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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ANTHONY R. GALLO, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erred and violated double jeopardy by imposing multiple convictions for offenses that merged.
2. Insufficient evidence supported Mr. Gallo's convictions.
3. The prosecutor committed misconduct, prejudicing Mr. Gallo, by repeatedly asking leading questions of the State's key witness despite numerous sustained objections.
4. The prosecutor committed misconduct, prejudicing Mr. Gallo, by repeatedly asking A.B.¹ if she was afraid of Mr. Gallo.
5. The prosecutor committed misconduct, prejudicing Mr. Gallo, by misstating the law and the facts during closing argument.
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."
7. Cumulative error denied Mr. Gallo a fair trial.

II. ISSUES PRESENTED

1. The State concedes Mr. Gallo's offenses merge.
2. May Mr. Gallo challenge the sufficiency of the evidence, where his contention is that the State's percipient witness is not credible? If

¹ Although A.B.'s identity was disclosed and she testified at the trial, the State uses initials to protect her anonymity.

so, does the State's evidence establish Mr. Gallo used a firearm in the commission of the robbery where the witness testified Mr. Gallo used a firearm?

3. Did the prosecutor commit misconduct, prejudicing Mr. Gallo, by asking a hostile witness leading questions during direct examination; and, if so, can Mr. Gallo establish the questions caused prejudice when the witness was recalled the next day and testified she recanted because she was afraid of Mr. Gallo?

4. Did the prosecutor misstate the law when arguing inferences from facts in closing argument and, if not, may a prosecutor reference evidence admitted for a limited purpose pursuant to a jury instruction?

5. Did the prosecutor act inappropriately by explaining in rebuttal that Mr. Gallo mischaracterized A.B.'s testimony about a drug debt?

6. Did the prosecutor commit misconduct in asking law enforcement witnesses foundational questions concerning their job duties, and would answers that their special unit was tasked with searching for violent offenders prejudice Mr. Gallo when he was on trial for first degree robbery with a firearm?

7. Does the cumulative error doctrine apply when the only error Mr. Gallo established is a sentencing error?

III. STATEMENT OF THE CASE

Anthony Gallo appeals from his convictions for first degree robbery and second degree assault. CP 76.

In 2018, A.B. began to work as a confidential police informant. RP 51, 78-79. In December of 2018, law enforcement planned a “controlled buy,” directing A.B. to purchase controlled substances from Mr. Gallo. RP 78-79. A.B. called Mr. Gallo to request heroin, and he agreed to meet A.B. and sell her a quarter ounce of heroin for \$500. RP 79-80.

Immediately prior to the controlled buy, law enforcement searched A.B. and gave her \$500 of pre-recorded currency. RP 60, 80. A.B. walked to Mr. Gallo’s nearby vehicle and called him. RP 81-82. Mr. Gallo exited his vehicle briefly and opened the trunk; he then re-entered the rear compartment of the car, where A.B. joined him. RP 43, 64-65, 82-83. An associate of Mr. Gallo, Angela Ankrom, was seated in the driver’s seat. RP 83; CP 1-2.²

Ms. Ankrom drove the vehicle away from the point of contact. RP 84-85. A.B. produced the pre-recorded currency and Mr. Gallo handed her a plastic bag containing “fake” heroin. RP 85, 175-76. Suddenly, Mr. Gallo grabbed the cash from A.B. RP 85, 175-76. Mr. Gallo then

² The State charged Ms. Ankrom as an accomplice to the robbery as well as with a number of additional crimes not at issue in this appeal.

produced a firearm and shoved it into her cheek. RP 172-73. Mr. Gallo yelled to A.B. that “she was a cop” and ordered her to leave the vehicle. RP 85. At some point, A.B. attempted to use her cell phone to call for help; Officer Scott Lesser answered the call but could only hear a struggle, an agitated male voice, and a female screaming, “Stop!” RP 154-55. A.B. and Mr. Gallo “wrestled” and A.B. ended up outside of the vehicle. RP 173. A minute later, A.B. called Officer Lesser again. RP 155-56. She sounded scared, was crying hysterically, and exclaimed that Mr. Gallo had put a gun to her head. RP 156. A.B. developed an injury on her cheek as a result of being struck with the firearm. RP 173.

