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No. 69401-4-I

DIVISION ONE OF THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON

CITY OF KENT,

Petitioner

v.

EVERARDO BECERRA-AREVALO,

Respondent

REPLY BRIEF OF PETITIONER CITY OF KENT

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A. **Mr. Becerra-Arevalo Opened the Door to Officer's Opinion Testimony And Cannot Carry His Burden to Obtain Reversal Based on Prosecutorial Misconduct.**

1. Prosecutor Did Not Elicit Improper Opinion on Direct.

Given the open the door doctrine, Mr. Becerra-Arevalo attempts to shift the Court's focus to questioning made by the prosecutor on direct, which Mr. Becerra-Arevalo alleges was "designed to bring out improper opinion evidence." Brief of Respondent ("BOR") at 16. However, when the actual transcript is consulted and not counsel's summation, it becomes clear that this statement is incorrect. On direct, the following exchange occurred between the prosecutor and officer:

> Q: And once you told him why it was that you were there did he say anything to you about what had happened?
>
> A: Just to refer back to my notes real quick. The conversation, from what I remember, was kind of odd because it was—I don't want to say he was trying to hide something. He was very careful about what he said and how he answered the questions . . . .

CP 110. While the officer's answer was nonresponsive to the prosecutor's question, if Mr. Becerra-Arevalo took issue with the officer's answer, it was his responsibility to object to the officer's response as nonresponsive or improper opinion. *See, e.g,. State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). No objection was made. While the officer testified that

Mr. Becerra-Arevalo was trying to be "careful" about what he said to her, the officer never said why she felt he was being "careful." Therefore, in an effort to elicit that factual basis or the conduct the officer observed, the prosecutor asked the following question:

> Q: So why was it that you believed he was trying to be very careful in how he answered your questions.
>
> [Defense Objection]: Objection, Your Honor. Calls for speculation.

CP 110. Mr. Becerra-Arevalo's counsel objected, arguing that the form of the question called for speculation, and the court sustained the defense objection and allowed the prosecutor to rephrase the question.[1] The following exchange then occurred:

> Q: Officer Nastansky, was it your opinion that the defendant was being careful in answering your questions?
>
> A: Yes.
>
> Q: Why did you have that opinion?
>
> A: Because he was slow to answer as if he were trying to come up with a story in his head versus just if something had happened you would be able to freely tell the story and you wouldn't have to think about it. There would be no like okay, well did this happen and then this. You just say what happened, nothing to hide.

[1] It is the City's position that this evidentiary ruling was error, but that decision is not at issue in this appeal.

Q: And did you get that perception with him here?

A: No. He was—it seemed to me like he was trying to hide something.

Q: Did you—while you were speaking with him did you have trouble communicating with him in English?

A: No.

Q: Did you believe that there was any sort of language barrier that was maybe interfering with your conversation with him?

A: No.

Q: And why not?

A: I—he spoke English.

Q: Okay. Did he seem confused at all by the questions you were asking him?

A: No. No he did not.

Q: Did he ask you to explain anything again to him?

A: No.

CP 110-111. No objections were made by Mr. Becerra-Arevalo to either the prosecutor's questions or the officer's answers. In hindsight, the prosecutor certainly could have asked more pointed questions earlier on in the exchange, but in context, it is clear that the prosecutor's questions were an effort to elicit the factual basis and the conduct upon which the

officer relied in stating Mr. Becerra-Arevalo was "careful" in answering her questions, not to obtain improper opinion evidence regarding the defendant's guilt or veracity.

While a witness is prohibited from testifying to her opinion as to the guilt of a defendant, a witness testifying that the defendant was "careful" does not convey the same meaning as the defendant is "guilty," "lied," or was "untruthful." Instead, the word "careful" means only that the person who is described by that adjective was "cautious in thought, speech, or action; thorough and painstaking; showing care; full of cares or anxiety." _Webster's II, New College Dictionary_ (1995) (Appendix 1, pg. 3). "Careful" is not synonymous for guilt or untruthfulness. Therefore, it was not misconduct for the prosecutor to inquire into the factual basis upon which the officer believed Mr. Becerra-Arevalo was being "careful." However, even if this limited inquiry did appear to solicit testimony that was a comment on the defendant's guilt or veracity, the prosecutor's questioning at this point in her direct examination was not so flagrant and ill intentioned that any resulting prejudice could not have been cured had Mr. Becerra-Arevalo fulfilled his obligation and made a timely and specific objection.

2. Mr. Becerra-Arevalo Opened the Door to Testimony that was Otherwise Inadmissible.

The biggest hurdle for Mr. Becerra-Arevalo in carrying his burden to establish prosecutorial misconduct or improper opinion testimony is his trial counsel's unclean hands due to his opening the door to opinion testimony that would have otherwise been improper. It is that defense conduct that causes his appeal to fail. On cross, Mr. Becerra-Arevalo's counsel asked Officer Nastansky questions concerning discussion topics upon which his client was "guarded" in his answers. CP 116-117[2]. The effect of that exchange was to leave the impression that Mr. Becerra-Arevalo was "guarded" only as to questions regarding his "relationships with other females." CP 117. Therefore, in response, the prosecutor asked the officer on redirect:

> Q: Okay. And now Counsel had asked you questions about whether or not the defendant was just guarded in the questions that you were asking about the relationships that he [had] with the women on the property?
>
> A: Mm-hmm (affirmative).
>
> Q: Was he also guarded with you on the events that occurred on October 27th?
>
> A: Yes he was. And he lied to me also. He told me he didn't know why I was there, although he had already been

[2] The officer never testified on direct that Mr. Becerra-Arevalo was "guarded." This term was interjected by defense counsel on cross. See RP 49-60, 62-63.

> contacted by the property manager, so you would assume that he would know why I was there.

CP 119-120.

