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Division I  
State of Washington

NO. 72849-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

SANTIAGO ORTUNO-PEREZ,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE ELIZABETH J. BERNS

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**BRIEF OF RESPONDENT**

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A. ISSUES PRESENTED.

1. Evidence of other suspects is properly excluded if a sufficient foundation for such evidence is not presented. A sufficient foundation requires more than presence at the crime scene. Did the trial court reasonably exercise its discretion in excluding speculative other suspects evidence and argument based on other people's presence at the crime scene?

2. Evidence of threats against a witness is admissible as relevant to credibility if the witness's credibility is attacked. The central defense was that the State's witnesses were not credible. Did the trial court properly exercise its discretion in allowing evidence of threats against them?

3. Speculation as to the facts of a case is not admissible from either lay witnesses or expert witnesses. The defense attempted to ask the medical examiner to speculate as to whether back spatter occurred in this case. Did the trial court reasonably exercise its discretion in sustaining the State's objection?

4. A witness may not opine on the credibility of another witness. But questions about demeanor do not invade the province of the jury. Did the prosecutor properly ask the law enforcement witnesses about the demeanor of the people they interviewed?

5. A prosecutor commits misconduct in argument by trivializing the burden of proof, disparaging the role of defense counsel and appealing to sympathy. A claim of misconduct is waived if no objection is made at trial and the argument is not so flagrant and ill-intentioned that it could not be cured by an instruction. In this case, the prosecutor's argument did not trivialize the burden of proof, attack defense counsel's role or seek a verdict based on sympathy. Did the lack of any objections waive the claim of misconduct?

B. STATEMENT OF THE CASE.

1. PROCEDURAL FACTS.

Santiago Ortuno-Perez was convicted by a jury of the crime of murder in the second degree while armed with a firearm. CP 153. He was sentenced to 280 months of confinement. CP 158. This appeal follows.

2. FACTS OF THE CRIME.

In the early morning hours of October 12, 2013, twenty-one-year-old Erika Lazcano drove her boyfriend, Jesus Castro, and their toddler daughter to a friend's house in Renton where they believed

people were gathering to "hang out." RP11/5/14 294-96, 311, 319-22. When they drove up to the house, they saw cars parked outside and people standing in the driveway. RP11/5/14 325. Castro got out of the car, and approached the group of men standing in the driveway. RP11/5/14 327-28. Erika heard one of the men ask Castro, "Where are you from?" RP11/5/14 328. Castro answered, "What's it to you?" RP11/5/14 329. At that point, Santiago Ortuno-Perez, who was one of the men in the group, put a gun to Castro's head and shot him. RP11/5/14 329. Ortuno-Perez then stated, "That's what it is to me." RP11/12/14 45. As Castro lay dying on the ground, with Lazcano kneeling over him, everyone fled from the scene. RP11/12/14 13; RP11/17/14 13. Lazcano called 911. RP11/5/14 330. In fleeing the scene in his parents' black Honda, Ortuno-Perez struck something and left the bumper of his parents' car, with the license plate intact, at the scene of the murder. RP11/3/14 29-30; RP11/18/14 10.

Lazcano did not know Ortuno-Perez, and was unable to identify him to the police or provide a description immediately after the shooting. RP11/12/14 16; RP11/13/14 39, 49; RP11/17/14 34. She was also scared to be seen cooperating with the police. RP11/12/14 24-25. But when shown a photographic montage two

days later, Lazcano was able to identify Ortuno-Perez as Castro's killer. RP11/12/14 34-37; RP11/13/14 51; RP11/19/14 23-25.

Austin Agnish, Joseph Perdoza, Zachary Parks, and Dechas Blue all testified to being at the scene of the murder, and having arrived together at the house in Renton with Ortuno-Perez.<sup>1</sup> They had all been together at Denny's before they followed Ortuno-Perez to the house in Renton. RP11/4/14 136-40. Agnish testified that at the Renton house Castro and Ortuno-Perez shook hands and briefly conversed, and then Castro fell to the ground, dead. RP11/4/14 147-53. Although Agnish would not admit to seeing Ortuno-Perez shoot Castro, he did admit that he heard a bang, that he saw that Castro had been shot in the head, and that it happened while Castro and Ortuno-Perez were talking to each other. RP11/4/14 153-56.

