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May 28, 2014
Court of Appeals
Division I
State of Washington

No. 90441-3

(Court of Appeals No. 69401-4-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF KENT,

Respondent,

v.

EVERARDO BECERRA-AREVALO,

Petitioner.

PETITION FOR REVIEW
OF COURT OF APPEALS DECISION TERMINATING REVIEW

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STATE OF WASHINGTON *CRF*

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A. IDENTITY OF PETITIONER

Everardo Becerra-Arevalo asks this Court to accept review of the Court of Appeals decision designated in Part B.

B. COURT OF APPEALS DECISION

Mr. Becerra-Arevalo seeks review of the Court of Appeals decision reversing the King County Superior Court Decision on RALJ Appeal and reinstating his Kent Municipal Court conviction for assault in the fourth degree with sexual motivation. City of Kent v. Everardo Becerra-Arevalo, No. 69401-4-I.

A copy of the Court of Appeals decision, dated April 28, 2014, is attached as Appendix A. A copy of the Decision on RALJ is attached as Appendix B.

C. ISSUES PRESENTED FOR REVIEW

1. On RALJ appeal, the superior court reversed Mr. Becerra-Arevalo's misdemeanor conviction and remanded for a new trial based upon the impact of various incidents of prosecutorial misconduct and the police officer's improper opinion that the defendant was lying, which was introduced through questions by both counsel. The Court of Appeals reversed the RALJ court after addressing only prosecutorial

misconduct and concluding some of the error was invited by or in reply to the defense.

a. Was Mr. Becerra-Arevalo's constitutional right to due process violated by the combined impact of prosecutorial misconduct and ineffective assistance of counsel?

b. Mr. Becerra-Arevalo's trial attorney (1) failed to object when a police officer offered her opinion that his client was lying, (2) asked questions on cross-examination that emphasized and strengthened the officer's opinion of the defendant's credibility and therefore guilt, (3) failed to object when the prosecutor commented on the defendant's right to confront witnesses, and (4) failed to object when the officer related the alleged victim's hearsay account of the incident. Mr. Becerra-Arevalo's appellate lawyer did not raise ineffective assistance of counsel on RALJ appeal. Was Mr. Becerra-Arevalo's constitutional right to effective assistance violated by his trial counsel's deficient performance?

2. The superior court reversed Mr. Becerra-Arevalo's conviction and therefor did not consider two of the issues he raised on appeal. Did the Court of Appeals deny Mr. Becerra-Arevalo's constitutional right to appeal by affirming his conviction and reinstating

his conviction without first remanding the case to superior court for consideration of his remaining appellate issues?

D. STATEMENT OF THE CASE

Everardo Becerra-Arevalo worked as the maintenance supervisor for Plemmons Industries, owners of industrial parks and a shopping complex in Kent. CP 69, 164-65, 254, 256.¹ Kelly Fitzpatrick was the office manager for one of Plemmons' tenants, and she would occasionally speak with Mr. Becerra-Arevalo when he was working at her office. CP 67, 69-70. Ms. Fitzpatrick found Mr. Becerra-Arevalo to be polite and friendly, and the two went to lunch one day. CP 71-75.

According to Ms. Fitzpatrick, Mr. Becerra-Arevalo tried to kiss her and touched her breasts and when they were alone in her office on October 27, 2009. CP 76. Ms. Fitzpatrick reported the incident to the police on November 12 because she did not believe her employer had adequately addressed the problem. CP 83-84, 105-05. Mr. Becerra-Arevalo denied touching Mr. Fitzpatrick when interviewed by Kent Police Officer Carrie Nastansky. CP 104, 117.

¹ The report of the Kent Municipal Court Proceedings, entitled Electronic Record Transcription is found at CP 55-354.

1. **Kent Municipal Court.** The City of Kent charged Mr. Becerra-Arevalo with fourth degree assault with sexual motivation, and he was convicted after a jury trial in Kent Municipal Court. CP 4-5, 21. During her testimony, Officer Nastansky testified that he believed Mr. Becerra-Arevalo was lying when he denied the incident.

When the city attorney asked Officer Nastansky what Mr. Becerra-Arevalo told her about the incident, she did not answer the question. Instead, the officer opined that he was very cautious about what he said:

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 questions. He told me he's only there to work. He never talks to females, just that he comes in and says hi, and then he leaves and goes back to work.

CP 110. Over objection the prosecutor was then permitted to ask the officer why she believed Mr. Becerra-Arevalo was being careful in responding to her questions. CP 110-11.

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.

Q: Any did you get that perception here?

A: No. He was – it seemed to me that he was trying to hide something.