The City admits it was improper for the officer to blurt "and he lied to me also." However, that error cannot be attributed to prosecutorial misconduct as the form of the prosecutor's question did not elicit the officer's blurted response. *See* State v. Jungers, 125 Wn. App. 895, 902, 106 P.3d 827 (2005) and Brief of Petitioner ("BOP") at 15-16. However, instead of objecting to the improper and blurted statement, affording the trial court the opportunity to immediately remedy the situation, Mr. Becerra-Arevalo made a tactical decision to question the officer extensively concerning her blurted, though qualified, statement:

> Q: You said he lied to you? That's a pretty bold statement by an officer, wouldn't you agree?
>
> . . .
>
> Q: And you said that the reason you thought it was a lie was because this other person had talked to him previously?
>
> . . .
>
> Q: You go from the perspective that someone's guilty of a crime. What about somebody that doesn't think they've committed a crime?
>
> . . .
>
> Q: You classify this as a lie. You specifically said it was a lie.
>
> . . .
>
> Q: So what about that statement is a lie?
>
> . . .

Q: I'm asking about that statement specifically, not your interactions.

. . .

Q: If you were accused of a crime—most people that you deal with, when you accuse them of a crime, are they guarded?

. . .

Q: So you're saying just the people that are guilty are guarded?

. . .

Q: Okay. So your question was – so the answer to you alleging – he said I don't know why you're here.

. . .

Q: And that's the statement that you're saying is a lie?

CP 122-127. This questioning by the defense opened the door into an area that would otherwise have been inadmissible.

While Mr. Becerra-Arevalo cites to a number of cases where the court found that it was misconduct for the prosecutor to elicit testimony from one witness concerning another witness's veracity, each case cited involved defense counsel who had clean hands; not defense counsel who opened the door to the otherwise inadmissible questioning. *See* BOR 12-13. The one case cited by both parties that is directly analogous to the facts here is *State v. O'Neal*, 126 Wn. App. 395, 109 P.3d 429 (2005). In *O'Neal*, the court held that one witness may provide testimony that vouches for or against the veracity of another witness if the defense has opened the door to that testimony by placing in issue the first witness's opinion of the second witness's veracity. *O'Neal*, 126 Wn. App. at 409-

410. Mr. Becerra-Arevalo attempts to brush aside the holding in O'Neal by arguing that O'Neal was not based on a claim of prosecutorial misconduct. BOR 22-23. In arguing his position to this Court, however, Mr. Becerra-Arevalo has overlooked a key footnote in the case, which provides: "because we hold that the defense opened the door to the vouching testimony, the prosecutor's actions did not constitute misconduct." O'Neal, 126 Wn. App. at 410, n. 14. This footnote makes it clear that prosecutorial misconduct for an improper opinion was raised in O'Neal, but the court dismissed that claim based on defense counsel opening the door to the line of questioning. Based upon Mr. Becerra-Arevalo's cross examination, the same holding should result here.

3. Once Mr. Becerra-Arevalo Opened the Door, it was not Error for the Prosecutor to Question the Officer Regarding her Opinion.

a. Prosecutor's Questions Not Improper.

If the City understands Mr. Becerra-Arevalo's argument correctly, it appears he attempts to argue that even if the defense opened the door and elicited the officer's opinion testimony on cross, State v. Jones, 144 Wn. App. 284, 183 P.3d 307 (2008), provides that the prosecutor's ethical duty required her not to inquire into that opinion on redirect as such testimony invaded Mr. Becerra-Arevalo's constitutional right to a fair

trial. BOR 20-21. Mr. Becerra-Arevalo's argument is not only misplaced, it is the exact position the open the door doctrine seeks to avoid. First, in State v. Gefeller, 76 Wn.2d 449, 458 P.2d 17 (1969), the Supreme Court explained what it means to "open the door":

> It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquires about it. Rules of evidence are designed to aid in establishing the truth. To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths. Thus, it is a sound general rule that, when a party opens up a subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced.

State v. Gefeller, 76 Wn.2d at 455. Second, in Jones, the court found that the question the defense asked on cross was improper as it exceeded the scope of the prosecutor's direct examination. Jones, 144 Wn. App. at 295. However, instead of properly objecting to the question as outside the scope of direct, the prosecutor seized the opportunity to admit otherwise clearly inadmissible and inflammatory hearsay evidence regarding a non-testifying confidential informant in violation of the rules of evidence. Id. The prosecutor in Jones specifically laid in wait for the sole purpose of

admitting inadmissible and inflammatory evidence that the prosecutor would not otherwise have been able to admit. In Mr. Becerra-Arevalo's case, the prosecutor did not act in such a manner. If anything, Mr. Becerra-Arevalo's counsel acted as the prosecutor did in _Jones_.

Here, instead of objecting to the officer's blurted statement, Mr. Becerra-Arevalo made a tactical and strategic decision to attempt to discredit and impeach the officer on cross. CP 120, 121-126. Once Mr. Becerra-Arevalo elected this tactical position, ER 611 permitted his inquiry as an attack on the officer's credibility and, unlike the facts in _Jones_, there was no proper objection for the prosecutor to make. However, once the defense made that tactical decision to forego an objection, attempt impeachment under ER 611, and solicit opinion testimony, the prosecutor was allowed to ask the officer on redirect to explain those opinions. The prosecutor's conduct was not improper, did not violate the defendant's constitutional right to a fair trial, and _Jones_ does not support the position argued by Mr. Becerra-Arevalo on this point. Finding otherwise would negate the very purpose and foundation upon which the open the door doctrine is based. "What is sauce for the goose, is sauce for the gander." _State v. Bourgeois_, 133 Wn.2d 389, 402, 945 P.2d 1120 (1997).

Mr. Becerra-Arevalo's counsel additionally argues that there is no evidence that trial counsel's failure to object to the officer's blurted statement that Mr. Becerra-Arevalo "lied to me also," was a deliberate trial tactic. BOR 23-24. However, the decision of whether to object to the admission of testimony is a "classic example of trial tactics." State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). Therefore, a reviewing court presumes that "the failure to object was the product of legitimate trial strategy or tactics, and the onus is on the defendant to rebut this presumption." State v. Johnston, 143 Wn. App. 1, 20, 177 P.3d 1127 (2007). One legitimate tactic is that defense counsel may not have wanted to emphasize the testimony with an objection. Another legitimate tactic, the one chosen by Mr. Becerra-Arevalo's trial counsel, is to attempt to discredit the officer through cross examination. CP 121-126. Mr. Becerra-Arevalo's counsel could have objected to the officer's blurted statement, as counsel had competently objected and argued vigorously and passionately for his client throughout trial.[3] Instead, Mr. Becerra-Arevalo's counsel waited to attack the officer on cross-examination, hoping that damaging the officer's credibility in front of the jury would be

[3] Mr. Becerra-Arevalo's trial counsel had objected at least 21 times during the prosecutor's case in chief, her cross examination of Mr. Becerra-Arevalo, her rebuttal case, and her closing argument. His trial counsel had also provided considerable argument on a number of issues throughout the course of the trial. CP 98-350.

more persuasive to his case than objecting and having the offending testimony stricken. *See* CP 121-126, RP 7, 8, 28. However, as his trial counsel admitted at the first level of appeal, this strategy backfired. RP 7, 8, 28. This strategy also opened the door to the prosecutor questioning the officer for the bases of the opinions elicited by defense counsel on cross.

b. Prosecutor's Re-direct was Material, Relevant, and Appropriate.

