Supreme Court No. 100164-9
(COA No. 81581-4-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW LEARNED,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court

Washington Court of Appeals

Rules

Constitutional Provisions

A. IDENTITY OF PETITIONER AND COURT OF APPEALS DECISION

Matthew Learned, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review dated August 2, 2021. RAP 13.3; 13.4.

B. ISSUES PRESENTED FOR REVIEW

1. Did the trial court improperly admit out-of-court statements where the evidence established the person who made the statements made concurrent fabricated statements and where hours had elapsed between the startling event and when the statements were made?

2. Did the prosecutor's use of a "straw person" to shift the burden of proof and other misconduct in closing arguments deprive Mr. Learned of his right to a fair trial?

3. Did the trial court err when it did not grant Mr. Learned's motion for a new trial based on newly discovered exculpatory evidence?

C. STATEMENT OF THE CASE

Jennifer Kasik encountered Mary Gomez on the side of the road after receiving a telephone call from her daughter. RP 605. Ms. Gomez had apparent injuries and was otherwise disheveled. RP 610-11.

Ms. Kasik wanted to call 911, but Ms. Gomez asked her not to, declaring, "Please don't do that. I have a warrant. I don't want to be arrested." RP 624-25. Ms. Kasik called anyway.

Before speaking to 911, Ms. Gomez asked Ms. Kasik to call her "brother." RP 308. It was revealed that Ms. Gomez lied about who she wanted to speak with and that she really wanted Ms. Kasik to call a friend and not her brother. RP 318.

By the time Ms. Kasik called 911, Ms. Gomez had calmed down and was "relaxed." RP 615-16. When asked by 911 who had assaulted her, Ms. Gomez identified Mr. Learned. RP 24. Ms. Gomez left the hospital with her friend before the police could verify her story. RP 690.

The trial court admitted Ms. Gomez's statements to the 911 operator implicating Mr. Learned. RP 354.

Ms. Gomez did not testify at trial. At trial, the government alleged that Mr. Learned held Ms. Gomez against her will for two weeks and assaulted her at some point in those weeks. RP 383.

The medical technicians who treated Ms. Gomez contradicted this timeline. According to their testimony, the injuries Ms. Gomez sustained occurred within an hour of the 911 call. RP 557.

Further, Mr. Learned was not around during the timeline established by the EMTs. Instead, he went to court with his mother, who picked him up early and did not return with him until the police had arrived at his home. RP 750.

In its closing argument, the government described Mr. Learned as "the unluckiest man in the world." RP 810. The government stated that Mr. Learned was going on his "merry way" when "out of the blue" Ms. Gomez appeared. RP 810. The prosecutor continued this theme, arguing that "Unluckiest of all, she pins the whole thing on him." RP 811. He described how Ms. Gomez repaid Mr. Learned's "kindness" by telling "this wild story" of her assault. RP 811.

He then argued that "the truly unlucky part" was that "Mary Gomez was brave enough to leave." RP 814. The prosecutor then claimed it was "unlucky" for Ms.

Kasik to have found Ms. Gomez and that she made Ms. Gomez feel safe enough to speak to the police and paramedics. *Id.*

The jury found Mr. Learned not guilty of unlawful imprisonment but guilty of second-degree assault. RP 821.

After trial, Mr. Learned moved for a new trial based on texts received from Ms. Gomez. In the first text, Ms. Gomez stated she did not remember Mr. Learned as her abuser. RP 840. The second text explicitly said, "Matthew did not hurt me." CP 164.

The trial court denied Mr. Learned's motions for a new trial finding the exonerating evidence to be "merely impeaching." RP 877.

The Court of Appeals found no error. Mr. Learned asks this Court to accept review.

D. ARGUMENT

1. **The trial court improperly admitted out-of-court statements.**

This Court should accept review of whether the trial court's error in admitting Ms. Gomez's out-of-court statements deprived Mr. Learned of a fair trial.