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<sup>1</sup> The interrelationships among these five young men were as follows: Dechas Blue and Zachary Parks testified to being good friends since they were young. RP11/3/14 48; RP11/13/14 63-64. Austin Agnish was friends with Dechas Blue, Joey Perdoza and Santiago Ortuno-Perez, but did not know Zachary Parks. RP11/3/14 49; RP11/4/14 116-19; RP11/5/14 207. Dechas Blue and Zachary Parks did not know Joey Perdoza or Santiago Ortuno-Perez. RP11/3/14 54, 59, 62; RP11/5/14 207; RP11/13/14 61-63, 67-70. On the night of the shooting, Perdoza was riding in Agnish's car and Ortuno-Perez was following in his car, when the group picked up Blue and Parks. RP11/3/14 56-59, 67; RP11/4/14 132; RP11/5/14 209, 212; RP11/13/14 66-70. Parks rode in Ortuno-Perez's car and Perdoza and Blue rode in Agnish's car, as the group went to Denny's first and then to the house in Renton. RP11/3/14 56-59, 67-69; RP11/4/14 132, 140; RP11/5/14 209, 212, 214; RP11/13/14 66-70, 75.

After seeking advice from his father, Agnish called the police several hours after the murder and reported having witnessed the murder. RP11/4/14 163, 172-74. He testified that he was scared when giving his statement to the police, had subsequently received threats and did not want to testify. RP11/4/14 122, 129, 157, 181. He identified Ortuno-Perez as the shooter from a photo montage. RP11/4/14 179.

At trial, Joey Perdoza claimed to have been very drunk at the time of the shooting. RP11/5/14 212, 216. He testified that he was standing outside the house in Renton when he heard an argument between Castro and Ortuno-Perez and then a loud pop, at which point Castro fell to the ground. RP11/5/14 218-20, 227-29, 232-33. He denied seeing the gun or the shooting. RP11/5/14 276. He also testified to having received threats, and that he did not want to testify. RP11/5/14 205-06.

Dechas Blue testified to being at the Renton house with Agnish, Perdoza, Parks and Ortuno-Perez. RP11/3/14 67-80. He was inside the house using the restroom at the time of the shooting. RP11/3/14 80-86. Parks approached Blue as he exited the bathroom and said, "Bro, he shot him." RP11/3/14 86. When Blue walked out of the house he saw Castro lying on the ground and

Ortuno-Perez standing over him, looking "crazy." RP11/3/14 89. Blue explained, "He wasn't looking like somebody I wanted to be standing next to him." RP11/3/14 89. Blue and Parks left in Agnish's car with Perdoza. RP11/3/14 94-95. Ortuno-Perez fled alone in his car. RP11/3/14 98-100. After returning home, Blue and Parks decided to report the shooting to the police, and went to the Federal Way Police Department. RP11/3/14 106-09. Blue identified Ortuno-Perez as the shooter from a photo montage with 100 percent certainty. RP11/17/14 101-02.

Zachary Parks testified that he rode to the Renton house with Ortuno-Perez in a black Honda. RP11/13/14 70-71, 75. While in the car, Parks saw that Ortuno-Perez had two guns: a small .22 caliber and a revolver. RP11/13/14 77-79. Parks had experience with firearms from being deployed in Iraq with the Army National Guard. RP11/13/14 59. At the house, he saw Castro and Ortuno-Perez greet each other, but the encounter quickly turned into an argument in Spanish. RP11/13/14 95, 99. Then he heard a gunshot. RP11/13/14 95. He saw Ortuno-Perez with a gun in his hand immediately after hearing the gunshot. RP11/13/14 102. Ortuno-Perez was pulling the gun back from Castro's head. RP11/13/14 102. Ortuno-Perez ordered Lazcano to move her car,

which was blocking his car, then he dragged Castro's body, which was also blocking his car, out of the way and drove away from the house. RP11/13/14 103-08. The bumper of his car fell off as Ortuno-Perez drove away. RP11/13/14 108. Parks and Blue decided to go the police. RP11/13/14 118. Parks identified Ortuno-Perez as the shooter from a photo montage with 100 percent certainty. RP11/13/14 120-23.

