SUPREME COURT NO. 101048-6

NO. 55185-3-II

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH BERCIER,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable Stephen Brown, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER/DECISION BELOW

Joseph Bercier, appellant below, asks this Court to grant review, pursuant to RAP 13.4, of the unpublished decision of the Court of Appeals in State v. Bercier, no. 55185-3-II, entered on May 24, 2022. A copy of the opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. The right to a jury trial is violated when witnesses offer opinion testimony on the guilt of the accused or the credibility of witnesses. Was this right violated when the officer testified that, after hearing to the complaining witness' allegations of rape, he had probable cause to arrest Bercier?

2. It is improper for a prosecutor to urge a verdict based on public policy considerations or social problems rather than the facts of the case and the law. Here, the prosecutor argued to the jury that corroboration of the complaining witness' testimony was not necessary because otherwise, sexual abuse cases "would be almost impossible." Did this improper argument violate Bercier's right to a fair trial?

3. Did the cumulative effect of the officer's opinion testimony and the prosecutor's closing argument improperly bolster the complaining witness' testimony, violating Bercier's right to a fair trial and requiring reversal of his conviction for rape of a child in the third degree?

4. Was Bercier's constitutional right to effective assistance of defense counsel violated when his attorney failed to object to the improper opinion testimony and prosecutorial misconduct that unfairly bolstered the credibility of the complaining witness?

C. STATEMENT OF THE CASE

In August of 2019, appellant Bercier's daughter, A.B., accused him of inappropriate sexual conduct. CP 1. Bercier and A.B.'s mother split up when A.B. was small, but they reunited several years later. 2RP 152-53. Initially, A.B.'s mother was happy and believed that father and daughter enjoyed a strong bond. 2RP 155. However, after about a year and a half, A.B.'s mother noticed Bercier was becoming more controlling of both

her and the children, and the bond with A.B. was diminishing. 2RP 155-57.

A.B. testified Bercier began enforcing numerous rules. He refused to allow her to spend time with friends, have a phone, ride the bus, or wear ripped pants. 2RP 113. She claimed that in August 2018, he pressured her to prove she was grown-up by drinking alcohol and smoking drugs. 2RP 123. She claimed she complied because he told her she could earn back her privileges by doing so. 2RP 123, 125-26. She also claimed he had installed cameras all over the house, and showed her a video of herself, in the nude, getting in the shower. 2RP 125. Then, according to A.B., Bercier insisted she suck his penis, and she complied. 2RP 130-32. She testified that, the next day, he apologized, told her he had not been in his right mind, and told her it would never happen again. 2RP 133. But she claimed that a short time later, while on a trip to Spokane, he again persuaded her to suck his penis. 2RP 135-36. She testified that he pressured her other times, offering money and phones, but

she refused. 2RP 137. For nearly a year, A.B. told no one. 2RP 132-33.

When told what had happened, A.B.'s mother immediately believed her. 2RP 160. She took A.B. to the police station to report her allegations. 2RP 160. After describing A.B.'s report and demeanor, Zieber testified before the jury, "I told them that I would be in contact with some other officers and letting them know that I had probable cause at that time for the arrest of Joseph Bercier." 2RP 174.

A.B.'s mother also called Bercier to confront him. 2RP 160. Bercier asserted his innocence. 2RP 161. She told him never to come back to their home and he has not done so. 2RP 139, 142, 160-61. A.B. now has a phone, is allowed to see her friends, and wears ripped jeans. 2RP 141-43.

Shortly after A.B.'s report, police stopped Bercier's car. 2RP 178-80. Bercier pulled over immediately but fled when the officers approached his window and told him he was under arrest. 2RP 180-81, 190-91. As Bercier drove away, the open

driver's side door flung backwards slightly and hit an officer's wrist. 2RP 192. Bercier was arrested the next day at a motel in Olympia. 1RP 29.

A.B.'s mother called police again to report finding a sawed-off shotgun inside a black baseball bag in the garage. 1RP 39-40; 2RP 164. A.B. testified Bercier had tried to enlist her assistance in sawing off the barrel and he carried the gun around in the bag. 2RP 120-21. Bercier's fingerprints were on the tape around the grip of the gun. 1RP 72-73.

A.B.'s mother also told police there were drugs in the car, but the substances found did not test positive for any illegal substance. 1RP 53-55. Although A.B.'s mother was willing to allow a police search, no one attempted to verify the claim that Bercier had placed cameras throughout the house. 1RP 55.

In closing, Bercier argued the state had failed to prove he intended to assault Officer Sexton as he drove away or that he had endangered anyone else. 1RP 105-06. He argued the state had failed to prove third-degree rape of a child because A.B.'s

testimony was not corroborated. 1RP 107-08. Finally, he argued there was no evidence that the shotgun contained a firing pin. 1RP 112. In rebuttal, the prosecutor told the jury that the law does not require corroboration of A.B.'s story, and that if it were otherwise, these types of cases would be "almost impossible." 1RP 117.

Bercier was convicted of third-degree rape of a child, attempt to elude a pursuing police officer, third degree assault of a police officer, unlawful possession of a firearm, and possession of a short-barreled firearm. CP 45-49. At sentencing, Bercier agreed that his offender score on each count was 12. 2RP 206. The court sentenced Bercier, as requested by the state, to consecutive sentences on counts one (third-degree rape of a child), two (unlawful possession of a firearm), and four (attempt to elude) for a total term of 217 months. 2RP 212-14; CP 84. On Count 5 (third-degree assault), the court imposed 51 months of confinement and 9 months of community custody. CP 84-85.

The Court of Appeals reversed Bercier's conviction for assault of the officer as he fled in his car. App. at 2. The court also held that the two convictions for unlawful possession of a firearm and possession of a short-barreled firearm were the same criminal conduct, that several of the community custody conditions were invalid, and that Bercier's prior conviction for possession of a controlled substance must be removed from the calculation of his offender score. App. at 2. The court affirmed the remaining counts including third-degree rape of a child and remanded for resentencing. App. at 2. Bercier now seeks this Court's review.