In denying Mr. Learned relief, the Court of Appeals decision contradicts decisions issued by this Court. In *State v. Brown*, this Court held that a statement made after the complainant escaped from a kidnapping and rape was inadmissible, even though it occurred shortly after her escape. 127 Wn.2d 749, 758, 903 P.2d 459 (1995). In *Brown*, the complainant fabricated part of her story when she spoke with 911. *Id.* at 753. Like *Brown*, Ms. Gomez fabricated part of her story when she asked Ms. Kasik to allow her to call her "brother." RP 308.

The Court of Appeals determined it did not have to follow *Brown* because Ms. Gomez did not later admit to a fabrication, nor was the fabrication about the facts of the crime. APP 5. The Court of Appeals analysis misses the point of *Brown*, which is to exclude statements where they do not have the indicia of reliability required for admission. 127 Wn.2d at 759.

Instead, this Court should accept review to reiterate that when admitting an excited utterance, the "key determination is 'whether the statement was made while the declarant was still under the influence of the event to the extent that [the] statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment.'" *Brown*, 127 Wn.2d at 758-59 (quoting *State v. Strauss*, 119 Wn.2d 401, 416, 832 P.2d 78 (1992)). Because the evidence, in this case, demonstrated that Ms. Gomez fabricated a story before

she spoke to the police or 911, it was an error for the court to admit her out-of-court statements. Her lie demonstrates that she had the opportunity to fabricate and did, in fact, do so.

The Court of Appeals also chose not to follow *Brown v. Spokane Cty. Fire Prot. Dist. No. 1*, where this Court again found that a statement made 30 to 40 minutes after an event did not meet the exception for an excited utterance. 100 Wn.2d 188, 196, 668 P.2d 571, 576 (1983). Accepting that at least an hour had passed between the incident and when Ms. Gomez made her statements, the Court nevertheless determined this case did not apply because the witness in *Brown v. Spokane* had an opportunity to calm down. App 6. Again, the Court of Appeals overlooks the similarity to the facts of this case. Here, not only had significant time passed, but Ms. Gomez had also

calmed down. RP 307-08. Like *Brown v. Spokane*, Ms. Gomez was no longer under the influence of any event that occurred between her and Mr. Learned, as witnesses described her as relaxed. RP 615-16.

This Court should take review. Any startling event between Mr. Learned and Ms. Gomez occurred hours before Ms. Gomez made her statement. If anything, her fear when she encountered Ms. Kasik was of the police and her worry about being arrested. RP 625. The court later learned that Ms. Gomez's fear of the police was legitimate, as she had experienced being tased by them. CP 93.

And unlike other statements, the evidence here established Ms. Gomez actually told lies before she made her statement, demonstrating her opportunity to fabricate. RP 308. The core reason why an out-of-court statement is admissible is because of its reliability.

Where a witness has the chance to fabricate before they make their statement, it should not be admissible. *Brown*, 127 Wn.2d at 758. The Court of Appeals' decision to the contrary conflicts with this Court's holdings. And here, not only did Ms. Gomez have the opportunity to fabricate, which is the critical question, but she did in fact do so. The Court of Appeals' distinction between whether the lie is central to the statement is not part of the analysis this Court provided in *Brown*.

Ms. Gomez's out-of-court statements were central to the government's case, and the error in admitting the statements materially affected the trial's outcome. Because the Court of Appeals decision conflicts with decisions of this Court, RAP 13.4 is satisfied. Because this error deprived Mr. Learned of his right to a fair trial, this Court should grant review.

2. The government's misconduct tainted Mr. Learned's right to a fair trial.

Prosecutorial misconduct violates the "fundamental fairness essential to the very concept of justice." *Donnelly v. DeChristoforo*, 416 U.S. 637, 642, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974); U.S. Const. amend. XIV; Const. art. I, § 3, § 22. Here, the prosecutor's misconduct deprived Mr. Learned of a fair trial. Review should be granted to remedy the unfairness of the prosecutor's misconduct.