Police discovered through Department of Licensing records that the license plate on the bumper left at the scene of the murder was registered to a black Honda belonging to Simon Hernandez and Edgar Ortuno. RP11/4/14 42.

A few hours after the murder, Ortuno-Perez returned to the house of Patti Rowell, where he was staying. RP11/17/14 113, 125-27. A few hours later, police had the house under surveillance when Ortuno-Perez's mother picked him up shortly before noon and drove him to where the damaged Honda was parked. RP11/18/14 24-30, 111-12, 127-32. Ortuno-Perez was then arrested. RP11/17/14 130; RP11/18/14 30, 117, 133. A .22 caliber bullet was found in Ortuno-Perez's pocket at the time of his arrest. RP11/18/14 71. Some of his clothes were found in the washing machine at Rowell's house. RP11/18/14 59.

It was determined that Castro was shot in the head from close range with a .22 caliber gun, but with a different brand of ammunition than the bullet found in Ortuno-Perez's pocket. RP11/19/14 54-61, 76, 80.<sup>2</sup> The murder weapon was never found. RP11/19/14 140. No traces of blood were found on Ortuno-Perez's clothes. RP11/24/14 17-27.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN EXCLUDING QUESTIONS AND ARGUMENT REGARDING "OTHER SUSPECTS" WHICH WERE PURELY SPECULATIVE.

Ortuno-Perez contends that his right to a fair trial was violated by the trial court's ruling that speculative evidence and argument of other suspects would not be admitted. This claim should be rejected. The trial court applied the correct standard for such evidence, and reasonably concluded that the witnesses' presence at the scene was insufficient to establish the necessary foundation for other suspect evidence and argument.

The right to present a defense is based in the Sixth Amendment, but it is not absolute. State v. Maupin, 128 Wn.2d

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<sup>2</sup> The bullet was recovered from the victim's body. RP11/19/14 57-59, 82.

918, 924, 913 P.2d 808 (1996). Evidence that a person other than the defendant could have committed the crime is inadmissible if based solely on motive or “mere speculation about the possibility that someone else might have committed the crime.” Id. at 928.

A trial court’s decision whether to admit or exclude evidence of other suspects is reviewed for abuse of discretion. State v. Strizheus, 163 Wn. App. 820, 829, 262 P.3d 100 (2011).

Washington courts require a defendant to lay a foundation before evidence suggesting that another person committed the crime will be admitted. Id. at 830. The foundation required is a clear nexus between the person and the crime. Id. Motive, ability and opportunity are not sufficient. Id. The foundation required has been described as “a train of facts or circumstances as tend clearly to point out someone besides the prisoner as the guilty party.”

State v. Downs, 168 Wash. 664, 667, 13 P.2d 1 (1932), aff’d in State v. Mak, 105 Wn.2d 692, 716, 718 P.2d 407 (1986). When the State’s case is entirely circumstantial, the rule is relaxed to the extent that it allows the defense to present circumstantial evidence tending to identify another person as the perpetrator. State v. Starbuck, 189 Wn. App. 740, 751-52, 355 P.3d 1167 (2015). As the state supreme court recently stated, “Evidence establishing

nothing more than suspicion that another person might have committed the crime” is inadmissible because its probative value is “greatly outweighed by its burden on the judicial system.” State v. Franklin, 180 Wn.2d 371, 380, 325 P.3d 159 (2014).

Applying the standard, evidence that an infamous burglar was in town at the time of the charged burglary was not admissible in Downs. 168 Wash. at 668. In contrast, eyewitness testimony that a kidnapping victim was seen after the kidnapping with a person other than the defendant was admissible in Maupin. 128 Wn.2d at 928.

The evidence in the present case was not circumstantial. The murder occurred in plain sight of a number of people. Several eyewitnesses testified to seeing Ortuno-Perez shoot Castro. There was no eyewitness testimony that anyone else shot Castro. The defense’s other suspect proffer was in essence speculation that someone else at the scene could have committed the murder. While the argument on appeal focuses on Agnish as another suspect, the briefing to the trial court was not so precise. In the defense trial memorandum, Ortuno-Perez asserted that “the defense has the right to argue that any or all of the state’s alleged eye witnesses are guilty of shooting Jesus Castro.” CP 105. This

argument was based on the fact that the witnesses were “standing within a few feet of Mr. Castro when he was shot.” CP 105, 107. As such, the defense proffer of other suspects was based solely on opportunity. The trial court was presented with no motive, no eyewitness testimony and no forensic evidence linking any of the witnesses to the commission of the murder.

