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Division I
State of Washington

NO. 74110-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JUAN GARCIA-MENDEZ,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JOHN H. CHUN

BRIEF OF RESPONDENT

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A. ISSUES

1. A defendant who fails to object to a prosecutor's allegedly improper comments in closing argument has waived any claim on appeal unless the comments were flagrant and ill-intentioned and resulted in enduring prejudice that could not have been neutralized by a curative instruction. Drawing reasonable inferences from the evidence, the prosecutor focused on Garcia-Mendez being the initial aggressor and his intent to cause great bodily harm. Given the video evidence showing that Garcia-Mendez aggressively approached his victim and shot first before the victim returned fire, as well as DNA evidence that link him to the crime, has Garcia-Mendez, who did not object during closing argument, failed to show that if any misconduct occurred it requires reversal?

2. In an attempt to overcome his failure to object to alleged prosecutorial misconduct, Garcia-Mendez claims it was ineffective assistance of counsel for his attorney to fail to object to the prosecutor's closing argument. To establish ineffective assistance of counsel, an appellant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Has Garcia-Mendez failed to prove ineffective assistance of counsel when, if the prosecutor committed any misconduct at all, it was not so egregious that it affected the outcome of the case?

3. The State concurs that an error occurred at sentencing. A 60-month firearm enhancement was counted twice in calculating Garcia-Mendez's total sentence. This matter should be remanded for resentencing.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Juan Garcia-Mendez and his accomplice, Darreson Howard, were charged by information with assault in the first degree. CP 11. A third codefendant, Sophia Delafuente, was charged with felony rendering criminal assistance in the first degree. CP 11. The State alleged that on or about April 1, 2013, Garcia-Mendez, with intent to cause great bodily harm, assaulted Richard Powell with a firearm causing great bodily harm. CP 11. Garcia-Mendez was also charged with unlawful possession of a firearm in the first degree, based on his prior convictions for robbery in the first degree and burglary in the first degree. CP 12.

After a jury trial, Garcia-Mendez was convicted of assault in the first degree and unlawful possession of a firearm in the first degree. CP 281, 283. The jury also rendered two special verdicts, finding that Garcia-Mendez was armed with a firearm at the time of the commission of the assault, and that he had committed both crimes shortly after being

released from prison.[1] CP 284, 291-92. The court imposed an exceptional sentence totaling 400 months for the assault conviction, with a lesser standard range sentence for unlawful firearm possession to be served concurrently.[2] CP 300, 307-08.

2. SUBSTANTIVE FACTS

On April 1, 2013, at 11:20 p.m., Seattle Police Officer Randy Shelhorse responded to a "shots fired" call in the area of Avalon and Charlestown Streets in Seattle. 2RP[3] 106, 108-09. He found Richard Powell lying on the ground, not breathing, with his eyes wide open. 2RP 110-11. The officer looked into Powell's eyes and thought, "there was absolutely nothing there." 2RP 110-11. Officer Shelhorse immediately started CPR, and continued with the chest compressions for a few minutes until other officers arrived and assisted. 2RP 111-12. The additional officers tilted Powell's head back to open up his airways as Shelhorse continued the compressions. 2RP 113. The officers continued in that fashion for a few more minutes until Seattle Fire Department medics

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[1] In a bifurcated proceeding a Department of Corrections records custodian established that Garcia-Mendez had been released from prison on March 27, 2013, five days before he shot Mr. Powell. 2RP (8/4/15) 1097.

[2] In this brief, the State acknowledges that a miscalculation occurred in imposing the sentence and that the case should be remanded for resentencing. The 60-month firearm enhancement was added into the sentence twice.

[3] References to the verbatim report of trial proceedings in this brief follows the convention established by the appellant: "1RP" is the single volume containing proceedings from 12/13/13, 5/1/15, 6/29/15, 7/1/15, 7/7/15, and 9/25/15; "2RP" contains the remaining volumes starting on 7/9/15 that are consecutively paginated.

arrived and took over the life-saving efforts. 2RP 113-14. During the time that the police officers worked on Powell he was not responsive in any way and there was no indication of a pulse. 2RP 114. When the medics took over, they continued with the chest compressions until Powell was taken to the hospital. 2RP 115.

At the time he was shot, Richard Powell was working the 5:00 p.m. to 5:00 a.m. shift for a town car service. 2RP 123-24. He would begin his shift by going to work and picking up a car — on the night of the shooting, a Cadillac — and provide rides to customers as he was dispatched throughout the night. 2RP 124. A few years before the shooting, Powell had been robbed at gunpoint, an experience that caused him to feel powerless and led him to obtain a permit to carry a concealed weapon. 2RP 126-27. While working for the town car service, because the job required him to carry cash and interact with strangers, Powell carried a 9mm Glock semiautomatic pistol in a holster at his waist. 2RP 126.

