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Supreme Court No. 96462-9

Court of Appeals No. 49882-1-II

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ADRIAN TROY ABRAM III,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Adrian Abram, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision 49882-1-II, issued on September 25, 2018, pursuant to RAP 13.3 and RAP 13.4(b)(2), (3), and (4). The opinion is attached.

B. ISSUES PRESENTED FOR REVIEW

1. Before a trial court admits scientific or expert testimony under ER 702, this Court requires the trial court (1) qualify the witness as an expert**;** (2) establish that the expert's opinion is based upon a theory generally accepted in the relevant scientific community; and (3) find the testimony is helpful to the trier of fact. *State v. Cheatam*, 150 Wn.2d 626, 645, 81 P.3d 830 (2003). Here, where the police officer was not qualified to offer expert testimony under ER 702, did the trial court's instruction to the jury on expert witness testimony conflict with established Washington case law's requirements for expert witness testimony, warranting review under RAP 13.4(b)(2)?

2. The use of the accused's silence at the time of arrest and after *Miranda* warnings have been given is fundamentally unfair and violates due process. Should this Court grant review, under RAP 13.4(b)(3), of

the State's violation of this right when it elicited evidence of Mr. Abram's post-*Miranda* silence as evidence of his guilt at trial?

3. Where the public has a substantial interest in ensuring criminal convictions are not compromised by a trial court's legal errors, does the Court of Appeals finding that the trial court's erroneous admission of prejudicial ER 404(b) and hearsay evidence was not harmful warrant review by this Court under RAP 13.4(b)(4)?

C. STATEMENT OF THE CASE

Adrian Abram was charged with attempting to elude a police officer based on what officers characterized as a high speed chase. CP 1-2; RP 199-212. The Court of Appeals found there was no error in the trial court instructing the jury, over defense objection, that the jury could consider the police officers' testimony as expert witness testimony, even though the trial court had not qualified the officers as experts. Slip op. at 7.

At trial, Mr. Abram presented evidence that he believed he was being chased by a man who had just threatened him. RP 346-347, 355. The State's theory was that Mr. Abram was attempting to elude police because of an outstanding warrant, but there was no evidence that Mr. Abram was aware he had a warrant. RP 8/23/16; 34; RP 223. The Court

of Appeals agreed with Mr. Abram that the court abused its discretion in admitting this unsupported motive evidence, but found it harmless, despite the fact that Mr. Abram's state of mind in speeding while police followed him that night was a disputed issue at trial. Slip op. at 12. This error was compounded by the trial court's erroneous admission of hearsay evidence that the Court of Appeals also found to be harmless error. Slip op. at 13.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. This Court should grant review of the Court of Appeals decision approving of an expert witness instruction for police officers who were not qualified as experts, because this decision conflicts with established Washington case law that requires the qualification of experts who offer expert witness testimony.

a. The jury was instructed to consider the officers' testimony as expert witness testimony even though the officers had not been qualified as experts.

The offense of attempting to elude a police vehicle contains the element that the accused drive a vehicle in a "reckless manner" while attempting to elude a pursuing marked police vehicle. RCW 46.61.024 (1). Here, key to the prosecution establishing the elements of a "reckless manner" and eluding, was police officer testimony about the speed and manner in which Mr. Abram drove. To bolster the officers'

credibility, the prosecutor requested an expert witness instruction, even though the officers were never qualified as experts. RP 370.

To admit scientific or expert testimony under ER 702, the court must (1) qualify the witness as an expert**;** (2) the expert's opinion must be based upon a theory generally accepted in the relevant scientific community, and (3) the testimony must be helpful to the trier of fact. *Cheatam*, 150 Wn.2d at 645.

Officer Maas was a "patrol deputy," whose main duty is to answer 911 calls. RP 193. He was trained at the police academy, where he learned "the basic rules of Washington State; traffic laws, domestic violence laws." RP 192. Deputy Nicodemus also worked patrol, completed the police academy and field training, and was a field training officer. RP 263-264.

The officers testified about their observations of Mr. Abram's driving, which included estimates of his speed. *See e.g.*, RP 199-212. This non-scientific, non-expert testimony on estimated speed is lay opinion. *State v. Kinard*, 39 Wn. App. 871, 874, 696 P.2d 603 (1985) ("A proper lay opinion would include the speed of a vehicle.").

Moreover, neither officer presented evidence that the patrol car speedometer was properly calibrated and in good working order. By

contrast, evidence of driving speed measured by a radar device requires expert testimony about the accuracy of the radar. *See City of Bellevue v. Mociulski*, 51 Wn. App. 855, 860–61, 756 P.2d 1320 (1988) ("The witness must first qualify as an expert via knowledge, skill, experience, training, or education. ER 702. After the witness has qualified as an expert, he/she must show that the machines passed the requisite tests and checks. Only then can the speed measuring devices be deemed reliable.").

Here, the police officers presented only lay witness testimony, and the court was never asked to qualify the police officers as expert witnesses where neither officer testified to specialized training regarding speed estimations or driving safety.

Despite the fact that the officers were not qualified as experts, and only testified as lay witnesses, the prosecution requested an instruction on expert witness testimony

> Well, I don't know if they -- I think the police did -- the deputies in this case did provide testimony that relates to like an opinion about the speed that the defendant was going through the intersections and things like that whether or not he could safely clear intersections. I think that that is based on their training and experience and in motor vehicle operation and pursuit driving. Obviously the defendant has testified that he thought he was driving safely. So I think that could be considered an expert opinion in as much as they relied on their expertise.

