer to "I guess kind of. Yeah. Sure." *Id.* Defense counsel objected, and the objection was sustained. RP at 91. However, the trial court never instructed the jury to disregard the leading questions, the repetitive questions, or Ms. Bowers' answers. RP at 87-88, 90-91, 100-01, 172.

At the end of testimony, the trial court instructed the jury on the law. RP at 184. The court instructed that evidence of "the law enforcement attempt to purchase heroin" from Mr. Gallo was admitted "for only a limited purpose." RP at 189. The court told the jury that it could only consider this evidence "for the purpose of establishing the defendant and the complaining witness were together on the night in question. You may not consider it for any other purpose." *Id.*

Despite this instruction, the prosecutor in closing argument described this case as “a drug rip.” RP at 199. The prosecutor also misstated the facts of the case. He claimed that Ms. Bowers denied being in debt to Mr. Gallo. RP at 205-06. This was not accurate. Ms. Bowers testified that she was “sure” she owed money to Mr. Gallo. RP at 94.

The jury convicted Mr. Gallo of both first-degree robbery and second-degree assault. RP at 210. The trial court determined that these “two counts merge.” RP at 223. However, according to the trial court, merger meant that the assault “was not included” in Mr. Gallo’s offender score. *Id.* The court sentenced Mr. Gallo to 126 months for robbery and 61.5 months for assault, served concurrently. RP at 223-24, 228-29. Mr. Gallo appeals. CP 91-106.

V. ARGUMENT

Numerous errors in this case deprived Mr. Gallo of a fair trial and violated his constitutional rights. The trial court erred and violated double jeopardy by entering convictions for both second-degree assault and first-degree robbery. The state presented insufficient evidence to establish that Mr. Gallo used a firearm to commit these alleged crimes. The prosecutor committed misconduct during both questioning and closing argument. A police officer improperly testified that Mr. Gallo was a dangerous criminal wanted by federal authorities. Even if each error alone was harmless,

accumulated together they deprived Mr. Gallo of a fair trial. This Court should reverse.

A. Mr. Gallo's Convictions Violate Double Jeopardy.

This Court must vacate Mr. Gallo's conviction for second-degree assault because it merged with his conviction for first-degree robbery. The trial court correctly determined that these offenses merged. RP at 223. However, the court erred and violated double jeopardy by entering convictions for both offenses. CP 76-89.

Appellate courts review double jeopardy claims de novo. *State v. Knight*, 162 Wn.2d 806, 810, 174 P.3d 1167 (2008). The state may file, and a jury may consider, multiple charges arising from the same criminal conduct in a single trial. *State v. Michielli*, 132 Wn.2d 229, 238-39, 937 P.2d 587 (1997). However, a court violates double jeopardy by entering multiple convictions for the same offense. *State v. Freeman*, 153 Wn.2d 765, 770-71, 108 P.3d 753 (2005).

Double jeopardy turns on legislative intent. *Id.* at 771. The legislature has the power to define offenses and set punishments. *Id.* "Where a defendant's act supports charges under two criminal statutes, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the same offense." *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 815, 100 P.3d 291 (2004).

Courts consider the offenses as they were actually charged, not in the abstract. *Id.* at 817.

Here, the state charged Mr. Gallo with first-degree robbery and second-degree assault. CP 1-2. For the robbery, the charging document alleged that Mr. Gallo, “on or about December 10, 2018, with the intent to commit theft, did unlawfully take and retain” the personal property of Aliah Bowers against her will, “by use or threatened use of immediate force, violence or fear of injury to said person” and “in the commission of and immediate flight therefrom, the defendant was armed with a deadly weapon, A FIREARM.” CP 1. For the assault, the charging document alleged that “on or about December 10, 2018 [Mr. Gallo] did intentionally assault” Aliah Bowers “with a deadly weapon, to-wit: A FIREARM.” CP 2.