D. REASONS WHY REVIEW SHOULD BE ACCEPTED AND ARGUMENT

1. Police testimony opining on guilt violated Bercier's right to a fair trial

Bercier seeks this Court's review because the police officer testified to an improper opinion on guilt in violation of Bercier's constitutional right to a jury trial. Review is warranted under RAP 13.4(b)(1) and RAP 13.4(b)(3) because this case raises a

constitutional issue and the Court of Appeals decision is in conflict with the principles of State v. Montgomery, 163 Wn.2d 577, 590, 183 P.3d 267 (2008), State v. Demery, 144 Wn.2d 753, 765, 30 P.3d 1278 (2001), and State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007).

The jury's role as fact-finder is essential to the constitutional right to a jury trial. Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711 (1989). That role is to be held "inviolate" under Washington's constitution. Const. art. I, §§ 21, 22. Therefore, "No witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference." State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). Expressions of personal belief as to guilt are "clearly inappropriate" testimony in criminal trials. Montgomery, 163 Wn.2d at 591.

To determine whether an opinion is improper, courts consider (1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of

defense, and (5) the other evidence before the trier of fact. State v. Johnson, 152 Wn. App. 924, 931, 219 P.3d 958 (2009) (citing State v. Hudson, 150 Wn. App. 646, 653, 208 P.3d 1236 (2009)). Courts generally distinguish proper factual observations from testimony about guilt or intent State v. Quaale, 182 Wn.2d 191, 198-99, 340 P.3d 213 (2014); Montgomery, 163 Wn.2d at 595 (officer testimony improper because it contained explicit opinion on intent).

Police testimony is particularly problematic because it is clothed in an "'aura of reliability.'" Montgomery, 163 Wn.2d at 595 (quoting Demery, 144 Wn.2d at 765). Any opinion offered by a police officer is likely to be more persuasive in the eyes of the jury and thus more damaging to the accused's right to a fair trial. Id.

"Official suspicion" by police is an impermissible basis for the jury's verdict. Taylor v. Kentucky, 436 U.S. 478, 485, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978)). Admission of such evidence

violates the accused's right to have the jury determine its verdict "solely on the basis of the evidence introduced at trial." Id.

Here, the specific nature of the testimony was an opinion by the officer that there was probable cause to arrest Bercier. 2RP 174. Officer Brandi Zieber offered this testimony during her description of A.B.'s report to police. 2RP 173-74. After describing A.B.'s report and demeanor, Zieber testified, "I told them that I would be in contact with some other officers and letting them know that I had probable cause at that time for the arrest of Joseph Bercier." 2RP 174. This testimony amounted to telling the jury that, in the officer's professional opinion, Bercier was guilty because A.B.'s account was to be believed.

This testimony was improper under Montgomery and Demery, and was manifest constitutional error, reviewable even when raised for the first time on appeal under RAP 2.5. RAP 2.5(a)(3) requires a "'plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case.'" Kirkman, 159 Wn.2d at 935 (quoting State v.

WWJ Corp., 138 Wn.2d 595, 603, 980 P.2d 1257 (1990)). In the context of improper opinions, this requires "an explicit or almost explicit witness statement on an ultimate issue of fact." Id. at 936.

Zieber's testimony that there was probable cause to arrest Bercier was just such an "almost explicit witness statement." 2RP 174. A police officer's testimony that there was probable cause to arrest a defendant for the charged crime amounts to a "spur-of-the-moment assessment" of criminal liability. Demery, 144 Wn.2d at 760-761 (citing Warren v. Hart, 71 Wn.2d 512, 514, 429 P.2d 873 (1967)). Here, that spur-of-the-moment assessment was based solely on the credibility of A.B., whose account was, in turn, the only evidence that a crime even occurred. Thus, the assertion of probable cause was an almost explicit opinion on guilt, warranting this Court's review under RAP 2.5.

It is immaterial that determining probable cause to arrest is part of an officer's job. That does not excuse informing the jury directly about the officer's belief. In Montgomery, the state argued the officers' opinions added nothing new because the jury

already knew the officers arrested the defendant because they believed he was guilty. 163 Wn.2d at 595. The court rejected this argument, declaring, "We believe this unavoidable state of affairs does not justify allowing explicit opinions on intent. The opinion testimony in this case was improper." Id.

Here, the written jury instructions failed to mitigate the prejudice because they did not disabuse jurors of the notion that they could defer to the officer's opinion when deciding A.B.'s credibility. Given the lack of corroborating evidence regarding A.B.'s allegations, the jury was likely to give significant weight to the officer's apparent assessment that her claims were to be believed. The opinion testimony was manifest constitutional error that invaded the province of the jury. This Court should accept review and reverse.

2. The prosecutor committed misconduct in arguing it would be "almost impossible" if corroboration of the complaining witness' testimony were required.

Prosecutors are not permitted to "invite[] the jury to think about how difficult it would be to convict child molesters if the

law required evidence corroborating the victim's testimony." State v. Smiley, 195 Wn. App. 185, 187, 379 P.3d 149 (2016). The prosecutor in this case did precisely that when she told the jury that these types of cases would be "almost impossible" if corroboration of the complaining witness' testimony were required. 1RP 117. For this additional reason, Bercier's conviction for third-degree rape of a child should be reversed.

This Court should accept review under RAP 13.4(b)(3) and (4) for two reasons. First, the Court of Appeals' conclusion in this case and in Smiley, 195 Wn. App. at 189-90, that this type of prosecutorial misconduct would be curable by an instruction from the judge should be revisited. Second, the frequent recurrence of this type of misconduct suggests reversal of convictions is necessary as a deterrent to prosecutors for making clearly improper arguments that violate the accused's right to a fair trial.