RP 370. Over defense objection, the court instructed the jury as requested by the prosecution, noting that the jury could indeed find some of the officer testimony to be expert testimony:

> I think that it may provide some information to the jury. While lay witnesses can testify about speed, I think that there's some additional experience and training that law enforcement officers have in regards to these situations. So I will give that instruction.

RP 370-371; CP 25. The court acknowledged that the officers' testimony regarding speed was lay opinion testimony, but nevertheless gave an expert witness instruction. CP 25.

b. Mr. Abram was prejudiced by the expert witness instruction because it gave undue deference to the officers' testimony.

To satisfy the constitutional demands of a fair trial, the jury instructions, when read as a whole, must correctly tell the jury of the applicable law, not be misleading, and permit the defendant to present his theory of the case. *State v. O'Hara*, 167 Wn.2d 91, 105, 217 P.3d 756 (2009); *State v. Benn*, 120 Wn.2d 631, 654, 845 P.2d 289 (1993); *see* U.S. Const. amend. XIV; Const. art I, § 22. A misleading instruction requires reversal when it prejudices the complaining party. *State v. Aguirre*, 168 Wn.2d 350, 364, 229 P.3d 669 (2010) (citing *Keller v. City of Spokane*, 146 Wn.2d 237, 249, 44 P.3d 845

(2002)). A challenge to a jury instruction is reviewed de novo, and the instruction is evaluated "in the context of the instructions as a whole." *State v. Knutz*, 161 Wn. App. 395, 403, 253 P.3d 437 (2011).

Courts must take special care to distinguish between expert testimony and non-expert testimony provided by testifying police officers, because of the concern that "an agent's status as an expert could lend him unmerited credibility when testifying as a percipient witness…" *United States v. Torralba-Mendia*, 784 F.3d 652, 658 (9th Cir. 2015) (quoting *United States v. Vera*, 770 F.3d 1232, 1242 (9th Cir. 2014)). This is why clarification is necessary where officers offer both lay and expert witness testimony at trial. "'[i]f jurors are aware of the witness's dual roles,' the jury 'must be instructed about what the attendant circumstances are in allowing a government case agent to testify as an expert.'" *Vera*, 770 F.3d at 1242 (quoting *United States v. Freeman*, 498 F.3d 893, 904 (9th Cir. 2007)).

Such confusion between an officer's expert opinion and lay opinion is certain to occur where, as here, the officers were not in fact qualified as experts, but the court nonetheless gives an expert witness instruction. This situation exemplifies the Ninth Circuit's concern that a jury will give improper deference to a police officer's testimony as an

expert in matters for which he is not in fact qualified to offer expert testimony. *See Vera*, 770 F.3d at 1246 (Had the court instructed the jury that the officer's lay opinion testimony was "not based on scientific, technical, or other specialized knowledge," it would have deterred the jury from viewing his opinions as having the "imprimatur of scientific or technical validity.").

As noted by the prosecution, the officers and Mr. Abram gave differing accounts of their speed and driving, and credibility was a big part of the case. RP 370, 420. It was thus a question for the jury about whose account to believe. The officers expressed various opinions about how Mr. Abram's driving demonstrated that he was attempting to elude. For example, Deputy Maas opined the only reason Mr. Abram would drive as he did was to elude the officers:

> Q. Why would somebody turn their lights off during a pursuit, in your experience?
> A. My only thought for them to do be doing that would be hoping that it would make it so we would lose sight of them or quit chasing them.
>
> Q. Does that increase the amount of danger of a collision with other vehicles when they turn their lights off?
> A. Yes.

RP 236. He also expressed the unsubstantiated opinion that the siren would be "audible within the Cherokee." RP 237.

Likewise, Deputy Nicodemus opined on Mr. Abram's state of mind: "He was definitely trying to avoid me." RP 273. And despite the lack of pedestrian or vehicular traffic, the deputy posited that he was not "safely" clearing intersections." RP 272.

The inclusion of the expert witness instruction impermissibly and prejudicially directed the jury to lend "unmerited credibility" to the entirety of the lay testimony by the officers. *See Torralba-Mendia*, 784 F.3d at 658 (quoting *Vera*, 770 F.3d at 1246) ("[I]n light of our Circuit's clearly expressed concerns about case agents testifying in both lay and expert capacities, the district court's failure to give an instruction explaining [the agent's] dual roles was plain error.").

A jury is presumed to follow the court's instructions. *State v. Wiebe*, 195 Wn. App. 252, 256, 377 P.3d 290, 293, *review denied*, 186 Wn. 2d 1030, 385 P.3d 122 (2016) (citing *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007)). Thus it must be presumed here that the jury in fact granted deference to the police as "a witness with special training, education, or experience," without the deputies ever having been qualified to offer opinion testimony. CP 25.

The Court of Appeals found no error despite the fact that the officer was not qualified to testify as an expert. Slip op. at 10. Mr.

Abram requests this Court to review the Court of Appeals opinion because it is contrary to published Washington case law that requires a court to qualify an expert before allowing the witness to testify as an expert. *Cheatam*, 150 Wn.2d at 645.

2. Review should be granted under RAP 13.4(b)(3) of the State's impermissible elicitation of Mr. Abram's post-*Miranda* silence as evidence of guilt.

The Court of Appeals' failure to find error in the prosecutor's impermissible comment on Mr. Abram's right to remain silent is a constitutional question meriting review by this Court. Slip op. at 18.

a. Mr. Abram was entitled to remain silent after being advised of his *Miranda*[1] rights.

Miranda warnings "constitute an 'implicit assurance' to the defendant that silence in the face of the State's accusations carries no penalty." *State v. Easter*, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 628, 113 S.Ct. 1710, 1716–17, 123 L.Ed.2d 353 (1993)). Thus, comments on this right to remain silent at the time of arrest and after the *Miranda* warnings is fundamentally unfair and violates due process. *Id.*

The State should not draw attention to a defendant's exercise of the constitutional right to silence. *State v. Burke*, 163 Wn.2d 204, 225,

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S,Ct 1602, 16 L.ED.2d 694 (1966).