In a similar case, the Washington Supreme Court evaluated charges of second-degree assault and attempted first-degree robbery. *In re Pers. Restraint of Francis*, 170 Wn.2d 517, 524, 242 P.3d 866 (2010). The state in *Francis* “expressly used the second degree assault conduct to elevate Francis’ attempted robbery charge to the first degree.” *Id.* Based on these facts, the Court applied the merger doctrine to determine legislative intent. *Id.* “Under the merger doctrine, when the degree of one offense is raised by conduct separately criminalized by the legislature, we presume the legislature intended to punish both offenses through a greater sentence for

the greater crime.” *Id.* at 524-25 (quoting *Freeman*, 153 Wn.2d at 772-73, 108 P.3d 753). The Court held that “the legislature intended to punish Francis’ second degree assault through a greater sentence for the attempted first degree robbery.” *Id.* at 525.

Here, like in *Francis*, the second-degree assault conduct was charged as an element of the first-degree robbery charge. CP 1-2. The second-degree assault was used to elevate the robbery to first degree. *Id.* The legislature intended to punish this conduct through the greater sentence for first-degree robbery. *See Francis*, 170 Wn.2d at 525. The trial court correctly determined that these “two counts merge.” RP at 223. However, the court erred by sentencing the two convictions concurrently. RP at 224, 227-28. Instead, “conviction of both offenses violates double jeopardy,” and the remedy is to “vacate the conviction on the lesser offense—the second degree assault.” *Francis*, 170 Wn.2d at 532. This Court must reverse.

B. No Rational Jury Could Have Convicted Mr. Gallo.

The state also presented insufficient evidence to support Mr. Gallo’s convictions. Specifically, the state failed to prove beyond a reasonable doubt that Mr. Gallo used a firearm, or what appeared to be a firearm during the commission of the charged crimes.

“The State must prove every element of a crime beyond a reasonable doubt for a conviction to be upheld.” *State v. Sibert*, 168 Wn.2d 306, 311, 230 P.3d 142 (2010) (quoting *State v. Byrd*, 125 Wn.2d 707, 713, 887 P.2d 396 (1995)). To determine whether sufficient evidence supports a conviction, courts view the evidence in the light most favorable to the state and determine whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182, 185 (2014).

A claim of insufficient evidence admits the truth of the state’s evidence and all reasonable inferences that can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Appellate courts defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

A person commits robbery in the first degree if, in the commission of a robbery, he “is armed with a deadly weapon” or “displays what appears to be a firearm or other deadly weapon.” RCW 9A.56.200(1)(a)(i)-(ii). A person commits assault in the second degree when he “[a]ssaults another with a deadly weapon.” RCW 9A.36.021(1)(c).

Mr. Gallo does not concede that he committed robbery or assault. Regardless, no rational jury could convict him of first-degree robbery or second-degree assault because the state presented insufficient evidence to establish that Mr. Gallo was armed with, displayed, or used a firearm or other deadly weapon, for two reasons.

First, the state's central witness, Aliah Bowers, was not credible. Ms. Bowers is a drug addict who appeared to be under the influence when testifying. RP at 93, 221. She owed money to Mr. Gallo and thus had an incentive to see him incarcerated. RP at 94. Ms. Bowers also displayed a terrible memory. She forgot her own birthday. RP at 78, 174. She could not remember key details of the events in question, including the names of the police officers she worked for, the date of these events, and dollar amounts. RP at 79-80. The prosecuting attorney had to repeatedly ask leading questions to remind her of what she was supposed to say. RP at 87-88, 100-01, 172.

Ms. Bowers also lied on the stand. RP at 175. Her testimony changed dramatically between the first and second days of trial. RP at 173-75. Initially, she testified that Mr. Gallo did not have a weapon and did not assault her. RP at 88, 90, 98-99. The next day, she completely changed her demeanor and her testimony, now stating that Mr. Gallo struck her with a gun. RP at 173-75, 203. These statements cannot both be true. Ms. Bowers

was the only witness who allegedly saw Mr. Gallo with a weapon. Given her utter lack of credibility, no rational jury could conclude that Mr. Gallo had or used a firearm.