A prosecutor is a quasi-judicial officer with an independent duty to ensure that accused persons receive a fair trial. State v. Thierry, 190 Wn. App. 680, 689, 360 P.3d 940 (2015). A

prosecutor's misconduct has the potential to render the trial process unfair and violate the accused's constitutional rights. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012).

Therefore, it is improper for prosecutors to use arguments calculated to inflame the passions or prejudices of the jury. Thierry, 190 Wn. App. at 690 (citing Glasmann, 175 Wn.2d at 704). Prosecutors may not appeal to jurors' "fear and repudiation of criminal groups." State v. Perez-Mejia, 134 Wn. App. 907, 916, 143 P.3d 838 (2006). Appeals to protect the community or "send a message" about a societal problem such as child abuse are a specifically prohibited subset of emotional appeals. See, e.g., Perez-Mejia, 134 Wn. App. at 916-18; State v. Powell, 62 Wn. App. 914, 918-19, 816 P.2d 86 (1991); State v. Bautista-Caldera, 56 Wn. App. 186, 195, 783 P.2d 116 (1989).

Two published cases in recent years have presented a specific subset of this type of misconduct: arguments grounded in the difficulty of prosecuting child sex offenses if corroboration

were required. These arguments have been deemed improper appeals to policy considerations that should have no influence on the jury's verdict in a given case. See, e.g., Smiley, 195 Wn. App. at 194. In Smiley, the court noted that such arguments "create[] the risk that the jury will decide to believe the child's testimony for improper reasons." Id. at 195. In Thierry, the court explained this argument was improper because it was tantamount to inviting the jury to convict in order to "protect future victims," or to protect against a "threatened impact on other cases, or society in general." 190 Wn. App. at 691.

Two other unpublished cases involved similar improper arguments by prosecutors. In State v. Harris, 197 Wn. App. 1062, 2017 WL 504751 (2017) (unpublished),[1] the prosecutor "called the jury to imagine a system in which corroborating evidence was required and how difficult it would be to prosecute cases with a

[1] The unpublished decisions in this section, cited under GR 14.1, have no precedential value, are not binding on any court, and are cited only for such persuasive value as the court deems appropriate.

child's testimony alone." In In re Pers. Restraint of Domingo-Cornelio, 7 Wn. App. 2d 1068, 2019 WL 1093435 (2019), rev'd, 196 Wn.2d 255, 474 P.3d 524 (2020), the prosecutor argued, "In such a system, most children would have to be told, sorry, we can't prosecute your case, we can't hold your abuser responsible because there is nothing to corroborate what you are telling us and [no one] is going to believe a child. "

An argument is flagrant and ill-intentioned "when a Washington court previously recognized the same argument as improper in a published opinion." State v. Jones, 13 Wn. App. 2d 386, 406, 463 P.3d 738 (2020) (citing State v. Johnson, 158 Wn. App. 677, 685, 243 P.3d 936 (2010); State v. Fleming, 83 Wn. App. 209, 213-14, 921 P.2d 1076 (1996)). That is the case here. Given the long history of precedent condemning this line of prosecutorial argument, the argument in this case should be deemed flagrant and ill-intentioned.

Moreover, the effect of the prosecutor's argument was incurable by instruction. The prosecutor had already activated

jurors' pre-existing concerns for the larger problem of child abuse in this country. As is frequently said, the bell, once rung, cannot be unrung. See Powell, 62 Wn. App. at 919. Activating jurors' emotions with inflammatory argument is the type of misconduct that courts have deemed incurable by instruction. See, e.g., Glasmann, 175 Wn.2d at 707-08 (highly prejudicial imagery could not be overcome by instruction); State v. Emery, 174 Wn.2d 741, 762-63, 278 P.3d 653 (2012) (contrasting cases of mere jury confusion, which can be cured by instruction, with cases of inflammatory effect requiring reversal). The legal fiction presuming that juries are always capable of following the court's instruction to set their passions and prejudices aside is not warranted when the prosecutor activated the jury's emotions and concern for the larger problems making it difficult to prosecute child abuse.

Moreover, as Judge Fearing recently stated in an unpublished opinion, "Vindication of an accused's rights should not always depend on the skills of his lawyer and whether his

lawyer timely objected to errors by the prosecuting attorney." State v. Crossguns, 15 Wn. App. 2d. 1047, 2020 WL 7231098, at *11 (2020) (unpublished). Bercier was entitled to a fair trial, by a jury who set emotions aside to decide the case based on rational application of the law to the evidence presented at trial. He asks this Court to accept review and reverse.

3. Cumulative error also requires reversal.

The two errors discussed above both unfairly bolstered the credibility of the complaining witness. Particularly when taken together, their effects combined to render Bercier's trial unfair, and this Court should accept review under RAP 13.4(b)(3).

Every criminal defendant has the constitutional due process right to a fair trial. U.S. Const. Amend. XIV; Const. art. 1, § 3. Under the cumulative error doctrine, a defendant is entitled to a new trial when the errors at trial, even if individually harmless, accumulate to deny the accused a fair trial. State v. Venegas, 155 Wn. App. 507, 520, 228 P.3d 813 (2010) (citing

State v. Weber, 159 Wn.2d 252, 279, 149 P.3d 646 (2006)). That is the case here.

In Venegas, the court noted that the case hinged on witness credibility and, rather than trusting the jury to make its determination based on the evidence, the prosecutor resorted to unfair tactics. Venegas, 155 Wn. App. at 526. The court reversed based on cumulative error. Id. at 527.

The third-degree rape of a child charge in this case likewise hinged on A.B.'s credibility. Both the opinion testimony and the misconduct in closing argument operated to bolster her credibility. Because A.B.'s testimony was the only evidence of this charge, the accumulated prejudice from the improper opinion testimony and the prosecutor's improper closing argument denied Bercier a fair trial, and his conviction should be reversed.

4. Defense counsel was ineffective in failing to object to improper opinion testimony and prosecutorial misconduct both of which unfairly bolstered the credibility of the complaining witness.