CP 111.

On cross-examination, the officer testified that only Mr. Becerra-Arevalo's answers concerning his relationship with other women at work were slow or guarded. CP 117. On re-direct, the prosecutor asked if the defendant's answers were also guarded concerning Ms. Fitzpatrick's allegations. CP 120. Officer Nastansky replied that not only was Mr. Becerra-Arevalo guarded as to the incident, he also lied to her:

And he lied to me as 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 he would know why I was there.

Id.

Defense counsel then asked numerous questions concerning the officer's opinion that Mr. Becerra-Arevalo, emphasizing her belief that he was lying. CP 122-27. In her answers, the officer related that she was a good judge of when people were lying and reiterated that Mr. Becerra-Arevalo lied to her. CP 125-27.

The prosecutor then asked the officer to again confirm that she believed Mr. Becerra-Arevalo was lying to her. CP 128. Over defense objection, Officer Nastansky explained the basis of her opinion:

Because he – just the way that he kind of – when you’re asked a certain question and then you answer part of it, but you don’t answer the full part of it, you’re really kind of choppy on what the answers are, very careful knowing that there’s a police officer in front of you, you’re very careful to [sic] how you answer it. Like I said before, if he didn’t have anything to hide he would have told me, you know, this, this, and this happened and yes, I was in that room at that time, but I never touched her. But he didn’t answer it. He didn’t go into detail whatsoever. And then I offered a taped statement. . . .

CP 128-29. The prosecutor ended her examination by asking the officer to confirm that her opinion that Mr. Becerra-Arevalo lied about the incident was based upon her “entire investigation and all of the information she obtained” during the investigation. CP 129.

Finally, defense counsel brought out the officer’s opinion that guilty people are always guarded when responding to police interrogation, but innocent people generally are not. CP 131.

In closing argument, the city attorney urged the jury to discount Mr. Becerra-Arevalo’s testimony based upon Officer Nastansky’s expert opinion that Mr. Becerra-Arevalo’s responses to her questions indicated he was guilty. CP 350-51. In addition, the prosecutor

commented on Ms. Fitzpatrick's discomfort in testifying and "how painful it was for her to look at that defendant." CP 325.

2. King County Superior Court

On appeal to King County Superior Court, Mr. Becerra-Arevalo's conviction was reversed and remanded for a new trial by the Honorable Leroy McCullough. CP 459-60 (attached as Appendix B).

The superior court ruled that Mr. Becerra-Arevalo did not receive a fair trial due to the impact upon the jury of the police officer's testimony concerning the defendant's credibility, the testimony elicited by both counsel that the officer believed the defendant was lying when he denied the offense, and the city attorney's comment during closing argument concerning the defendant's constitutional right confront witnesses. Id.

The superior court therefore declined to address other issues Mr. Becerra-Arevalo had raised on appeal. Slip Op. at 2; CP 460.

3. Court of Appeals

The Court of Appeals granted the City's motion for discretionary review of the RALJ decision. Order Granting Discretionary Review (5/6/13). The Court of Appeals refused to consider Mr. Becerra-Arevalo's request to address whether he received

ineffective assistance of counsel at both the trial and appellate level if review was granted. Id. at 3 n.1; Answer to Motion for Discretionary Review at 15-19 (2/1/13).

The Court of Appeals reversed the superior court's RALJ decision, holding that the superior court erred by concluding that the prosecutor committed misconduct. Slip Op. at 3. The Court of Appeals ruled that the city attorney did not commit misconduct in eliciting Deputy Nastansky's testimony about Mr. Becerra-Arevalo's credibility. The Court reasoned that the officer's initial testimony was merely a description of the defendant's demeanor, that the officer's testimony that Mr. Becerra-Arevalo was lying was not in response to the prosecutor's question, further testimony about lying was elicited by defense counsel, and the City's later questions of the officer were invited by defense counsel or were in reply to information he had elicited. Slip Op. at 3-8.

The Court of Appeals also found that the city attorney's closing argument was not a comment on Mr. Becerra-Arevalo's constitutional right to confront his accusers. Slip Op. at 8-9. Finally, the Court of Appeals held that, if the City did commit misconduct, Mr. Becerra-Arevalo could not show that it was so flagrant and ill-intentioned that it

could not have been cured by appropriate instructions to the jury. Slip Op. at 9-13.

