

NO. 44022-9-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

ISAIAH NEWTON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Vicki Hogan

No. 12-1-01850-4

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the State adduced sufficient evidence to prove, beyond a reasonable doubt, that the defendant entered or remained unlawfully?
2. Whether the State adduced sufficient evidence to prove, beyond a reasonable doubt, that the defendant entered or remained with the intent to commit a crime?
3. Whether the trial court erred in instructing the jury regarding a permissible inference per RCW 9A.52.040?
4. Where the defendant failed to object at any point to the State's closing argument, whether the defendant demonstrates that the remarks were flagrant, ill-intentioned, prejudicial, and could not be cured by an instruction?
5. Whether the prosecuting attorney argued that, in order to acquit, the jury had to find that the State's witnesses were lying?
6. Whether the prosecuting attorney properly argued the credibility of witnesses?
7. Whether the prosecutor's brief remarks regarding a police witness' reputation was so egregious as to taint otherwise appropriate argument, thereby requiring a new trial?

8. Whether the defendant has demonstrated cumulative error which deprived him of a fair trial?

B. STATEMENT OF THE CASE.

1. Procedure

On May 21, 2012, the Pierce County Prosecuting Attorney (State) filed an Information charging Isaiah Newton, the defendant, with one count of burglary in the first degree, and one count of resisting arrest. CP 1-2. The case was assigned to Hon. Vicki Hogan for trial and began on August 1, 2012. 1 RP 3.

After hearing all the evidence, the jury found the defendant guilty of burglary in the first degree and resisting arrest, as charged. CP 47, 50. The court later sentenced the defendant to 87 months in prison for the felony (CP 62) and 90 days for the misdemeanor (CP 69), to be served concurrently. The defendant filed a timely notice of appeal. CP 76.

2. Facts

Volinda Williams, the defendant's mother, is disabled. She can only walk and move about with great difficulty. 2 RP 58. She lives with another woman, Kathie Cooper, at 1322 So. Cushman St. in Tacoma. 2 RP 53. The defendant frequently visited Ms. Williams, often several times a day. 2 RP 96.

In the early morning hours of May 18, 2012, the defendant telephoned Ms. Williams. 2 RP 60. He wanted to come over to see her. 2 RP 61. She told him that she was asleep and to come over in the morning. *Id.* A short time later, the defendant called again. 2 RP 62. Again, Ms. Williams told the defendant not to come over until morning. *Id.* The defendant called a third time. *Id.* This time the defendant told Ms. Williams that he had spoken with God, who had told the defendant that Ms. Williams could walk again. *Id.* The defendant wanted to come over and see Ms. Williams walk. *Id.* Now suspecting that the defendant had been using drugs, Ms. Williams again told him not to come to her residence. *Id.*, 2 RP 63.

Shortly after this series of phone calls, Ms. Williams awoke, hearing the defendant yelling for her as he pounded on the front door and rang the doorbell. 2 RP 63. The defendant came to Ms. Williams' bedroom window. 2 RP 64. There, he again told her that God wanted her to walk. *Id.* The defendant wanted her to open the window and let him in. *Id.* Ms. Williams told him that she was not going to open the window. 2 RP 65.

The defendant opened the window and climbed in. 2 RP 66. The defendant tried to get Ms. Williams to get out of bed to walk to the bathroom. *Id.* Ms. Williams cannot sit up or get out of bed without assistance, usually with a device she called a "gate belt". *Id.*

Despite Ms. Williams' pleas, the defendant did not use the belt. 2 RP 68. During the defendant's repeated unsuccessful attempts to lift her, Ms. Williams fell back onto the bed and onto the floor. 2 RP 69. The defendant continued to try to lift her and to insist that Ms. Williams could walk. *Id.* Ms. Williams began to yell for help. 2 RP 70.

Ms. Williams began to struggle with the defendant. She hit him and kicked him in the groin. 2 RP 73. The defendant continued to insist that God would make her walk. *Id.* Ms. Williams was able to back up to the door frame and get to a standing position, holding onto the frame. 2 RP 74, 75.

Neighbors heard the commotion. Frank Givens, David Price, and others went from their respective homes to investigate. 2 RP 110, 4 RP 494. Givens and Price went to Ms. Williams' bedroom window and looked in. They saw the defendant "manhandling" Ms. Williams. 2 RP 116. They saw the defendant holding Ms. Williams head. 2 RP 116, 4 RP 395. Ms. Williams was screaming "You're hurting me." 4 RP 396. Givens called 911. 2 RP 114, 115.