The Court of Appeals declined to reverse Bercier's conviction not because the officer's testimony and the prosecutor's argument were not improper, but because defense counsel failed to object. App. at 9, 11. Bercier therefore also asks this Court to accept review and reverse due to constitutionally ineffective assistance of counsel under RAP 13.4(b)(3).

Defense counsel is constitutionally ineffective where (1) the attorney's performance was unreasonably deficient and (2) the deficiency prejudiced the defendant. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). The presumption of competent performance is overcome by demonstrating "the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel." State v. Crawford, 159 Wn.2d 86, 98, 147 P.3d 1288 (2006). Failure to

preserve error can also constitute ineffective assistance and justifies examining the error on appeal. State v. Ermert, 94 Wn.2d 839, 848, 621 P.2d 121 (1980); see State v. Allen, 150 Wn. App. 300, 316-17, 207 P.3d 483 (2009) (addressing ineffective assistance claim where attorney failed to raise same criminal conduct issue during sentencing). Similarly, the failure to object to the admission of evidence is ineffective when (1) there was no legitimate tactical reason for failing to object; (2) an objection would likely have been sustained; and (3) the result of the trial would have been different had the evidence not been admitted. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

Counsel was ineffective in failing to object or move for mistrial based on the prosecutor's improper argument, which appealed to jurors' emotions and encouraged a verdict based on the larger societal problem of child abuse. As discussed above, this argument could *not* be effectively countered by a jury instruction. However, to the extent that an instruction would have cured the prejudice and protected Bercier's right to a fair trial,

then there was no valid strategic reason not to seek such an instruction.

Similarly, with respect to the officer's opinion testimony, Bercier's conviction should also be reversed due to ineffective assistance of counsel. There was no reason not to object because an objection would likely have led to an express jury instruction to disregard the officer's opinion. The jury would be presumed to have followed that instruction. Kirkman, 159 Wn.2d at 928. If the jury had been properly instructed to determine A.B.'s credibility without regard to the officer's opinion on guilt, it is reasonably probable the outcome of the trial with respect to the third-degree rape of a child charge would have been different.

E. CONCLUSION

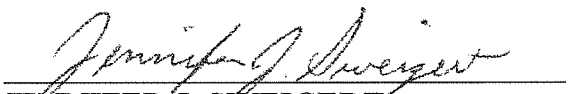
For the foregoing reasons, Bercier respectfully requests this Court accept review and reverse.

DATED this 23rd day of June, 2022.

I certify that this document was prepared using word processing software and contains 3,741 words excluding the parts exempted by RAP 18.17.

Respectfully submitted,

NIELSEN KOCH & GRANNIS, PLLC



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Appendix

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Division Two

May 24, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JOSEPH ADAM BERCIER, Appellant.	No. 55185-3-II UNPUBLISHED OPINION

GLASGOW, C.J.—Joseph Adam Bercier raped his 15-year-old daughter, AB. After AB reported the rape to police, officers pulled Bercier over to arrest him. As soon as an officer opened the driver's side door of the car and told Bercier he was under arrest, Bercier accelerated and fled. The car door swung back and hit the officer's wrist, causing a minor injury. After Bercier's arrest, his wife found a short-barreled shotgun in the garage.

A jury found Bercier guilty of third degree rape of a child, attempting to elude a pursuing police vehicle, third degree assault of a police officer, first degree unlawful possession of a firearm, and unlawful possession of a short-barreled firearm. The trial court imposed an exceptional sentence and imposed community custody only for the assault conviction.

Bercier appeals his convictions for rape of a child and assault. He argues his conviction for rape of a child should be reversed due to improper opinion testimony, prosecutorial misconduct, and, in the alternative, ineffective assistance of counsel and cumulative error. He argues his conviction for assault should be reversed because the State failed to prove that he intended to place

the officer in apprehension or fear of bodily injury. We affirm Bercier's conviction for rape of a child and reverse his conviction for assault.

Bercier also appeals his sentence. He asserts that his trial counsel was ineffective for failing to argue that the convictions for unlawful possession of a firearm and unlawful possession of a short-barreled firearm constituted the same criminal conduct, that the trial court erred by imposing community custody conditions unrelated to the assault crime, and that his offender score included a conviction for unlawful possession of a controlled substance in violation of *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021). The State concedes all of these errors, and we accept the State's concessions.

We reverse Bercier's conviction for third degree assault of a police officer and affirm his remaining convictions. We remand for the trial court to vacate the assault conviction, strike the associated community custody conditions, and resentence Bercier on all remaining counts with corrected offender scores, considering Bercier's convictions for unlawful possession of a firearm and unlawful possession of a short-barreled firearm as the same criminal conduct.

FACTS

AB's father raped and sexually abused her when she was 15 years old by forcing her to drink alcohol and consume controlled substances and then committing rape. After AB told her mother that Bercier had raped her, AB and her mother gave separate statements to Officer Brandi Zieber.

When Zieber testified at trial, the State asked, "And so after taking those two statements, what did you do next?" Verbatim Report of Proceedings (VRP) (Nov. 13, 2019) at 174. Zieber responded, "I told them that I would be in contact with some other officers and let[] them know

that I had probable cause at that time for the arrest of Joseph Bercier and that I would update them on what was to come after that." *Id.* Zieber then notified the rest of the department that they had probable cause to arrest Bercier and provided them with descriptions of Bercier and the vehicle he was driving, which belonged to AB's mother.

Early the next morning, Officer Nathan Nussbaum was on patrol when he saw the car that Zieber had described. He pulled the car over and recognized the driver as Bercier. Nussbaum approached from the passenger side of the car and ordered Bercier to keep his hands on the steering wheel while he waited for other officers to arrive.

When Officer Gary Sexton arrived, he approached from the driver's side of the car and opened Bercier's door. Sexton informed Bercier that he was under arrest, and Bercier "just hit the gas and fled the scene." *Id.* at 191; *see also id.* at 182 (Nussbaum testifying, "[A]s soon as . . . Sexton said [']you're under arrest,['] Mr. Bercier fled."); VRP (Nov. 14, 2019) at 21 (third officer testifying that "the car immediately took off"). The jury was also shown a video of Sexton opening the car door and Bercier immediately driving away.