181 P.3d 1 (2008). It is constitutional error for the State to purposefully elicit testimony about the defendant's silence. *State v. Romero*, 113 Wn. App. 779, 790, 54 P.3d 1255 (2002) (citing *Easter*, 130 Wn.2d at 236). Thus, a police witness may not comment on the silence of the accused so as to infer guilt from a refusal to answer questions. *Id.* (citing *State v. Lewis*, 130 Wn.2d 700, 705, 927 P.2d 235 (1996)).

b. The State's elicitation of Mr. Abram's post-*Miranda* silence was constitutional error.

Romero suggested a "two-part analytical framework for determining whether a State agent's direct or indirect comments during trial on a defendant's silence amount to constitutional error." *State v. Terry*, 181 Wn. App. 880, 891, 328 P.3d 932 (2014) (citing *Romero*, 113 Wn. App. at 790–91). If, as here, the comment was not direct, *Romero* suggested three questions from which to determine whether the State was seeking to capitalize on an *inference* of guilt in a manner violating the defendant's rights:

> First, could the comment reasonably be considered purposeful, meaning responsive to the State's questioning, with even slight inferable prejudice to the defendant's claim of silence? Second, could the comment reasonably be considered unresponsive to a question posed by either examiner, but in the context of the defense, the volunteered comment can reasonably be considered as either (a) given for the purpose of attempting to prejudice the defense, or (b) resulting in the unintended effect of likely prejudice to the defense? Third, was the indirect comment

> exploited by the State during the course of the trial, including argument, in an apparent attempt to prejudice the defense offered by the defendant?
>
> Answering "yes" to any of the questions means the indirect comment is an error of constitutional proportions.

Id. at 791.

Here, the answer is "yes," to the first question. At the pre-trial hearing, the State ascertained that Mr. Abram waived his *Miranda* rights, but remained silent in response to several of the officer's questions. RP 8/23/2016; 19, 22.

Then at trial, the State impermissibly elicited this testimony about Mr. Abram's exercise of his constitutional right to remain silent pursuant to police questioning.

> Q. Did you ever confront Mr. Abram about how close you were and there being no car between you?
> A. Yes. And he would just decline to answer those ones.

RP 222-223. Mr. Abram's silence must be read "in the face of police questioning," as, "quite expressive as to the person's intent to invoke the right" *Easter,* 130 Wn.2d at 239.

This constitutional error can only be considered harmless "if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error and where

the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt." *Terry,* 181 Wn. App. at 894 (quoting *Burke,* 163 Wn.2d at 222). Where Mr. Abram testified at trial and provided his own account of events, the evidence implicating guilt from his silence must be seen to have affected the verdict of any reasonable jury, because it was used to undermine his credibility. The Court of Appeals failed to give due weight to Mr. Abram's constitutional right to remain silent. Slip op. at 17-18.

3. This Court should grant review of the Court of Appeals decision that allows Mr. Abram's conviction to stand despite repeated trial errors, because the public has a substantial interest in ensuring that convictions are not compromised by flawed proceedings.

Mr. Abram requests review of the Court of Appeals decision that failed to give proper weight to the effect of a trial court's repeated evidentiary errors.

a. The Court of Appeals recognized two important trial court errors raised by Mr. Abram, but found them to be harmless.

The prosecutor sought to introduce evidence of an outstanding misdemeanor warrant as motive for Mr. Abram attempting to elude. RP 170. Over defense objection, the court determined the probative value of the outstanding warrant to show Mr. Abram's "mindset" outweighed

the prejudice, regardless of whether he testified at trial. RP 171-173. But there was not evidence that Mr. Abram had any knowledge of this outstanding misdemeanor warrant that could have demonstrated this motive. The Court of Appeals correctly agreed that the trial court erred in admitting this evidence of a warrant because the prejudice outweighed its probative value, but found the error to be harmless. Slip op. at 10.

Mr. Abram also raised on appeal the trial court's admission of Ms. Sandoval's testimonial statements introduced by the State calling her as a witness. RP 326. They were classic hearsay statements to show the truth of the matter asserted—that Mr. Abram eluded police. The Court of Appeals correctly determined that the trial court erred in admitting Ms. Sandoval's hearsay statements, but again found the error to be harmless. Slip op. at 13.

b. The trial court's erroneous admission of the outstanding warrant and hearsay prejudiced Mr. Abram.

The Court of Appeals wrongly concluded that these compounded evidentiary errors did not prejudice Mr. Abram. Slip op. at 10, 13.

Erroneously admitted evidence requires reversal if, "within reasonable probabilities, had the error not occurred, the outcome of the

trial would have been materially affected." *State v. Cunningham*, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980); *State v. Gonzalez-Gonzalez*, 193 Wn. App. 683, 690–91, 370 P.3d 989 (2016).

Mr. Abram testified he believed he was being pursued by someone who had threatened him in the parking lot. RP 355, 356. To refute Mr. Abram's account, the prosecution argued during closing that the misdemeanor warrant was Mr. Abram's motive for eluding police, despite the complete lack of evidence Mr. Abram was aware of the warrant. RP 391, 423. Evidence of the warrant is precisely the sort of propensity evidence that ER 404(b) prohibits because the jury would use it to infer that Mr. Abram is a person who disobeys police and court orders. This is particularly damaging because of the nature of the charge, attempting to elude a police vehicle.