On the night of the shooting, Powell had just dropped off a customer in West Seattle and decided to take a smoke break. He pulled the Cadillac over at Avalon and Charlestown, got out of the car, and lit a cigarette. 2RP 130-31. Powell testified that he did not have a good memory of the incident as a whole, but did have a "vivid" memory of

certain details. 2RP 152. He testified that a car came around the corner and someone got out of the passenger side and approached him and aggressively said "empty your pockets." 2RP 132-34, 136. The person had a gun pointed at Powell when he said that. 2RP 136.

Powell was certain that he reached for his own gun only after seeing the gun pointed at him: "I remember reaching for my gun as a direct response to seeing a gun pointed at me." 2RP 144-45. Powell had no memory of pointing his gun or pulling the trigger. 2RP 136-37. Powell felt a shot enter his body, which he said was not painful, but rather felt like an electrical shock to his system. 2RP 137. His last memory was calling 911 and trying to give the operator his location. 2RP 138. His next memory was waking up at Harborview Medical Center and being told he was going back into surgery. 2RP 139. After that, his next memory was waking up after that surgery and being told that it went well and it looked like he would survive. 2RP 139-40. He had been shot in the chest three times. 2RP 137-38. He still has a bullet in his spine because it would be more dangerous to remove it than leave it where it is. 2RP 140.

Dr. Michael Sayre is a professor of emergency medicine at the University of Washington and an attending physician in the emergency room at Harborview Medical Center. 2RP 568. According to Dr. Sayre, when Richard Powell arrived at Harborview he was "in full trauma code,"

meaning that he was "actively dying." 2RP 584. Powell was not breathing on his own; paramedics were using a bag and a breathing tube to blow air into his lungs. 2RP 591. ER doctors saw that he had bullet holes in his upper right chest and was bleeding heavily. 2RP 593-96. Before going into surgery Powell was intubated and given three pints of blood. Id. When asked how close to death Powell was upon arriving at Harborview, Dr. Sayre responded: "Oh, he's a lucky guy....it's basically a miracle that he's alive." 2RP 599. Sayre said that the survival rate of patients with similar circumstances is less than ten percent. 2RP 599.

Because he had lost a liter and a half of blood, about half the volume of blood in a healthy person's body, Powell was immediately taken to surgery, performed by trauma specialist Dr. Lisa McIntyre. 2RP 850. According to Dr. McIntyre, when Powell arrived at the operating room he was dying. 2RP 851. When the surgical team opened Powell's chest they determined he was still bleeding from bullet holes to the lungs. 2RP 855. Surgeons removed a portion of Powell's lungs. 2RP 857. A cardiothoracic specialist was called in to repair damaged blood vessels to Powell's heart. 2RP 859-60. The next day the cardiothoracic specialist operated on Powell again to repair a leak in his lungs. 2RP 861-63. A bullet had damaged Powell's spine but not his spinal cord, so surgeons left

the bullet lodged against his vertebrae to avoid damaging his spinal cord. 2RP 867.

At the scene of the shooting, one of the responding officers found a blood trail that started just a few feet from where Powell was lying and led up an alley. 2RP 201-02. At the end of the blood trail the officer found a bullet fragment with blood and flesh on it. 2RP 202. A civilian witness testified at trial that he had been playing video games when he heard gunshots. 2RP 248. He went to his window that looked out on the alley and saw a car idling, then 10 or 15 seconds later he saw two men run to the car and get into the backseat before the car "peeled out...going super fast." 2RP 248-50. He called 911. 2RP 252.

DNA analysis conclusively established that the source of the blood from the blood trail and the biological material on the bullet found in the alley was Garcia-Mendez. 2RP 644, 798-800, 807. A firearm expert from the Washington State Patrol Crime Laboratory determined that the bloody bullet recovered in the alley had been fired from Powell's gun. 2RP 913.

While officers were working at the scene of the shooting there was another 911 dispatch to the 5600-block of Delridge in West Seattle. 2RP 216. A female caller had reported that her boyfriend had been shot. 2RP 291. While a patrol officer was responding to that dispatch, a male came out from between apartments toward the officer's car. 2RP 294. The man

was shirtless and seemed "manic" in the way he approached the police car, and as he got closer the officer could see that he was bloody. 2RP 295-96. The officer called for medics, who transported the man to the hospital. 2RP 301. At trial, the officer identified the man in court as Garcia-Mendez. 2RP 300-01. At that location, two red bandanas and a red and black flannel shirt were found in the street, and a jacket, glove, and T-shirt were found in a garbage can behind a fourplex. 2RP 217. Most of the items were bloody. 2RP 312-14.

At Harborview, Dr. Sayre also treated Garcia-Mendez , who arrived at the emergency room about 20 minutes after Powell. 2RP 604. Garcia-Mendez had a superficial bullet wound to his left side that did not require surgery. 2RP 602-03. He also had a fractured right thumb and a wound to the muscle of his upper right arm. 2RP 603-04. A detective spoke to Garcia-Mendez while he was on a gurney in a treatment room. 2RP 219. Garcia-Mendez claimed he did not remember who shot him or what the person looked like. 2RP 221.