After A.B. exited the vehicle she gave a pre-arranged signal to law enforcement indicating she needed rescue. RP 67. When A.B. reached the safety of law enforcement officers, she told them about the robbery. RP 86. A.B. was terrified of what had occurred; she was hyperventilating, her skin was pale and flushed, and she was unable to calm herself. RP 68.

Officers took several photographs of her cheek, which showed a bruise developing, where Mr. Gallo had thrust his firearm into her face. RP 86-87; Ex. 3-6. A.B. did not have any marks on her cheek before she initiated the controlled buy. RP 72. Officers noticed the bruising began to develop approximately 30 minutes after they rescued A.B. RP 72. One officer described the bruising as “progressing even just as we were standing

there.” RP 158. Law enforcement took A.B. to a nearby police station, where she verified that Mr. Gallo had robbed her at gunpoint. RP 157.

Meanwhile, Ms. Ankrom and Mr. Gallo fled the scene in their vehicle. RP 120-21. Just prior to midnight, which was three to four hours after the robbery, Officer Winston Brooks located the vehicle while on patrol, and began to follow it. RP 117, 121. He followed the vehicle for nine to ten minutes before backup arrived. RP 121. At that point, he attempted to stop the vehicle. RP 126-27. The vehicle fled the traffic stop at a high rate of speed. RP 127. The vehicle led law enforcement on a lengthy chase before Officer Brooks forced it to crash. RP 127-30. Officer Brooks followed the vehicle for 10 miles, but was not always able to maintain visual contact because of winding road, darkness, and the fact the vehicle at one point fled through a field that contained snow and weeds “taller than [a] car.” RP 136.

After the crash, law enforcement discovered Mr. Gallo and Ms. Ankrom each possessed some of the pre-arranged currency. RP 47. Law enforcement searched Mr. Gallo’s vehicle. RP 46. The search revealed two firearm holsters, each located in the trunk of the vehicle. RP 47, 133-34; Ex. 9, 10. The firearm Mr. Gallo used to facilitate the robbery was never recovered. RP 137.

Procedure.

The State charged Mr. Gallo with first degree robbery, second degree assault, and possession of a controlled substance. CP 1-2. The morning of trial, the State moved the court to dismiss the possession charge due to witness unavailability. CP 55.

The State called A.B. as a witness on the first day of trial. RP 77. A.B. recanted on the witness stand; she first gave answers indicating that she did not remember the details of the night, but later she began to give answers directly contradicting her statements to police the night of the robbery. *See* RP 77-92. A.B. admitted on the stand that she had told officers that Mr. Gallo had “pulled a weapon on [her], but he—that’s not what happened.” RP 86. The State also asked: “Now, right when this happened, you told officers that Mr. Gallo used a firearm on you, didn’t you?” RP 87. A.B. agreed. RP 87. The State began to ask, “and you had a bruise from where he pushed the firearm into your face so hard that it caused a bruise,” when Mr. Gallo objected as leading; the trial court sustained the objection. RP 87-88.

The State pursued a line of questioning impeaching A.B. with her prior statements that Mr. Gallo had a firearm. RP 88-90. Eventually, A.B. admitted that she was afraid of Mr. Gallo, but Mr. Gallo objected on the basis that the question had been “asked and answered three times until she

gave the answer that [the State] wanted to hear.” RP 91. However, Mr. Gallo did not move to strike the answer. RP 91. During cross-examination, Mr. Gallo asked A.B. if she “owed [Mr. Gallo] money?” RP 94. A.B. equivocated by answering, “I’m sure.” RP 94.

Later, during re-direct examination, the State asked, “and you were crying hysterically?” and Mr. Gallo objected by asserting the State was testifying. RP 101. The trial court sustained the objection. RP 101. The State explained to the court that A.B. was a hostile witness, but the trial court, without opining whether or not the witness was hostile, nonetheless directed the State to “ask open-ended questions.” RP 101. The State briefly examined A.B. and did not ask any more questions that drew an objection from Mr. Gallo. RP 101-02.

During a recess, the State briefly flirted with the idea of amending the charges based on A.B.’s recantation. RP 113. However, the next day the State recalled A.B. as a witness. RP 165. A.B. explained that she had contacted law enforcement and the prosecutor’s office the previous night, on her own initiative, because she wished to testify again and “make things right.” RP 167. She later explained that she was nervous to the point that she did not even remember her own birthday, but felt terrible and did not “want to be the reason why somebody is out on the streets and doing it to

someone else.” RP 173-74.³ A.B. testified in accordance to her statements the night of the robbery and in earlier witness interviews: that Mr. Gallo had used a firearm to rob her. RP 172. She explained that he shoved the gun into the side of her face. RP 173. During cross-examination, Mr. Gallo elicited testimony that A.B. had fabricated her answer the previous day about Mr. Gallo not having a firearm, and that she was nervous. RP 174-76.