In argument, the prosecutor accused Mr. Learned of being the "unluckiest man in the world." To acquit, the prosecutor argued the jury had to find that Mr. Learned was "going along with his merry life" when "out of the blue, Mary Gomez comes back into his life." RP 810. He continued his argument by stating, "Unluckiest of all, [Ms. Gomez] pins the whole thing on him." RP 811. "How unlucky." *Id.*

> The prosecutor then mocked the defense stating, And of course Mr. Learned was surprised when he came back with his mom. I'm sure he was surprised at the injuries that he gave her and the threats he probably gave her hadn't worked. I'm sure she was -- I'm sure he was surprised that she left. He probably thought that when he beat her up she wouldn't try to leave again; that she learned her lesson the first time.

RP 813.

He returned to this theme to vouch for the credibility of Ms. Gomez. RP 814. The prosecutor argued,

> But the truly unlucky part, the truly unlucky part for Matthew Learned is that despite her painful injuries, Mary Gomez was brave enough to leave. In the face of whatever threat he had given her to try to make her to stay, despite her clear fear that he was going to come for her, she left.

RP 814.

The prosecutor also vouched for the credibility of Ms. Kasik through his burden-shifting argument. RP 814. The prosecutor argued,

> He was unlucky that a Good Samaritan found her and made her feel safe and reassured her that police officers and the fire department would care a lot more about her injuries than about the fact that she had this warrant out for driving with a suspended license.

RP 814.

These arguments were improper as they misrepresented the defense and shifted the burden of proof. Further, in affirming Mr. Learned's conviction, the Court had to disregard its precedence. In *State v. Thierry*, the Court of Appeals recognized that similar misconduct required a new trial. 190 Wn. App. 680, 694, 360 P.3d 940 (2015).

In *Thierry*, the prosecutor created a "straw person" that it could quickly destroy. 190 Wn. App. at 694. Having made this incorrect portrayal of the defense argument, the prosecution criticized the defense for saying no prosecutions could ever occur for

crimes against children. *Id.* In fact, the defense argued the complainant should not be believed because of her inconsistencies. *Id.* The *Thierry* Court ruled the prosecution's mischaracterization of the defense in rebuttal unfairly denied Mr. Thierry his right to present a defense. *Id.*

At no time in Mr. Learned's case did he argue that he was "unlucky." He did not argue, as the prosecutor suggested, that a series of misfortunate events led to his prosecution. In fact, the jury did not need to find that a parade of horribles occurred to acquit Mr. Learned. Ms. Gomez had not appeared for court and had lied to the others about her "brother."

By arguing Mr. Learned was the "unluckiest man in the world," the prosecutor presented the jury with the false choice of acquitting Mr. Learned only if they found him to be unlucky and not because of the

government's failure to present sufficient evidence of guilt. *Thierry*, 190 Wn. App. at 694. This argument eroded the burden of proof and improperly discredited Mr. Learned's defense. *State v. Warren*, 165 Wn.2d 17, 27, 195 P.3d 940 (2008). These arguments were improper. Review should be granted to clarify these unacceptable arguments that compromise the right to a fair trial.

3. Newly discovered evidence required a new trial.

After trial, Mr. Learned made two motions for a new trial based on newly discovered evidence. RP 829, CP 161 (citing CrR 7.5(a)(3)). Both times, the trial court found that the newly discovered evidence was insufficient to overturn Mr. Learned's conviction. RP 848, CP 187. The Court of Appeals agreed and determined the trial court did not abuse its discretion when it did not rule in Mr. Learned's favor. APP 10.

This Court should grant review. The two texts received from Ms. Gomez called into question the reliability of her out-of-court statements and whether they should have been admitted. And while the Court of Appeals focused on their impeachment value at trial, it does not address the threshold question of whether the trial court would have admitted the statements in the first instance, other than to observe that the trial court speculated it would not have changed its analysis of the statement's admissibility. APP 10.

A court should order a new trial based on newly discovered evidence when the moving party demonstrates the evidence "(1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not

merely cumulative or impeaching." *State v. Williams*, 96 Wn.2d 215, 223, 634 P.2d 868 (1981).

Critically, this Court looks to whether the newly discovered evidence is material. *State v. Hawkins*, 181 Wn.2d 170, 181, 332 P.3d 408 (2014). A witness's recantation is generally considered "newly discovered evidence." *State v. Macon*, 128 Wn.2d 784, 799-800, 911 P.2d 1004 (1996). When provided with an exculpatory recantation, the trial court is tasked with deciding whether or not the recantation is reliable; if the defendant's conviction is based solely upon the recanting witness's testimony, and the trial court determines the recantation is reliable, the trial court shall grant a new trial. *Id.* at 804.