Mr. Becerra-Arevalo additionally argues that even if defense counsel opened the door to some redirect, the prosecutor committed misconduct because her redirect was not material or relevant, and redirect was only appropriate to rebut false impressions. BOR 20-21. However, the cases cited by Mr. Becerra-Arevalo do not limit the open the door doctrine as he proposes. First, the decision to admit evidence lies within the sound discretion of the trial court. State v. Bourgeois, 133 Wn.2d 389, 399, 945 P.2d 1120 (1997). Whether a party's redirect examination of a witness is within or outside the scope of cross examination is within the trial court's discretion. State v. Gallagher, 112 Wn. App. 601, 609, 51 P.3d 100 (2002), *review denied*, 148 Wn.2d 1023 (2003). A trial court abuses its discretion when it bases its decision on untenable grounds or reasons. Gallagher, 112 Wn. App. at 609. Second, once a witness's credibility is attacked by the defense on cross examination, the prosecutor

may rehabilitate that credibility through redirect. *See, e.g., State v. Ish*, 170 Wn.2d 189, 198-199, 241 P.3d 389 (2010). Such rehabilitation is not collateral. *See, State v. Petrich*, 101 Wn.2d 566, 574-575, 683 P.2d 173 (1984). While a false impression is one of the areas that may be clarified once the defendant has opened the door, contrary to Mr. Becerra-Arevalo, it is not the only area that may be explained, clarified, or contradicted. Once the door on a particular subject has been opened on cross, the rules will permit redirect examination within the scope of the examination in which the subject matter was first introduced. *State v. Gefeller*, 76 Wn.2d at 455.

Here, Mr. Becerra-Arevalo's counsel questioned the officer extensively on cross examination about the statement she blurted, and qualified, while on direct. CP 120-126. He attempted to discredit her and alleged through his questioning that she possessed a preconceived opinion that all suspects are guilty; that because the defendant was accused, he was guilty; and that she lacked any foundation for her opinion. *See* CP 120-126. By choosing this line of questioning, Mr. Becerra-Arevalo opened the door to the officer further explaining her opinions. Therefore, on her redirect, the prosecutor asked the officer a very limited number of questions specifically based on the lie and opinion testimony elicited by

Mr. Becerra-Arevalo on cross. CP 128. When Mr. Becerra-Arevalo objected to the City's redirect examination of the officer, alleging it "calls for speculation," the court exercised its discretion in overruling the objection and allowing the redirect examination in light of Mr. Becerra-Arevalo's cross. CP 128. While Mr. Becerra-Arevalo's objection was ineffective to preserve the matter for appeal, in light of Mr. Becerra-Arevalo's extensive cross examination of the officer, there is no evidence that the court's admission of this testimony on redirect was on untenable grounds or reasons. *See* State v. Walker, 121 Wn.2d 214, 217, 848 P.2d 721 (1993), State v. Cateneda-Perez, 61 Wn. App. 354, 357-359, 810 P.2d 74 (1991). As in *O'Neal* and *Ramos*[4], the prosecutor's questioning was in direct response to Mr. Becerra-Arevalo's cross examination of the officer. Therefore, Mr. Becerra-Arevalo opened the door or provoked to that questioning, and prosecutorial misconduct did not occur.

4. Prosecutor's Statement in Closing Argument was not a Comment on Mr. Becerra-Arevalo's Right to Confront the Witnesses Against Him.

Mr. Becerra-Arevalo's failure to object to the prosecutor's statement in closing argument concerning the victim, Ms. Fitzpatrick's, demeanor while testifying also cannot support his claim of prosecutorial

[4] *State v. Ramos*, 164 Wn. App. 327, 263 P.3d 1268 (2011).

misconduct. First, his failure to object at trial or request a curative instruction suggests that the prosecutor's comment did not appear unduly prejudicial in full context. _State v. Swan_, 114 Wn.2d 613, 661, 790 P.2d 610 (1990). Second, even Mr. Becerra-Arevalo's trial counsel knew that the prosecutor was referring to the victim's demeanor in assessing credibility, and not asking the jury to hold Ms. Fitzpatrick's discomfort against the defendant as punishment for him exercising his constitutional right. Not only is this understanding evidenced by trial counsel's failure to object when the statement was made by the prosecutor, but also by Mr. Becerra-Arevalo's statement in his own closing argument about Ms. Fitzpatrick's demeanor while testifying: "[a]nd what you have is a woman, who through her demeanor when she testified seemed very believable." CP 325-326, 341. Here, if Mr. Becerra-Arevalo's counsel felt the prosecutor's statement was improper, defense counsel had a duty to promptly object, as he had throughout trial, and ask the trial court to correct it. "Counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on . . . appeal." _Jones v. Hogan_, 56 Wn.2d 23, 27, 351 P.2d 153 (1960).

Here, the allegedly improper statement made by the prosecutor concerning Mr. Becerra-Arevalo's right to confront his witnesses occurs in four sentences of the ten page transcript of the prosecutor's closing argument. CP 325. When reviewed in context of the total argument, it is clear that the comment was made in the context of judging witness credibility, and not a plea to penalize Mr. Becerra-Arevalo for exercising his constitutional right.

B. **Even if Misconduct Found, There is No Evidence Prejudice Occurred.**

Even if any of the prosecutor's statements were improper, Mr. Becerra-Arevalo can succeed on his appeal only if he can prove that any resulting prejudice had a substantial likelihood of affecting the verdict, and then only if the comments were so flagrant and ill-intentioned that no curative instruction would have obviated any prejudicial effect on the jury. *State v. Emery*, 174 Wn.2d 741, 759-761, 278 P.3d 653 (2012). The focus of this inquiry, however, is more on whether the resulting prejudice could have been cured, rather than the flagrant and ill-intentioned nature of the remarks. *Id*. at 762. Mr. Becerra-Arevalo cannot carry this burden.