On appeal, Ortuno-Perez argues that Agnish’s reluctance to testify at trial, his prescription medicine use, and his gun ownership was a sufficient foundation for argument that Agnish shot the victim. As for a gang motive, there was no clear evidence that Agnish belonged to a gang, that he knew the victim, or that he believed at the time of the murder that the victim belonged to a gang.<sup>3</sup>

In its ruling, the trial court was properly focused on whether there was a sufficient nexus between the alleged other suspects and commission of the crime. The court concluded that “it’s not sufficient that others were merely present.” RP10/23/14 77.<sup>4</sup> In so concluding, the trial court did not abuse its discretion. Other than

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<sup>3</sup> Agnish testified that he had never seen the victim before. RP11/4/14 147-48, 165. Likewise, Lazcano testified that she did not know Agnish or any of the men standing outside the Renton house. RP11/12/14 4. In the defense interview with Agnish, which was quoted in the defense trial memorandum, Agnish stated he did not know the victim’s gang affiliation on the night of the murder. CP 115.

<sup>4</sup> In truth, it was primarily argument regarding other suspects that was disallowed, not evidence. The presence of Agnish and the others at the scene, their actions, and knowledge of the murder was fully explored at trial.

speculation that their presence gave them the opportunity to commit the murder, there was no evidence linking the other witnesses to commission of the murder. Having failed to present a sufficient foundation for evidence that someone else committed the murder, Ortuno-Perez's right to present a defense was not violated.

2. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING EVIDENCE OF ANONYMOUS THREATS AGAINST THE WITNESSES WHICH WERE RELEVANT TO EVALUATING THEIR CREDIBILITY.

Ortuno-Perez relies on State v. Bourgeois, 133 Wn.2d 389, 945 P.2d 1120 (1997), to contend that the trial court abused its discretion in allowing testimony about threats that Agnish, Perdoza, and Parks had received. This claim of error should be rejected. Because the credibility of these witnesses was the central issue at trial, testimony about their fear of testifying was admissible.

The decision to admit evidence lies within the sound discretion of the trial court. Id. at 399. Testimony of a witness regarding his fear and reluctance to testify has relevance to the witness's credibility. Id. at 400. However, there is also a danger that such testimony will be used to improperly imply guilt. Id. When the credibility of a State's witness is not attacked by the

defense, it is improper to bolster the witness's credibility by offering evidence of the witness's fear of testifying or threats against the witness. Id. However, when the witness's credibility is challenged by the defense, that witness's fear and reluctance to testify is admissible as bearing on credibility. Id. It is reasonable for the State to anticipate an attack on credibility and inquire into threats and fear on direct examination. Id.

Agnish testified without objection that he did not want to be a witness because he felt "at risk," stating, "Dechas has already been shot over this." RP11/4/14 122. Subsequently, over objection, he testified that he did not come to court willingly, but had to be arrested because he had been "receiving death threats." RP11/4/14 122. The trial court clarified that it would allow the State to inquire into the witnesses' state of mind and their having received threats, as long as the threats were not attributed to the defendant. RP11/4/14 125-56. Similarly, Perdoza testified that he had not come to court voluntarily but had been arrested, and had received "death threat calls" from unknown numbers. RP11/5/14 206. Parks did not testify to any threats on direct examination, but in response to questions *on cross-examination* about his reluctance to testify, Parks stated, "I didn't want to testify because I didn't want

to die.” RP11/13/14 158. He added, “People die for stuff like this.”  
RP11/13/14 158. None of the threats were specifically attributed to  
Ortuno-Perez.

Here, there can be no question that the credibility of Agnish,  
Perdoza and Parks, along with Blue and Lazcano, was the central  
issue at trial. Agnish’s credibility was vigorously challenged  
through lengthy cross-examination about inconsistencies between  
his statements to police and his testimony. RP11/4/15 2-22.

Perdoza was also cross-examined at length about inconsistencies  
in his testimony. RP11/5/14 263, 273-82. Parks was cross-  
examined about his reluctance to testify. RP11/13/14 158-59. In  
closing, the defense argued that Agnish and the other witnesses  
were not believable:

. . . the real question is, can you rely on anything  
Mr. Agnish says? And the answer is no. . . . Nothing  
he says is credible to you.