The evidence presented at the trial court met these criteria.

First, it would have changed the outcome of the trial. The only inculpating evidence was Ms. Gomez's statement. If the trial court had found this statement not reliable, it would have excluded the statement, necessitating the dismissal of these charges.

Second, the statements could not have been found without due diligence. Both Mr. Learned and the government could not find Ms. Gomez, who only communicated when she chose to. They both made efforts to find her before the trial but were unable to do so. Further, the trial court agreed that Mr. Learned acted with due diligence. RP 873.

Third, the newly discovered evidence was not merely cumulative or impeaching. As argued, the reliability of Ms. Gomez's statement was highly questionable. Mr. Gomez's out-of-court statements were made hours after her claimed assault and

occurred simultaneously with a story about her "brother." Had the trial court had this evidence when considering the statements' admissibility, it is likely it would have excluded these statements, regardless of what the court declared after Mr. Learned had been convicted.

These statements also could have been admitted as substantive evidence. *State v. Young*, 192 Wn. App. 850, 856, 192 Wn. App. 850 (2016). To be admissible, the text must be purported to be authored or created by a particular sender, sent from an address associated with the sender, and the contents must be sufficiently distinct that, taken in conjunction with the circumstances, they are sufficient to support a finding that the text in question is what the proponent claims it to be. *Id.* at 855. These text messages met all of these requirements.

This Court should grant review. When confronted with newly discovered evidence, the trial court only has the discretion to deny a new trial where independent corroborating evidence exists to support the original testimony. *State v. Eder*, 78 Wn. App. 352, 358, 899 P.2d 810 (1995). If independent corroboration is lacking and the defendant is convicted solely on the testimony of a now recanting witness, it is an abuse of discretion not to grant a new trial." *Id.* at 358-59; *see also In re Clements*, 125 Wn. App. 634, 641, 106 P.3d 244 (2005).

Without Ms. Gomez's statement implicating Mr. Learned, the evidence was insufficient to convict Mr. Learned. The physical evidence established Ms. Gomez may have been assaulted, but not when Mr. Learned was present. RP 557. No other person names Mr. Learned as the perpetrator. None of the physical evidence directly linked Mr. Learned to the offense. RP

711. He made a statement denying his involvement. Without Ms. Gomez's statement, the evidence is insufficient to support a conviction.

Based on this record, this Court should grant review. The integrity of Mr. Learned's conviction is tenuous. The Court's error in admitted the out-of-court statements was made in error and is in conflict with decisions of this Court. The criteria for this Court to accept review are met and, to enforce the rules for when a new trial should be granted, Mr. Learned asks this Court to grant review.

E. CONCLUSION

Mr. Learned asks this Court to grant review as requested above. RAP 13.4(b).

Counsel further certifies this document contains 2,912 words and complies with RAP 18.7(b).

DATED this 1st day of September 2021.

Respectfully submitted,

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APPENDIX

Table of Contents

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. MATTHEW SCOTT LEARNED, Appellant.	No. 81581-4-I DIVISION ONE UNPUBLISHED OPINION

APPELWICK, J. — Learned appeals from a judgment and sentence for second degree assault - domestic violence. He argues the trial court improperly admitted the victim's out-of-court statements. He further contends the State committed prosecutorial misconduct in its rebuttal. Finally, he argues newly discovered evidence required a new trial. We affirm.

FACTS

Matthew Learned was charged with second degree assault - domestic violence and unlawful imprisonment - domestic violence for events occurring between October 2, 2019 and October 16, 2019. Learned and the victim, Mary Gomez, had previously been in a relationship.

A witness at trial, Jennifer Kasik, testified that on October 16, 2019 she received a call from her daughter who had encountered Gomez on the street. Kasik left her house and soon found a "visibly scared" Gomez on the sidewalk a few blocks away. Kasik called the 911 emergency system and relayed statements

from Gomez to the dispatcher. Gomez identified Learned as her boyfriend and said that he "beat her up." She said Learned lived in a nearby trailer. Responding law enforcement noted Gomez "looked like she had been beaten up severely." She had significant injuries to her head, face, and body, including two swollen shut black eyes.