Important to the determination of whether opinion testimony prejudices the defendant is whether the jury was properly instructed. *State v. Montgomery*, 163 Wn.2d 577, 595, 183 P.3d 267 (2008). No prejudice

will be found, even despite allegedly improper opinion testimony, when the jury was properly instructed that they are the sole judges of witness credibility and are not bound by expert opinions. *See* *Montgomery*, 163 Wn.2d at 595-596. In the absence of evidence to the contrary, such as written jury inquiries or other evidence that the jury was unfairly influenced, a reviewing court should presume the jury followed the court's instructions. *Montgomery*, 163 Wn.2d at 596. In *Montgomery*, cited multiple times by Mr. Becerra-Arevalo, the court held that although it was improper for the prosecutor to elicit testimony concerning the intent possessed by the defendant, that misconduct did not result in prejudice because the jury was properly instructed, there was no evidence the jury was unfairly influenced, and because defense counsel had previously objected and had those objections sustained, it was likely that had he objected, those objections would have also been sustained and a curative instruction given, if requested. *Montgomery*, 163 Wn.2d at 596. In *Montgomery*, there was no evidence that had Mr. Montgomery's attorney objected, that a curative instruction would not have removed any prejudice; therefore, the court refused to overturn Mr. Montgomery's

conviction for prosecutorial misconduct.[5] Montgomery, 163 Wn.2d at 596.

Here, Mr. Becerra-Arevalo's counsel objected multiple times throughout *every* stage of his trial.[6] Had Mr. Becerra-Arevalo objected to the prosecutorial misconduct and improper opinion testimony that he alleges in this appeal, the trial court had abundant options available to remedy any resulting prejudice, including: (i) striking any prosecutor question or statement, (ii) striking a witness's answer, (iii) admonishing the prosecutor or witness, (iv) instructing the jury to disregard, (v) providing a more detailed instruction to the jury, (vi) finding a mistrial, or (vii) or taking some other action to immediately remedy the issue at the trial court level. However, Mr. Becerra-Arevalo foreclosed the trial court from that opportunity, and instead remained silent, "speculating upon a favorable verdict, and then, when it [was] adverse, use[d] the claimed misconduct as a life preserver on . . . appeal." Jones v. Hogan, 56 Wn.2d 23, 27, 351 P.2d 153 (1960). If the prejudice could have been cured by a

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[5] Mr. Montgomery's conviction was ultimately overturned due to the trial court abusing its discretion and improperly providing a missing witness instruction to the jury. The court found the providing of the improper instruction was not harmless error when it was referred to by the prosecutor 7 times in closing argument. Montgomery, 163 Wn.2d at 597, 600. Such claim is not at issue here.

[6] *See, e.g.,* CP 98, 108, 110, 113, 128, 129, 257, 259, 260, 263, 274, 291, 299, 300, 301, 306, 326, 346, and 348.

jury instruction, but the defense did not request one, reversal is not required. State v. Dhaliwal, 150 Wn.2d 559, 578-581, 79 P.3d 432 (2003).

Further complicating Mr. Becerra-Arevalo's difficulty in proving prejudice is his conduct of opening the door to the officer's opinion testimony on cross. Given the extensive questioning by his own counsel on cross, Mr. Becerra-Arevalo cannot prove that it was the limited questioning by the prosecutor on direct, and not his opening the door and extensive cross examination of the officer, that resulted in any prejudice. In fact, instead of leaving the officer's testimony alone, Mr. Becerra-Arevalo's counsel highlighted in his closing argument the officer's opinions that he elicited on cross examination—that Mr. Becerra-Arevalo was a "liar," that "guilty people are guarded and non-guilty people are not guarded," and that "everyone who has dealt with a police officer has been guarded." CP 336-337.

Additionally weighing against any prejudice is the fact that the jury was properly instructed. As part of their instructions, the jury received WPIC 1.02, which instructed them that: "You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness . . . You must disregard any remark, statement, or argument that is not supported by the

evidence or the law in my instructions…." CP 8. This instruction was referred to by the prosecutor multiple times in her closing argument. CP 320, 321, 325. There is no evidence that the jury did not follow these instructions. To the contrary, it appears the jury diligently reviewed the instructions after retiring for deliberations. There are handwritten comments and tally marks on some of the instructions that would appear to evidence review, understanding, and thoughtful consideration by the jury. CP 14, 15, 16, 17, 18.

Here, the evidence simply supports that the jury believed the victim, Ms. Fitzpatrick's, testimony. Her courtroom testimony was consistent with previous statements she made, and her demeanor while testifying, even from the defense's standpoint, made her appear believable. CP 341. While Mr. Becerra-Arevalo also testified, his courtroom testimony was inconsistent with prior statements and admissions he made, and his employer produced documents, in Mr. Becerra-Arevalo's own handwriting, that directly impeached his courtroom testimony. *See* BOP 34-35.

Even if some amount of prosecutorial misconduct is found, Mr. Becerra-Arevalo simply cannot carry his burden of establishing, in the absence of a timely and specific objection at trial, that the prosecutor's

misconduct, separate and apart from defense counsel's cross examination of the officer and opening the door to otherwise inadmissible testimony, was so flagrant and ill-intentioned that no curative instruction would have obviated any prejudicial effect on the jury, and that any prejudice that occurred as a result of the prosecutor had a substantial likelihood of affecting the verdict. Because Mr. Becerra-Arevalo cannot meet that burden, his appeal must fail.

C. **Improper Opinion Testimony Cannot Support Reversal When that Testimony was Invited or Provoked by Mr. Becerra-Arevalo.**

In supporting its reversal of Mr. Becerra-Arevalo's conviction, the RALJ court held that improper opinion testimony, elicited by both the prosecutor and defense counsel, violated Mr. Becerra-Arevalo's constitutional right to a fair trial. CP 459-460. However, because there was no ineffective assistance of counsel claim alleged, it was improper for the RALJ court to use any error committed by Mr. Becerra-Arevalo's trial counsel to support reversal of his conviction, particularly when that conduct was a deliberate trial strategy that invited any error.