Mr. Gallo proposed a limiting instruction that would instruct the jury that it could only consider evidence that law enforcement had set up a controlled purchase between A.B. and Mr. Gallo for the limited purpose of establishing the two were together that evening. RP 115-16. The State agreed, and the court instructed the jury to only consider this evidence for a limited purpose. CP 38.

During closing argument, the State recited generally the testimony of witnesses in support of its theory of the case. RP 197-99. The State summarized the evidence that the event was essentially a “drug rip.” RP 199. Mr. Gallo did not object. RP 199-200. During rebuttal, the State pointed out that A.B. did not testify that she owed a “drug debt to Mr. Gallo.” RP 205. Again, Mr. Gallo did not object. RP 205-06.

³ Mr. Gallo objected to this answer as non-responsive but did not move to strike.

The jury found Mr. Gallo guilty of first degree robbery and second degree assault. CP 51-52. The State's sentencing brief informed the court that the two offenses merged. CP 63. The trial court imposed a mid-point sentence of 126 months of total confinement for first degree robbery and 61.5 months total confinement for assault and ordered Mr. Gallo to serve the sentences concurrently. CP 80-81. The court did not vacate the lesser offense. CP 76-81.

IV. ARGUMENT

A. MERGER APPLIES TO MR. GALLO'S CONVICTIONS

The State agrees with Mr. Gallo that his offenses of first degree robbery and second degree assault merge. The State proposed that the offenses merged in its sentencing brief to the trial court. CP 63. The remedy is for this Court to vacate the lesser conviction. *State v. Weber*, 159 Wn.2d 252, 265, 149 P.3d 646 (2006). In this case, the lesser conviction is the second degree assault.

B. THE EVIDENCE IS SUFFICIENT

Mr. Gallo asserts that the State did not provide sufficient evidence that he used a firearm during the robbery. Mr. Gallo's contention is completely contrary to the standard of review: he does not believe A.B. was credible, so he asks this Court to reverse his conviction. Because credibility determinations are not subject to review, this Court should affirm.

In a criminal case, the State must provide sufficient evidence to prove each element of the charged offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). In evaluating the sufficiency of the evidence, the court must determine whether, when viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Pirtle*, 127 Wn.2d 628, 643, 904 P.2d 245 (1995). A claim of insufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences from that evidence. *State v. Kintz*, 169 Wn.2d 537, 551, 238 P.3d 470 (2010). All reasonable inferences must be interpreted most strongly in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Reviewing courts must 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). This Court does not reweigh the evidence or substitute its judgment for that of the jury. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). For sufficiency of evidence claims, circumstantial and direct evidence carry equal weight. *State v. Varga*, 151 Wn.2d 179, 201, 86 P.3d 139 (2004).

An appellate court is not in a position to find persuasive evidence that the trier of fact found unpersuasive. *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn. App. 710, 717, 225 P.3d 266 (2009). In determining the sufficiency of evidence, an appellate court need only consider evidence favorable to the prevailing party. *Bland v. Mentor*, 63 Wn.2d 150, 155, 385 P.2d 727 (1963). “Credibility determinations are peculiarly matters for the trier of fact and may not be second-guessed by an appellate court.” *Minehart v. Morning Star Boys Ranch, Inc.*, 156 Wn. App. 457, 464, 232 P.3d 591 (2010).

Mr. Gallo repeatedly asserts that he does not believe A.B. was credible, and, therefore, the jury should not have believed her statements that Mr. Gallo used a firearm to rob her. This entire argument is contrary to the standard of review, which requires him to admit the truth of the State’s evidence, and provides that credibility is not subject to review. In light of that, his claim that the State did not provide sufficient evidence that he was armed with a firearm fails and no further analysis is necessary.