. . .  
But there is plenty of reasonable doubt in this case,  
because all three – all four of these witnesses are  
incredible. . . . We know their stories don’t match up.

RP11/24/14 60-61.

In Bourgeois, the state supreme court held that the trial court properly admitted the testimony of state witness Frank Rojas about his fear and reluctance to testify because his credibility was attacked by the defense. 133 Wn.2d at 402. Likewise, in the present case, the trial court did not abuse its discretion in allowing evidence about the fear and reluctance of Agnish, Perdoza and Parks to testify when their credibility was not only attacked, but was the focus of the defense at trial.

3. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DISALLOWING SPECULATION FROM THE MEDICAL EXAMINER ABOUT THE LIKELIHOOD OF BLOOD SPATTER IN THIS CASE.

Ortuno-Perez contends that the trial court improperly limited cross-examination of Dr. Williams, the medical examiner who performed the autopsy of Jesus Castro. This claim should be rejected. Defense counsel's questions about whether spatter occurred in this case were speculative because Dr. Williams had no basis for knowing whether spatter had occurred.

Speculative testimony is not rendered less speculative simply because it comes from an expert. State v. Lewis, 141 Wn. App. 367, 389, 166 P.3d 786 (2007). In Lewis, the medical

examiner testified about the high level of methamphetamine in the murder victim's body. Id. at 386. The doctor also testified about the possible effects of high levels of methamphetamine. Id.

The doctor could not opine as to the specific effect that methamphetamine had on the victim because he had not observed the victim's behavior. Id. Thus, the appellate court held that the trial court properly disallowed a question to the doctor about the effect of methamphetamine on the victim's behavior because it called for speculation and could not have helped the jury. Id.

In this case, Dr. Williams opined that the murder weapon was fired a short distance away from the victim—two inches to two feet away—based on “stippling” observed around the gunshot wound. RP11/19/14 76-78. On cross-examination, defense counsel questioned Dr. Williams about the possibility of back spatter of bodily fluids when a bullet enters the head and there is no exit wound. RP11/19/14 91. Dr. Williams testified it would be possible to have back spatter under those circumstances, but that it would not necessarily happen in every case. RP11/19/14 92. Dr. Williams testified that he did not know whether spatter occurred in this case or not. RP11/19/14 93. Defense counsel then asked if it was “very possible” or “a possibility” that spatter occurred in this

case. RP11/19/14 93. The State's objection to these questions as calling for speculation was sustained. RP11/19/14 93-94.

Ortuno-Perez cannot show that the trial court abused its discretion. Counsel had already established on cross-examination that back spatter can occur, but does not always occur, when a bullet enters the head and does not exit. Dr. Williams had no basis for knowing whether spatter occurred in this case. The doctor was not being asked a hypothetical, but was being asked to opine about the possible presence of facts in this case of which he had no knowledge. As in Lewis, the trial court properly sustained the State's objection as calling for speculation that would not be helpful to the jury. Moreover, there could be no prejudice to the defense from the trial court's ruling as the point had already been made: spatter was possible under these circumstances.

4. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION AND DID NOT ALLOW POLICE WITNESSES TO INVADE THE PROVINCE OF THE JURY BY TESTIFYING AS TO THE WITNESSES' CREDIBILITY.

Ortuno-Perez claims that the trial court abused its discretion in allowing several of the detectives to improperly vouch for the credibility of several of the State's witnesses. This claim is not

borne out by the record. No detective was allowed to opine about the credibility of another witness over a timely defense objection. To the extent that some of the testimony may have verged on vouching, the error was not preserved and is not a manifest constitutional error.

Generally, a witness may not offer an opinion regarding the credibility of another witness. State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007). Such testimony invades the province of the jury and is unfairly prejudicial. Id. Testimony from a law enforcement officer about the veracity of another witness can be especially prejudicial. Id. at 928. However, testimony about a witness's demeanor based on personal observation is not equivalent to an opinion of the witness's credibility. State v. Rafay, 168 Wn. App. 734, 807-08, 285 P.3d 83 (2012).