Police soon arrived. Sgt. Hannity went to the window where Givens and Price were. Sgt. Hannity saw the defendant holding Ms. Williams in a "bear hug". 3 RP 285. The defendant had lifted Ms. Williams so that her feet were off the floor and was shaking her back and forth. 3 RP 285. Ms Williams was screaming for help. 3 RP 290.

Police breached the front door and entered the house. 2 RP 152. The police ordered the defendant to release Ms. Williams, but he refused. 2 RP 155, 3 RP 292. The police used an electronic control tool (ECT) or "taser" to subdue the defendant. 3 RP 293. After a further struggle, police handcuffed the defendant and eventually placed him in the patrol car. 2 RP 164, 3 RP 296.

C. ARGUMENT.

1. THE STATE ADDUCED SUFFICIENT EVIDENCE TO PROVE ALL ELEMENTS OF BURGLARY IN THE FIRST DEGREE BEYOND A REASONABLE DOUBT.

In a challenge to the sufficiency of the evidence, the appellate court determines whether any rational fact finder could have found the essential elements of the charged crime beyond a reasonable doubt, viewing the trial evidence in the light most favorable to the State. *State v. Brockob*, 159 Wn.2d 311, 336, 150 P.3d 59 (2006). An insufficiency claim “admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Direct and circumstantial evidence are equally reliable. *State v. Thomas*, 150 Wn. 2d 821, 874, 83 P. 3d 970 (2004).

The reviewing court defers to the trier of fact on issues of conflicting testimony, witness credibility, and the persuasiveness of evidence. *Thomas*, at 874-875; *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The jury is the sole and exclusive judge of the evidence. *State v. Bencivenga*, 137 Wn.2d 703, 709, 974 P.2d 832 (1999). The reviewing court's role is not to reweigh the evidence and substitute its judgment for that of the jury. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

Burglary in the first degree includes, among other elements: "enters or remains unlawfully" and "intent to commit a crime against a person or property therein". RCW 9A.52.020. Although at trial the defense conceded in closing argument that his entry was unlawful (4RP 480) and that he committed a criminal trespass (4 RP 483), on appeal the defendant now challenges the sufficiency of the evidence of unlawful entry. App. Br. at 14.

- a. The defendant entered or remained unlawfully.

The defendant called Ms. Williams three times in the early morning hours. Each time, she told him not to come over. 2 RP 61, 62. Despite this, the defendant came over and pounded on the front door, yelling for Ms. Williams. 2 RP 62, 3 RP 303. When he appeared at her window, she told him that she was not going to open the window. 2 RP 65,

3 RP 306. Kathie Cooper had also told the defendant not to come to the house that night. 3 RP 302. When the defendant pounded on the front door, Kathie Cooper told him not to come in. 3 RP 303.

In the early morning hours, after being told four times not to come to the house, and then, when he did, not to enter; he entered through the bedroom window of an older, physically disabled woman, not the door where both occupants had refused him entry. The jury could conclude from this evidence that this was an unlawful entry.

Even if the defendant had initially entered lawfully, once his license to remain is revoked, remaining present is unlawful. In *State v. Gohl*, 109 Wn. App. 817, 37 P.3d 293 (2001), one of the victims and the defendant had dated for about two months. One night, Gohl came to the victim's apartment. 109 Wn. App. at 820. She told him he could not come in because her roommates were sleeping. They went to a park for a while, then returned to the victim's apartment. *Id.* Gohl asked for a quarter so he could call a friend to come get him. The victim told Gohl to wait outside while she went in to get the quarter. *Id.* She left the door ajar because she was coming right back. Gohl came inside and asked for a glass of water. *Id.* The victim brought the water to him and took it into the kitchen when he was done. *Id.*, at 823. As she turned around to say goodbye, Gohl hit her hard in the back of the head. She screamed for help. *Id.*

One of the roommates was awakened by the screams. She came out to see what was happening. The defendant assaulted her also. *Id.* Both victims screamed for help. *Id.*, at 824.

The Court of Appeals found that the jury could infer from this evidence that the victim revoked any invitation or license she may have given earlier, and that the defendant exceeded any such license by assaulting the victim and her roommate. 109 Wn. App. at 824. Any invitation or license extended to him was limited to a specific area and purpose, and that it was impliedly revoked when he exceeded it. 109 Wn. App. at 824.