The Court of Appeals reversed the RALJ decision and reinstated the municipal court's judgment and sentence. Slip Op. at 14. Mr. Becerra-Arevalo seeks review in this Court.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

- 1. The Court of Appeals reversal of the superior court decision is based upon a misunderstanding of the superior court's decision. This Court should accept review to determine if Mr. Becerra-Arevalo was denied a fair trial based upon cumulative error when both his counsel and the city attorney elicited improper testimony about his credibility and guilt.**

The Court of Appeals reviewed Judge McCullough's RALJ decision as if the ruling was based only upon prosecutorial misconduct. This is incorrect. The superior court's reversal of Mr. Becerra-Arevalo's misdemeanor conviction was based upon several errors that combined to deny him a fair trial: the officer's improper comments on the credibility of the defendant, including the discussion of lying elicited by both counsel, and the prosecutor's comment on the defendant's right to be present and confront the witnesses. CP 459-60. The decision reads:

[T]he lower court erred for the following reasons: the cumulative effect of the combination of the police officer's comment on the credibility of the defendant and the emphasis by both counsel on lying during the officer's testimony with the comment on the defendant's presence during the witness's testimony when he had a constitutional right to be there require reversal and remand for retrial.

CP 460-61.

The court's ruling was based on the questioning of the police officer "by both counsel" to elicit testimony that the defendant was lying. It also references the officer's improper testimony rather than the prosecutor's efforts to elicit that testimony. Thus, the superior court's reversal is based upon cumulative error by both counsel that denied Mr. Becerra-s Arevalo his due process right to fair trial. The Court of Appeals improperly reversed the superior court by only reviewing prosecutorial misconduct.

The due process clauses of the federal and state constitutions provide that a criminal defendant receive a fair trial. U.S. Const. amend. XIV; Const. art. 1, §§ 3, 22. Reversal may be required due to the cumulative effects of trial court errors, even if each error examined on its own would otherwise be considered harmless. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). Thus, in Alexander, the Court of Appeals ordered a new trial because (1) a counselor impermissibly

suggested the victim's story was consistent and truthful, (2) the prosecutor impermissibly elicited the defendant's identity from the victim's mother, and (3) the prosecutor repeatedly attempted to introduce inadmissible testimony at trial and in closing. State v. Alexander, 64 Wn. App. 147, 158, 822 P.2d 1250 (1992). And in Coe, this Court reversed four rape convictions based upon numerous evidentiary errors and a violation of discovery rules by the prosecutor. Coe, 101 Wn.2d at 774-86, 788-89.

In the present case, both counsel elicited testimony concerning Officer Nastansky's view of Mr. Becerra-Arevalo's credibility. Mr. Becerra-Arevalo's trial attorney did not object when Officer Nastansky offered her opinion of Mr. Becerra-Arevalo's credibility. CP 110-11, 120, 128-29. His cross-examination only emphasized her opinion that Mr. Becerra-Arevalo was lying. CP 109-10, 124-25, 131. Defense counsel also failed to object when the police officer related hearsay testimony of her conversations with Ms. Fitzpatrick and others. CP 106-07, 109, 114. And he did not object when the prosecutor commented upon the defendant's right to confront witnesses. CP 325-26.

Mr. Becerra-Arevalo's appellate attorney worked in the same law firm as trial counsel, and she did not argue on appeal that defense counsel was ineffective. In the Court of Appeals, however, Mr. Becerra-Arevalo's new counsel asked that the Court of Appeals consider the issue of ineffective assistance of counsel if it granted review. Answer to Motion for Discretionary Review at 15-19. The Court of Appeals declined to do so. Order Granting Discretionary Review at 3 n.1. Had the Court of Appeals considered that argument, however, it would have engaged in review of all of the reasons for the RALJ court's reversal of Mr. Becerra-Arevalo's conviction.

A criminal defendant has the constitutional right to the assistance of counsel. U.S. Const. amends. VI, XIV; Const. art. I, § 22; State v. A.N.J., 168 Wn.2d 91, 96-97, 225 P.3d 956 (2010). Counsel's critical role in the adversarial system protects the defendant's fundamental right to a fair trial. Strickland v. Washington, 466 U.S. 668, 684-85, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); United States v. Cronin, 466 U.S. 648, 656, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). The right to counsel therefore necessarily includes the right to effective assistance of counsel. Kimmelman v. Morrison, 477 U.S. 365, 377, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986); A.N.J., 168 Wn.2d at 98.

The right to effective assistance of counsel applies to appellate counsel. Evitts v. Lucy, 469 U.S. 387, 396, 105 S. Ct. 830, 836, 83 L. Ed.2d 821 (1985); see In re Pers. Restraint of Morris, 176 Wn.2d 157, 166, 288 P.3d 1140 (2012).