The erroneously admitted hearsay evidence was just as harmful because Ms. Sandoval's erroneously admitted out-of-court statements implicated Mr. Abram, and he was prejudicially forced to take on the burden of refuting her statements by calling her as a witness at trial.

The prosecutor was permitted to elicit Deputy Maas's recitation of Ms. Sandoval's statements at the scene of the stop:

> Q: Did she ever mention there being another vehicle pursuing them besides you?"

> A: No.
> […]
> Q: Did she ever answer any of your questions initially?
> A. Initially she stated that they were at Safeway. He told her that he got in an argument with somebody; and when they left Safeway, we got behind him.

RP 223. The prosecution again elicited Ms. Sandoval's testimony on redirect.

> Q: Did you ask her about whether she knew that there was a police car behind them?
> A. Yes.
> Q: To the best of your recollection, what exactly did she say about that?
> A. She stated that -- basically all she would say is that once they left Safeway, we got behind them and he just didn't stop when we turned our lights on.

RP 260-261.

Both the defense and the State originally included Ms. Sandoval on their witness lists. RP 96. But neither the defense nor the State had an opportunity to talk to Ms. Sandoval prior to trial, so neither party knew whether they would call her. RP 309. The defense then called her as a witness after the State had introduced her damaging statements. RP 326-327. The defense questioned her about the hearsay statements, which she denied making. RP 331-332. Because of this inadmissible hearsay, the defense had to call a witness it might not have otherwise elected to call to rebut the highly damaging inadmissible statements.

Mr. Abram seeks review by this Court where the compounded effect of these errors was not harmless, and the Court of Appeals decision compromises his right to a fair trial.

F. CONCLUSION

Based on the foregoing, Mr. Abram respectfully seeks review under RAP 13.4(b)(2), (3), and(4).

Respectfully submitted this the 24th day of October 2018.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ADRIAN TROY ABRAM, III, Appellant.	No. 49882-1-II UNPUBLISHED OPINION

SUTTON, J. — Adrian Troy Abram III appeals his convictions for attempting to elude a police vehicle and first degree driving while license suspended or revoked. First, Abram argues that the trial court erred by giving an expert witness instruction. Second, Abram argues that the trial court erred by admitting evidence of Abram's outstanding warrant as a motive for eluding. Third, Abram argues that the trial court erred by allowing the State to elicit inadmissible hearsay statements from a witness. Fourth, Abram argues that the prosecutor committed misconduct by impermissibly commenting on his right to remain silent.

First, we hold that the trial court did not err by giving the expert witness instruction. Second, we hold that the trial court did err by admitting evidence of Abram's outstanding warrant, but that this error was harmless. Third, we hold that the trial court erred by admitting the hearsay statements by the witness, but that Abram was not prejudiced by their admission. Fourth, we hold that the prosecutor did not impermissibly comment on Abram's right to remain silent, and thus, his claim of prosecutor misconduct fails. Thus, we affirm.

FACTS

I. PRETRIAL FACTS

On January 2, 2016, Abram was arrested after a high speed chase with two deputies, Deputy James Maas and Deputy Tommie Nicodemus. Abram was subsequently charged with attempting to elude a police vehicle and first degree driving while license suspended or revoked.

Before trial, the State informed the trial court of a potential ER 404(b) issue and advised the trial court that it intended to introduce evidence that Abram had an outstanding warrant when he was pulled over by the deputies. Abram objected to this evidence on the grounds that the evidence was not relevant. The trial court disagreed and ruled,

> Well, I do find that it is relevant. . . . The relevance is to show what may have been the mindset of Mr. Abram at the time that the officers were behind him, the fact he had an outstanding warrant.
>
> The prejudicial effect of that can be substantial if the jury hears that he has a warrant. But I think that can be limited by having it be described as a misdemeanor warrant rather than a felony warrant and not going into the nature of it being a reckless driving warrant. So that could be an outstanding misdemeanor warrant I think is accurate. I think that minimizes the prejudice to therefore the probative value of it. The relevance of it is not substantially outweighed by the danger of unfair prejudice. I will allow the admissibility of the fact that he had an outstanding misdemeanor warrant.

IV Verbatim Report of Proceedings (VRP) at 173. On January 4, 2017, Abram's jury trial began.

II. TESTIMONY

Deputy Maas and Deputy Nicodemus testified at trial. Deputy Maas testified that he completed the law enforcement academy, worked for several months with a field officer, and completed the Pierce County Sheriff's Department internal education requirements. He began his career as a corrections deputy for Pierce County in 1996, and then worked as a patrol deputy since

2007. As a patrol deputy, his main job is to respond to 911 calls and to work in traffic enforcement. He explained that his training at the academy included training on the traffic rules and laws, safe motor vehicle operations, how to drive a patrol vehicle, and pursuits.

Deputy Nicodemus testified that he worked for the Pierce County Sheriff's Department since 1998, first as a corrections deputy and then as a patrol deputy. He testified that he completed the law enforcement academy and field training. He has worked as a firearms instructor and as a field training officer. Deputy Nicodemus also stated that he has worked in search and rescue, marine services, the domestic violence unit, and as an investigator for Pierce Transit.

On January 2, 2016, Deputy Maas was riding with Deputy Nicodemus on patrol duty. Their vehicle was a fully marked police vehicle with lights and sirens. Maas witnessed a black Jeep drive past them with no front license plate. The deputies began to follow the Jeep.

Once the deputies began to follow the Jeep, it accelerated and quickly turned down a side street. The deputies continued to pursue the Jeep down residential streets, as it accelerated to high speeds and ran through red lights and intersections. At this point, the deputies activated their emergency lights and notified dispatch that they were in pursuit of the Jeep. They then turned on the siren and continued to pursue the Jeep.