After Garcia-Mendez's arrest, he was a cellmate at the King County Jail with Lawrence Askew, who was incarcerated pending resolution of drug charges. 2RP 934-39. They shared a cell for over a month and a friendship developed. 2RP 939-40. Askew testified that initially when Garcia-Mendez discussed why he had been charged, he said

that he had just been asking for directions and somehow was shot. 2RP 942. As they became closer, according to Askew, Garcia-Mendez grew more open. 2RP 942. Garcia-Mendez told Askew that on the night of the incident he and Sophia and "Chaotic" had gone out "to rob and do some damage to people." 2RP 943-44. Garcia-Mendez told Askew that Sophia was driving and when they saw a man leaning against a Cadillac they pulled over. 2RP 945-46. He and "Chaotic" got out of the car and approached the man with their guns drawn and made a demand for money. 2RP 946-47. Garcia-Mendez did not specify who shot first, but said that the man pulled a gun and shooting started, and that "Chaotic" ran off without firing a shot. 2RP 946-47. Garcia-Mendez said he was firing a .22 revolver which is why he left no shell casings at the scene. 2RP 949. After hearing these things from Garcia-Mendez, Askew, through his attorneys, agreed to provide information to the prosecutor's office. 2RP 950. In return for his cooperation, the State recommended that Askew's drug charges be resolved by sentencing him to a residential treatment program. 2RP 951.

On the day after the shooting, officers discovered that a business on Charlestown, a British auto repair shop, had a surveillance video that captured the shooting. 2RP 355-57; Ex. 12. At trial, a detective with specialized training in video forensic analysis reviewed the video from the

business. 2RP 660-66; Ex. 62. The jury was shown the surveillance video and the expert witness testified that the figure known to be Powell did not shoot first, but rather returned fire after he had been shot. 2RP 679-82.

C. ARGUMENT

1. THE PROSECUTOR DID NOT COMMIT FLAGRANT AND ILL-INTENTIONED MISCONDUCT DURING CLOSING ARGUMENT.

Although he made no objections during the State's closing argument, Garcia-Mendez now claims that there were several instances of prosecutorial misconduct. He alleges that it was misconduct for the prosecutor to argue for justice on behalf of the victim; he claims that the prosecutor committed misconduct by misstating the law regarding initial aggressor and self-defense; and he claims that the prosecutor committed misconduct by referring to the uncharged crime of attempted murder and by giving her personal opinion as to the defendant's guilt.

Garcia-Mendez's arguments are without merit. Asking for justice in an individual case without invoking larger societal imperatives is not misconduct. Regarding the alleged misstatement of law, the prosecutor correctly and extensively argued the initial aggressor issue and the jury was properly instructed. To the extent that there was any error in the prosecutor's argument it could have been cured by a timely objection and reference to the court's instruction. Further, the prosecutor did not

improperly give a personal opinion as to the defendant's guilt, but rather argued based on the evidence that the defendant's intent to inflict great bodily harm was clear. Finally, although it may have been inappropriate to refer to the uncharged crime of attempted murder, the prosecutor did not do so in order to argue that Garcia-Mendez was guilty of a greater crime. Rather, she was referring to the *mens rea* of assault in the first degree and the distinction between intent to kill and intent to inflict great bodily harm. If this was error, it was harmless given the overwhelming evidence of the defendant's guilt.

a. Closing Arguments.

In her initial closing argument, the prosecutor began by telling the jury that Michael Powell was the victim of horrific, unprovoked, and senseless stranger violence at the hands of Garcia-Mendez and his two accomplices. 2RP 1031-32. After recounting that Powell had simply taken a break from his work as a town-car driver and was smoking when he was attacked, the prosecutor, referring to Powell's injuries, stated that Powell was lucky to be alive and able to testify. 2RP 1032-33. The prosecutor then said, "Now it's time to bring him justice." 2RP 1033.

Still in the initial closing argument, the prosecutor played the video showing the shooting and discussed the "initial aggressor" issue:

> You have seen the approach. You have seen the getaway. Let's talk about the sequence.
>
> It is clear from the testimony of Leon Gordon and Lawrence Askew and Mr. Powell that the defendant and his accomplices had a plan. And it is clear that they accosted him, they confronted him with guns drawn, and they were the aggressors. Not Mr. Powell.

2RP 1038. The prosecutor then reminded the jury that expert witness analysis of the video established that Garcia-Mendez fired the first shot and Powell then returned fire. 2RP 1039.