This Court has held that a defendant's constitutional right to a jury trial is violated if a witness expresses her opinion about the defendant's guilt or credibility. State v. Kirkman, 159 Wn.2d 918, 826-27, 155 P.3d 125 (2007); State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001); U.S. Const. amend. XIV; Const. art. I §§ 21, 22. Deputy Nastansky's testimony that Mr. Becerra-Arevalo lied when he denied committing the crime directly told the jury that the officer believed Mr. Becerra-Arevalo was guilty.

Competent counsel would have immediately objected to this type of testimony and would not have posed cross-examination questions that emboldened the city attorney to introduce even more damaging opinion testimony. Even if trial counsel's decision to emphasize the officer's opinion that Mr. Becerra-Arevalo was lying could be considered tactical, it was not a reasonable tactical decision and may be attacked on appeal. See State v. Grier, 171 Wn.2d 17, 33-34, 246 P.3d 1260 (2011); State v. Reichenbach, 153 Wn.2d 126, 130,

101 P.3d 80 (2004). “The relevant question is not whether counsel’s choices were strategic, but whether they were reasonable.” Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000).

Additionally, defense counsel did not object when the police officer related her hearsay conversations with Ms. Fitzpatrick, thus bolstering Ms. Fitzpatrick’s testimony, and offered her opinion that Ms. Fitzpatrick was still upset from the incident that allegedly occurred over two weeks earlier. CP 106-08. He also did not object with Officer Nastansky reported that Mr. Becerra-Arevalo had quit his job and was planning to leave the country. CP 109. No exception to the hearsay rule permits Officer Nastansky’s testimony concerning what Ms. Fitzpatrick told her about the incident or what she learned about defendant from the property manager. ER 802, 803, 804(b). Criminal defense attorneys are expected to have a basic understanding of the hearsay rule and to pose objections on that basis.

The RALJ court held that Mr. Becerra-Arevalo’s right to a fair trial was prejudiced when both the city attorney and defense counsel elicited a police officer’s opinion on his credibility, including her belief that Mr. Becerra-Arevalo was lying when he denied committing the

crime – a direct opinion that he was guilty. The Court of Appeals, however, only addressed the issue of prosecutorial misconduct. This Court should accept review so that Mr. Becerra-Arevalo so that the denial of his constitutional rights to due process and effective assistance of counsel are not denied. RAP 13.4(b)(3).

2. The Court of Appeals failed to remand Mr. Becerra-Arevalo's case to the superior court for consideration of issues not addressed by the RALJ court in light of the reversal on other grounds.

When the superior court reversed Mr. Becerra-Arevalo's conviction, it did not consider one of the issues he raised on appeal. CP 460. The Court of Appeals recognized this, but did not remand to the superior court for consideration of the remaining issue. Slip Op. at 2, 14. This Court should accept review because the Court of Appeals violated Mr. Becerra-Arevalo's right to appeal.

Mr. Becerra-Arevalo was convicted of a misdemeanor, and he therefore had the right to appeal to superior court. Const. art. I § 22; City of Seattle v. Helser, 98 Wn.2d 73, 85, 653 P.2d 631 (1982); RCW 3.02.020. Having reversed Mr. Becerra-Arevalo's appeal on different grounds, the superior court acted reasonably in not deciding other issues raised on appeal. When the Court of Appeals accepted

discretionary review and then reversed the RALJ court, however, it left those issues unaddressed.

This Court can remedy the violation of Mr. Becerra-Arevalo's right to appeal. This Court should accept review and order the Court of Appeals to remand Mr. Becerra-Arevalo's case to King County Superior Court for consideration of his remaining appellate issues. RAP 13.4(b)(3).

F. CONCLUSION

Everardo Becerra-Arevalo asks this Court to accept review of the Court of Appeals decision reversing the RALJ court and reinstating his misdemeanor conviction.

DATED this 28th day of May 2014.

Respectfully submitted,



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APPENDIX A

COURT OF APPEALS DECISION TERMINATING REIVEW

April 28, 2014

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CITY OF KENT,)	No. 69401-4-1
)	
Appellant,)	DIVISION ONE
)	
v.)	
)	
EVERARDO BECERRA-AREVALO,)	UNPUBLISHED
)	
Respondent.)	FILED: <u>April 28, 2014</u>
_____)	

Cox, J. — We granted discretionary review of the superior court's RALJ order reversing the conviction of Everardo Becerra-Arevalo for assault in the fourth degree with sexual motivation. The superior court ruled that the prosecutor committed misconduct by eliciting testimony on Becerra-Arevalo's credibility and by commenting on Becerra-Arevalo's exercise of his constitutional right to confront witnesses against him. Because Becerra-Arevalo fails to establish that the statements, to which he failed to object below, were improper and prejudicial, we reverse the superior court's order and reinstate Becerra-Arevalo's conviction.