Both deputies testified that the Jeep was often driving at double the posted speed limit down residential streets and side streets, and driving 70 miles per hour through a four way stop and a second stop sign. The Jeep did not stop or slow down at any stop signs, red lights, or intersections. The deputies testified that once the Jeep turned onto the freeway, the Jeep exceeded 100 miles per hour. Eventually, the deputies used their vehicle to nudge the Jeep, forcing it to spin out and stop. Once the Jeep was stopped, the deputies contacted the occupants of the Jeep. The

Jeep's driver was Abram, the two passengers were Abram's girlfriend, Armita Sandoval, and their three-year-old son.

During direct examination, Deputy Maas testified about conversations that he had with Sandoval and Abram at the scene of the traffic stop:

> [State]: Did you ask [Sandoval] about whether she observed police cars behind her?
>
> [Deputy Maas]: Yes.
>
> [State]: And what did she say?
>
> [Defense Counsel]: I'm going to object, Your Honor.
>
> The Court: Basis?
>
> [Defense Counsel]: Hearsay.
>
> The Court: Overruled.
>
> [Deputy Maas]: She stated that she knew that -- every time I would ask her a question, she would not answer it.
>
> . . . .
>
> [State]: Were there ever any cars between you and [Abram] during the majority of this pursuit?
>
> [Deputy Maas]: No.
>
> [State]: Did you challenge [Abram] about that?
>
> [Deputy Maas]: Yes. He just said he thought there was [sic] other cars; thought we were chasing the car chasing him and that guy just happened to take every turn and every direction that he took.
>
> [State]: Did you ever confront [Abram] about how close you were and there being no car between you?
>
> [Deputy Maas] Yes. And he would just decline to answer those ones.
>
> [State]: And did you ask [Abram] if he knew it was [the] police behind him?
>
> [Deputy Maas]: Yes.
>
> [State]: What did [Abram] say?
>
> [Deputy Maas]: He said he knew there were police behind him, but he thought we were trying to stop the other car.
>
> [State]: And I want to go back to [Sandoval]. Did she ever answer any of your questions initially?
>
> [Deputy Maas]: Initially she stated that they were at Safeway. He told her that he got in an argument with somebody; and when they left Safeway, we got behind him.

> [State]: Did she ever mention there being another vehicle pursuing them besides you?
>
> [Deputy Maas]: No.

IV VRP at 221-23.

Deputy Maas further testified that Abram said that while he and Sandoval were at a Safeway, Abram got into an altercation with a person. After leaving the store, when the deputies got behind him in his Jeep, he thought they were trying to stop the person who Abram had had the altercation with. Abram told the deputies that he believed they were attempting to pull over the person who was following him. Both deputies testified that no other vehicle was between Abram's vehicle and their vehicle.

During redirect, Deputy Maas was again asked about his interaction with Sandoval:

> [State]: The defense just asked you about the passenger, [Sandoval]. In your report, did you -- well, let me ask . . . [d]id you ask her about whether she knew that there was a police car behind them?
>
> [Deputy Maas]: Yes.
>
> [State]: So I mean, if you can kind of look at your report and refresh your memory, to the best of your recollection, what exactly did she say about that?
>
> [Deputy Maas]: She stated that -- basically all she would say is that once they left Safeway, we got behind them and he just didn't stop when we turned our lights on.

V VRP at 261.

Both Deputy Maas and Deputy Nicodemus testified that Abram was driving in such a manner and speed in an attempt to elude them. V VRP at 236, 273. Deputy Maas stated:

> [State]: Why would somebody turn their lights off during a pursuit, in your experience?
>
> [Deputy Maas]: My only thought for them to do be doing that would be hoping that it would make it so we would lose sight of them or quit chasing them.
>
> [State]: Does that increase the amount of danger of a collision with other vehicles when they turn their lights off?
>
> [Deputy Maas]: Yes[.]

V VRP at 236. Deputy Nicodemus also opined that "[Abram] was definitely trying to avoid me" and that despite the lack of pedestrian or vehicular traffic, Abram was not safely clearing intersections. V VRP at 273.

Both Sandoval and Abram testified. Sandoval denied telling the deputies anything related to Abram's driving. Abram denied being aware that the deputies were behind him until they forced him to stop the vehicle.

III. JURY INSTRUCTIONS

Over Abram's objection, the trial court gave the pattern jury instruction on expert testimony, ruling:

> I will include the [expert testimony] instruction. I think that it may provide some information to the jury. While lay witnesses can testify about speed, I think that there's some additional experience and training that law enforcement officers have in regard[] to these situations. So I will give that instruction.

VI VRP at 371.

The trial court instructed the jury as follows:

> A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts.
>
> You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

Clerk's Papers (CP) at 25; 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 6.51, at 211 (4th ed. 2016) (WPIC).

The trial court also instructed the jury that to find Abram guilty of attempting to elude a police vehicle, they must find that "he willfully fail[ed] or refus[ed] to bring his vehicle to a stop after being given a visual or audible signal to bring the vehicle to a stop by a police officer, and while attempting to elude a pursuing police vehicle [he drove] his vehicle in a reckless manner." CP at 27; RCW 46.61.024.

Abram was convicted of attempting to elude a police vehicle and driving while license revoked in the first degree. He appeals his convictions.

ANALYSIS

I. JURY INSTRUCTIONS

Abram argues that the trial court erred by instructing the jury on expert witness testimony because the two deputies who testified did not qualify as expert witnesses.[1] We disagree.