Regardless, the to-convict instruction required the State to prove Mr. Gallo displayed what appeared to be a firearm or other deadly weapon. CP 41. A.B. testified Mr. Gallo was armed with what appeared to be a firearm and used it in the commission of the crime by jabbing it into A.B.’s cheek and threatening her. The State also offered circumstantial evidence

that Mr. Gallo possessed the firearm: A.B. developed a bruise consistent with being struck in the face by a hard object, just as she explained happened. Police found two firearm holsters in the vehicle, hours later. Those holsters were located in the trunk. Witnesses saw Mr. Gallo briefly leave the vehicle and open the trunk before getting back into the vehicle with A.B. Several officers testified to A.B.'s excited utterances from the night she was robbed, and those statements indicated Mr. Gallo used a firearm.

Mr. Gallo additionally argues in support of his contention that: “no rational person would throw an expensive item like a firearm out of a car window prior to a police chase”; that law enforcement did not see anyone throw a firearm from the vehicle during the hot pursuit; and that law enforcement did not find a firearm. Appellant’s Br. at 14. That arguments ignores the above evidence and the reasonable inferences which can be taken from that evidence. First, a person who has just robbed someone—at gunpoint—that they know to be a police informant⁴ has a rational reason to rid themselves of a firearm shortly after the incident. RP 85. Second, the police pursuit did not occur until hours after the robbery, which gave Mr. Gallo ample time to hide or rid himself of the firearm. Third, law

⁴ This fact alone suggests Mr. Gallo is not acting rationally.

enforcement testified that the pursuit took place over many miles, in the dark and eventually through a field, and that they could not maintain visual contact with Mr. Gallo's vehicle the entire time. There are entirely rational explanations for why the State did not produce the firearm at trial, and they do not implicate the question of whether the State provided *sufficient* evidence that Mr. Gallo was armed with a firearm.

Even assuming that this Court would entertain a credibility challenge on appeal, A.B. adequately explained her decision to recant on the first day of trial before correcting her testimony: she was seriously afraid of Mr. Gallo. This was a reasonable explanation and the jury was permitted to accept it. After all, Mr. Gallo *knew A.B. was a police informant* and still inexplicably chose to rob her at gun-point, knowing that she was immediately going to contact or be contacted by law enforcement. CP 18 (“Dude ur the police k”); RP 85 (“He said I was a cop and to get out of the car”). Even the trial court recognized, after the verdict, that confidential informants “end up having a lot of problems because nobody likes a snitch.” RP 224. Other witnesses corroborated A.B.'s original reaction to and recitation of the robbery. There is no basis for reversal.

C. PROSECUTORIAL MISCONDUCT

Mr. Gallo makes several claims of prosecutorial misconduct. He fails to meet his burden to establish the prosecutor acted improperly in any

instance. Even assuming any of the allegations constituted improper conduct, none resulted in prejudice.

1. Principles of law.

To establish prosecutorial misconduct, a defendant bears the burden of proving the prosecutor's conduct was both (1) improper and (2) prejudicial. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). If a defendant shows that the prosecutor's conduct was improper, the court must determine whether the improper conduct prejudiced the defendant. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). A prosecutor's improper conduct results in prejudice when “there is a substantial likelihood [that] the instances of misconduct affected the jury's verdict.” *Thorgerson*, 172 Wn.2d at 443 (alteration in original) (quoting *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)). Courts review the comments of a prosecutor during closing argument in “the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions.” *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). Even improper remarks are not grounds for reversal if they were “a pertinent reply” or response to defense counsel's acts or statements. *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994).

2. *Leading questions.*

Mr. Gallo first contends the prosecutor acted improperly by asking A.B. leading questions during direct examination when she recanted. He does not meet his burden to demonstrate prosecutorial misconduct.

A leading question is one that suggests the desired answer. *State v. Scott*, 20 Wn.2d 696, 698, 149 P.2d 152 (1944). ER 611(c) provides:

leading questions should not be used in direct examination “except as may be necessary to develop the witness’ testimony. Ordinarily leading questions should be permitted on cross examination. *When a party calls a hostile witness ... interrogation may be by leading questions.*

(Emphasis added). The State is entitled to treat its own witness as hostile when that witness recants during direct examination. *See State v. Harstad*, 17 Wn. App. 631, 637, 564 P.2d 824 (1977) (“The prosecutor clearly expected [the State’s witness] to testify that Harstad had asked him to go and find the rapist. [The State] was surprised that he did not and was entitled to treat him as a hostile witness and cross-examine him”). The State may not call a known hostile witness in order to introduce otherwise inadmissible evidence the prosecutor must have expected the witness to give evidence. *State v. Allen S.*, 98 Wn. App. 452, 465, 989 P.2d 1222 (1999).