Second, insufficient evidence supported Mr. Gallo's convictions because he was not found with a firearm or other deadly weapon when arrested. Police searched his person and the car but did not find a weapon. RP at 137, 142. All police found were two holsters, allegedly for guns. RP at 133-35. Possession of holsters is not illegal. Police also had no evidence connecting the holsters to Mr. Gallo. The holsters could easily have belonged to the driver of the car, the owner of the car, a previous owner, or a different passenger.

It is also not credible to believe that Mr. Gallo disposed of a gun prior to his arrest. Mr. Gallo was the passenger in a car that was being followed by a police officer. RP at 131. The officer waited until backup arrived before turning on his lights or indicating that he was police. RP at 126. No rational person would throw an expensive item like a firearm out of a car window prior to a police chase. Police did not see anything thrown from the car. RP at 136. Police also searched the area around the chase, including with metal detectors. RP at 137. They did not find a firearm. *Id.* The logical conclusion is that they did not find one because there was no firearm to find.

Under the state's theory of the case, Mr. Gallo committed first-degree robbery and second-degree assault while armed with, displaying, or using a firearm. However, no firearm was found on his person, in the car, or at the scene. Police did not see him discard a firearm and did not find one along the route of the chase. The only witness who allegedly saw this firearm was Ms. Bowers, who was not remotely credible. Under these circumstances, no rational jury would convict Mr. Gallo of these crimes. This Court should reverse based on insufficient evidence.

C. The State Committed Flagrant and Repeated Misconduct, Depriving Mr. Gallo of a Fair Trial.

This Court should also reverse due to misconduct by the state. The right to a fair trial is a fundamental liberty secured by the United State and Washington Constitutions. U.S. Const. amend.s VI, XIV; Wash. Const. art. I, § 22; *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691 (1976); *State v. Finch*, 137 Wn.2d 792, 843, 975 P.2d 967 (1999). Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). In order to prevail on a claim of prosecutorial misconduct, a defendant must show that the prosecutor's conduct was both improper and prejudicial. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011).

Here, the state acted improperly on numerous occasions. The prosecutor repeatedly asked leading questions, effectively testifying. RP at 37, 87-88, 100-01, 154, 157, 161, 172. He asked the same question until he got his desired answer. RP at 90-91. In closing argument, he misrepresented evidence and improperly referenced evidence admitted for a limited purpose. RP at 199, 205-06. The state's witnesses also acted improperly. Officer Brooks connected Mr. Gallo to "the U.S. Marshal's task force," which searches for "the most violent people." RP at 120.

Taken together, this misconduct prejudiced Mr. Gallo by encouraging the jury to convict him not based on evidence, but instead because he is allegedly a dangerous drug dealer. Absent this misconduct, it is highly unlikely that Mr. Gallo would have been convicted because, as explained above, the state's case was weak. This Court must reverse because Mr. Gallo was denied a fair trial.

1. The prosecutor committed prejudicial misconduct by leading the state's key witness and by repeatedly asking the same question.

The prosecutor in this case committed misconduct in the way he questioned the state's key witness, Ms. Bowers. The prosecutor repeatedly asked leading questions, effectively testifying for Ms. Bowers. RP at 87-88, 100-01, 172. He also asked the same question over and over until Ms.

Bowers supplied the answer he wanted. RP at 90-91. This conduct was flagrant, repetitive, and occurred despite numerous sustained objections.

Courts typically do not permit leading questions because they allow an attorney to “suggest his desired results” to the witness. *State v. Torres*, 16 Wn. App. 254, 258, 554 P.2d 1069 (1976) (quoting *Locken v. United States*, 383 F.2d 340 (9th Cir. 1967)). “The asking of leading questions is not usually a reversible error; however, ‘the persistent pursuit of such a course of action is a factor to be added in the balance.’” *Stevens v. Gordon*, 118 Wn. App. 43, 56, 74 P.3d 653 (2003) (quoting *Torres*, 16 Wn. App. at 258).