When the Court undertakes the *Heatley* analysis as set out in the Brief of Petitioner, it is clear that any opinion testimony offered by the officer, prior to Mr. Becerra-Arevalo opening the door during his cross

examination, was not a manifest error that had practical and identifiable consequences in the trial. BOP at 40, *Seattle v. Heatley*, 70 Wn. App. 573, 585, 854 P.2d 658 (1993). Because he did not object to any opinion testimony at trial, Mr. Becerra-Arevalo may only obtain review of this issue if he can meet the *Heatley* standard of establishing a manifest error of a constitutional issue. An appeal based on a manifest constitutional error that was not objected to at trial is a narrow exception, and the appellant must establish actual prejudice. *State v. Kirkman*, 159 Wn.2d 918, 927 and 934, 155 P.3d 125, *citing State v. McFarland*, 127 Wn.2d 322, 333-334, 899 P.2d 1251 (1995). Essential to this issue is a plausible showing by Mr. Becerra-Arevalo that the asserted error had practical and identifiable consequences in the trial. *Kirkman*, 159 Wn.2d at 935. A manifest error requires an explicit, or nearly explicit, statement by the witness that the witness believed the accusing victim. *Kirkman*, 159 Wn.2d at 937. Opinion testimony regarding the veracity of the defendant is unfairly prejudicial to the defendant *unless* the defendant offers affirmative testimony raising the issue. *Kirkman*, 159 Wn.2d at 927-927.

As previously argued above, the officer's testimony on direct that Mr. Becerra-Arevalo was "careful" was not a direct comment on Mr. Becerra-Arevalo's guilt. CP 110. This testimony was more akin to the

testimony in State v. Hager, 171 Wn2d 151, 248 P.3d 512 (2011) that the defendant was "evasive," in Saunders that the defendant's statements were "inconsistent," or in Fisher that the defendant's conduct indicated to the officer that the defendant was "involved in the transaction or he was the one running the show." BOP 41, Hager, 171 Wn.2d 160-161; State v. Saunders, 120 Wn. App. 800, 812, 86 P.3d 232 (2004); State v. Fisher, 74 Wn. App. 804, 812-813, 155 P.3d 125 (1994). These courts found that the officers' opinions were either proper, or if improper, accorded only slight prejudice not warranting reversal. For the reasons previously argued in the Brief of Petitioner and above, the officer's testimony on direct was not improper opinion testimony, and any opinion testimony provided on redirect was in response to Mr. Becerra-Arevalo opening the door or provoking that questioning on cross. Once Mr. Becerra-Arevalo opened the door to the officer's opinion testimony, he invited any subsequent error that occurred and is barred from using that improper opinion as a basis for his appeal. *See* In re Pers. Restraint of Tortorelli, 149 Wn. 2d 82, 94, 66 P.3d 606 (2003).

Even if any testimony elicited from the officer on direct was improper opinion testimony, Mr. Becerra-Arevalo cannot demonstrate that the unobjected to testimony on direct caused actual prejudice. When there

is evidence of tactical reasons to support defense counsel's failure to object, and when the jury is properly instructed that they are the sole deciders of credibility and any weight to be given to the evidence, actual prejudice will not be found. *See Kirkman*, 159 Wn.2d at 937-938. Any opinion testimony elicited on direct from the officer that Mr. Becerra-Arevalo was "careful" was inconsequential. While the officer blurted "and he lied to me also. He told me he didn't know why I was there, although he had already been contacted by the property manager, so you would assume that he would know why I was there," she qualified and downplayed that blurted statement. CP 120. When that limited statement is taken together with the instructions provided to the jury and the repeated reference to those instructions by the prosecutor in closing, it cannot be said that the officer's limited statement caused actual prejudice. The same, however, cannot be said of the significant cross examination conducted by Mr. Becerra-Arevalo's counsel; his eliciting on cross the officers' opinions that he lied to her, that people that are guilty are guarded, and innocent people are not guarded; and highlighting those opinions in his closing argument. CP 122-126, 131, 336-337. Because Mr. Becerra-Arevalo made those tactical trial decisions, he cannot carry his burden of establishing that the officer's testimony on direct, and not

the testimony on cross elicited by Mr. Becerra-Arevalo and highlighted in his closing, resulted in actual prejudice.

Even if the court were to find improper opinion testimony was provided on direct, Mr. Becerra-Arevalo's cross examination of the officer, his highlighting the opinions he solicited on cross in his closing argument, and the other evidence at trial that directly contradicted and impeached Mr. Becerra-Arevalo's courtroom testimony, support that any error that occurred was harmless. *See, e.g.*, BOP 34-35.

D. Conclusion.

For the reasons outlined in the Brief of Petitioner, as further supplemented by this Reply Brief, the RALJ court should be overturned and Mr. Becerra-Arevalo's conviction for Assault in the 4th Degree with Sexual Motivation reinstated.

RESPECTFULLY SUBMITTED this day of January, 2014.

CITY OF KENT

By:______________________________
TAMMY L. WHITE, WSBA #43595
Prosecuting Attorney

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DECLARATION OF SERVICE

I, Kim Komoto, declare as follows:

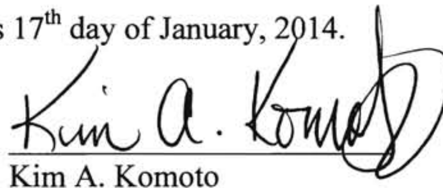
I am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, competent to be a witness herein, and have personal knowledge of the facts stated below.

On January 17, 2014, I caused to be filed the foregoing Reply Brief, on behalf of the City of Kent, with the Clerk of the Court by placing the City's Reply Brief in the mail for delivery via regular U.S., postage prepaid mail. On this same date, and in the manner indicated below, I caused the City's Brief and this appended Declaration of Service to be served upon:

Elaine L. Winters
Washington Appellate Project
701 Melbourne Tower
1511 Third Ave
Seattle, WA 98101

[X] Regular U.S. Mail – Postage Prepaid

DATED at Kent, Washington on this 17th day of January, 2014.