In *State v. Davis*, 90 Wn. App. 776, 954 P.2d 325 (1998), the defendant entered an apartment to help a woman resident who was breaking up with her boyfriend to get her belongings. While Davis was there, he assaulted the woman's estranged boyfriend and another woman with a gun. He was convicted of burglary in the first degree and two counts of second-degree assault. He argued on appeal that the State failed to show he entered or remained unlawfully. Where the occupants had both told Davis to leave when he began yelling, the evidence was pretty clear that they had revoked his license to enter. *Davis*, 90 Wn. App. at 781. Also, there was no evidence or indication that Davis had entered with any intent other than the assault.

In the present case, Ms. Williams told the defendant to stop; to put her down. She resisted him by striking him. 2 RP 73. She struggled to get away from him. 4 RP 413-414. She cried out in pain, 2 RP 153, 156. She cried out for help. 3 RP 290. She cried out "You're hurting me." 4 RP 396. She was distraught from the experience. 2 RP 199, 3 RP 302.

Here, although the defendant generally had permission to enter the residence, permission to enter at nearly 1:00 a.m. had been denied several times. 2 RP 62-63, 3 RP 303. In *Gohl* and *Davis*, the initial entry was permitted or at least tolerated until the respective defendants began assaulting the occupants. Likewise, here, even assuming that his initial entry through the window was lawful, the jury could conclude that once Ms. Williams began crying out in pain and screaming for help that the defendant's license to remain was revoked.

b. The defendant entered or remained with intent to commit a crime.

While entry with intent to commit a crime is an element of burglary, the State is not required to prove intent to commit a specific crime. *See, State v. Bergeron*, 105 Wn. 2d 1, 15-16, 711 P. 2d 1000 (1985). Here, the jury could conclude from the evidence that the defendant entered with intent to commit the crime of assault. The jury was correctly instructed that:

An assault is an intentional touching or striking of another person that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive.

Instruction 17, CP 35.

Before he went to Ms. Williams' residence, the defendant knew that Ms. Williams, his mother, could not walk or get out of bed without assistance. 2 RP 66, 70, 96. The jury could conclude that he, therefore, knew that dragging her out of bed, holding her or physically "forcing" her to walk against her will would be an intentional "offensive touching"; which in the eyes of the law is an assault. His intent was to force her to walk. 2 RP 64, 69, 73, 111, 3 RP 290, 4 RP 395.

The burglary statute lists the property violation in the alternative: "enters *or* remains unlawfully". RCW 9A.52.020 (emphasis added). From all the evidence, the jury could conclude that the defendant formulated the intent to commit a crime; assault Ms. Williams, before he entered the residence. The jury could also conclude, as in *Gohl* and *Davis*, that the defendant formed the intent to assault when he remained unlawfully after his license to be present had been revoked.

2. THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY REGARDING A PERMISSIBLE INFERENCE, PER RCW 9A.52.040.

RCW 9A.52.040 permits an inference regarding intent in burglary cases:

In any prosecution for burglary, any person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein.

WPIC 60.05 uses this statutory language for the pattern instruction. This inference is permissive; the jury is free to reject it. Beyond the statutory language, the instruction goes on to tell the jury:

This inference is not binding upon you and it is for you to determine what weight, if any, such inference is to be given.

Instr. 11, CP 29.

This challenge to the propriety of this instruction, based upon due process, is an issue of constitutional magnitude. *See, State v. Deal*, 128 Wn.2d 693, 698, 911 P.2d 996 (1996). Therefore, the Court reviews the issue *de novo*. *See, State v. Walker*, 136 Wn.2d 767, 772, 966 P.2d 883 (1998).

In cases where there is some evidence of the "intent to commit a crime therein", this instruction is proper. *See, State v. Brunson*, 128 Wn.2d 98, 106, 905 P.2d 346 (1995). Permissive inferences do not relieve the State of its burden of proof because the State must still convince the

jury the suggested conclusion should be inferred from the evidence. *See, State v. Hanna*, 123 Wn.2d 704, 710, 871 P.2d 135 (1994).

Here, as pointed out above, the State did not rely solely on the statutory permissive inference. The State offered evidence supporting the conclusion that the defendant intended to assault Ms. Williams. Also, the State argued that the evidence supported a conclusion that the defendant entered intending to cause damage to Ms. Williams' property. 4 RP 501. Indeed, a glass shelf and a television in Ms. Williams' room were damaged. 2 RP 92.