On October 27, 2009, Becerra-Arevalo put his hands on Kelly Fitzpatrick's breasts and attempted to kiss her at her place of employment. Fitzpatrick reported the incident to the police. Thurston County Deputy Carrie Nastansky responded to Fitzpatrick's report and investigated the allegation.

No. 69401-4-1/2

The City of Kent charged Becerra-Arevalo with assault in the fourth degree with sexual motivation.

At trial, the City presented the testimony of Kelly Fitzpatrick, Deputy Nastansky, and Teresa Plemmons-Hutchens, Becerra-Arevalo's supervisor. Becerra-Arevalo also testified. We describe this testimony in more detail later in this opinion.

The jury convicted Becerra-Arevalo of assault in the fourth degree with sexual motivation.

He filed a RALJ appeal in superior court asserting, among other claims, that the City committed prosecutorial misconduct by eliciting improper opinion testimony from Deputy Nastansky and by commenting on Becerra-Arevalo's constitutional right to confront a witness against him. The superior court reversed Becerra-Arevalo's conviction on these grounds, concluding that:

[T]he cumulative effect of the combination of the police officer's comment on the credibility of the defendant and the emphasis by both counsel on lying during the officer's testimony with the comment on the defendant's presence during the witness's testimony when he had a constitutional right to be there require reversal and remand for retrial.^[1]

The superior court declined to address the additional issues Becerra-Arevalo raised on appeal.

We granted the City's motion for discretionary review.

¹ Clerk's Papers at 459-60.

PROSECUTORIAL MISCONDUCT

The City asserts that the superior court erred by concluding that the prosecutor committed misconduct. We agree.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the challenged conduct was both improper and resulted in prejudice.² We review alleged misconduct "within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions."³

IMPROPER CONDUCT

Becerra-Arevalo contends, as he did on RALJ appeal, that several incidents of misconduct deprived him of a fair trial. He first argues that the prosecutor elicited impermissible opinion testimony on his credibility. He is mistaken.

On direct examination, Deputy Nastansky described her initial contact with Becerra-Arevalo, which occurred on November 12, 2009. Deputy Nastansky testified that her conversation with Becerra-Arevalo "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."⁴ The following exchange then occurred:

² State v. Cheatam, 150 Wn.2d 626, 652, 81 P.3d 830 (2003).

³ State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

⁴ Clerk's Papers at 110.

[Prosecutor]: **Why did you have that opinion [that Becerra-Arevalo was being careful in answering your questions]?**

[Deputy Nastansky]: 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. You just say what happened, nothing to hide.

[Prosecutor]: And did you get that perception with him here?

[Deputy Nastansky]: **No. He was – it seemed to me like he was trying to hide something.^[5]**

Generally, no witness may offer an opinion regarding the defendant's guilt or veracity.⁶ A police officer's testimony on the veracity of another witness raises additional concerns because "an officer's testimony often carries a special aura of reliability."⁷ However, testimony that is not a direct comment on the defendant's guilt or veracity, is helpful to the jury, and is based on inferences that is not improper opinion testimony.⁸

Deputy Nastansky's initial statements do not amount to improper opinion testimony. Rather, they were based on her observations of Becerra-Arevalo's

⁵ Clerk's Papers at 111 (emphasis added).

⁶ State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007); State v. Rafay, 168 Wn. App. 734, 805, 285 P.3d 83 (2012), review denied, 176 Wn.2d 1023 (2013).

⁷ Kirkman, 159 Wn.2d at 928.

⁸ State v. Fisher, 74 Wn. App. 804, 813-14, 874 P.2d 1381 (1994) (aff'd in part, rev'd in part sub nom., State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995)).

demeanor when she confronted him about the allegation against him. Although her statements may imply or suggest culpability, they were not direct comments on Becerra-Arevalo's guilt.

Nor was Deputy Nastansky's subsequent testimony improper. The statements were invited by defense counsel's line of questioning.

On cross-examination, Becerra-Arevalo's defense counsel inquired, "And you said his answers were guarded? As far as you were aware did you know if Mr. Becerra was aware of the claims that had been made against him?" and, "The answers that were guarded as far as giving a slow answer to was in response to his relationships with other females?"⁹

During redirect examination, the prosecutor followed up on defense counsel's questions concerning whether Becerra-Arevalo appeared "guarded":

[Prosecutor]: Was [Becerra-Arevalo] also guarded with you on the events that occurred on October 27th?