For example, in State v. Aguirre, 168 Wn.2d 350, 357, 229 P.3d 669 (2010), a rape case, a police detective testified about the victim's demeanor while being interviewed. On appeal, the court rejected the defendant's claim that the detective had been allowed to improperly vouch for the victim's credibility, because the testimony was based on her objective observations of the victim's

demeanor, and she did not explicitly testify that the witness had been a victim of domestic violence. Id. at 360.

Moreover, a witness expressing an opinion about another witness's credibility is not necessarily a manifest error affecting a constitutional right pursuant to RAP 2.5(a)(3) and is not automatically reviewable. Kirkman, 159 Wn.2d at 936. When a defendant does not object to improper opinion testimony at trial, he waives the issue unless he can show the error was truly "manifest." Id. at 935. Such an error is not manifest unless the witness gives an explicit or almost explicit statement that the witness believes the other witness. Id. at 936-37.

In this case, a careful parsing of the challenged testimony is necessary to analyze the claim of error. The defense did not preserve an objection to the first instance of alleged vouching, which occurred during the testimony of Detective Onishi. The detective was being questioned about his interview with Agnish hours after the murder. RP11/18/14 84-88. The prosecutor asked the detective about Agnish's demeanor. RP11/18/14 88. Detective Onishi responded that his demeanor seemed normal. RP11/18/14 88. The prosecutor then asked "And was he pretty forthcoming with you with information?" RP11/18/14 88. There was no

objection. Detective Onishi responded, "I believe so. I didn't see any real signs of deception there, there was nothing in the story that didn't make sense to me. He wasn't contradicting himself. It didn't seem like he was hiding things at all." RP11/18/14 88. There was again no objection and no motion to strike the testimony as improper, and the direct examination moved on.

This testimony did not constitute a manifest error as set forth in Kirkman. Detective Onishi did not testify that he believed Agnish, but confined his testimony to observations of Agnish's demeanor. The detective testified that he did not see any signs of deception, not that he believed that Agnish's account was truthful. This error cannot be raised for the first time on appeal.

During the testimony of Detective Edwards, the prosecutor asked about his interview with Kristen Zamora, who was not a witness at trial. RP11/19/14 22. The prosecutor asked the detective, "Was that witness forthcoming with information for you?" RP11/19/14 22. A defense objection was overruled. RP11/19/14 22. Detective Edwards replied, "Yes," but did not elaborate.

RP11/19/14 22.<sup>5</sup> There was no evidence of what Kristen Zamora told Detective Edwards. While the term “forthcoming” might be interpreted as encompassing honesty, it primarily refers to a witness’s cooperativeness. Because Zamora was not a witness at trial, and there was no evidence of what she told the detective, the testimony could not have constituted improper vouching.

During the testimony of Detective Montemayor, the prosecutor asked about the demeanor of Agnish on the morning of the murder. RP11/19/14 118. The prosecutor asked, “How would you describe Mr. Agnish’s demeanor throughout his contact with you that morning?” RP11/19/14 118. The detective answered:

“Um, you know, that’s a difficult question. He is – I don’t want to say he is quirky, but he seemed to want to do the right thing.”

RP11/19/14 118. The defense objected, and the objection was sustained, but the defense did not move to strike the testimony.

RP11/19/14 118. The prosecutor then specifically inquired about whether Agnish seemed intoxicated. RP11/19/14 118. The prosecution’s questions were clearly directed toward the detective’s observations of demeanor, not his opinion of Agnish’s credibility,

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<sup>5</sup> Ortuno-Perez claims on appeal that Detective Edwards was asked about Erika Lazcano’s demeanor, but that claim is not supported by the record. The testimony cited involved Detective Edwards’ interview with Kristin Zamora. RP11/18/14 21-22.

and were proper. To the extent that the detective's answer was nonresponsive, the defense objection was sustained. Having not moved to strike, the defendant cannot claim that the trial court erred in not striking the testimony.

Finally, while Detective Montemayor was questioned about his contact with Parks, the prosecutor asked, "Did he appear willing to cooperate?" RP11/19/14 141. The defense objection was overruled. RP11/19/14 141. The detective answered, "He was not happy to see us initially, and showed a lot of concerns about cooperating." RP11/19/14 141. The prosecutor did not ask the detective about his assessment of Parks' credibility, and the detective's answer did not in any way convey an opinion as to Parks' credibility.