After discussing evidence linking the three codefendants to the shooting, the prosecutor addressed the "to convict" jury instruction for first degree assault and the definition of great bodily harm. In discussing great bodily harm, and noting that medical testimony established that Powell was on the verge of death before being revived, the prosecutor said:

> What is great bodily harm? There's a few different phrases in that instruction, but when it boils down to it, this isn't a homicide case because of a medical miracle. But great bodily harm is bodily injury that creates a probability of death.

2RP 1043-44.

The prosecutor then refuted the anticipated self-defense argument by again focusing on the initial aggressor issue:

> But remember, you don't even have to look at or debate the self-defense instructions if you find that Mr. Garcia-Mendez himself and his accomplices were the aggressors in

this case. From the surveillance video, we know Mr. Powell was not looking for them. Mr. Powell was not seeking them out.

Sure, when he [Garcia-Mendez] first talked to Mr. Askew in his cell, he said, "I didn't have anything to do with it." Kind of when he first told Detective Duffy, "I don't remember anything about it."

Then he, after a little while, tries to tell Mr. Askew he got shot in the fray, was asking for directions. We know that wasn't his intent, because did he ever ask Leon Gordon for directions? No. Did he ever ask Mr. Powell for directions? No.

Finally when he trusts Mr. Askew, he tells him the story. Out looking to rob people, do some damage, shoot some people.

There is nothing in this case to suggest that Mr. Powell did anything to provoke or justify what Mr. Garcia-Mendez did that night.

2RP 1045-46.

The prosecutor concluded the initial closing argument by arguing that the lesser included offense of second degree assault was not warranted under the facts of the case. 2RP 1047.

In the defense closing argument, Garcia-Mendez attempted to minimize the video surveillance footage that showed Garcia-Mendez and his accomplice aggressively approaching Powell:

> The State will have you believe that the way that those figures move in itself is somehow an act of aggression.
>
> Well, people walk differently. Young men of a certain lifestyle walk a certain way. It is not attractive, it is not pleasing to the eye, but aggression? Why is that suddenly aggression?

2RP 1053.

Defense counsel also argued that if Garcia-Mendez was the shooter depicted in the video, that there was insufficient evidence to conclude that he intended to inflict great bodily harm:

> Juan did not intend to inflict great bodily harm. Who knows what was intended? It's probably something unsavory, probably come on, give me your stuff. Who knows?
>
> But did he -- did he really intend, is there sufficient -- you may think so, you may guess so, you may kind of project your expectations, but is there sufficient evidence that he intended to inflict great bodily harm on Mr. Powell? Is there concrete, concrete, strong evidence of that? I suggest no.

2RP 1061. Defense counsel concluded by asking the jury to consider the lesser included offense of second degree assault based on the reckless infliction of substantial bodily harm. 2RP 1062-63.

In rebuttal, the prosecutor immediately refuted the defense argument regarding intent:

> The key issue here is what did Mr. Garcia-Mendez intend. Because the intent, his intent that day, is what determines was he the primary aggressor and did he intend great bodily harm. Rather than recklessly inflicting substantial bodily harm.

2RP 1063-64. The prosecutor then argued that because "you cannot read the mind of the defendant," the video was "an excellent piece of evidence that tells you and shows you what his intent was." 2RP 1064. Then: "We know on the video he approached Mr. Powell. And we know that he was

the one that accosted Mr. Powell. Mr. Powell did not go looking for him." Id.

The prosecutor then stated:

> Now, is this easily an attempted murder? Yeah. But we made it easy for you. Assault in the first degree. Intent to inflict great bodily harm. Juan Garcia-Mendez acted with that intent when he shot Mr. Powell three times at point-blank range in the chest. And he did so with a firearm. And he did inflict great bodily harm.

2RP 1065.

Then, after making clear that the State had the burden to disprove self-defense, the prosecutor again argued that Garcia-Mendez and his accomplices were the aggressors:

> The State submits to each and every one of you that there is no reason to even look at self-defense, because the evidence is overwhelming that Juan Garcia-Mendez and his accomplices were the primary aggressors. It's clear from the video he shot first, he has a calculated perfect little circle of shots, he knew exactly what he was doing, he knew exactly what he was intending, and he was in control the entire time.

2RP 1066.

The prosecutor began her conclusion by asking the jury not to render a verdict based on emotions or passion. 2RP 1067. The prosecutor then stated:

> Your job is, what does the evidence prove? And what reasonable doubt, if any, exists? And in some cases like this, the evidence is overwhelming. And the ultimate

> decision for you is a difficult one, heavy-hearted one and a serious one, but at the end of the day -- at the end of the day, it's a no-brainer. You stand there, and you shoot a man in the chest three times, and you didn't intend to inflict great bodily harm?

Id.

b. Within The Context Of The Whole Argument The Prosecutor's Comments Were Not Misconduct.