[Deputy Nastansky]: 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 contacted by the property manager, so you would assume that he would know why I was there.^[10]

⁹ Clerk's Papers at 117.

¹⁰ Clerk's Papers at 120 (emphasis added).

Then, on recross-examination, defense counsel posed numerous questions regarding Deputy Nastansky's belief that Becerra-Arevalo lied to her and appeared guarded, including the following:

[Defense Counsel]: You said he lied to you? That's a pretty bold statement by an officer, wouldn't you agree?^[11]

[Defense Counsel]: And you said that the reason you thought it was a lie was because this other person had talked to him previously?^[12]

[Defense Counsel]: You go from the perspective that someone's guilty of a crime. What about somebody that doesn't think they've committed a crime?^[13]

[Defense Counsel]: You classify this as a lie. You specifically said it was a lie.^[14]

[Defense Counsel]: So what about that statement is a lie?^[15]

[Defense Counsel]: If you were accused of a crime – most people that you deal with, when you accuse them of a crime, are they guarded?^[16]

[Defense Counsel]: So you're saying just the people that are guilty are guarded?^[17]

¹¹ Clerk's Papers at 122.

¹² Id.

¹³ Id.

¹⁴ Clerk's Papers at 124.

¹⁵ Id.

¹⁶ Clerk's Papers at 125.

¹⁷ Id.

[Defense Counsel]: And that's the statement that you're saying is a lie?^{18]}

On second redirect examination, the prosecutor asked Deputy Nastansky additional questions about her conclusion that Becerra-Arevalo lied to her.

A prosecutor's remarks do not constitute misconduct if they are invited by defense counsel or are in reply to defense counsel's acts unless they "go beyond a pertinent reply and bring before the jury extraneous matters not in the record, or are so prejudicial that an instruction would not cure them."¹⁹

Here, Deputy Nastansky testified on redirect and second redirect examination concerning her belief that Becerra-Arevalo lied to her. But Becerra-Arevalo's defense counsel opened the door to this line of questioning. As detailed above, on cross-examination, defense counsel posed questions about Becerra-Arevalo appearing "guarded." Subsequently, on re-cross examination, defense counsel relentlessly inquired about Deputy Nastansky's stated belief that Becerra-Arevalo lied to her and appeared guarded. The prosecutor's questions on redirect and second redirect examination were a direct and pertinent response to defense counsel's series of questions.

Moreover, the prosecutor cannot be assigned fault for Deputy Nastansky's declaration that Becerra-Arevalo had "lied to me also." Statements in response to a prosecutor's questioning when not elicited by the prosecutor are not

¹⁸ Clerk's Papers at 126.

¹⁹ State v. Dennison, 72 Wn.2d 842, 849, 435 P.2d 526 (1967) (quoting State v. LaPorte, 58 Wn.2d 816, 822, 365 P.2d 24 (1961)); State v. Jones, 144 Wn. App. 284, 299, 183 P.3d 307 (2008).

characterized as prosecutorial misconduct.²⁰ Deputy Nastansky volunteered her opinion that Becerra-Arevalo had lied to her. The prosecutor did not pursue this issue on redirect examination after Deputy Nastansky made that remark.

Instead, defense counsel reopened the issue on recross-examination. In light of this sequence of testimony, the prosecutor's questions were not improper.

Becerra-Arevalo additionally asserts that the prosecutor's closing statements amounted to an improper comment on Becerra-Arevalo's constitutional right to confront witnesses against him. We reject this contention.

During closing argument, the prosecutor stated to the jury, "[Y]ou saw how difficult it was for [Fitzgerald] to testify. You saw how painful it was for her to look at the defendant. You saw how much she did not want to do that. You saw how uncomfortable she was to be in this environment."²¹

"The State can take no action which will unnecessarily 'chill' or penalize the assertion of a constitutional right and the State may not draw adverse inferences from the exercise of a constitutional right."²² Specifically, the State may not invite the jury to draw a negative inference from the defendant's exercise of a constitutional right.²³ The right to confront witnesses against an accused is one such right.²⁴

²⁰ See State v. Jungers, 125 Wn. App. 895, 902, 106 P.3d 827 (2005).

²¹ Clerk's Papers at 325.

²² State v. Gregory, 158 Wn.2d 759, 806, 147 P.3d 1201 (2006) (quoting State v. Rupe, 101 Wn.2d 664, 705, 683 P.2d 571 (1984)).

²³ Gregory, 158 Wn.2d at 806 (citing State v. Jones, 71 Wn. App. 798, 811-12, 863 P.2d 85 (1993)).