The asking of leading questions is not generally a reversible error. *Stevens v. Gordon*, 118 Wn. App. 43, 55-56, 74 P.3d 653 (2003). Most

instances of leading questions are not prejudicial. *State v. Swanson*, 73 Wn.2d 698, 699, 440 P.2d 492 (1968).

Mr. Gallo does not meet his burden to demonstrate the State's conduct was improper. Leading questions may always be used with a hostile witness. ER 611(c); *see State v. Belt*, 2016 WL 2874188, 194 Wn. App. 1006 at *9 (2016) (Siddoway, J., concurring) (unpublished).⁵ A.B. was clearly hostile the first day when she recanted her story on the stand and claimed she lied when she told law enforcement Mr. Gallo had a firearm. The State was entitled to expect testimony consistent with A.B.'s earlier statements that Mr. Gallo had shoved a firearm into her cheek and robbed her. When her testimony was not as anticipated, the rules of evidence authorized the State to ask her leading questions. In fact, Mr. Gallo recognized this very concept when he argued to the trial court during his sentencing hearing that the jury must have made a mistake in finding him guilty because A.B. was "belligerent" and "evasive" while testifying on the first day of trial. RP 221.

Admittedly, the trial court directed the State to ask "open-ended questions" when the State asserted that Ms. Gallo was hostile. RP 101. But

⁵ Under GR 14.1, a party may cite to an unpublished decision of the Court of Appeals filed on or after March 1, 2013. Unpublished opinions have no precedential value, are not binding on any court, and may be accorded such persuasive value as the court deems appropriate. GR 14.1(a).

the State ended its examination shortly after that admonition, which did not address whether A.B. was hostile. RP 101-02. The next day, the State did not treat A.B. as a hostile witness, because she no longer was such. RP 167-69, 172-74. Because Mr. Gallo does not establish the prosecutor acted improperly by adhering to the rules of evidence, his claim fails.

Mr. Gallo also fails to establish prejudice. The State elicited hearsay testimony through several different law enforcement officers pursuant to the excited utterance exception that A.B. exclaimed Mr. Gallo had a firearm. She had bruising consistent with having been struck with a firearm. That bruising was not present prior to A.B. entering Mr. Gallo's vehicle. But for three objections, two of which occurred when A.B. was obviously hostile, Mr. Gallo was apparently satisfied with the remainder of the State's questioning.

Mr. Gallo never asked the trial court to strike the responses, and he never requested a mistrial. *See* RP at passim. This strongly suggests that he did not believe the few preserved evidentiary objections resulted in prejudice. Mr. Gallo implies the court sua sponte should have struck the responses, but that is not an accurate statement of the law; he should have asked for that remedy. *See State v. Neukom*, 17 Wn. App. 1, 4, 560 P.2d 1169 (1977). A party has an obligation to attempt to correct errors at the trial court level, and when a party does not move to strike testimony

after an objection, it suggests the party is choosing to gamble on the verdict. *Id.*; see also *Drake v. Ross*, 3 Wn. App. 884, 886, 478 P.2d 251 (1970) (the failure to move to strike testimony after successful objection operates as a waiver).

Additionally, A.B.'s inconsistent testimony about the firearm bolstered his attacks on her credibility. This was a strategic decision by defense counsel. Were the trial court to have declared a mistrial, the record does not provide a reason to believe that in a future trial A.B. would not testify *only* in accordance with her statements the night of the robbery. This would give Mr. Gallo a weaker attack on her credibility. Mr. Gallo gambled on the verdict. He cannot now claim prejudice.

3. *Closing argument: "mischaracterizing" testimony of drug debt.*

Mr. Gallo argues the prosecutor acted improperly when pointing out that A.B. did not testify she had a drug debt. This claim fails.

A claim of prosecutorial misconduct is waived where a defendant does not object during trial unless the misconduct is "so flagrant and ill-intentioned that it cause[d] an enduring and resulting prejudice that could not have been neutralized by a curative instruction." *Matter of Phelps*, 190 Wn.2d 155, 165, 410 P.3d 1142 (2018). Reviewing courts focus less on whether the conduct was flagrant and ill-intentioned, and more on whether the resulting prejudice could have been cured. *Emery*, 174 Wn.2d at 762.