When Learned arrived at his residence, law enforcement were already present. Learned was detained and agreed to speak to police. He said his ex-girlfriend, Gomez, had been staying in his trailer for two weeks. He denied that Gomez had been held captive.

Gomez did not testify at trial. Defense counsel moved to exclude her out-of-court statements as inadmissible hearsay. The court admitted the statements she made prior to the 911 call as well as a portion of the 911 call recording.

In its rebuttal, the State described Learned as being, by the defense's theory of the case, "the unluckiest man in this world." Defense counsel did not object to the remarks.

The jury found Learned guilty of second degree assault - domestic violence. Near the end of the trial, Learned's investigator received a text message. The sender identified themselves as Gomez, writing in part "I don't remember [Learned] as my abuser." Learned moved for a new trial and the court denied the motion. The investigator received another text message addressed from Gomez stating Learned was not the person who hurt her. Learned filed another motion for a new trial, which the court denied.

Learned appeals.

DISCUSSION

First, Learned argues the trial court improperly admitted Gomez's out-of-court statements. Next, he argues the State committed prosecutorial misconduct in its closing argument. Finally, he argues newly discovered evidence required a new trial.

I. Hearsay

Learned argues Gomez's out-of-court statements should not have been admitted as excited utterances.

We review a trial court's decision to admit evidence for abuse of discretion. Brundridge v. Fluor Fed. Servs., Inc., 164 Wn.2d 432, 450, 191 P.3d 879 (2008). "Discretion is abused if it is exercised on untenable grounds or for untenable reasons." State v. Vy Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

"Hearsay" is an out-of-court statement offered to prove the truth of the matter asserted. ER 801. Hearsay is not admissible except as provided by court rules or by statute. ER 802. A trial court may admit hearsay as an excited utterance if it is a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." ER 803(a)(2). A party may establish whether the declarant made the statement while under the stress of the event by circumstantial evidence "such as the declarant's behavior, appearance, and condition, appraisals of the declarant by others, and the circumstances under which the statement is made." State v. Young, 160 Wn.2d 799, 809-10, 161 P.3d 967 (2007). Spontaneity, the passage of time, and the declarant's state of mind are factors courts consider to determine

whether a declarant has had time to calm down enough to make a calculated statement based on self-interest. See State v. Hardy, 133 Wn.2d 701, 714, 946 P.2d 1175 (1997); State v. Dixon, 37 Wn. App. 867, 873, 684 P.2d 725 (1984).

Here, these factors weigh in favor of the court's decision. It admitted the statements Gomez made to Kasik before the 911 call as excited utterances. It based this decision "on her demeanor, [her] excited state, as well as the information gleaned to assist emergency aid." From Kasik's testimony, the court heard that "Gomez looked scared, was looking around, looked confused, [and] appeared disheveled." Kasik's testimony indicated as the 911 call progressed, Gomez was still upset, but began to calm down. Based on this description of her mental state, the court found that at the beginning of the call, Gomez was in an excited state and under the stress of the event, and as the call proceeded that stress dissipated. For that reason, it admitted the portion of the 911 call up until she was questioned about her injuries. It excluded the 911 call statements after that point and all post-911 call statements.

Learned argues that Gomez's out-of-court statements should have been excluded because her demeanor and mental state were primarily caused by her fear of the police. She told Kasik she was afraid of being arrested because of an outstanding warrant. But, Gomez also told Kasik, "He's coming for me," and Kasik described Gomez's obvious fear based on that, prior to their discussion of calling 911. Further, Gomez remained on the scene, awaiting the arrival of police. It was within the court's discretion to find her mental state was primarily caused by the exciting event, not the fear of police.