²⁴ U.S. Const. amend. XI; Wash. Const. art. I, § 22.

But a prosecutor has wide latitude in closing arguments to draw reasonable inferences from the facts in evidence and to express such inferences to the jury.²⁵ Moreover, "not all arguments touching upon a defendant's constitutional rights are impermissible comments on the exercise of those rights."²⁶ The question is whether the prosecutor "manifestly intended the remarks to be a comment on that right."²⁷

A review of the prosecutor's entire closing argument makes clear that her statements were not in any way a comment on Becerra-Arevalo's exercise of his constitutional rights. In closing, the prosecutor emphasized that the case hinged on the witnesses' credibility and that the jury alone was responsible for judging credibility. The prosecutor's reference to Fitzpatrick's demeanor was in support of her argument that the jury must consider the witnesses' motives and credibility. No evidence demonstrates that the prosecutor's intention was to comment on Becerra-Arevalo's right to confront witnesses against him.

We conclude that the prosecutor's conduct was not improper.

PREJUDICE

Even assuming the prosecutor's comments were improper, Becerra-Arevalo's prosecutorial misconduct claim fails because he does not satisfy the heightened standard of review on appeal for prejudicial effect.

Once a defendant establishes that the prosecutor's conduct was improper, a reviewing court determines whether the defendant was prejudiced under one of

²⁵ Gregory, 158 Wn.2d at 860; Dhaliwal, 150 Wn.2d at 577.

²⁶ Gregory, 158 Wn.2d at 806.

²⁷ State v. Crane, 116 Wn.2d 315, 331, 804 P.2d 10 (1991).

two standards of review.²⁸ If the defendant objected at trial, "the defendant must show that the prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict."²⁹ However, where, as here, the defendant failed to object to the prosecutor's alleged misconduct, "the defendant 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."³⁰

Under this latter heightened standard of review, Becerra-Arevalo carries the burden of establishing that "(1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.'"³¹ Moreover, "[r]eviewing courts should focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured."³² Even flagrant misconduct can be cured.³³

Because Becerra-Arevalo did not object at trial to the prosecutor's alleged misconduct, he must establish prejudice under the heightened standard. He fails to meet this burden here.

We first note that any prejudice derived from Officer Nastansky's remarks was primarily attributed to defense counsel's persistent questioning regarding

²⁸ State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012).

²⁹ Id.

³⁰ Id. at 760-61

³¹ Id. at 761 (quoting State v. Thorgerson, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)).

³² Id. at 762.

³³ Id. at n.13 (citing State v. Warren, 165 Wn.2d 17, 27, 195 P.3d 940 (2008)).

Deputy Nastansky's belief that Becerra-Arevalo was lying and her theories on the relationship between being guarded and being guilty. As discussed above, Becerra-Arevalo's defense counsel repeatedly posed questions to Deputy Nastansky on this topic. This sequence of testimony diminishes Becerra-Arevalo's contention that the prosecutor's conduct was flagrant or ill-intended. Any prejudicial impact was exacerbated, if not initially caused, by defense counsel.

Second, Becerra-Arevalo cannot prove that a curative instruction would not have obviated any prejudicial impact on the jury. To the contrary, any prejudicial effect resulting from the prosecutor's alleged misconduct was neutralized by the jury instructions.³⁴ Here, the jury was instructed, "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."³⁵ The instructions also stated, "The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence...."³⁶ The prosecutor referred to these instructions numerous times during closing argument. We presume that the jury followed the court's instructions.³⁷

³⁴ See State v. Montgomery, 163 Wn.2d 577, 595, 183 P.3d 267 (2008) ("Important to the determination of whether opinion testimony prejudices the defendant is whether the jury was properly instructed.").

³⁵ Clerk's Papers at 8.

³⁶ Id.

³⁷ State v. Stein, 144 Wn.2d 236, 247, 27 P.3d 184 (2001).

Moreover, defense counsel made no effort to defuse the alleged prejudice by requesting a curative instruction or objecting to the prosecutor's remarks. The absence of a curative instruction or motion for mistrial strongly suggests that the conduct was not prejudicial.³⁸ Even "[i]f the prejudice could have been cured by a jury instruction, but the defense did not request one, reversal is not required."³⁹ Furthermore, "[c]ounsel 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."⁴⁰ This appears to be the case here.

Becerra-Arevalo also fails to show a substantial likelihood that the prosecutor's statements affected the jury's verdict. Deputy Nastansky was not the sole witness in this case whose testimony undermined Becerra-Arevalo's credibility—Fitzpatrick and Plemmons-Hutchens also offered testimony unfavorable to Becerra-Arevalo.