Mr. Gallo did not object to the prosecutor's statement. Mr. Gallo could have asked the court to give the jury a curative instruction, which would most likely have been a reference to the standard jury instruction pertaining to evidence. CP 31-32.

Although the State agrees that the verdict hinged on the jury's assessment of A.B.'s credibility, whether or not A.B. had a drug debt would not entitle Mr. Gallo to rob her at gunpoint. And Mr. Gallo had ample impeachment evidence from A.B.'s inconsistent testimony about the presence of the firearm. Because a timely objection and curative instruction would have cured any hypothetical prejudice, Mr. Gallo has waived this alleged error.

Mr. Gallo likely did not object because the statement was not improper. The State is generally afforded wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence. *State v. Gentry*, 125 Wn.2d 570, 641, 888 P.2d 1105 (1995).

A.B. did not "testif[y] that she was 'sure' she owed money to Mr. Gallo" as he asserts in his brief. Appellant's Br. at 8. This is a mischaracterization of the actual testimony. During cross-examination, defense counsel asked A.B., "did you owe [Mr. Gallo] some money?"

RP 94. A.B. replied “I’m sure.” RP 94. This is an equivocal⁶ answer and plainly suggests A.B. did not know whether or not she owed a drug debt. Mr. Gallo asserted during his closing argument, as he does on appeal, that A.B. unequivocally answered she was sure she had a drug debt. The State was justified in pointing out that her answer was not as certain as Mr. Gallo contends. *See Russell*, 125 Wn.2d at 86. There is no impropriety. This claim fails.

4. *Closing argument: improperly “referenced evidence admitted for a limited purpose” that the robbery was a drug rip.*

Mr. Gallo also asserts the prosecutor acted improperly by characterizing the facts of this case as a “drug rip.” RP 199. He complains that this constituted a misstatement of law. Appellant’s Br. at 23-24. The prosecutor did not comment on the law when characterizing the facts of the case as a drug rip; consequently, this claim has no merit.

Evidence that A.B. was planning to purchase drugs from Mr. Gallo pursuant to a controlled buy is inseparably related to the committed crime. There would have been no contact between A.B. and Mr. Gallo but for the drug buy. Mr. Gallo would not have handed A.B. a bag of fake drugs and

⁶ Equivocal means “of doubtful meaning ... uncertain as an indication or sign.” *State v. Smith*, 34 Wn. App. 405, 408, 661 P.2d 1001 (1983). A.B. gave similar equivocal answers for other questions she did not know the answer to. *See* RP 79 (“Sure. Yeah.”); RP 91 (“I guess kind of. Yeah. Sure”).

forcefully taken cash from her at gunpoint but for the fact that this was a drug transaction. The State elicited testimony in support of all those facts. None of these facts the State elicited arises to a statement (or misstatement) of the law.

To the extent Mr. Gallo implies the prosecutor improperly appealed to the jury's passion, he waived this alleged error. *Matter of Phelps*, 190 Wn.2d at 165. Once again, Mr. Gallo did not object. RP 199-200.

Although the State did not make an improper argument, any potential impropriety would not have resulted in an enduring prejudice because Mr. Gallo's commission of the robbery is inseparably linked to the fact that the basis for the contact was A.B.'s controlled attempt to buy drugs from him. Importantly, a limiting instruction differs from an evidentiary ruling made by the trial court directing the parties not to elicit or mention evidence. The limiting instruction in this case appropriately directed the jury that it could consider the res gestae of the crime, but only for a limited purpose as the factual foundation for the contact. The State did not refer to inadmissible evidence. Further, had there been an objection, a reference to the limiting instruction would have easily cured any hypothetical prejudice.

Furthermore, the evidence was obviously relevant and admissible, and was, in fact, admitted at trial. The State is generally afforded wide latitude in making arguments to the jury and prosecutors are allowed to

draw reasonable inferences from the evidence. *Gentry*, 125 Wn.2d at 641. The prosecutor did not improperly request the jury to find Mr. Gallo guilty of robbery *because he was a drug dealer*. The prosecutor asked the jury to find Mr. Gallo guilty of robbery because the evidence demonstrated that during a law enforcement-controlled drug transaction Mr. Gallo produced a firearm, shoved it in A.B.'s face, and forcibly took her cash. There is no error.