A. LEGAL PRINCIPLES

We review legal errors in jury instructions de novo. *State v. Jensen*, 149 Wn. App. 393, 398, 203 P.3d 393 (2009). However, absent a legal error, we review a trial court's decision regarding the specific language of an instruction and a trial court's decision to give an instruction for an abuse of discretion. *Jensen*, 149 Wn. App. at 399. An abuse of discretion exists when a trial court's exercise of its discretion is based upon untenable grounds or reasons; a decision is based on untenable reasons if it is based on an incorrect standard. *State v. Quaale*, 182 Wn.2d 191, 196-97, 340 P.3d 213 (2014).

[1] Abram also argues that neither deputy presented any evidence that their speedometer was properly calibrated that night. This argument goes to the admissibility of the testimony given by the deputies regarding Abram's speed. Because this testimony was not objected to, we do not consider this argument. *State v. Perez-Cervantes*, 141 Wn.2d 468, 482, 6 P.3d 1160 (2000).

A trial court has discretion to determine whether a witness is an expert in a particular subject. ER 702. Under ER 702, a witness may be qualified as an expert by his knowledge, skill, experience, training, or education. *State v. Cheatam*, 150 Wn.2d 626, 645, 81 P.3d 830 (2003). When considering the admissibility of expert testimony under ER 702, we engage in a two-part inquiry: (1) does the witness qualify as an expert, and (2) would the witness's testimony be helpful to the trier of fact. *State v. Yates*, 161 Wn.2d 714, 762, 168 P.3d 359 (2007). Practical experience is sufficient to qualify a witness as an expert. *Yates*, 161 Wn.2d 765.

B. JURY INSTRUCTION

The trial court's to convict instruction for attempting to elude a police vehicle stated, "[a] person commits the crime of attempting to elude a police vehicle when he willfully fails or refuses to bring his vehicle to a stop after being given a visual or audible signal to bring the vehicle to a stop by a police officer, and while attempting to elude a pursuing police vehicle he drives his vehicle in a reckless manner." CP at 27; RCW46.61.024. The court's instruction defined "reckless manner" as "a rash or heedless manner, indifferent to the consequences." CP at 31.

Because the trial court's expert witness instruction, WPIC 6.51, is a legally correct statement of the law, we review the court's decision to give the expert witness instruction for an abuse of discretion. *Jensen*, 149 Wn. App. at 399.

Here, the deputies testified about their extensive training and experience related to their jobs as patrol deputies in traffic enforcement, including safe motor vehicle operations during pursuits. Both deputies testified about the Jeep's excessive speed during their pursuit of it. They testified that the Jeep was often driving at double the posted speed limit while driving on residential streets and side streets, including driving 60 miles per hour on residential streets with posted speed

limits of 25 and 35, and driving 70 miles per hour through a four way stop sign and a second stop sign. Once the Jeep turned onto the freeway, the Jeep exceeded 100 miles per hour on a roadway with a posted speed limit of 60 miles per hour. They opined that the speed the Jeep was travelling at was unsafe, particularly as it sped through stop signs, red lights, and intersections without slowing down. The deputies also opined that Abram was driving that night in such a manner as to elude them. Abram did not object at trial to the testimony of the deputies or to their qualifications.

Abram did object to the proposed expert witness instruction, arguing that neither deputy was an expert. The trial court ruled,

> I will include the [WPIC] 6.51 instruction. I think that it may provide some information to the jury. While lay witnesses can testify about speed, I think that there's some additional experience and training that law enforcement officers have in regard[] to these situations. So I will give that instruction.

VI VRP at 371. The trial court acknowledged that the testimony of the deputies regarding Abram's speed was lay opinion testimony.

The trial court correctly ruled that the deputies' practical experience and training in traffic patrol duties, safe motor vehicle operations, and pursuit driving qualified them to state their opinions as to the speed and manner of Abram's driving during their pursuit of his vehicle. The trial court also correctly ruled that the deputies' opinions on the subject would be helpful to the jury. Thus, the trial court had a tenable reason to give the expert witness instruction. Because the

trial court had a tenable reason, it did not abuse its discretion. Because the trial court did not abuse its discretion, it did not err. Therefore, Abram's argument fails.[2]

II. EVIDENCE OF THE OUTSTANDING WARRANT

Abram argues that the trial court erred by admitting evidence of an outstanding warrant as a motive to elude. Specifically, Abram argues that the trial court abused its discretion in finding that the outstanding warrant was sufficiently probative because the State was required to prove that he was aware of the warrant at the time the deputies pulled him over. We agree with Abram that the trial court abused its discretion by admitting evidence of an outstanding warrant because the prejudice of the evidence substantially outweighed its probative value. However, because the outcome of the trial would not have been materially affected had the erroneous admission of the evidence of the warrant not occurred, the error was harmless.

A. LEGAL PRINCIPLES

We review a trial court's interpretation of ER 404(b) de novo. *State v. Gunderson*, 181 Wn.2d 916, 922, 337 P.3d 1090 (2014). If the trial court interprets ER 404(b) correctly, we review the trial court's ruling to admit evidence for an abuse of discretion. *Gunderson*, 181 Wn.2d at 922. An abuse of discretion exists when a trial court's exercise of its discretion is based upon untenable grounds or reasons; a decision is based on untenable reasons if it is based on an incorrect standard. *Quaale*, 182 Wn.2d at 196-97. Here, Abram does not argue that the trial court interpreted ER 404(b) incorrectly, but argues that the trial court abused its discretion.

[2] Abram also argues that this instruction prejudiced him because it gave undue deference to the testimony of the deputies. But the instruction given was proper and it did not accord undue deference to the testimony of the deputies, and thus, we do not need to address the issue of prejudice.