The United States and Washington Constitutions guarantee every defendant a fair trial. U.S. CONST. amend. V, VI; WA CONST. art. I, § 3. A defendant who claims on appeal that prosecutorial error or misconduct deprived him of a fair trial bears the burden of establishing that the conduct was both improper and prejudicial. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). In the context of closing arguments, the prosecuting attorney has "wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence." Id. Appellate courts evaluate allegedly improper comments "within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions." State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

A defendant who did not object to an allegedly improper comment has waived any claim on appeal unless the comment was so flagrant and ill-intentioned that it caused an enduring prejudice that could not have

been neutralized by a curative instruction. Fisher, 165 Wn.2d at 747. Under this heightened standard, the defendant must show 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." State v. Emery, 174 Wn.2d 741, 761, 278 P.3d 653 (2012) (quoting State v. Thorgerson, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)). Garcia-Mendez chose not to object during closing argument. If there was any error at all by the State, Garcia-Mendez cannot meet the heightened standard.

Herein, the State will address each alleged instance of misconduct, not in the order put forth in the appellant's brief, but in the chronological order in which the instances occurred during the closing arguments.

First, Garcia-Mendez alleges it was misconduct for the prosecutor to have argued, referring to the victim, "Now it's time to bring him justice." In support of his argument, Garcia-Mendez cites only two cases, State v. Echevarria, 71 Wn. App. 595, 860 P.2d 420 (1993), and State v. Bautista-Caldera, 56 Wn. App. 186, 783 P.2d 116 (1989). In fact, neither case supports his argument, as they both involve a prosecutor's invoking of societal concerns outside of the evidence admitted at trial. Echevarria involved a simple undercover drug buy in downtown Seattle. 71 Wn. App. at 596. At trial, the prosecutor began his opening statement by

referring at length to the "war on drugs." Echevarria, at 596. He remarked that the jurors knew from the news the identities of the "commanders" and "generals" of the war on drugs. Id. He stated that the trial would not be about these leaders, but rather about the "enlisted men or the recruits" who become involved in drugs "for the power or the money or the greed or peer pressure." Id. The prosecutor continued to discuss the "war on drugs," referring to the "battlefield of our own streets, our own neighborhoods and our own schools." Id. at 597.

The prosecutor then stated:

> This country just had a good example of how to fight a war, how a war can be fought successfully. This country has also seen situations where we haven't been as successful. The one thing we have learned is the way to successfully fight a war is to know who your enemy is, to have a strategy and a direct approach.

Id. The court reversed the conviction, holding that the prosecutor's remarks had "violated all of [the] tenets regarding the duty to seek a verdict based on the evidence and free of prejudice" and that no cautionary instruction could have cured the prejudicial effect of the argument. Id. at 598. The Court stated:

> The prosecutor's repeated improper references to the war on drugs set the tone for the entire trial. In particular, his comments about the "battlefield" in our neighborhoods and schools and his oblique references to the Gulf War and the Vietnam war were a deliberate appeal to the jury's passion and prejudice. Id. at 598.

In Bautista-Caldera, the defendant was convicted of two counts of first degree statutory rape and one count of indecent liberties, all of the crimes involving the same nine year old girl. 56 Wn. App. at 187. During rebuttal closing argument the prosecutor stated:

> Think of [the victim], *think of all the children who do not talk that well* who unfortunately don't remember everything in precise order in which it happens but whose only hope is people like yourself who are willing to take this case seriously, understand why it is that this happened.
> ...
> Should for some reason you not be satisfied that he penetrated [the victim], although I think that is clear from her testimony and from the definition that you're given, certainly, ladies and gentlemen, *do not tell that child that this type of touching is okay, that this is just something that she will have to learn to live with. Let her and children know that you're ready to believe them and [e]nforce the law on their behalf.*

Id. at 194-95 (emphasis in original).

The Court held that the prosecutor had committed misconduct. "[The argument] is not based solely on the evidence, however, but in effect exhorts the jury to send a message to *society* about the general problem of child sexual abuse. Such an emotional appeal is improper." Id. at 195 (emphasis in original). Even though the argument was misconduct, the court held that it was not so egregious that it could not have been neutralized by a curative instruction, and was not, therefore, reversible error. Id. at 195.

Neither Echevarria nor Bautista-Caldera is factually similar to this case. Here, based on the admitted evidence, and without pleas to send a broad message to society or to uphold an entire class of victims, the prosecutor simply asked that justice be done in this individual case. This was not misconduct.

Garcia-Mendez also claims that the prosecutor committed misconduct by misstating the law when arguing that Garcia-Mendez was the first aggressor for self-defense purposes. Essentially, Garcia-Mendez claims that it was error for the prosecutor to discuss Garcia-Mendez's known intent to "to rob and do some damage to people" when discussing the initial aggressor issue. His argument is without merit. Although the first aggressor is to be determined by assessment of the conduct of the actor, it was not error for the prosecutor to argue that the jury should evaluate Garcia-Mendez's conduct in light of his known state of mind — a desire to rob and hurt people.