5. *Foundational explanations of law enforcement unit duties.*

Mr. Gallo cites *In re Glasman*, 175 Wn.2d 696, 711, 286 P.3d 673 (2012), for the proposition that Mr. Gallo was prejudiced when witnesses explained their duties in foundational questioning. The State disagrees that these questions were improper or that they resulted in prejudice.

It is questionable whether the analysis in *Glasman* has any application to the question at issue here. In that case, a prosecutor altered booking photographs of the defendant, in which he already appeared bloody and unkempt, with captions such as “GUILTY, GUILTY, GUILTY” and “WHY SHOULD YOU BELIEVE ANYTHING HE SAYS ABOUT THE ASSAULT?” and published those pictures to the jury during closing argument. *Id.* at 711. In this case, the State questioned Patrol Anti-Crime Team (PACT) officers about their duties and the basis for why they were working that night, to establish a foundation for their testimony. RP 120.

Regardless, Mr. Gallo fails to meet his burden to demonstrate prosecutorial misconduct. First, the evidence he objected to was not unduly prejudicial. At a bare minimum, the instance Mr. Gallo challenges on appeal was cumulative with foundational explanations from several other officers. Sergeant Brian Eckersley explained PACT is a “proactive unit” that often works with the U.S. Marshals and the Violent Offenders Task Force, and that it often searches for robbery suspects. RP 35-36. Mr. Gallo did not object. Officer Mark Brownell also explained his duties with PACT and the Violent Offenders Task Force, again without objection from Mr. Gallo. RP 50.

Officer Winston Brooks explained that he was dispatched that night to search for a robbery suspect in accordance with that same PACT and Violent Offenders Task Force training when Mr. Gallo objected. RP 120. At a minimum, this evidence was cumulative to the unobjected-to testimony detailed above, so any prejudice is minimal. Second, the jury was fully aware that the State had charged Mr. Gallo with the violent crime of first degree robbery and alleged that Mr. Gallo had utilized a firearm in the commission of the crime. Information that the PACT team performed its duties by searching for a robbery suspect would not engender *unfair* prejudice; it was simply the crime that Mr. Gallo committed. The nature of robbery is inherently violent. Officer Brooks explained he was cautious and

somewhat apprehensive because he knew Mr. Gallo was allegedly armed, and he did not know if Mr. Gallo or the driver of the vehicle would shoot him at the termination of the pursuit. RP 130-31. Mr. Gallo himself elicited testimony that Officer Brooks had to unholster his firearm for this reason. RP 143-44.

Second, the prosecutor did not improperly seek to admit unfairly prejudicial evidence. The prosecutor simply asked the foundational question of why Officer Brooks had been dispatched that night. He did not ask if the officer believed Mr. Gallo was a violent individual, or one of the most violent individuals. The conduct in *Glasman*, by contrast, was completely intentional by design, because the prosecutor was showing highly prejudicial altered images to the jury during closing argument. The conduct in Mr. Gallo's case does not rise to that level.

D. CUMULATIVE ERROR DOES NOT APPLY

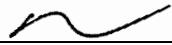
The cumulative error doctrine permits reversal where the cumulative effect of repetitive errors compromises a person's right to a fair trial. *State v. Case*, 49 Wn.2d 66, 73, 298 P.2d 500 (1956). Here, Mr. Gallo does not prevail on any alleged trial error. The conceded merger issue relates to sentencing, not to trial. There is no basis for this Court to apply the cumulative error doctrine. *See Weber*, 159 Wn.2d at 279.

V. CONCLUSION

The State agrees with Mr. Gallo that his convictions merge. Mr. Gallo's remaining challenges do not succeed. Appellate courts do not reweigh credibility or conflicting evidence. The prosecutor did not act inappropriately, nor could the prosecutor's actions have prejudiced Mr. Gallo. Cumulative error does not apply because the only error in this case is a sentencing error. This Court should affirm.

Dated this 26 day of March, 2020.

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

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY R. GALLO,

Appellant.

NO. 37088-7-III

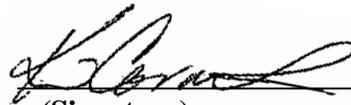
CERTIFICATE OF
SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on March 26, 2020, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Stephanie Taplin
stephanie@newbrylaw.com

3/26/2020
(Date)

Spokane, WA
(Place)



(Signature)

SPOKANE COUNTY PROSECUTOR

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