Leading questions were especially egregious with the state’s central witness, Ms. Bowers. As described above, Ms. Bowers had memory problems on the stand. She could not remember her birthdate, the date of the events in question, the dollar amounts involved, or the names of the police officers she worked for. RP at 78-80, 174. By asking leading questions, the prosecutor was able to fill in these gaps in her memory with his “desired results.” *See Torres*, 16 Wn. App. at 258. For example, the prosecutor supplied Ms. Bowers with answers about her injuries and the alleged firearm:

Mr. Treece: Now, right when this happened, you told officers that Mr. Gallo used a firearm on you, didn’t you?

Ms. Bowers: Yeah, I did.

Mr. Treece: And you had a bruise from where he pushed the firearm into your face so hard that it caused a bruise –

RP 87. At this point, defense counsel objected, and the objection was sustained. RP 87-88. However, the court did not instruct the jury to disregard the question or answer. RP 88.

The prosecutor did not stop asking Ms. Bowers leading questions. On redirect, he supplied her answers for what occurred during and after the attempted buy:

Mr. Treece: Ms. Bowers, do you recall actually calling Officer Scott Lesser on your phone while you were still in the car?

Ms. Bowers: I don't know.

Mr. Treece: Where he heard the scuffle that was going on in the car?

Ms. Bowers: He definitely could have because I wanted to – I didn't want them to think that I was doing something that I wasn't, so.

Mr. Treece: Okay.

Ms. Bowers: If I did, I was trying to, but I don't know if I –

Mr. Treece: But there was a scuffle that he heard on the phone?

Ms. Bowers: Yeah. I guess.

Mr. Treece: Okay. And then, just within seconds after that, you called him immediately and told him that you had been robbed at gunpoint?

Ms. Bowers: Yeah.

Mr. Treece: Okay. And immediately Officer Mark Brownell saw you with your jacket over your shoulder?

Ms. Bowers: Yeah.

Mr. Treece: And that was the sign of emergency?

Ms. Bowers: Yeah.

Mr. Treece: And you were crying hysterically?

RP 100-01. At this point, defense counsel objected, and the objection was sustained. RP 101. Once again, the court did not instruct the jury to disregard the questions or answers. *Id.*

The prosecutor continued asking Ms. Bowers leading questions. Specifically, he led her to his desired answers about the alleged firearm. For example, he said, “And were you immediately saying that Mr. Gallo had put a gun to your face?” RP 101. When Ms. Bowers testified a second time the next day, he asked her about the gun yet again:

Mr. Treece: Ms. Bowers, going back to the night that you had contact with Mr. Gallo back in December, one of the times he went back to the trunk of the vehicle and he got back in the car, did he come back with a firearm?

RP at 172. Defense counsel objected, but Ms. Bowers got the hint. *Id.* The prosecutor rephrased, and this time she gave the right answer and said that Mr. Gallo had a gun. *Id.*

The prosecutor also used other methods to get his desired answer from Ms. Bowers. He wanted Ms. Bowers to say that she was afraid of Mr. Gallo, but that was not her testimony. RP at 90. So the prosecutor asked her the same question three times until she came up with the right answer:

Mr. Treece: Are you scared of Mr. Gallo?

Ms. Bowers: No.

Mr. Treece: You're not scared of Mr. Gallo?

Ms. Bowers: Well, anybody would in this type of situation, not – if I was getting, you know, this whole situation to me, I would not be very happy about it, so yeah.

Mr. Treece: You are scared of Mr. Gallo?

Ms. Bowers: I guess kind of. Yeah. Sure.

Mr. Treece: Okay.