During closing argument the prosecutor played the surveillance video (Ex. 12) that showed Garcia-Mendez and his male accomplice quickly and aggressively approach Powell on the street while Powell simply took a smoke break. Rather than walking side-by-side, the two men were several feet apart as they approached Powell, thereby creating a more difficult threat for Powell to defend against. Garcia-Mendez moved

immediately into Powell's personal space, much closer than would be expected if a person were to approach another on the street at 11:20 p.m. for any innocent purpose. Powell stepped backward as Garcia-Mendez continued advancing, and from a distance at which he could have reached out and touched Powell, Garcia-Mendez shot him. Referring to the video the prosecutor said, "You have seen the approach," and reminded the jury that Askew, the cell-mate, had testified that Garcia-Mendez had admitted that he and his accomplices went out to rob people that night.

Later in the argument, the prosecutor again referred to what the jury could see on the video, saying that "Mr. Garcia-Mendez and his accomplices were the aggressors in this case. From the surveillance video, we know Mr. Powell was not looking for them." After defense counsel in closing minimized the video evidence of the two accomplices approaching Powell by saying "young men of a certain lifestyle walk a certain way," the prosecutor stated in rebuttal closing:

> The key issue here is what did Mr. Garcia-Mendez intend. Because the intent, his intent that day, is what determines was he the primary aggressor and did he intend great bodily harm. Rather than recklessly inflicting substantial bodily harm.

The prosecutor did not err when discussing the first aggressor issue by asking the jury to consider Garcia-Mendez's state of mind when he and his accomplice aggressively approached Powell. Under the law, the

actor's intent is specifically relevant. The jury was properly instructed on the issue:

> No person may, by any ***intentional*** act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon use, offer, or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

CP 232 (emphasis added); WPIC 16.04. Here, Garcia-Mendez and his accomplice aggressively approached Powell with the intention of committing a robbery, which is the intentional act that precluded Garcia-Mendez from the refuge of self-defense. The two cases cited by Garcia-Mendez, State v. Wingate, 155 Wn.2d 817, 122 P.3d 908 (2005), and State v. Riley, 137 Wn.2d 904, 976 P.2d 624 (1999), in no way suggest that a known state of mind of the actor must be ignored by jurors in determining whether a person was the initial aggressor for self-defense purposes.

The prosecutor discussed the initial aggressor issue at length and correctly. Garcia-Mendez seems to argue that it was error for the prosecutor to refer to the actor's intent as a "key issue" in determining whether he was the initial aggressor. If this emphasis is at all improper, an objection and request for a curative instruction would have resolved the situation with no prejudice. After all, the jury was properly instructed and

the trial court could simply have referred the jury to the provided instruction.

Garcia-Mendez also claims it was misconduct for the prosecutor to have referred to the uncharged crime of attempted murder. The State acknowledges that it was inappropriate for the prosecutor to have referred to an uncharged crime, however, Garcia-Mendez's argument that it was flagrant and ill-intentioned and must result in reversal despite the lack of objection is based on his misconstruing the context of the prosecutor's remark. Garcia-Mendez argues that "the prosecutor revealed her personal opinion that Garcia-Mendez was guilty" (BOA at 8), and that the prosecutor "had concluded that Garcia-Mendez was 'easily' guilty of attempted murder." BOA at 10. The context of the prosecutor's argument does not support these assertions. Similarly, the prosecutor's reference to Garcia-Mendez's intent to do great bodily harm as a "no brainer," though a colloquialism, was not an improper expression of opinion as to the defendant's guilt.

To determine whether the prosecutor is expressing a personal opinion of the defendant's guilt, independent of the evidence, a reviewing court views the challenged comments in context:

> It is not uncommon for statements to be made in final arguments which, standing alone, sound like an expression of personal opinion. However, when judged in the light of

> the total argument, the issues in the case, the evidence discussed during the argument, and the court's instructions, it is usually apparent that counsel is trying to convince the jury of certain ultimate facts and conclusions to be drawn from the evidence. Prejudicial error does not occur until such time as it is **clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion**.

State v. McKenzie, 157 Wn.2d 44, 53-54, 134 P.3d 221(2006) (emphasis in original). Reviewing courts will not find prejudicial error "unless it is clear and unmistakable that counsel is expressing a personal opinion." State v. Warren, 165 Wn.2d 17, 30, 195 P.3d 940 (2008). For example, "'I believe [the witness]. I believe him.'" State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995) (quoting State v. Sargent, 40 Wn. App. 340, 343, 698 P.2d 598 (1985)).