When Bercier "hit the gas[,] . . . the door flung back and struck [Sexton] on [his] right wrist causing a small laceration and bruising." VRP (Nov. 13, 2019) at 192. Sexton speculated that Bercier was aware Sexton was standing in the doorway, but the trial court sustained an objection to this testimony and instructed the jury to disregard it.

Bercier never tried to drive the car toward Sexton, and Sexton never testified that he experienced fear or apprehension. On cross-examination, Bercier's counsel asked Sexton whether Bercier fled to "get away from" the officers. *Id.* at 199. Sexton responded, "I would speculate that's what he was trying to do, yes." *Id.*

Bercier then drove through multiple red traffic lights "at a high rate of speed." *Id.* at 183. The speed limit was 25 miles per hour, and Sexton estimated that Bercier "was going at least 60 miles [per] hour." *Id.* at 194. Shortly thereafter, officers located the car, but it had been abandoned. Bercier was eventually arrested in Olympia.

Bercier had locked the family's garage with two padlocks and prohibited anybody else from entering without his supervision. When the car was returned to AB's mother, she found a "bundle of keys" in it. *Id.* at 164. Some of these keys unlocked the garage. AB's mother entered the garage and found several weapons in a sports bag, including a short-barreled shotgun. She called police and asked them to take the bag. Fingerprints from tape that had been wrapped around the grip of the shotgun matched Bercier's fingerprints. Bercier had previously been convicted of a felony offense.

A. Motion to Dismiss, Jury Instructions, and Closing Arguments

After the close of evidence at trial, Bercier moved to dismiss the third degree assault charge, arguing the State failed to present evidence that Bercier "intended to assault anybody." VRP (Nov. 14, 2019) at 83. The assault charge was based on an alleged assault of Sexton when Bercier fled the traffic stop. The State responded that Bercier did not "have to intend, necessarily, that the crime result, but his action was intentional" when he sped up and drove away. *Id.* The trial court agreed that evidence of an "intentional touching or striking" was "not there," and the State does not appeal this ruling. *Id.* at 84. But the trial court denied Bercier's motion to dismiss, reasoning that the jury could find Bercier created a reasonable apprehension of fear or bodily injury.

Relevant to this charge, the trial court instructed the jury that "[a]n assault is an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury." Clerk's Papers (CP) at 40.

In closing, the State argued that when officers pulled Bercier over, Bercier hit the gas and fled because he did not want to be arrested. According to the State, Bercier knew that "the best way to get [Sexton] away from the car" was to place him in reasonable fear that he would be hit with and injured by the car. VRP (Nov. 14, 2019) at 99. "So by [Bercier] hitting the gas with . . . Sexton in that door well, that is assault in the third degree." *Id.*; *see also id.* at 114 ("He probably did just react. But his intent was to get that officer away from his car, by making him think he was going to get hit."). The State further argued that "in this case, not only was it reasonable for . . . Sexton to fear bodily injury, he actually suffered some minor bodily injury." VRP (Nov. 14, 2019) at 99. Bercier argued his only intention was to get away.

Addressing the child rape charge, Bercier argued in closing that there was "emotional testimony," but there was not "any corroborating evidence." *Id.* at 107. "What you have is a bare allegation with no follow up whatsoever, and no corroborative evidence. That should give you grave concern." *Id.* at 109. In rebuttal, the State responded that "the law does not require any corroboration. Specifically, the law is that the testimony of the victim, if you believe her beyond a reasonable doubt[,] is sufficient to sustain a conviction." *Id.* at 117; *see* RCW 9A.44.020(1). "And when you think about what these cases are, it would be almost impossible if that weren't the standard" because these crimes are not typically committed in public places or around other people. VRP (Nov. 14, 2019) at 117.

The jury found Bercier guilty as charged of third degree rape of a child, attempting to elude a pursuing police vehicle, third degree assault of a police officer, first degree unlawful possession of a firearm, and unlawful possession of a short-barreled firearm. The jury also returned a special verdict finding that when Bercier attempted to elude a police vehicle, his actions threatened others with physical injury or harm.

B. Sentencing

Both parties agreed that Bercier had an offender score of 12. Bercier's offender score included one prior conviction for unlawful possession of a controlled substance.

The trial court imposed an exceptional sentence by ordering Bercier's sentences for rape of a child, attempting to elude a pursuing police vehicle, and unlawful possession of a firearm to run consecutively to each other and to all other counts for a total confinement term of 217 months. In support of the exceptional sentence, the trial court explained that Bercier "committed multiple current offenses and [his] high offender score results in some of the current offenses going unpunished." CP at 76; *see also* CP at 77 (citing RCW 9.94A.535(2)(c)). Additionally, the jury found an aggravating factor that Bercier endangered others when eluding a police vehicle.

The trial court imposed nine months of community custody on the assault conviction. As a condition of community custody, the trial court required Bercier to "[o]btain a sexual deviancy evaluation and follow all treatment recommendations." CP at 96. It also prohibited him from contacting any juveniles or vulnerable adults without supervision; changing treatment providers without approval; possessing or pursuing any sexually explicit material; accessing the Internet, e-mail, or social media without permission; entering "X-rated movies, peep shows, or adult book

stores;" loitering or frequenting places where children congregate; and contacting AB and her family. *Id.*

Bercier appeals his convictions for third degree rape of a child and third degree assault of a police officer. He also appeals his sentence.

ANALYSIS

I. THIRD DEGREE RAPE OF A CHILD

Bercier argues his conviction for third degree rape of a child should be reversed because Officer Zieber impermissibly expressed an opinion on Bercier's guilt and the prosecutor committed misconduct during closing argument. Alternatively, he argues his trial counsel was ineffective for failing to object to these errors. Bercier further argues that even if these errors were insufficient to warrant reversal independently, their cumulative effect deprived him of a fair trial. We disagree.