RP at 90-91. Yet again, defense counsel objected, and the objection was sustained. RP 91. Again, the trial did not strike the testimony or instruct the jury not to consider it. *Id.*

Intentionally asking leading questions, after repeated sustained objections, amounted to prosecutorial misconduct in this case. It effectively resulted in the prosecutor testifying instead of the witness. It also pointed Ms. Bowers in the direction intended by the state. It was also misconduct to ask the same question over and over until Ms. Bowers provided the answer sought by the prosecutor.

This misconduct prejudiced Mr. Gallo. Prejudice requires showing a substantial likelihood that the misconduct affected the jury verdict. *State v. Ish*, 170 Wn.2d 189, 195, 241 P.3d 389 (2010). A defendant cannot establish prejudice where a curative instruction could have cured any error. *State v. Corbett*, 158 Wn. App. 576, 594, 242 P.3d 52 (2010). However, “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.” *State v. Walker*, 164 Wn. App. 724, 737, 265 P.3d 191 (2011).

Here, Mr. Gallo’s attorney objected appropriately. RP at 87-88, 90-91, 100-01, 172. His objections to these leading and repetitive questions were sustained. *Id.* However, the trial court did not instruct the jury to disregard these questions or answers. *Id.* A curative instruction would not have corrected the prejudice in this case because the damage was already done.

The state’s entire case rested on Ms. Bowers. She was the only witness who testified about what occurred in the car. She was the only witness who allegedly saw a firearm. She also had massive credibility problems, as described above. This is not a case where overwhelming evidence supported guilt despite the prosecutor’s misconduct. The prosecutor’s leading and repetitive questions bolstered up a weak witness

and supplied essentially the only evidence used to convict Mr. Gallo. No curative instruction could fix this because it was already clear what answer the prosecutor desired. This Court must reverse because Mr. Gallo was denied a fair trial.

2. The prosecutor committed misconduct during closing argument, which prejudiced Mr. Gallo.

The prosecutor also committed misconduct during his closing argument, in two ways. First, he misrepresented the evidence presented at trial. RP at 205-06. Second, he specifically referenced evidence that was admitted for a limited purpose, despite the judge's instructions to the jury. RP at 199. Mr. Gallo did not object to the state's closing at trial. Thus, he must show that a jury instruction would not have cured the prejudice. *Thorgerson*, 172 Wn.2d at 443.

In closing argument, counsel may argue “the facts in evidence and reasonable inferences” therefrom. *State v. Dhaliwal*, 150 Wn.2d 559, 577, 79 P.3d 432 (2003) (quoting *State v. Smith*, 104 Wn.2d 497, 510, 707 P.2d 1306 (1985)). However, counsel “may *not* make prejudicial statements that are unsupported by the evidence.” *State v. Schierman*, 192 Wn.2d 577, 640, 438 P.3d 1063 (2018) (citing *State v. Rose*, 62 Wn.2d 309, 312, 382 P.2d 513 (1963)) (emphasis added).

Here, the prosecutor exceeded the bounds of proper argument in closing. According to the prosecutor, “Ms. Bowers never said on the stand that she had a drug debt to Mr. Gallo. She was asked about that. That’s not what she said on the stand.” RP at 205-06. This is false. Ms. Bowers was asked, “Did you owe him [Mr. Gallo] some money?” and she replied, “I’m sure.” RP at 94. The prosecutor committed misconduct by inaccurately characterizing Ms. Bowers’ testimony.

This misconduct prejudiced Mr. Gallo because it improperly bolstered Ms. Bowers’ credibility, and her credibility was the state’s entire case. In cases that are “largely a credibility contest,” the “prosecutor’s improper arguments [can] easily serve as the deciding factor.” *Walker*, 164 Wn. App. at 738. For example, in *Walker*, the prosecutor repeatedly misstated the law in closing arguments. *Id.* at 726. The cumulative effect of this misconduct required reversal and a new trial. *Id.* at 737. Like in *Walker*, the prosecutor’s misconduct had a particularly prejudicial effect because the case came down to credibility.