Learned also argues Gomez's statements were unreliable because she asked to call her "brother" to pick her up, but Kasik later learned the individual was not her brother but a friend. Citing State v. Brown, Learned asserts that due to this misstatement, the court could not be assured that Gomez did not fabricate her statement. 127 Wn.2d 749, 758, 903 P.2d 459 (1995). There, the victim's statement on the 911 tape was held not to be an excited utterance, because she testified that she had an opportunity to, and did in fact, decide to fabricate a portion of her rape story while making the call to 911. Id. at 757-58. Brown is distinguishable. Gomez did not say she fabricated anything. The challenged statement was not about the facts of the crime at all. It is a statement that goes to her overall reliability. Whether Gomez intended to mislead Kasik in order to use the phone, or whether she changed her mind about who Kasik should call, or whether she was still under the influence of the exciting event, the inconsistencies are considerations for the trial court to weigh.

Still, Learned points to another case, Brown v. Spokane County Fire Protection District No. 1, where a statement made to a firefighter 30 to 40 minutes after a car accident did not meet the exception for an excited utterance. 100 Wn.2d 188, 196, 668 P.2d 571 (1983). He argues, at best, Gomez and Learned's interactions ended when Learned left for court, an hour before her statement.[1] So, he asserts that we should apply the same analysis here to hold Gomez's excitement had passed. But, as the State notes, the admissibility of the excited

[1] Learned told police he left his trailer around 8:30 a.m. that morning to go to court. The 911 call was placed at 9:34 a.m.

utterance evidence was not the primary question before the court in that case. Brown, 100 Wn.2d at 195-96. The Brown court focused on whether the admission was prejudicial since it was cumulative of other witnesses' testimony. Id. at 196. It did not adopt a rule that a 30 to 40 minute delay in making a statement about an event or condition rendered the statement per se outside the stress of excitement caused by the event or condition. Id. at 195-96. The court below had determined the excited utterance exception did not apply because the witness had the opportunity to calm down and reflect on events. Id. at 196. Additionally, Gomez could still be said to be undergoing stress from fleeing Brown's property and her fear of Brown coming after her. According to police, Gomez exited the trailer about 10 minutes after Learned left to go to court, walking through the woods until she reached the neighborhood where she ran into Kasik.

Here, the trial court found considerable evidence that Gomez was still under the stress of an ongoing event. In light of the broad discretion granted to the trial court in ruling on admissibility of excited utterances, it did not err in admitting Gomez's statements.

II. Prosecutorial Misconduct

Learned, who did not object at trial, further contends the State committed prosecutorial misconduct in its rebuttal. To demonstrate prosecutorial misconduct, the defendant must prove the prosecutor's conduct was both improper and prejudicial. State v. Emery, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). When the defendant fails to object at trial, any error is waived unless the prosecutor's conduct

was "so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice." Id. at 760-61.

Our first inquiry, therefore, is whether the prosecutor's comments were improper. Id. at 756. The contested remarks occurred during the State's rebuttal. The prosecutor said, "One of two things has to be true . . . . Either [Learned] did this or [Learned] is the unluckiest man in this world." He then outlines the implausibility of alternative theories exonerating Learned: that Gomez voluntarily spent two weeks living with him before a stranger went to his trailer and attacked her. "Unluckiest of all," he remarks, "she pins the whole thing on him." He argued,

> [T]hat's not reasonable. No, beyond a reasonable doubt in this case [Gomez]'s substantial bodily injuries, her fearful demeanor and statements, the leaves and the pine needles on her clothing and body, her description of her assault and of her assailant points to one reasonable conclusion, Matthew Learned did it.

Learned argues, "[The government] eroded the burden of proof by suggesting that [it] did not need to prove its case but merely had to discredit Mr. Learned's defense." In context, the prosecutor was juxtaposing the account offered by Learned with the evidence the State presented at trial. He reiterated the State's burden of proof before summarizing the evidence offered to meet that burden. He neither stated nor implied that the defendant had to produce any evidence. Arguing Learned either committed the crimes as supported by the evidence or is very unlucky to have been falsely accused is not equivalent to arguing the jury must believe Learned's account in order to acquit.

Learned relies on State v. Thierry, where the prosecutor incorrectly stated defense counsel had argued a witness should not be believed because of his age.