Generally, evidence of a defendant's prior bad acts is inadmissible to demonstrate the accused's propensity to commit the crime charged. ER 404(b); *State v. Fisher*, 165 Wn.2d 727, 744, 202 P.3d 937 (2009). However, ER 404(b) allows the introduction of prior bad acts for other purposes, including to demonstrate motive or intent. *Fisher*, 165 Wn.2d at 744. Further, we read ER 404(b) in conjunction with ER 403. *State v. Mee*, 168 Wn. App. 144, 154, 275 P.3d 1192 (2012). ER 403 requires the trial court to exercise its discretion by excluding relevant evidence that would be unfairly prejudicial.

Prior to the admission of ER 404(b) evidence, the trial court, on the record, must: (1) find by a preponderance of the evidence that the bad act actually occurred, (2) identify the purpose of admitting the evidence, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value against the prejudicial effect of the evidence. *Gunderson*, 181 Wn.2d at 923. Doubtful cases must be resolved in favor of exclusion. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

It is well settled that the erroneous admission of evidence in violation of ER 404(b) is analyzed under the lesser standard for nonconstitutional error. *State v. Gresham*, 173 Wn.2d 405, 433, 269 P.3d 207 (2012). The nonconstitutional error standard requires that we determine whether, "'within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.'" *Gresham*, 173 Wn.2d at 433 (internal quotation marks omitted) (quoting *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)).

B. ERRONEOUS ADMISSION

Here, the State was required to prove that Abram willfully failed to stop when the pursuing deputies signaled him to stop. RCW 46.61.024(1). The State argued that the evidence of the

outstanding warrant was admissible to show Abram's motive for evading the deputies. The State argued that the evidence of the warrant was highly probative of Abram's willful failure to stop and that it could be reasonably inferred that he was afraid to stop because he believed that he would be arrested for a reason unrelated to the traffic stop. Prior to admitting testimony about the outstanding warrant, the trial court heard the parties' arguments and then conducted a balancing test to weigh the probative value and the prejudicial effect under ER 401 and ER 403.

However, no evidence was admitted at trial showing that Abram was aware of the warrant. Because there was no evidence that Abram had any knowledge of the outstanding misdemeanor warrant, the evidence of the warrant did not establish that he had a motive which caused him to act. *See* ER 404(b). Without a showing that the warrant could have provided any such motive, the evidence about the outstanding warrant did not have any probative value. Thus, the absence of any probative value was substantially outweighed by the prejudicial effect from the admission of the outstanding warrant. Consequently, because the probative value was outweighed by the prejudice, the trial court abused its discretion in admitting the evidence of the outstanding warrant.

Regardless, the error was harmless. The deputies were eyewitnesses to the incident and they testified to Abram's conduct during their pursuit of his vehicle. Further, Abram testified that he was speeding, but explained that he was not fleeing from the deputies; rather, he was fleeing from the person he believed was chasing him. Thus, within reasonable probabilities, the outcome of the trial was not materially affected by the erroneous admission of the evidence which, in turn, means that the error was harmless. *Gresham*, 173 Wn.2d at 433. Because the error was harmless, Abram's claim fails.

III. HEARSAY STATEMENTS

Abram next argues that (1) the trial court erred by admitting hearsay statements made by Sandoval at the scene of the traffic stop to Deputy Maas because her statements were offered to prove the truth of the matter asserted—that Abram was eluding the deputies and (2) the erroneous admission of the hearsay statements forced him to call Sandoval as a witness to rebut her hearsay statements, which prejudiced him. The State argues that Abram did not preserve the hearsay objection he now complains of on appeal. We hold that Abram sufficiently preserved the hearsay objections, and we agree that the trial court erred in admitting Sandoval's hearsay statements. However, we disagree that Abram suffered any prejudice. Thus, his claim fails.

A. LEGAL PRINCIPLES

Under ER 801(c), "hearsay" is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." "Unless an exception or exclusion applies, hearsay is inadmissible." *State v. Hudlow*, 182 Wn. App. 266, 278, 331 P.3d 90 (2014); ER 802. We review de novo whether a statement is hearsay. *Hudlow*, 182 Wn. App. at 281. We review the admission of evidence under a hearsay exception for an abuse of discretion. *State v. Thomas*, 150 Wn.2d 821, 854, 83 P.3d 970 (2004). We will not disturb a trial court's ruling that a statement falls under a hearsay exception unless we believe that no reasonable judge would have made the same ruling. *Thomas*, 150 Wn.2d at 854. Improper admission of hearsay is harmless if, within reasonable probability, the statement did not materially affect the outcome of the trial. *See State v. Stenson*, 132 Wn.2d 668, 709, 940 P.2d 1239 (1997).

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. The

confrontation clause bars the "'admission of testimonial statements of a witness who did not appear at trial unless [the witness] was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.'" *State v. Koslowski*, 166 Wn.2d 409, 417, 209 P.3d 479 (2009) (internal quotation marks omitted) (quoting *Davis v. Washington*, 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).

B. PRESERVATION FOR APPEAL

Preliminarily, the State argues that Abram did not object to the same hearsay statements by Sandoval that he now challenges on appeal. However, our review of the record reveals that Abram preserved the issue for our review and we address the merits of his claim.

C. SANDOVAL'S HEARSAY STATEMENTS

Abram argues that the trial court erred by allowing the State to elicit hearsay statements by Sandoval at the scene of the traffic stop during Deputy Maas's testimony. We agree with Abram that the trial court erred, but we hold that Abram fails to show prejudice.

Deputy Maas testified that Sandoval told him at the scene of the traffic stop that when she and Abram were at Safeway, Abram told her he got into an argument with another person and when they left the store, "we got behind him"; she did not tell Deputy Maas that there was another vehicle pursuing them. IV VRP at 223.