Second, the prosecutor committed misconduct in closing by referencing evidence admitted for only a limited purpose. RP at 199. A prosecutor’s argument “must be confined to the law stated in the trial court’s instructions.” *Walker*, 164 Wn. App. at 736 (citing *State v. Estill*, 80 Wn.2d 196, 199, 492 P.2d 1037 (1972)). When the prosecutor mischaracterizes the

law and there is a substantial likelihood that the misstatement affected the jury verdict, the defendant is denied a fair trial. *State v. Gotcher*, 52 Wn. App. 350, 355, 759 P.2d 1216 (1988). A prosecutor's misstatement of the law is a serious irregularity having the grave potential to mislead the jury. *Davenport*, 100 Wn.2d at 764.

This case arose from a controlled buy of heroin. RP at 38. The trial court instructed the jury that it could only consider the controlled buy for the limited purpose of placing Ms. Bowers and Mr. Gallo in the same area:

Instruction No. 6: Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of the law enforcement attempt to purchase heroin from the defendant and may be considered by you only for the purpose of establishing the defendant and the complaining witness were together on the night in question. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

RP at 189. Despite this limitation, in closing the prosecutor described the case as "a drug rip." RP at 199.

By using this description, the prosecutor did not confine his argument to the law as stated by the trial court. Describing the case as a "drug rip" encouraged the jury to consider the controlled buy for more than a limited purpose. It encouraged the jury to convict because Mr. Gallo was a drug dealer, not based on the evidence presented at trial.

The prosecutor's statement prejudiced Mr. Gallo. Reversal is required where the prosecutor's "comments deliberately appealed to the jury's passion and prejudice and encouraged the jury to base the verdict on the improper argument 'rather than properly admitted evidence.'" *In re Pers. Restraint of Glassman*, 175 Wn.2d 696, 711, 286 P.3d 673 (2012) (quoting *State v. Furman*, 122 Wn.2d 440, 468-69, 858 P.2d 1092 (1993)). That is exactly what occurred here. This Court must reverse because the prosecutor's comments encouraged the jury to convict on an improper basis, which carried significant weight due to the credibility issues in this case.

3. Mr. Gallo was prejudiced when the state's witness connected him to the "U.S. Marshal's task force" that locates "the most violent people."

Mr. Gallo was also denied a fair trial based on testimony by Officer Winston Brooks, a witness for the state. On the night in question Officer Brooks followed the silver Audi in which Mr. Gallo was a passenger. RP at 122. The prosecutor asked Officer Brooks why he went to work that night. RP at 120. In answering that question, Officer Brooks effectively told the jury that Mr. Gallo was a fugitive wanted by federal authorities:

Mr. Treece: Okay. And what was the – the reason – the primary reason you went to work that night after you spoke with Officer Lesser?

Officer Brooks: I was informed before dinner that they were – the members of the PACT team, my other team members, were going to perform a controlled purchase of drugs from *a subject I was looking for for probably nine days prior to*

that. Excuse me. A part of being on the PACT Team, we're also attached to the U.S. Marshal's task force where we – we're part of the Northwest Fugitive Task Force Team where *we look for the most violent people* in our –

RP at 120 (emphasis added). Defense counsel objected at that point, and the objection was sustained. *Id.* However, the court did not issue a limiting instruction or tell the jury to disregard this testimony. *Id.*

This testimony improperly referenced alleged prior bad acts by Mr. Gallo. It also characterized Mr. Gallo as one of the “most violent people” in the area. This encouraged the jury to convict in order to get an allegedly dangerous criminal off the street rather than based on evidence. This Court must reverse because Mr. Gallo was prejudiced by these improper comments. *See Glassman*, 175 Wn.2d at 711.

D. Cumulative Error Denied Mr. Gallo a Fair Trial.

Each of the errors described above is sufficient for reversal. In addition, their cumulative effect denied Mr. Gallo a fair trial. This Court should reverse and remand because of the pervasiveness of the errors in this case.