A. Opinion Testimony

Bercier argues Zieber impermissibly expressed her opinion on Bercier's guilt when she testified that after interviewing AB and AB's mother, she told them she had probable cause to arrest Bercier. The State responds that this was not a manifest constitutional error warranting review for the first time on appeal because the officer's testimony was not an "'explicit or nearly explicit'" expression of her opinion on Bercier's guilt. Br. of Resp't at 4 (citing *State v. Kirkman*, 159 Wn.2d 918, 936, 155 P.3d 125 (2007)). It was "a fleeting reference to having probable cause to arrest." *Id.* at 7.

"The role of the jury is to be held 'inviolate' under Washington's constitution." *State v. Montgomery*, 163 Wn.2d 577, 590, 183 P.3d 267 (2008). The jury alone is responsible for

weighing the evidence and deciding what facts have been proved. *Id.* Therefore, it is "clearly inappropriate" for witnesses to express their personal beliefs on the defendant's guilt or innocence. *Id.* at 591. "Such opinions are unfairly prejudicial because they invade the fact finder's exclusive province." *State v. Johnson*, 152 Wn. App. 924, 930, 219 P.3d 958 (2009).

"When improper opinion testimony is expressed by a government official, such as a sheriff or police officer, the opinion may influence the jury and deny the defendant a fair and impartial trial." *State v. Smiley*, 195 Wn. App. 185, 189-90, 379 P.3d 149 (2016). Although in a criminal case the jury already knows officers arrested the defendant because they believed the defendant may have committed a crime, "this unavoidable state of affairs does not justify allowing explicit opinions" on a defendant's guilt. *Montgomery*, 163 Wn.2d at 595. However, testimony is not improper opinion testimony if it "is not a direct comment on the defendant's guilt," is "otherwise helpful to the jury," and is "based on inferences from the evidence." *Smiley*, 195 Wn. App. at 190.

Where the defendant failed to object to the challenged testimony during trial, they must satisfy the "narrow" exception allowing us to review manifest constitutional errors for the first time on appeal. *Kirkman*, 159 Wn.2d at 936 (applying RAP 2.5(a)(3)). To show that an error was "'manifest,'" the defendant must show that the error actually prejudiced them. *Id.* at 926-27. In the context of opinion testimony in child sex offense cases, "'[m]anifest error' requires a nearly explicit statement by the witness that the witness believed the accusing victim." *Id.* at 936.

In *Kirkman*, the Washington Supreme Court found no improper opinion testimony where a detective's challenged testimony was "simply an account of the interview protocol he used." *Id.* at 931. The detective never testified that he personally believed the child victim, so there was no manifest constitutional error. *Id.* Testimony describing protocols "only provides context;" it "does

not improperly comment [on] the truthfulness of the victim." *Id.* at 934; *see also State v. Song Wang*, 5 Wn. App. 2d 12, 28, 424 P.3d 1251 (2018) (holding a detective's statement was not improper opinion testimony where it was offered within the context of the detective "explaining the course of the investigation").

Here, the State asked Zieber what she did next after taking AB and AB's mother's statements. Zieber responded, "I told them that I would be in contact with some other officers and let[] them know that I had probable cause at that time for the arrest of Joseph Bercier and that I would update them on what was to come after that." VRP (Nov. 13, 2019) at 174. Bercier did not object to this response.

Like in *Kirkman*, Zieber never testified to whether she personally believed AB or AB's mother. Her statement that she had probable cause to arrest Bercier was given in the context of an explanation about the course of the department's investigation. Because Zieber did not explicitly, or nearly explicitly, state that she believed AB, Bercier fails to show a manifest constitutional error that we may review for the first time on appeal. RAP 2.5(a)(3); *Kirkman*, 159 Wn.2d at 936.

B. Prosecutorial Misconduct

Bercier next argues the prosecutor committed reversible misconduct during closing argument when she told the jury that if corroboration of victim testimony were required, prosecuting sex offenses would be "'almost impossible.'" Am. Br. of Appellant at 24 (quoting VRP (Nov. 14, 2019) at 117). We disagree.

To establish prosecutorial misconduct, a defendant must show that "the prosecutor's conduct was both improper and prejudicial." *State v. Emery*, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). Because Bercier failed to object to the alleged misconduct during trial, he is "deemed to

have waived any error, unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." *Id.* at 760-61.

Even a prosecutor's plainly improper remarks "do not merit reversal 'if they were invited or provoked by defense counsel and are in reply to [their] acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective.'" *State v. Thierry*, 190 Wn. App. 680, 690, 360 P.3d 940 (2015) (quoting *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994)). We review the prosecutor's arguments "'in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given.'" *Id.* at 689 (quoting *Russell*, 125 Wn.2d at 85-86).

This court has previously held that it is an improper emotional appeal to invite the jury to convict a defendant of a child sex offense "in order to allow reliance on the testimony of victims of child sex abuse and to protect future victims of such abuse." *Id.* at 691. In *Thierry*, the prosecutor repeatedly argued, in both their initial closing and their rebuttal argument, that corroboration of a victim's testimony is not required to prove child sex offenses because "'if it were, the State could never prosecute any of these types of cases'" and "'then the State may as well just give up prosecuting these cases.'" *Id.* at 685, 688 (emphasis omitted). The prosecutor implied that if the jury were to acquit the defendant, "they would put other children in danger." *Id.* at 692.

Division One has also cautioned, "Jurors should not be made to feel responsible for ensuring that the criminal justice system is effective in protecting children." *Smiley*, 195 Wn. App. at 195. In *Smiley*, the prosecutor argued, in part, "'If the law required that additional [corroborative] evidence, we couldn't prosecute so many of these cases, the majority of these cases. We couldn't hold the majority of sexual abusers responsible. We couldn't hold [the victim's]

abuser responsible.'" *Id.* at 191 (second alteration in original). Division One explained that this form of argument can be prejudicial because it encourages jurors to believe children "for improper reasons." *Id.* at 195.