Before deciding to include the instruction, the court considered defendant's objection, and the case cited; *State v. Sandoval*, 123 Wn. App. 1, 94 P. 3d 323 (2004). 4 RP 437-438. Of note, *Sandoval* is indeed distinguishable from the present case. Sandoval, while drunk, kicked in the front door of a stranger's home, went in, and shoved the occupant, Mr. Christensen. 123 Wn. App. at 3. There was little to no evidence that Sandoval intended either unlawful entry or a crime. The evidence showed that, in his inebriation, Sandoval likely mistook the victim's house for his own. *Id.*, at 3, 5. Therefore, the inference instruction was improper. *Id.*, at 6.

The court in the present case properly applied the law after considering the necessary factors. 4 RP 446. The court did not err.

3. THE PROSECUTING ATTORNEY DID NOT VIOLATE THE DEFENDANT'S RIGHT TO A FAIR TRIAL IN CLOSING ARGUMENT.

a. Prosecutorial misconduct in general.

Prosecutorial misconduct is grounds for reversal if the prosecuting attorney's conduct was both improper and prejudicial. *State v. Monday*, 171 Wn.2d 667, 675, 257 P.3d 551 (2011). The appellant bears the burden of establishing the impropriety of the statements and their prejudicial effect. *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). The prosecutor's improper statements are prejudicial only where there is a substantial likelihood that the misconduct affected the jury's verdict. *State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359 (2007).

Failure by the defendant to object to an improper remark constitutes a waiver of that error unless the remark is deemed so “flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *Stenson*, 132 Wn.2d at 719, citing *State v. Gentry*, 125 Wn.2d 570, 593-594, 888 P. 2d 570 (1995); *see also*, *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

The defendant has a duty to object to a prosecutor's allegedly improper argument. *State v. Emery*, 174 Wn.2d 741, 761, 278 P.3d 653 (2012). “If either counsel indulges in any improper remarks during closing argument, the other must interpose an objection at the time they are made.

This is to give the court an opportunity to correct counsel, and to caution the jurors against being influenced by such remarks.” *Id.*, at 761-762, quoting 13 Royce A. Ferguson, Jr., *Washington Practice: Criminal Practice And Procedure* § 4505, at 295 (3d ed. 2004). Objections are required not only to prevent counsel from making additional improper remarks, but also to prevent potential abuse of the appellate process. *Emery*, at 761-762.

The absence of a motion for mistrial at the time of the argument strongly suggests that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial. *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990). "Counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal. ” *Id.*, quoting *Jones v. Hogan*, 56 Wn.2d 23, 27, 351 P.2d 153 (1960).

Reviewing courts focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured. “The criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?” *Emery*, 174 Wn. 2d at 762.

- b. The prosecuting attorney did not argue that, in order to acquit, the jury had to find that the State's witnesses were lying.

A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to freely comment on witness credibility based on the evidence. *State v. Gregory*, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006). Where a prosecutor shows that other evidence contradicts a witness' testimony, the prosecutor may argue that the witness is lying. *See, State v. McKenzie*, 157 Wn.2d 44, 59, 134 P.3d 221 (2006); *see also State v. Copeland*, 130 Wn.2d 244, 291–292, 922 P.2d 1304 (1996). Here, each time the prosecutor argued that a witness was lying, she cited to evidence in the record.

The Courts have repeatedly held that it is misconduct for a prosecutor to argue that in order to acquit a defendant, the jury must find that the State's witnesses are either lying or mistaken. *See, State v. Casteneda-Perez*, 61 Wn. App. 354, 362-363, 810 P.2d 74 (1991) (“it is misleading and unfair to make it appear that an acquittal requires the conclusion that the police officers are lying”); *see, also, State v. Fleming*, 83 Wn. App. 209, 921 P. 2d 1076 (1996). Such an argument misrepresents both the role of the jury and the burden of proof by telling jurors they have to decide who is telling the truth and who is lying in order to render a verdict. *State v. Wright*, 76 Wn. App. 811, 826, 888 P.2d 1214 (1995).

The prosecutor may argue that if the jury accepts one version of conflicting facts, it may or must necessarily reject another version. *Id.*, at 825.