Kim A. Komoto

APPENDIX 1

Webster's II

New College Dictionary

Houghton Mifflin Company
Boston • New York

Words are included in this Dictionary on the basis of their usage. Words that are known to have current trademark registrations are shown with an initial capital and are also identified as trademarks. No investigation has been made of common-law trademark rights in any word, because such investigation is impracticable. The inclusion of any word in this Dictionary is not, however, an expression of the Publisher's opinion as to whether or not it is subject to proprietary rights. Indeed, no definition in this Dictionary is to be regarded as affecting the validity of any trademark.

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Signs and Symbol

car·di·a (kär′dē-ə) *n.* [Gk. *kardia*, heart, cardiac orifice of the stomach.] The opening of the esophagus into the stomach.
car·di·ac (kär′dē-ăk′) *adj.* [Lat. *cardiacus* < Gk. *kardiakos* < *kardia*, heart.] **1.** Of, near, or relating to the heart. **2.** Of or relating to the cardia. —*n.* One having a heart disorder.
cardiac arrest *n.* Sudden cessation of heartbeat.
cardiac massage *n.* A resuscitative procedure characterized by the rhythmic compression of the chest in an effort to restore proper circulation and respiration.
cardiac muscle *n.* The striated muscle of the heart.
car·di·al·gia (kär′dē-ăl′jə, -jē-ə) *n.* [Gk. *kardialgia* : *kardia*, heart + *algos*, pain.] Heartburn.
car·di·gan (kär′dĭ-gən) *n.* [After the Seventh Earl of *Cardigan*, James Thomas Brudenell (1797–1868).] A sweater or knitted jacket opening down the front.
car·di·nal (kär′dn-əl, kärd′nəl) *adj.* [ME < Lat. *cardinalis*, principal, pertaining to a hinge < *cardo*, hinge.] **1.** Being of prime importance : PIVOTAL. **2.** Of a dark to deep or vivid red color. —*n.* **1.** *Rom. Cath. Ch.* A member of the College of Cardinals who is appointed by and ranks just below the pope. **2.** A dark to deep or vivid red. **3.** A North American bird, *Richmondena cardinalis*, with a crested head, a short thick bill, and bright-red plumage in the male. **4.** A short hooded cloak, orig. of scarlet cloth, worn by women in the 18th cent. **5.** A cardinal number. —**car′di·nal·ship′** *n.*
car·di·nal·ate (kär′dn-ə-lĭt, kärd′nə-, -lāt′) *n. Rom. Cath. Ch.* **1.** The College of Cardinals. **2.** The position, rank, dignity, or term of a cardinal.
cardinal flower *n.* A plant, *Lobelia cardinalis* of eastern North America, with a terminal cluster of brilliant scarlet flowers.
cardinal number *n.* A number, as 3 or 11 or 412, indicating quantity but not order.
cardinal point *n.* One of the four main directions on a compass.
cardinal virtues *pl.n.* The four qualities of justice, prudence, fortitude, and temperance.
cardio– *or* **cardi–** *pref.* [Gk. *kardio-* < *kardia*, heart.] Heart <*cardiovascular*>
car·di·o·ac·cel·er·a·tor (kär′dē-ō′ăk-sĕl′ə-rā′tər) *n.* An agent that increases the heart rate. —**car′di·o′ac·cel′er·a′tion** *n.*
car·di·o·gen·ic (kär′dē-ō-jĕn′ĭk, -jē′nĭk) *adj.* Originating in a cardiac condition.
car·di·o·gram (kär′dē-ə-grăm′) *n.* The curve traced by a cardiograph, used in diagnosis of heart defects.
car·di·o·graph (kär′dē-ə-grăf′) *n.* **1.** A device for recording the mechanical movements of the heart. **2.** An electrocardiograph. —**car′di·og′ra·phy** (-ŏg′rə-fē) *n.*
car·di·oid (kär′dē-oid′) *n.* A heart-shaped plane curve, the locus of a fixed point on a circle that rolls on the circumference of another circle with the same radius.