However, this argument does not always warrant reversal. In *Smiley*, Division One concluded the defendant waived any error because the trial court "could have decisively derailed" the improper argument by sustaining a timely objection, and Smiley did not object. *Id.* at 197.

Here, unlike in *Thierry* and *Smiley*, the prosecutor did not rely on any public policy theme for her initial closing argument, nor did she repeatedly assert such a theme. She made a single arguably improper remark during rebuttal, after defense counsel focused most of his closing argument on the lack of corroboration in the State's evidence. *See, e.g.*, VRP (Nov. 14, 2019) at 109 ("What you have is a bare allegation with no follow up whatsoever, and no corroborative evidence. That should give you grave concern.").

We review the prosecutor's isolated remark in the context of her otherwise proper closing arguments and recognize that it was a response to defense counsel's closing. Moreover, an objection could have "decisively derailed" the argument and any resulting prejudice, and Bercier failed to object. *Smiley*, 195 Wn. App. at 197. The remark did not rise to the level of flagrant and ill-intentioned misconduct, and we decline to reverse Bercier's conviction for third degree rape of a child on this basis.

C. Assistance of Counsel

Bercier argues that even if his claim of improper opinion testimony fails to satisfy the RAP 2.5(a)(3) exception, his trial counsel was constitutionally ineffective for failing to object to the testimony. He similarly argues that if this court holds the prosecutor's argument could have been cured by an objection, his counsel was ineffective for failing to object. Again, we disagree.

To succeed on a claim of ineffective assistance of trial counsel, Bercier must show both that counsel's performance fell below an objective standard of reasonableness and that the deficient performance was prejudicial. *State v. Estes*, 188 Wn.2d 450, 457-58, 395 P.3d 1045 (2017). Counsel's performance is not deficient if it "can be characterized as legitimate trial strategy or tactics." *Id.* at 458. Counsel's deficient performance is not prejudicial unless there is a reasonable probability that, had counsel not performed deficiently, the result of the proceeding would have been different. *Id.*

Decisions of "whether and when to object fall firmly within the category of strategic or tactical decisions." *State v. Johnston*, 143 Wn. App. 1, 19, 177 P.3d 1127 (2007). "'Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal.'" *Id.* (quoting *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989)). This is particularly true during closing arguments. *State v. Blockman*, 198 Wn. App. 34, 42, 392 P.3d 1094 (2017). The defendant must also show that an objection would have been sustained. *Johnston*, 143 Wn. App. at 19.

As discussed above, Zieber testified that she had probable cause to arrest Bercier, not that she believed AB. The testimony was offered in the context of Zieber explaining the steps of the investigation. For the same reasons this was not a manifest constitutional error, it was not an

egregious circumstance involving testimony central to the State's case. Therefore, counsel's failure to object does not justify reversal.

And although an objection could have cured any prejudice resulting from the prosecutor's argument about corroboration, the brief and isolated remark was neither egregious nor central to the State's argument. For the same reason it was not flagrant and ill-intentioned misconduct, trial counsel was not deficient for failing to object.

D. Cumulative Error

Finally, Bercier argues cumulative error deprived him of his right to a fair trial because the child rape charge "hinged on credibility" and "the opinion testimony and the misconduct in closing argument operated to bolster the credibility of the complaining witness." Am. Br. of Appellant at 36-37. Where multiple errors combine to deprive the defendant of a fair trial, the cumulative error doctrine requires reversal. *State v. Lazcano*, 188 Wn. App. 338, 370, 354 P.3d 233 (2015). But it is the defendant's burden to prove "an accumulation of error of sufficient magnitude to warrant a new trial." *Id.* Here, Bercier failed to prove any errors that were sufficiently manifest, flagrant, or egregious to warrant a new trial, whether considered in isolation or collectively. We affirm his conviction for third degree rape of a child.

II. THIRD DEGREE ASSAULT OF AN OFFICER

Bercier argues the State failed to prove he intended to assault a police officer and "[a]n accidental injury is not third-degree assault." Am. Br. of Appellant at 37. "The mere fact that

Sexton was hit by the car door does not amount to proof beyond a reasonable doubt that he was intentionally placed in reasonable fear." *Id.* at 40.[1] We agree.

Evidence is sufficient to sustain a conviction if, 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. Frahm*, 193 Wn.2d 590, 595, 444 P.3d 595 (2019) (quoting *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). For purposes of a sufficiency challenge, the defendant "admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d at 201. Circumstantial and direct evidence are equally reliable. *State v. Cardenas-Flores*, 189 Wn.2d 243, 266, 401 P.3d 19 (2017). "However, inferences based on circumstantial evidence must be reasonable and cannot be based on speculation." *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318 (2013).

The State charged Bercier with assaulting a law enforcement officer who was performing their official duties at the time of the assault. *See* RCW 9A.36.031(1)(g). The term "assault" is not defined by statute, so courts look to common law definitions for guidance. *State v. Elmi*, 166 Wn.2d 209, 215, 207 P.3d 439 (2009). "Three definitions of assault are recognized in Washington: (1) an unlawful touching (actual battery); (2) an attempt with unlawful force to inflict bodily injury upon another, tending but failing to accomplish it (attempted battery); and (3) putting another in apprehension of harm." *Id.* The State argued during closing that Bercier committed assault by placing Sexton in reasonable apprehension of being hit by the car. The State told the jury, "For . . . assault in the third degree, the State is arguing . . . [that a]n assault is an act done with the intent

[1] The State argues only that Bercier assaulted Sexton by putting him in apprehension of harm; it does not claim Bercier committed an actual or attempted battery.

to create in another apprehension and fear of bodily injury, which does, in fact, create in that person a reasonable apprehension [and] imminent fear of bodily injury." VRP (Nov. 14, 2019) at 99.