190 Wn. App. 680, 692, 360 P.3d 940 (2015). The prosecutor then suggested if such an argument had merit, "'the State may as well just give up prosecuting'" child sex abuse cases. Id. at 690. We held that the argument was improper in the context presented. Id. at 692.

This case is distinguishable from Thierry. First, unlike defendant Thierry, Learned does not offer specific ways in which the prosecutor's characterization of his defense was untrue. Id. at 692. He merely argues the contested remarks offered an "extreme version" of his defense theory. Second, in Thierry, the prosecutor's remarks were found to be improper in part because they relied "on a threatened impact on other cases or society in general, rather than on the merits of the State's case." Id. at 691. Here, the prosecutor made no statements regarding the societal impacts of an acquittal.

Learned has not demonstrated that the contested remarks constituted prosecutorial misconduct.[2]

III. Newly Discovered Evidence

Finally, Learned asserts the trial court erred by not granting a new trial based on newly discovered evidence.

To prevail on a motion for a new trial based on newly discovered evidence, a defendant must show that the evidence (1) will probably change the result of the

[2] Learned also argues the prosecutor impermissibly vouched for the witnesses. "Vouching may occur in two ways: the prosecution may place the prestige of the government behind the witness or may indicate that information not presented to the jury supports the witness's testimony." State v. Coleman, 155 Wn. App. 951, 957, 231 P.3d 212 (2010). Neither referring to Gomez as "brave" for leaving nor calling Kasik a "Good Samaritan" constituted vouching. This argument is without merit.

trial, (2) was discovered since the trial, (3) could not have been discovered before trial by the exercise of due diligence, (4) is material, and (5) is not merely cumulative or impeaching. State v. Swan, 114 Wn.2d 613, 641-42, 790 P.2d 610 (1990).

Recantation may be newly discovered evidence, but it is inherently suspect. State v. Macon, 128 Wn.2d 784, 799-801, 911 P.2d 1004 (1996). "'Recantation by an important witness of his or her testimony at the trial does not necessarily, or as a matter of law, entitle the defendant to a new trial.'" State v. Wynn, 178 Wash. 287, 288, 34 P.2d 900 (1934). "When a defendant is convicted upon the testimony of a witness who later recants, the trial court must first determine whether the recantation is reliable before considering a defendant's motion for a new trial based upon the recantation." Macon, 128 Wn.2d at 804. A trial court's determination that a recantation of doubtful or insignificant value will not be lightly set aside by an appellate court. Wynn, 178 Wash. at 289.

Learned contends that Gomez's recantations via text messages to his investigator are newly discovered evidence. The first text message was sent by an individual who identified themselves as Gomez. It read in part, "I don't remember [Learned] as my abuser." The court found this to be an equivocal statement. The investigator later received a second text from the same individual. It read in part, "I'm not going to say who I think hurt me and not going to say I know anything but I know it wasn't Matthew who hurt me."

The text messages were unsworn and unauthenticated out-of-court statements. They were offered to prove the truth of the matter asserted. As such,

they were clearly hearsay. ER 801. As hearsay, the text messages would be admissible only for impeachment purposes.[3] ER 801, 806. Evidence that is merely cumulative or impeaching is not enough to prevail on a motion for a new trial. Swan, 114 Wn.2d at 641-42.

Still, he argues had the text messages been available, the trial court would have excluded all of Gomez's statements as unreliable. The trial court considered this argument, ultimately finding the messages "would not change the court's analysis" on the admissibility of the excited utterances.

We conclude Learned has not established that Gomez's text messages constitute newly discovered evidence. The trial court did not err in denying a new trial.

We affirm.

Appelwick, J.

WE CONCUR:

[3] Learned does not argue on appeal that the text messages fall under an exception to the hearsay rule. Learned argues that the text messages were not hearsay under ER 801(d)(1). ER 801(d)(1) is inapplicable, because Gomez did not testify at trial and Learned has not shown evidence that she would testify at a second trial. See ER 801(d)(1)(iii). And, the rule applies to statements of identification. Id. Gomez's texts do not identify an alternate assailant.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 81581-4-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Gavriel Jacobs, DPA
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Washington Appellate Project

WASHINGTON APPELLATE PROJECT

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