In the present case, the prosecutor's argument acknowledged that the case had conflicting testimony between Ms. Williams and Sgt. Hannity. 4 RP 466-467. The prosecutor acknowledged that there were inconsistencies in Givens' testimony (4 RP 470), and between Givens and Price. 4 RP 471-472. The jury had to judge the credibility of the witnesses and the weight of the evidence.

The jury was properly instructed that:

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

Instr. 1, CP18.

The prosecutor argued these same factors. 4 RP 461. She showed a slide to the jury that listed the factors from this instruction. Exh. 36, slide 14. The prosecutor's statements were not improper where she was

discussing valid factors to consider when making credibility determinations, as explicitly listed in jury instruction 1.

A prosecutor may compare and contrast conflicting testimony and evidence. In *State v. Lewis*, 156 Wn. App. 230, 233 P. 3d 891 (2010), the prosecutor argued:

Do you believe that Mr. Crocker isn't telling you the whole story or do you believe that the defendant is fudging on the story? Do you believe that Mr. Crocker took a swing or do you believe that the defendant beat him up to take the money and the wallet?

There, the prosecutor did not “force” the jury to choose sides “in order to acquit”. He asked the jury to decide whom they believed. Merely asking essentially rhetorical questions of the jury or arguing credibility does not rise to the level of misstating the law or misrepresenting the role of the jury and the burden of proof as in *Fleming*. The prosecutor there did not misrepresent the role of the jury, the burden of proof, or the law. *Lewis*, at 241-242. The same is true in the present case.

Using the word “liar” or arguing that a witness lied can be perilous for a prosecuting attorney. One of the reasons that the Supreme Court reversed the murder conviction in *State v. Reed*, 102 Wn. 2d 140, 145-146, 684 P.2d 699 (1984), was because the prosecutor called the defendant a liar “no less than 4 times”. However, a prosecutor may argue that a

witness lied, if the prosecutor is drawing a conclusion from other evidence that contradicts the witness' or defendant's testimony. *McKenzie*, 157 Wn. at 59.

The better practice would be to abstain from a liberal use of the words "liar" or "lying" in argument. However, when the prosecutor in the present case used these terms, she was consistently arguing conclusions from the evidence. A prosecutor may argue that a witness lied, if the prosecutor is drawing a conclusion from other evidence that contradicts the witness' or defendant's testimony. *McKenzie, supra*.

Here, the DPA questioned Ms. Williams' trial testimony by comparing it to the other evidence and her statement to police. 4 RP 454. The DPA went on to ask: "Is that consistent with anything that you heard from any of the witnesses who don't have a motive to lie?" 4 RP 457.

Likewise, the prosecutor questioned Ms. Cooper's testimony and why she changed her account of the events from the time of the incident. 4 RP 467-468. Ms. Cooper and Ms. Williams were friends and roommates. Ms. Cooper did not wish to get Ms. Williams' son in trouble. However, on the night the defendant entered the house and assaulted Ms. Williams, Ms. Cooper was very concerned; she called 911 to report it. 3 RP 246, 302, Exh. 7. Again, these were all factors the jury could consider in accepting all, part, or none of Ms. Cooper's testimony.

The prosecutor also argued:

So is there a conspiracy here? Is every single witness but Kathie and Volinda lying? Is every single witness in collusion to get the Defendant, to make sure that he is convicted? The answer to that is, obviously, no. I anticipate you are going to hear, well, Officer Hannity is lying. Officer Waddell is lying. Officer Chell, probably lying too. And you should believe Kathie Cooper's new version. You should believe Volinda Williams' new version. But you shouldn't believe Frank Givens, and you shouldn't believe David Price. There is no conspiracy here. The State's case is predicated on facts, on direct evidence. Use your common sense.

4 RP 478. This foreshadowing of the defendant's argument may or may not have been an effective strategy by the prosecuting attorney, but it was neither improper, nor misconduct.

In rebuttal argument, the prosecutor again discussed credibility of the witnesses. She told the jury that, in considering the credibility of the witnesses, to look at all the evidence and circumstances, and any motive for a witness not to tell the truth. 4 RP 505. She also argued:

But again, you can gauge every single witnesses' demeanor, credibility and you can decide for yourself. Was Officer Hannity telling the truth? And the evidence shows, it corroborates everything he told you from other witnesses, from 911 and from the physical evidence.