To obtain a conviction under RCW 9A.36.031(1)(g), specifically for third degree assault of an officer, "the State must prove that a defendant intended to commit and did commit an assault against another person," that the person was a law enforcement officer performing official duties at the time of assault, that the officer "had a reasonable apprehension and imminent fear of bodily injury at the time of the assault," and that "the defendant's actions created that apprehension." *State v. Brown*, 140 Wn.2d 456, 470, 998 P.2d 321 (2000).

Assault by apprehension of harm requires proof of specific intent to cause apprehension. *See Cardenas-Flores*, 189 Wn.2d at 266; *see also State v. Stevens*, 158 Wn.2d 304, 314, 143 P.3d 817 (2006) (Madsen, J., dissenting). Because the State must prove a specific intent, assault is not a strict liability crime. *State v. Brown*, 94 Wn. App. 327, 342, 972 P.2d 112 (1999), *aff'd*, 140 Wn.2d 456; *see also State v. Krup*, 36 Wn. App. 454, 458, 676 P.2d 507 (1984) ("[N]egligence alone is insufficient.").

Here, the three officers who were present when Bercier was pulled over all testified that as soon as Bercier was told he was under arrest, he "just hit the gas and fled the scene." VRP (Nov. 13, 2019) at 191, 182 ("he just slammed on the gas and just took off"); VRP (Nov. 14, 2019) at 21 ("the car immediately took off"). When Bercier "hit the gas[,] . . . the door flung back and struck [Sexton] on [his] right wrist causing a small laceration and bruising." VRP (Nov. 13, 2019) at 192. Sexton speculated that Bercier was trying to "get away from" the officers. *Id.* at 199. We cannot reasonably infer from this evidence alone that Bercier intended to assault Sexton.

Additionally, Sexton never testified that he was placed in apprehension of harm. The State presented no other proof (like utterances made at the time, for example) that Sexton experienced apprehension or fear. Sexton testified only that Bercier accelerated and that he was struck by the car door.

Accordingly, the State failed to provide sufficient evidence to sustain Bercier's conviction for assault as charged and argued to the jury. We reverse Bercier's conviction for third degree assault and remand for the trial court to vacate it.

III. SENTENCING ERRORS

Bercier also raises several claims relating to errors at the sentencing stage. The State concedes these errors.

A. Same Criminal Conduct

Bercier argues his counsel was ineffective for failing to argue that his convictions for unlawful possession of a firearm and unlawful possession of a short-barreled firearm were based on the same criminal conduct. The State concedes that these convictions were based on the same criminal conduct and should have been counted as one offense in Bercier's offender score.

When a defendant will be sentenced for multiple current offenses, all other current and prior convictions are used to calculate the offender score. RCW 9.94A.589(1)(a). But if the sentencing court determines that multiple offenses "encompass the same criminal conduct," those offenses will be counted as one crime for the offender score, and the sentences imposed on those offenses will be served concurrently. *Id.* Two crimes constitute the "'[s]ame criminal conduct'" when they "require the same criminal intent, are committed at the same time and place, and involve the same victim." *Id.*

In *State v. Hatt*, the defendant was found guilty of both unlawful possession of a firearm and possession of an unlawful firearm. 11 Wn. App. 2d 113, 127, 452 P.3d 577 (2019). Hatt possessed the same firearm at the same time and place, and the victim of both crimes was "the general public." *Id.* at 142. "Although Hatt's possession of the weapon was unlawful for two separate reasons, his objective criminal intent in committing the two crimes was the same: to possess the firearm." *Id.* at 143. Therefore, Division One held the two crimes were the same criminal conduct and remanded for resentencing after recalculation of Hatt's offender scores. *Id.* at 143-44.

As in *Hatt*, Bercier's convictions for unlawful possession of a firearm and unlawful possession of a short-barreled firearm were based on his possession of a single firearm, the victim of both crimes was the general public, and the criminal intent behind both crimes was to possess the firearm. Accordingly, we accept the State's concession and hold these two crimes were the same criminal conduct, warranting recalculation of Bercier's offender scores and resentencing.

B. Community Custody Conditions

Next, Bercier argues the trial court erred by imposing "community custody conditions related to sexual conduct and contact with children" because the trial court imposed community custody only on the assault conviction and these conditions are not related to the assault crime. Am. Br. of Appellant at 50. Because we reverse Bercier's assault conviction and remand for the trial court to vacate it, the challenged community custody conditions should be stricken on remand as well.

C. Prior Conviction for Possession of a Controlled Substance

Finally, Bercier argues his offender score was incorrect because it included a prior conviction for unlawful possession of a controlled substance. The State concedes that Bercier should be resentenced without this conviction included in his offender score.

Bercier was sentenced using an offender score that counted a prior conviction for unlawful possession of a controlled substance. After Bercier was sentenced, the Supreme Court held Washington's strict liability drug possession statute, former RCW 69.50.4013(1) (2017), unconstitutional. *Blake*, 197 Wn.2d at 195. "A prior conviction that is constitutionally invalid on its face may not be included in a defendant's offender score." *State v. Jennings*, 199 Wn.2d 53, 67, 502 P.3d 1255 (2022). We accept the State's concession and direct the sentencing court to exclude Bercier's prior conviction for unlawful possession of a controlled substance from his offender scores on remand.

CONCLUSION

We affirm Bercier's convictions for third degree rape of a child, attempting to elude a pursuing police vehicle, first degree unlawful possession of a firearm, and unlawful possession of a short-barreled firearm. We reverse Bercier's conviction for third degree assault of a police officer. We remand for the trial court to vacate the assault conviction, strike the associated community custody conditions, and resentence Bercier on all remaining counts with corrected offender scores, considering Bercier's convictions for unlawful possession of a firearm and unlawful possession of a short-barreled firearm as the same criminal conduct.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Glasgow, CJ

Glasgow, C.J.

We concur:

Maxa, J.

Maxa, J.

Veljacic, J.

Veljacic, J.

NIELSEN KOCH & GRANNIS P.L.L.C.

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