Here, the prosecutor's reference to attempted murder ("Could this easily have been attempted murder? Yeah.") was not an expression of her personal opinion that Garcia-Mendez was guilty of attempted murder, but rather an inartful attempt to discuss the intent element of the charged crime, assault in the first degree. The jury had seen video evidence of Garcia-Mendez shooting his victim three times in the chest at point-blank range, which likely caused jurors to wonder why attempted murder had not been charged. At no time did the prosecutor say she believed Garcia-Mendez was guilty of attempted murder; she juxtaposed her reference to

attempted murder with a discussion of the evidence that supported the State's decision to file the charge of assault in the first degree. The prosecutor's statement, "we made it easy for you," was a reference to the evidence of great bodily harm being easily established by Garcia-Mendez having shot Powell three times in the chest.

Likewise, the prosecutor's use of the term "no brainer" was not an expression of her opinion that Garcia-Mendez was guilty. The prosecutor did not preface the remark with "I believe," or some similar clear expression of personal opinion. Most significantly, in the context of the argument, the prosecutor was not even referring to guilt, but rather to the evidence that supported an element of the charged offense, the intent to cause great bodily harm. Her full reference was: "... at the end of the day, it's a no-brainer. You stand there, and you shoot a man in the chest three times, and you didn't intend to inflict great bodily harm?" The prosecutor was not clearly giving her personal opinion on guilt, but was summarizing irrefutable evidence that the defendant intended great bodily harm. Although the prosecutor used an informal, colloquial expression, there was no qualitative difference between her language and an argument that the evidence of intent to cause great bodily harm was "overwhelming."

Garcia-Mendez attempts to overcome the fact that he failed to object at trial by invoking State v. Reed, 102 Wn.2d 140, 684 P.2d 699 (1984). But the prosecutor's arguments here were not the type of comments that reviewing courts have held to be so ill-intentioned and inflammatory to require reversal despite a lack of objections. See, e.g., State v. Belgarde, 110 Wn.2d 504, 506-07, 755 P.2d 174 (1988) (prosecutor stated the American Indian group with which defendant was affiliated was "a deadly group of madmen " and "butchers," and told them to remember "Wounded Knee, South Dakota "); State v. Reed, 102 Wn.2d 140, 143-44, 684 P.2d 699 (1984) (prosecutor said defendant was a liar four times, stated defense had no case, said the defendant was a "murder two," and implied the defense witnesses should not be believed because they were from out of town and drove fancy cars).

In this case, the prosecutor was making arguments based on evidence adduced at trial. If there was any misconduct, Garcia-Mendez has failed to meet his burden to establish that the comments were so flagrant and ill-intentioned that no curative instruction could have prevented a substantial likelihood that the jury verdict was affected. Garcia-Mendez's guilt was conclusively established, largely through video and scientific evidence. The evidence showed that Richard Powell was innocently taking a smoke break from his job as a town-car driver when he

was aggressively approached by Garcia-Mendez and his accomplice in a robbery attempt, acts shown to the jury on video. Garcia-Mendez and his accomplices had gone out that night looking "to rob and do some damage to people." Garcia-Mendez shot Powell before Powell returned fire, a fact established by video evidence. Powell survived three gunshot wounds to the chest only because of the heroic efforts of Seattle police officers and Harborview doctors. Garcia-Mendez was definitively linked to the shooting by DNA evidence from the blood trail and blood and flesh from a recovered bullet fired from Powell's gun. Given this evidence, if there was any error in the prosecutor's closing argument, Garcia-Mendez cannot show that there was a substantial likelihood that the jury's verdict was impacted.

2. THE FAILURE OF GARCIA-MENDEZ'S TRIAL ATTORNEY TO OBJECT DURING THE STATE'S CLOSING ARGUMENT DID NOT CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL.

Garcia-Mendez attempts to circumvent preservation requirements by claiming that his trial counsel was ineffective for failing to object to the alleged instances of prosecutorial misconduct in closing argument.

A criminal defendant's right to the assistance of counsel derives from the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution. Under these provisions, a

criminal defense attorney has the constitutional duty to effectively assist his client. In re Personal Restraint of Yung-Cheng Tsai, 183 Wn.2d 91, 99, 351 P.3d 138 (2015) (citing Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Where a defense attorney makes "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," the attorney's performance is constitutionally deficient. Tsai, 103 Wn.2d at 99 (quoting Strickland, 466 U.S. at 687). In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that (1) defense counsel's performance was deficient and (2) that the deficient performance prejudiced the defendant. State v. Cienfuegos, 144 Wn.2d 222, 226-27, 25 P.3d 1011 (2001); Strickland, 466 U.S. at 668.

To show deficient performance, Garcia-Mendez must show that his counsel's performance fell below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). In judging the performance of trial counsel, courts "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689. To show prejudice, Garcia-Mendez must show that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. A reasonable probability "is a

probability sufficient to undermine confidence in the outcome." Id. If an appellant fails to establish one prong of the Strickland test, a reviewing court need not consider the other prong. Id. at 697.