cardioid

car·di·ol·o·gy (kär′dē-ŏl′ə-jē) *n.* The medical study of the diseases and functioning of the heart. —**car′di·ol′o·gist** *n.*
car·di·o·meg·a·ly (kär′dē-ō-mĕg′ə-lē) *n.* Megalocardia.
car·di·o·pul·mo·nar·y (kär′dē-ō-pŏŏl′mə-nĕr′ē) *adj.* Of or relating to the heart and the lungs.
cardiopulmonary resuscitation *n.* A procedure employed after cardiac arrest in which cardiac massage, drugs, and mouth-to-mouth resuscitation are used to restore breathing.
car·di·o·res·pi·ra·to·ry (kär′dē-ō-rĕs′pər-ə-tôr′ē, -rĭ-spīr′ə-tôr′ē, -tōr′ē) *adj.* Of or relating to the heart and the respiratory system.
car·di·o·vas·cu·lar (kär′dē-ō-văs′kyə-lər) *adj.* Of, relating to, or involving the heart and the blood vessels.
car·di·tis (kär-dī′tĭs) *n.* Inflammation of the heart.
car·doon (kär-dōōn′) *n.* [Fr. *cardon* < Prov. < Lat. *carduus*, wild thistle.] A plant, *Cynara cardunculus* of southern Europe, having spiny leaves, purple flowers, and an edible leafstalk.
card·sharp (kärd′shärp′) *also* **card·sharp·er** (-shär′pər) *n.* An expert cheat at cards. —**card′sharp′ing** *n.*
care (kâr) *n.* [ME < OE *cearu*.] **1.** A troubled, distressed state of mind : WORRY. **2.** Mental suffering : GRIEF. **3.** A source of worry, attention, or solicitude. **4.** Caution in avoiding harm or danger. **5.** The function of watching, guarding, or overseeing : CHARGE. **6.** Attentiveness to detail : painstaking application <read the manuscript with *care*> —*v.* **cared, car·ing, cares.** —*vi.* **1.** To be concerned or interested. **2.** [...] object : mind <I won't *care* if you borrow my book.> **3.** To ha[ve a] liking or attachment. —*vt.* **1.** To be inclined : WISH <We don't *ca*[re to] go.> **2.** To be concerned to the degree of <I don't *care* one bit [what] you think.>
★ ***syns:*** CARE, CHARGE, CUSTODY, GUARDIANSHIP, SUPERVISIO[N] *core meaning* : the function of watching, guarding, or overse[eing] <left the children in the *care* of their grandparents>
ca·reen (kə-rēn′) *v.* **-reened, -reen·ing, -reens.** [< Fr. (*en*) *rene*, (on) the keel < OFr. *carene* < OItal. *carena* < Lat. *carina*.] —[*vi.*] **1.** To swerve or lurch while in motion <a car *careening* around a [cor]ner> **2.** *Naut.* To lean to one side, as a ship sailing in the win[d]. [**3.**] *Naut.* To turn a ship on its side for cleaning, caulking, or repair[ing]. —*vt. Naut.* **1.** To cause (a ship) to lean to one side : TILT. **2. a.** To l[ay] (a ship) on one side for cleaning, caulking, or repairing. **b.** To cl[ean,] caulk, or repair (a ship in this position). —*n. Naut.* **1.** The act or [pro]cess of careening a ship. **2.** The position of a careened ship. —[**ca·**]**reen′er** *n.*
ca·reer (kə-rîr′) *n.* [Fr. *carrière* < OFr., racecourse < OProv. *carri*[era,] street < Med. Lat. (*via*) *carraria*, (road) for carts < LLat. *carra*, c[art] —see CAR.] **1. a.** A chosen profession or occupation <a *career* in [the] foreign service> **b.** The general progression of one's life, esp. in [one's] profession <a professor with a distinguished *career*> **2.** *Archaic.* [**a.** A] path or course. **b.** A rapid course or swift progression, as of the [sun] through the heavens. **3. a.** Speed <"My hasting days fly on with [full] *career*" —Milton> **b.** The moment of highest pitch or peak acti[vity] <The empire was now in the full *career* of its triumphs.> —[*vi.*] **-reered, -reer·ing, -reers.** To rush headlong. —*adj.* Having [un]dertaken a given occupation <*career* diplomats>
ca·reer·ism (kə-rîr′ĭz′əm) *n.* The practice of seeking one's pro[fes]sional advancement by all possible means. —**ca·reer′ist** *n.*
[illegible]
care·ful (kâr′fəl) *adj.* **1.** Cautious in thought, speech, or action : [CIR]CUMSPECT. **2.** Thorough and painstaking : CONSCIENTIOUS. **3.** Show[ing] care : SOLICITOUS. **4.** *Archaic.* Full of cares or anxiety. —**care′ful**[**·ly**] *adv.* —**care′ful·ness** *n.*
★ ***syns:*** **1.** CAREFUL, CAUTIOUS, CHARY, CIRCUMSPECT, PRU[DENT] *adj. core meaning* : trying attentively to avoid danger or risk <a *ca*[re]*ful* driver> ***ant:*** RECKLESS **2.** CAREFUL, METICULOUS, PAINSTA[KING,] SCRUPULOUS *adj. core meaning* : marked by attention to all asp[ects] or details <*careful* writing> ***ant:*** CARELESS
care·giv·er (kâr′gĭv′ər) *n.* **1.** A person who assists a sick or dis[abled] person. **2.** A person who attends to the needs of a child or depend[ent] adult.
care·less (kâr′lĭs) *adj.* **1.** Not taking sufficient care : NEGLIGENT. [**2.**] Marked by or resulting from lack of forethought or thoroughness. [**3.**] Showing a lack of consideration. **4.** Indifferent : unconcerned <*ca*[re]*less* about your health> **5.** Effortless : unstudied <*careless* elegan[ce>] **6.** Carefree. —**care′less·ly** *adv.* —**care′less·ness** *n.*
★ ***syns:*** **1.** CARELESS, FECKLESS, HEEDLESS, INATTENTIVE, THOUG[HT]LESS *adj. core meaning* : lacking or marked by a lack of care <a *ca*[re]*less* remark> ***ant:*** CAREFUL **2.** CARELESS, MESSY, SLAPDASH, SLIPSH[OD,] SLOPPY, SLOVENLY, UNTIDY *adj. core meaning* : indifferent to accu[racy] or neatness <a *careless* writer> ***ant:*** CAREFUL
ca·ress (kə-rĕs′) *n.* [Fr. *caresse* < Ital. *carezza* < *caro*, dear < [Lat.] *carus*.] A gentle touch or gesture of fondness, tenderness, or lo[ve]. —*vt.* **-ressed, -ress·ing, -ress·es. 1. a.** To touch or stroke aff[ec]tionately or lovingly. **b.** To touch or move as if with a caress <a wa[rm] soft breeze that *caressed* us> **2.** To treat fondly, kindly, or favor[ably]. —**ca·ress′er** *n.* —**ca·ress′ing·ly** *adv.* —**ca·res′sive** *adj.*
★ ***syns:*** CARESS, CUDDLE, FONDLE, PET *v. core meaning* : to to[uch] or stroke affectionately <patted and *caressed* the puppy>
car·et (kăr′ĭt) *n.* [Lat., there is lacking < *carere*, to lack.] A pr[oof]reading symbol (‸) used to indicate where material is to be inse[rted] in a written or printed line.
care·tak·er (kâr′tā′kər) *n.* One employed to look after goods, pr[op]erty, or another person : CUSTODIAN.
care·worn (kâr′wôrn′, -wōrn′) *adj.* Showing the effects of care[s] [...] tired, careworn face>
car·fare (kär′fâr′) *n.* Fare charged a passenger.
car·go (kär′gō) *n., pl.* **-goes** *or* **-gos.** [Sp. < *cargar*, to load < L[Lat.] *carricare* < Lat. *carrus*, cart, of Celtic orig.] Freight carried by a s[hip,] aircraft, or other transport vehicle.
car·hop (kär′hŏp′) *n.* One who waits on customers at a drive-in [res]taurant.
Car·ib (kăr′ĭb) *n., pl.* **Carib** *or* **-ibs.** [Sp. *Caribe*, of Cariban orig[in]] *also* **Car·i·ban** (kăr′ə-bən, kə-rē′bən). **1.** A member of a group [of] American Indian peoples of northern South America, the Lesser [An]tilles, and the eastern coast of Central America. **2.** Any of the [lan]guages of the Carib. —**Car′ib** *adj.*
Car·i·ban (kăr′ə-bən, kə-rē′bən) *n., pl.* **Cariban** *or* **-bans. 1.** [A member] *of* CARIB 1. **2.** A language family comprising the Carib langua[ges]. —**Car′i·ban** *adj.*
Car·ib·be·an (kăr′ə-bē′ən, kə-rĭb′ē-ən) *n.* A Carib Indian. —[*adj.*]