Cumulative error may warrant reversal, even if each error standing alone would otherwise be considered harmless. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Under the cumulative error doctrine, a defendant may be entitled to a new trial when several errors produce a trial that is fundamentally unfair. *See, e.g., State v. Coe*, 101 Wn.2d 772, 789,

684 P.2d 668 (1984) (accumulated errors, including permitting inadmissible evidence and prosecutorial discovery violations, required reversal); *State v. Alexander*, 64 Wn. App. 147, 158, 822 P.2d 1250 (1992) (reversal required because (1) a witness impermissibly suggested the victim's story was consistent and truthful, (2) the prosecutor impermissibly elicited the defendant's identity from the victim's mother, and (3) the prosecutor repeatedly attempted to introduce inadmissible testimony during the trial and in closing); *State v. Whalon*, 1 Wn. App. 785, 804, 464 P.2d 730 (1970) (reversing conviction because (1) court's severe rebuke of the defendant's attorney in the presence of the jury, (2) court's refusal of the testimony of the defendant's wife, and (3) jury listening to tape recording of lineup in the absence of court and counsel).

In this case, the errors made by the trial court and state each warrant reversal. However, even if each error standing alone is harmless, the accumulation of these errors deprived Mr. Gallo of a fair trial. *See Coe*, 101 Wn.2d at 789. This Court should reverse. *State v. Venegas*, 155 Wn. App. 507, 526-27, 228 P.3d 813 (2010).

///

///

///

VI. CONCLUSION

Anthony Gallo's convictions for first-degree robbery and second-degree assault must be reversed due to pervasive and significant errors at his trial and sentencing. The trial court erred and violated double jeopardy by entering convictions for both second-degree assault and first-degree robbery. The state presented insufficient evidence to establish that Mr. Gallo used a firearm to commit these crimes. The state also committed prejudicial misconduct during trial. Even if each error alone was harmless, accumulated together they deprived Mr. Gallo of a fair trial. Mr. Gallo respectfully requests that this Court reverse his convictions and remanded for a new trial.

RESPECTFULLY SUBMITTED this 2nd day of January, 2020.



STEPHANIE TAPLIN

WSBA No. 47850

Attorney for Appellant, Anthony R. Gallo

No. 37088-7-III

CERTIFICATE OF SERVICE

I, Stephanie Taplin, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct to the best of my knowledge:

On January 2, 2020, I electronically filed a true and correct copy of the Brief of appellant, Anthony R. Gallo, via the Washington State Appellate Courts' Secure Portal to the Washington Court of Appeals, Division III. I also served said document as indicated below:

Larry D. Steinmetz
Spokane County Prosecuting
Attorney's Office
1100 W Mallon Ave
Spokane WA 99260-2043

(X) via email to:
lsteinmetz@spokanecounty.org,
scpaappeals@spokanecounty.org

Anthony R. Gallo
DOC # 402694
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326

(X) via U.S. mail

SIGNED in Port Orchard, Washington, this 2nd day of January,
2020.



STEPHANIE TAPLIN
WSBA No. 47850
Attorney for Appellant, Anthony R.
Gallo

NEWBRY LAW OFFICE

January 02, 2020 - 2:50 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 37088-7
Appellate Court Case Title: State of Washington v. Anthony Ryan Gallo
Superior Court Case Number: 18-1-05432-1

The following documents have been uploaded:

- 370887_Briefs_20200102144952D3890757_8244.pdf
This File Contains:
Briefs - Appellants
The Original File Name was Gallo Brief.pdf

A copy of the uploaded files will be sent to:

- lsteinmetz@spokanecounty.org
- scpaappeals@spokanecounty.org

Comments:

Sender Name: Stephaie Taplin - Email: stephanie@newbrylaw.com
Address:
623 DWIGHT ST
PORT ORCHARD, WA, 98366-4619
Phone: 360-876-5477

Note: The Filing Id is 20200102144952D3890757