Deputy Maas testified in relevant part:

> [State]: Did you ask [Sandoval] about whether she observed police cars behind her?
> [Deputy Maas]: Yes.
> [State]: And what did she say?
>
> [Defense Counsel]: I'm going to object, Your Honor.
> [The Court]: Basis?

[Defense Counsel]: Hearsay.

[The Court]: Overruled.

[Deputy Maas]: She stated that she knew that -- every time I would ask her a question, she would not answer it.

IV VRP at 221.

The State then elicited further statements about Sandoval's statements to Deputy Maas at the scene:

[State]: And did you ask [Abram] if he knew it was [the] police behind him?

[Deputy Maas]: Yes.

[State]: What did [Abram] say?

[Deputy Maas]: He said he knew there were police behind him, but he thought we were trying to stop the other car.

[State]: And I want to go back to [Sandoval]. Did she ever answer any of your questions initially?

[Deputy Maas]: Initially she stated that they were at Safeway. He told her that he got in an argument with somebody; and when they left Safeway, we got behind him.

[State]: Did she ever mention there being another vehicle pursuing them besides you?

[Deputy Maas]: No.

IV VRP at 223.

Additionally, Deputy Maas testified as follows:

[State]: The defense just asked you about the passenger, [Sandoval]. In your report, did you -- well, let me ask . . . [d]id you ask her about whether she knew that there was a police car behind them?

[Deputy Maas]: Yes.

[State]: So I mean, if you can kind of look at your report and refresh your memory, to the best of your recollection, what exactly did she say about that?

[Deputy Maas]: She stated that -- basically all she would say is that once they left Safeway, we got behind them and he just didn't stop when we turned our lights on.

V VRP at 261.

Abram argues that all of the statements that Deputy Maas attributed to Sandoval were hearsay under ER 801(c) because they were offered and admitted to prove the truth of the matter asserted—that Abram was eluding the deputies. We agree that the statements are hearsay because they were offered to prove the truth of the matter asserted. Because we determined that the trial court erred by admitting the hearsay statements by Sandoval, we next determine whether Abram was prejudiced by their admission.

D. PREJUDICE

Abram argues that being forced to call Sandoval as a witness to rebut the inadmissible hearsay statements was prejudicial, and was not harmless error. Abram cites no authority to support his claim that being forced to call a witness is prejudicial. Prejudice is evidenced by a showing that the court's error in admitting the inadmissible hearsay materially affected the outcome of the trial.[3] *See Stenson*, 132 Wn.2d at 709. There is no showing of prejudice here, and this claim fails.

IV. COMMENT ON ABRAM'S RIGHT TO REMAIN SILENT

Lastly, Abram argues that the State wrongfully elicited evidence from Deputy Maas that Abram invoked his right to remain silent. We disagree.

The Fifth Amendment to the United States Constitution states that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. Article

[3] Abram also argues that his right of confrontation was violated because the hearsay statements by Sandoval were testimonial and he could not cross-examine her. Br. of App. at 20-21. However, Abram was able to cross-examine Sandoval, his right of confrontation was not violated. VI VRP at 328-32. Thus, this claim fails.

I, section 9 of the Washington Constitution states that "[n]o person shall be compelled in any criminal case to give evidence against himself." CONST. art. 1, § 9. Both provisions guarantee a defendant the right to be free from compelled self-incrimination, including a right to remain silent. *State v. Knapp*, 148 Wn. App. 414, 420, 199 P.3d 505 (2009).

When the defendant's right to remain silent is raised, we must consider "whether the prosecutor manifestly intended the remarks to be a comment on that right." *State v. Crane*, 116 Wn.2d 315, 331, 804 P.2d 10 (1991). The *Crane* court noted that a prosecutor's statement will not be considered a comment on a constitutional right to remain silent if "standing alone, [it] was 'so subtle and so brief that [it] did not naturally and necessarily emphasize defendant's testimonial silence.'" *Crane*, 116 Wn.2d at 331 (alterations in original) (internal quotation marks omitted) (quoting *State v. Crawford*, 21 Wn. App. 146, 152, 584 P.2d 442 (1978)). A remark that does not amount to a comment on a criminal defendant's right to remain silent is considered a "mere reference" to silence and is not reversible error absent a showing of prejudice. *State v. Lewis*, 130 Wn.2d 700, 706–07, 927 P.2d 235 (1996). Thus, focusing largely on the purpose of the remarks, we distinguish between "comments" and "mere references" to an accused's prearrest right of silence. *State v. Burke*, 163 Wn.2d 204, 216, 181 P.3d 1 (2008).

Here, Abram argues that Deputy Maas's testimony that Abram did not answer certain questions that Deputy Maas asked him constituted an impermissible comment on his right to remain silent. Specifically, Deputy Maas testified:

> [State]: Did you ever confront [Abram] about how close you were and there being no car between you?
>
> [Deputy Maas] Yes. And he would just decline to answer those ones.

IV VRP at 222-23.

The prosecutor did not follow up on the answer regarding Abram's silence, nor did the prosecutor refer to Abram's silence during closing argument. Because this statement was so subtle and brief, it did not emphasize Abram's right to remain silent. The statement was a mere reference and was not a comment on Abram's right to remain silent. Because the statement was a mere reference, it was not inappropriate. Thus, because the prosecutor did not impermissibly comment on Abram's right to remain silent, we hold that his claim of prosecutor misconduct fails. We affirm the convictions.

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

Sutton, J.
SUTTON, J.

We concur:

Worswick, J.
WORSWICK, P.J.

Bjorgen, J.
BJORGEN, J.

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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. 49882-1-II**, 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 / residence / e-mail address as listed on ACORDS / WSBA website:

☒ respondent Robin Sand, DPA
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☐ petitioner

☐ Attorney for other party

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