[...] or relating to the Caribbean Sea and its isla[nds] [...] Carib or their language.
[...]**be** (kə-rē′bē) *n.* [Am. Sp. < Sp. *Caribe*, C[arib] [...]
[...]**bou** (kăr′ə-bōō′) *n., pl.* **caribou** *or* **-bou**[**s**] [...]nquian orig.] A deer, *Rangifer tarandus* of [...] World, having antlers in both sexes.
[...]**ca·ture** (kăr′ĭ-kə-chŏŏr′) *n.* [Fr. < Ital. *ca*[...] [ex]aggerate, to load < Lat. *carrus*, cart, of Ce[ltic orig.] [...]rial representation in which the subject's di[stinctive pecu]liarities are intentionally distorted or exagg[erated] [...]ic or grotesque effect. **2.** The process or art of [...] [a]n imitation so inferior as to be absurd. —*vt.* [...]**es.** To represent in or as if in a caricature [...]**ur′ist** *n.*
[...]**ies** (kâr′ēz) *n., pl.* **caries.** [Lat.] Bone or t[ooth decay] [...]
[...]**il·lon** (kăr′ə-lŏn′, -lən) *n.* [Fr., alteration o[f] [...] *quaternio*, set of four. —see QUATERNION.] [...]matically tuned bells in a tower, usu. played [...] [com]position arranged or written for a carillon. — [...]**g, -lons.** To play a carillon.
[...]**il·lon·neur** (kăr′ə-lə-nûr′) *n.* A player o[f] [...]
[...]**i·na** (kə-rī′nə, -rē′-) *n., pl.* **-nae** (-nē′) [N[...] [...]-shaped ridge, as that on the breastbone of a [...] [ce]rtain flowers.
[...]**i·na** (kə-rī′nə) *n.* [Lat. < *carina*, keel.] A [...] [Sout]hern Hemisphere.
[...]**i·nate** (kăr′ə-nāt′, -nĭt) *also* **car·i·na**[**t·ed**] [...] Having or shaped like a keel : RIDGED.
[...]**i·ole** *also* **car·ri·ole** (kăr′ē-ōl′) *n.* [Fr. c[...] [...], dim. of *carri*, chariot < Lat. *carrus*, cart, [...] [...]ll, open one-horse carriage. **2.** A light covere[d] [...]
[...]**i·ous** (kâr′ē-əs) *adj.* Having caries : DECAY[ED] [...]
[...]′ĭ-tē), **car′i·ous·ness** *n.*
[...]**l** *or* **carle** (kärl) *n.* [ME < ON *karl*, man.] [...] [fa]rmer. **2.** *Obs.* A bondman : serf. **3.** *Regiona*[*l*] [...]
[...]**line** *or* **car·lin** (kär′lĭn) *n.* [ME *kerling* [...] [...] A woman, esp. an old woman.
[...]**ling** (kär′lĭng, -lĭn) *n.* [Fr. *carlingue* < OFr. [...] [...]ng, old woman < *karl*, man.] *Naut.* One of [...] [...]ers that connect the transverse beams supp[orting] [...]
[...]**list** (kär′lĭst) *n.* A supporter of Don Carlos [...] [Span]ish throne, or his heirs. —**Carl′ism** *n.*
[...]**load** (kär′lōd′) *n.* **1.** The load that a car ca[n hold] [...] [mini]mum weight necessary to ship freight at t[he] [...]
[...]**lo·vin·gian** (kär′lə-vĭn′jən, -jē-ən) *adj.* [...] [...]IAN.
[...]**man** (kär′mən) *n.* **1.** A conductor, as of a s[treetcar] [...] or cart.
[...]**mel·ite** (kär′mə-līt′) *n.* **1.** A monk or m[...] [...] the order of Our Lady of Mount Carmel, [...] [mem]ber of a community of nuns of the Carme[lite] [...] —**Car′mel·ite′** *adj.*
[...]**min·a·tive** (kär-mĭn′ə-tĭv, kär′mə-nā′-) [...] [L]at. *carminare*, to card wool < *carmen*, ca[rd] [...] [expu]lsion of gas from the stomach and intestine [...]
[...]**mine** (kär′mĭn, -mīn′) *n.* [Fr. *carmin* < [...] [...] a blend of Ar. *qirmiz*, kermes, and Lat. *m*[...] [...]g to vivid red color. **2.** A crimson pigment d[...] [...]**r′mine** *adj.*
[...]**nage** (kär′nĭj) *n.* [OFr. < OItal. *carnaggi*[*o*] [...] < Lat. *caro*.] **1.** Massive slaughter : MASS[ACRE] [...] **2.** *Obs.* Corpses, esp. of troops killed in [...]
[...]**nal** (kär′nəl) *adj.* [ME < Lat. *carnalis* < [...] [...]g to sensual desires and appetites. **2.** Earth[ly] [...]
[...]**i·ty** (kär-năl′ĭ-tē) *n.* —**car′nal·ly** *adv.*
[...]**al knowledge** *n.* Sexual intercourse.
[...]**nall·ite** (kär′nə-līt′) *n.* [G. *Carnallit*, af[ter] [...] –1874).] A white, brownish, or reddish [...] [...] used to make potash salts.
[...]**nas·si·al** (kär-năs′ē-əl) *adj.* [Fr. *carnass*[...] [...] flesh.] Adapted for tearing apart flesh. —[...] [...] [u]pper premolar and the first lower mola[r] [...] [ani]mals.
[...]**na·tion** (kär-nā′shən) *n.* [Prob. < OFr., [...] [...]gione < *carne*, flesh < Lat. *caro*.] **1. a.** A [...] *caryophyllus*, widely cultivated for its frag[rant] [...] [...]ers with fringed petals. **b.** The flower of th[...] [...] formerly used in painting.
[...]**nau·ba** (kär-nô′bə, -nou′-) *n.* [Port., pro[...] [...] tree, *Copernica cerifera* of tropical South [America] [...] [...]**a wax.** A hard wax obtained from the [...] [...] a polish and in candles.