**5. THE PROSECUTOR DID NOT COMMIT PREJUDICIAL MISCONDUCT IN CLOSING ARGUMENT.**

Ortuno-Perez contends that the prosecutor committed misconduct in closing argument. However, viewing the challenged statements in the context of the entire argument, the prosecutor did not engage in improper argument. Moreover, since there was no

objection at trial, the claim of error is waived because the argument was not flagrant, ill-intentioned or incurably prejudicial.

The prosecutor has wide latitude in making arguments to the jury and is allowed to draw reasonable inferences from the evidence. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). A defendant claiming prosecutorial misconduct must establish both improper conduct and prejudice. Id. Claims of misconduct are not viewed in isolation, but in the context of the entire argument. Id. Defense counsel's failure to object constitutes a waiver on appeal unless the argument is so flagrant, ill-intentioned and prejudicial that there is a substantial likelihood that it affected the verdict and could not have been cured by an instruction by the court. State v. Gentry, 125 Wn.2d 570, 596, 888 P.2d 1105 (1995).

Ortuno-Perez claims that the prosecutor trivialized or misstated the burden of proof in closing argument by analogizing the case to a puzzle. The propriety of puzzle analogies is reviewed on a case-by-case basis. State v. Fuller, 169 Wn. App. 797, 825, 282 P.3d 126 (2012). It is improper for the prosecutor to quantify the level of certainty required for proof beyond a reasonable doubt, such as by arguing that the standard is met by seeing only half of a

puzzle. Id. at 826. However, a puzzle analogy can be properly used without minimizing the burden of proof if there is no attempt to quantify the number of pieces needed to meet the standard. Id. For example, in State v. Curtiss, 161 Wn. App. 673, 700, 250 P.3d 496 (2011), it was proper for the prosecutor to argue that “when you’re putting the puzzle together, and even with pieces missing, you’ll be able to say, with some certainty, beyond a reasonable doubt, what that puzzle is.” Id. Similarly, in Fuller, 169 Wn. App. at 827, it was proper for the prosecutor to state in argument, “Do you have enough pieces of the puzzle? Do you have enough evidence to believe beyond a reasonable doubt?” without quantifying the burden.

In the present case, the prosecutor’s discussion of the reasonable doubt standard closely hewed to the jury instructions and was not improper. The prosecutor read the court’s definition of reasonable doubt, and then explained:

What this really comes down to is use your common sense. Does it add up? It’s like putting together pieces of a puzzle when you’re working on a puzzle, you reach a point where you have filled in a lot of the puzzle. You may not have every single piece, but there is enough where you are pretty confident that you know what this picture is that you’re looking at. Same thing here. “Beyond a reasonable doubt” means that there is just enough pieces of the puzzle

that have been put together for you to point to the defendant's guilt. If you can go back into that jury room and say, "I believe, based on the evidence that was presented, that the defendant killed Jesus Castro," that is enough for you to convict him. Beyond a reasonable doubt does not mean beyond a shadow of a doubt, it does not mean beyond all—any and all possible doubt.

RP11/24/14 33-34. There was no objection. The prosecutor's discussion of reasonable doubt was closely tied to the instruction, and the puzzle analogy was not used to improperly quantify the standard. The argument was not flagrant or ill-intentioned, and any misstatement could have been remedied by a curative instruction.

Next, Ortuno-Perez claims that the prosecutor improperly disparaged defense counsel during closing argument. Prosecutors may argue that the evidence does not support the defense theory of the case. State v. Thorgerson, 172 Wn.2d 438, 466, 258 P.3d 43 (2011). They may not impugn the role or integrity of defense counsel in so doing. Id. There is a "fine line" between disparaging a defense argument and disparaging defense counsel. Id. The prosecutor should not imply trickery on the part of defense counsel. Id.