4 RP 506.

Again, the only facts that change from Volinda Williams and Kathie Cooper are facts that help the Defendant. And it's no coincidence that they are the only witnesses who

have a motive to lie. [Defense counsel] asked, well, if they are going to lie for the Defendant when why would they testify that he told them -- he told Ms. Cooper, "Get in the room, bitch." Well, saying get in the room, bitch, is not a crime. It's just rude. And nobody is accusing Ms. Williams and Ms. Cooper of being sophisticated liars. The evidence, however, has shown that they are liars.

4 RP 508.

If a prosecutor appeals to the passion and prejudice of a jury by making a naked accusation of lying, it is misconduct. *See, Reed, supra*. Where, as here, the prosecutor argues from the evidence that witnesses are lying; it is permissible argument. The prosecutor did not misrepresent the role of the jury, the burden of proof, or the law. She argued credibility of the witnesses as conclusions from the evidence. It was not misconduct.

- c. In a case involving conflicting testimony, the prosecutor properly argued that the jury had to decide who was telling the truth.

In nearly every trial, a witness' credibility will be an issue. The defense tests it through cross-examination. The jury does decide what evidence and testimony is credible; that is why it is instructed as in Instruction 1 (CP 18). *See* argument *supra*. Where there is challenged, conflicting, or mutually exclusive testimony, part of this jury function includes deciding what to believe or reject, which witness is telling the truth, and how much of it.

The credibility arguments in this case regarding truth is different than the "speak the truth" or "declare the truth" arguments rejected in

Emery, 174 Wn. 2d at 760, and *State v. Anderson*, 153 Wn. App. 417, 429, 220 P.3d 1273 (2009). Those arguments were improper because they suggested that the jury's role is to solve the case. The prosecutor in the present case did not make such an argument.

- d. The defendant fails to show any prejudice from brief improper remarks the prosecutor made regarding a police officer's testimony.

The State commits prosecutorial misconduct if, during closing argument, it bolsters a witness' credibility, often by using facts not in evidence. *See, e.g., State v. Jones*, 144 Wn. App. 284, 293–294, 183 P.3d 307 (2008). It can also occur where the prosecutor suggests that a witness would be risking professional consequences for lying about an incident. *See, e.g., State v. Smith*, 67 Wn. App. 838, 841, 841 P.2d 76 (1992).

In *Smith*, evidence of commendations and awards of a police witness were admitted. The Court found that such evidence was not probative of the officer's truthfulness. 67 Wn. App. at 842. The Court also found that such evidence was inadmissible as an attempt to bolster the witness' credibility. *Id.*, at 845. However, the Court also found that the outcome of the trial would not have been different had the evidence of the awards and commendations not been allowed in. The jury could legitimately consider evidence of the officer's substantial training and experience in evaluating his testimony and credibility. 67 Wn. App., at 845.

Here, the prosecutor argued:

Ms. Cooper is good friends with Ms. Williams. Now, she tells Officer Hannity, and he interviews her first, she tells Officer Hannity that the Defendant called three times that night, was told that he couldn't come in. Now, you all know that Ms. Williams and Ms. Cooper did not have the opportunity to talk about this. Mr. Cooper and Ms. Williams told you that their conversation was just a cursory, are you okay, yes, and then they were interviewed in separate areas of the house.

So there is one of two things here. Either the Defendant called earlier in the night and she was awake, and Ms. Williams was awake, which would -- or is, I am going to argue, a bit the more consistent story. Or you could believe that Officer Hannity is lying. But you saw Officer Hannity. You saw his meticulousness. You heard Ms. Cooper describe him as polite. Do you believe that Officer Hannity is going to place his career on the line to put something in his report and document it when it didn't actually happen? He is, obviously, not going to do that.

4 RP 467.

The jury was properly instructed that:

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

Instr. 1, CP 18. The appellate court presumes that juries follow the court's instructions to disregard improper evidence or argument. *State v. Russell*, 125 Wn.2d 24, 84, 882 P.2d 747 (1994).

Other than the last two sentences, this section of the prosecutor's argument is proper. As in *Smith*, these brief remarks do not taint the entire section because there was admissible evidence of Sgt. Hannity's training and experience. As with any witness, the jury could also judge his demeanor and evaluate his testimony in light of all the evidence.

- e. The defendant waived appellate review of the issue where he failed to object to closing argument below.