Becerra-Arevalo testified that when Deputy Nastansky arrived to speak to him on November 12, 2009, he did not know the reason for her visit and was unaware of any allegations against him. Becerra-Arevalo further testified that his manager, Teresa Plemmons-Hutchens, first spoke to him about the allegation on November 12, 2009, after Deputy Nastansky had contacted him. But Plemmons-Hutchens's testimony contradicted Becerra-Arevalo's statements. She testified that she spoke to Becerra-Arevalo on November 2, 2009—10 days before

³⁸ See State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

³⁹ Dhaliwal, 150 Wn.2d at 578 (citing State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994)).

⁴⁰ Jones v. Hogan, 56 Wn.2d 23, 27, 351 P.2d 153 (1960).

No. 69401-4-I/13

Deputy Nastansky contacted him—and informed him of the allegation against him.

Furthermore, during direct examination, Becerra-Arevalo denied visiting the property where Fitzpatrick worked on the day of the assault. However, time cards, written in Becerra-Arevalo's handwriting, proved contrary. They showed that Becerra-Arevalo worked at Fitzpatrick's office building on the day of the assault and at approximately the same time Fitzpatrick testified the assault occurred. Plemmons-Hutchens also testified that Becerra-Arevalo told her that he visited the property where Fitzpatrick worked on the day of the assault and that Fitzpatrick was not there.

Finally, on cross-examination, Becerra-Arevalo denied touching or kissing Fitzpatrick. He also denied admitting to Plemmons-Hutchens that he assaulted Fitzpatrick. But Plemmons-Hutchens later testified that, on November 12, 2009, Becerra-Arevalo admitted to her that he had hugged and kissed Fitzpatrick. Therefore, significant testimony conflicted with Becerra-Arevalo's version of events surrounding the assault. He cannot demonstrate that any prejudice substantially impacted the jury's verdict.

Accordingly, Becerra-Arevalo fails to show that the heightened standard of review for prejudicial effect has been met.

Because we reverse on the prosecutorial misconduct issue, we need not resolve the City's additional claim of error concerning the admissibility of opinion testimony.

No. 69401-4-I/14

We reverse the RALJ court's order reversing Becerra-Averalo's conviction and reinstate the municipal court's judgment and sentence.

Cox, J.

WE CONCUR:

Jay, J.

Schubert, J.

APPENDIX B

ORDER ON RALJ APPEAL

September 7, 2012

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In the Superior Court of Washington for King County

City of Kent,)	Case No.: 12-1-01212-8 KNT
)	
Plaintiff/Respondent,)	Order on RALJ Appeal
)	
vs.)	
)	<u>CLERK'S ACTION REQUIRED</u>
Everardo Becerra-Arevalo,)	
)	
Defendant/Appellant.)	

THIS MATTER, having come before the court for oral argument on September 7, 2012, pursuant to RALJ 8.3 before the undersigned Judge of the above-entitled court, and, the court, having reviewed the record on appeal, the transcript, and the written and oral argument of the parties, ...

DOES HEREBY HOLD AS FOLLOWS: the lower court erred for the following reasons: the cumulative effect of the combination of the police officer's comment on the credibility of the defendant and the emphasis on lying during the officer's testimony with the comment on the defendant's presence during the witness's testimony when he had a constitutional


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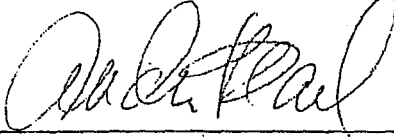
1 right to be there require reversal and remand for retrial.
2 The court does not find error with regard to the questioning of the
3 defendant about hugging and kissing. Based upon the decision on
4 this issue, the second and third claims were not reached.

5 IT IS HEREBY ORDERED that the above cause is remanded to
6 Kent Municipal Court for further proceedings, in accordance with
7 the above decision.

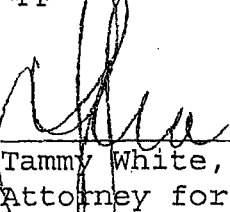
8 Dated this 7th day of September 2012.

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10 
11 Hon. L. McCullough
Superior Court Judge

12 Presented by:

13 
14
15 Andrea L. Beall, WSBA 26028
Attorney for Defendant/Appellant

17 Approved as to form by:

18 
19
20 Tammy White, WSBA# 43575
Attorney for Plaintiff/Respondent

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DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 69401-4-1**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

- Tammy Larson-White
City of Kent
- petitioner
- Attorney for other party


MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: May 28, 2014