After discussing the elements of the crime at length, the prosecutor stated, "Now, there has been a lot of distraction

throughout this trial about trivial and irrelevant issues.” RP11/24/14 32. The prosecutor then argued that the defense had shied away from the facts of the murder and focused on details as to what happened before the group went to the Renton house, such as who was picked up first, what they drank or ate, and how long they were at Denny's. RP11/24/14 32. In rebuttal, the prosecutor pointed out that some of the factual assertions made by defense counsel in argument were not supported by the evidence, and that he was “playing fast and loose with the facts to distract you over here, to keep you from looking at the real evidence.” RP11/24/14 65. The prosecutor then listed some of these facts that were misstated as to who was drinking and who was smoking marijuana at various times. RP11/24/14 64-65. There was no objection.

This argument was not improper because it focused on defense counsel's argument, not the role of defense counsel. The argument was not a broad attack on the role or integrity of defense counsel. The prosecutor did not accuse defense counsel of dishonesty when she pointed out that the defense argument was attempting to distract the jury from the consistent accounts of how the murder occurred by focusing on other inconsistencies. This was a fair characterization of the defense argument. Distraction is

not dishonesty. Similarly, while the prosecutor asserted that defense counsel had misstated some of the testimony, the prosecutor detailed precisely what evidence had been misstated, and did not broadly allege dishonesty on the part of defense counsel. Such misstatements could as easily be mistakes rather than dishonesty. Surely, a prosecutor is not prohibited from stating her disagreement with defense counsel's interpretation and recollection of the evidence.

Moreover, cases with much more blatant attacks on defense counsel's integrity have not required reversal. See Thorgerson, 172 Wn.2d at 452 (characterizing defense argument as bogus and sleight of hand did not require reversal); State v. Warren, 165 Wn.2d 17, 29, 195 P.3d 940 (2008) (disparaging the role of defense counsel did not require reversal); State v. Negrete, 72 Wn. App. 62, 66, 863 P.2d 137 (1993) (argument that defense attorneys are paid to twist words did not require reversal). In this case, there were no objections to this line of argument, and to the extent that it might have crossed the fine line into improper argument, a curative instruction could have remedied any prejudice. Any improper

argument was not so flagrant and ill-intentioned as to require reversal.

Next, Ortuno-Perez claims that the prosecutor committed misconduct by using the words “we know” in argument. There was no objection below. Other courts have disapproved of the use of “we know” when it implies knowledge outside the evidence. United States v. Younger, 398 F.3d 1179, 1191 (9th Cir. 2005). In contrast, the phrase is not improperly used when the record is clear that the phrase refers to evidence admitted at trial. Id. Here, there can be no doubt that the prosecutor was referring to the evidence admitted at trial when she stated, “Even from his [Agnish’s] testimony, we know that the defendant and the victim were involved in some altercation, and that nobody else was involved in this altercation.” RP 11/24/14 16. The prosecutor was simply recounting the testimony. The argument was not improper.

Finally, Ortuno-Perez claims that the prosecutor improperly appealed to sympathy by twice referencing the victim’s daughter and by arguing that Lazcano’s inconsistencies were due to her emotional distress rather than deception. However, the State was drawing a reasonable inference from the evidence in arguing that

Lazcano was traumatized by witnessing her boyfriend's murder, thus leading her to be less than coherent in her initial accounts of the crime to police. The prosecutor ended the first portion of her argument by noting that life for the victim's family would go on, and that his daughter might someday have questions about her father. The prosecutor stated, "But let today be the day that Lexus' family looks back on as the day that her father's murderer was held accountable." RP11/24/14 35. The prosecutor then urged to the jury to "stay[] focused on the relevant evidence" and find the defendant guilty. RP11/24/14 35. There was no objection. This one reference to holding the defendant accountable was not misconduct. It was not an improper appeal to sympathy because it was tied to establishing the defendant's guilt based on the evidence presented. To the extent the statement might have been improper, it cannot be said that it was so flagrant and ill-intentioned that a curative instruction would not have alleviated any prejudice. In sum, Ortuno-Perez has failed to establish prosecutorial misconduct in argument that deprived him of a fair trial.

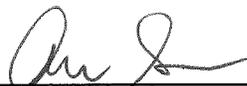
D. CONCLUSION.

The conviction should be affirmed.

DATED this 9th day of March, 2016.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By: 

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Nancy Collins, the attorney for the appellant, at Nancy@washapp.org, containing a copy of the Brief of Respondent in State v. Santiago Ortuno-Perez, Cause No. 72849-1-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.

Dated this 9 day of March, 2016.

  
Name:  
Done in Seattle, Washington