The defendant failed to object at trial to any of the arguments he now complains of on appeal. Although, as the defendant points out in his brief, there were, arguably, grounds to raise an objection. But, as the Supreme Court pointed out in *Emery*, 174 Wn. 2d at 761-762, the place to properly address such issues is the trial court. The trial court may have sustained or overruled those objections. The trial court could have admonished the prosecutor regarding any improper argument and also given an instruction curing a potential problem. *See, Emery, supra.*

The defendant does not demonstrate that any of these arguments are so “flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition

to the jury.” *Stenson*, 132 Wn.2d at 719. The defendant fails to show how a prosecuting attorney, who repeatedly referred the jury to the instructions and incorporated factors from the instructions in her arguments was “flagrant and ill-intentioned”. Unlike the case of *State v. Warren*, 165 Wn. 2d 17, 25, 195 P. 3d 940 (2008), there is no indication at all that the prosecuting attorney tried to mislead the jury or even misstated the law. Other than the brief remarks regarding Sgt. Hannity, which are addressed above, the prosecutor did not misstate the evidence. The defendant has waived review of the error.

- f. The defendant does not demonstrate prejudice from any of the alleged improper arguments.

As stated above, in order for the defendant to receive his requested relief, he must show not only improper argument, but also prejudice. He must show that there was impropriety, and that it likely affected the verdict. In analyzing prejudice, the Court views the questionable remarks in the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury. *Warren*, at 28.

Here, as discussed in detail above, in challenging the sufficiency of the evidence, the defendant admits to the truth of the evidence and all the inferences drawn in favor of the State. *Salinas*, 119 Wn. 2d at 201. Five witnesses: Williams, Cooper, Givens, Price, and Hannity saw the defendant assault Ms. Williams. Williams and Cooper told the defendant

not to come to the house, denied him entry when he arrived, and revoked any permission to be present when he began assaulting Ms. Williams.

- g. The defendant fails to show that the alleged improper argument was incurable by an appropriate instruction.

Where, as here, the defendant did not object to the alleged improper argument, he must show that the comments could not be cured by an appropriate instruction. *Warren*, 165 Wn. 2d at 28. In *Warren*, the prosecutor made a gross misstatement regarding the presumption of innocence. *Id.*, at 25. The defense counsel objected and the trial judge re-instructed the jury in detail. *Id.* This cured what otherwise would have required a new trial.

If the prosecutor's "lying" or bolstering arguments were inappropriate, an objection here, as in *Warren*, would have stopped the argument and given the court the opportunity instruct the jury and to admonish the prosecutor to correct her argument. The court could have re-instructed the jury regarding credibility determination and burden of proof. The court could have instructed the jury, per *Fleming*, that they could reach a verdict without deciding if a witness was lying.

None of the arguments in this case rose, or sank, to the level of those in *Belgarde* or *Monday*, which were virtually automatic reversals because they had nothing to do with the evidence or the law. *State v. Belgarde*, 110 Wn.2d 504, 755 P.2d 174 (1988). Nor did the arguments in

the present case raise issues of constitutional magnitude as in *Warren*. The defendant waived his objection to the closing argument.

4. THE DEFENDANT DOES NOT DEMONSTRATE CUMULATIVE ERROR WHICH DEPRIVED HIM OF A FAIR TRIAL.

Under the cumulative error doctrine, the Court of Appeals may reverse a defendant's conviction when the combined effect of trial errors effectively deny the defendant's right to a fair trial, even if each error alone would be harmless. *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006), *cert. denied*, 551 U.S. 1137, 127 S. Ct. 2986, 168 L.Ed.2d 714 (2007). The doctrine does not apply where errors are few and have little or no effect on the trial's outcome. *Weber*, 159 Wn.2d at 279.

Here, the defendant fails to show a cascade of error that resulted in denying him a fair trial.

D. CONCLUSION.

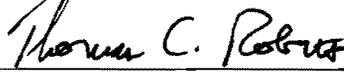
The defendant received a fair trial where a great deal of evidence was admitted against him and the jury was properly instructed. There were five witnesses who testified from direct observation of his behavior, including a police officer. Although the prosecutor's closing was not

without fault, the defendant waived this issue where he did not object to it and did not request curative instructions.

The State respectfully requests that the conviction be affirmed.

DATED: June 5, 2013.

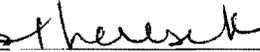
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

6.5.13 
Date Signature

PIERCE COUNTY PROSECUTOR

June 05, 2013 - 3:36 PM

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