The lack of objections by Garcia-Mendez's trial attorney to the prosecutor's closing argument does not constitute ineffective assistance of counsel. In In re Personal Restraint of Davis, 152 Wn.2d 647, 101 P.3d 1 (2004), a death penalty case, the supreme court rejected a claim of ineffective assistance of counsel for failure to object to the prosecutor's closing argument by, in part, emphasizing that objections during closing arguments are uncommon.

> Defense counsel's decision to refrain from objecting during the prosecutor's closing argument was not deficient performance. Lawyers do not commonly object during closing argument absent egregious misstatements. A decision not to object during summation is within the wide range of permissible professional legal conduct.

152 Wn.2d at 717 (citations omitted). Similarly, the supreme court in In re Personal Restraint of Cross, 180 Wn.2d 664, 692-93, 327 P.3d 660 (2014), rejected an ineffective assistance claim, stating, "Defense counsel's failure to object to a prosecutor's closing argument will generally not constitute deficient performance because lawyers do not commonly object during closing argument absent egregious misstatements." (citations omitted).

As argued in the previous section, in the context of the case the prosecutor's arguments were not misconduct. The fact that defense counsel did not make objections, or request a mistrial or curative instruction, strongly suggests that the comments were not unduly prejudicial in the context of the trial. State v. Calvin, 176 Wn. App. 1, 18, 316 P.3d 496 (2013). To the extent that any of the prosecutor's comments were inappropriate, they were not so egregious that would require any competent defense counsel to take the uncommon action of objecting during closing argument.

3. THIS CASE SHOULD BE REMANDED FOR RESENTENCING BECAUSE THE 60-MONTH FIREARM ENHANCEMENT WAS ERRONEOUSLY IMPOSED TWICE.

The State concedes that an error occurred in sentencing and that this matter should be remanded for resentencing. However, the error is more straightforward than asserted by Garcia-Mendez. Simply put, the 60-month firearm enhancement was counted twice in calculating Garcia-Mendez's 400 month sentence for assault in the first degree.

Garcia-Mendez alleges that there was a miscalculation of the standard range sentence. There was not. There was, however, a clerical error relating to the seriousness level of the offense. Paragraph 2.4 of the judgment and sentence incorrectly indicates that the seriousness level on

Count 1, assault in the first degree, is XIII. CP 298. In fact, assault in the first degree carries a seriousness level of XII. RCW 9.94A.515. However, the judgment and sentence, in the same paragraph, indicates the correct standard range, 178 – 236, for assault in the first degree with the seriousness level of XII and Garcia-Mendez's agreed offender score of 7. CP 298; RCW 9.94A.510. To be clear, despite the clerical error, the correct seriousness level was used to determine the correct standard range sentence.

As indicated on the judgment and sentence, the correct standard range of 178 – 236 months was then increased by the firearm enhancement of 60 months for a "total standard range" of 238 – 296 months. CP 298. In his oral remarks, Judge Chun indicated he was imposing an additional 44 months for an exceptional sentence. 1RP 199. At paragraph 4.4 of the judgment and sentence the term of confinement shows 340 months, indicating that the 44 months was added to the high end of 296 months (which already included the 60 months for the firearm enhancement). CP 300. Then, erroneously, the 60-month firearm enhancement was again added to the 340, for a total sentence of 400 months. CP 300. The firearm enhancement was mistakenly counted twice.

Garcia-Mendez asks that this Court "remand for the trial court to correct the Judgment and Sentence to accurately reflect a total sentence of

340 months." BOA at 32. But this Court should not limit the trial court's discretion on remand. The Sentencing Reform Act requires "that the *end sentence* be the result of principled discretion." State v. Parker, 132 Wn.2d 182, 190, 937 P.2d 575 (1997) (emphasis added). In Parker, the supreme court declined to affirm an exceptional sentence where the standard range had been incorrectly calculated "because of the great likelihood that the judge relied, at least in part, on the incorrect standard ranges in his calculus." Id. Affirming the exceptional sentence "would uphold a sentence which the sentencing judge might not have imposed given correct information and would defeat the purpose of the SRA." Id.

Here, it is likely that the trial court relied on the incorrect understanding that the firearm enhancement was only being imposed once, as he seemed to fashion the exceptional sentence to satisfy a just "end sentence." The trial court phrased its imposition of the exceptional sentence in this way: "I've decided to add an additional 44 months to the sentence here, bringing the total time to 400 months." 1RP 199.

From the record it is not clear that the trial court would impose the same exceptional sentence of 44 months when the 60-month firearm enhancement is imposed correctly. Therefore, this Court should remand for resentencing on Count 1 without the restriction requested by Garcia-Mendez.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Garcia-Mendez's convictions but remand to the trial court for resentencing.

DATED this 12 day of August, 2016.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorneys for the appellant, Jennifer L. Dobson and Dana Nelson, containing a copy of the BRIEF OF RESPONDENT, in STATE V.JUAN GARCIA-MENDEZ, Cause No. 74110-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Date : Aug. 12, 2016

Done in Seattle, Washington