Supreme Court No. ____
(COA No. 854941)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS PINE-NELSON,

Petitioner.

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

PETITION FOR REVIEW

KATE L. BENWARD
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, WA 98101
(206) 587-2711
katebenward@washapp.org

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A. IDENTITY OF PETITIONER

Nicholas Pine-Nelson, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review pursuant to RAP 13.3 and RAP 13.4(b).

B. ISSUES PRESENTED FOR REVIEW

1. Counsel is ineffective when they do not object to inadmissible evidence that affects the outcome of the case. In Mr. Pine-Nelson's trial for assault of his 16-year-old stepson, E.E., counsel did not object to (1) E.E.'s claim that Mr. Pine-Nelson assaulted him on a previous occasion and (2) the refuted hearsay statement that Mr. Pine-Nelson assaulted E.E.'s mother. Counsel's failure to object to inadmissible propensity evidence violated of the Sixth Amendment of the United States Constitution and article I, section

22 of the Washington Constitution, meriting this Court's review. RAP 13.4(b)(3).

2. The prosecutor inflamed the jury by baselessly arguing this is what domestic violence and child abuse looks like when a "child is old enough to try to defend himself." The prosecutor also committed misconduct by impugning defense counsel for participating in a "suspicious" meeting with a witness whose credibility the prosecutor derided, and by diluting the burden of proof and presumption of innocence in closing argument. This incurable misconduct deprived Mr. Pine-Nelson of a fair trial and this Court should accept review. RAP 13.(b)(3).

C. STATEMENT ●F THE CASE

Mr. Pine-Nelson was in a long-term relationship with his partner Chelsea Bounds. RP 178. E.E is Ms.

Bounds' 17-year-old son. RP 129.[1] E.E. lived with his mother and step-father, Mr. Pine-Nelson, for about ten years. RP 130. E.E. viewed their relationship as "neutral." RP 130. The biggest arguments they had were over homework. RP 179.

In June 2021, when E.E. was 16 years old, he was outside his mother's and Mr. Pine-Nelson's bedroom digging a posthole for a fence. RP 132. Ms. Bounds came outside and told E.E. they were leaving. RP 133. E.E. claimed he confronted Mr. Pine-Nelson after his mother said Mr. Pine-Nelson "hit" her. RP 136. In fact, Ms. Bounds only said that Mr. Pine-Nelson was being abusive, which to her meant verbally abusive. RP 182.

[1] There are three separately paginated verbatim reports of proceedings. RP references that are not part of the consecutively paginated volume 1-242 will be preceded by a date.

Mr. Pine-Nelson claimed E.E. punched him on the side of the head when he approached him during the argument. RP 221.

E.E. described the altercation differently. He claimed Mr. Pine-Nelson grabbed him by the throat with his left hand, pushed him up against the car and punched E.E. in the left shoulder with his right hand. RP 137. E.E. said he punched Mr. Pine-Nelson back. RP 137. Ms. Bounds tried to pull Mr. Pine-Nelson off of E.E. RP 138. E.E. and his mother got in the car and left. RP 144.

The next day E.E.'s leg was hurting and his mother drove him to the hospital. RP 147. E.E.'s leg was broken. RP 148.

The court entered a no-contact order against Mr. Pine-Nelson. RP 148-49; Ex. 2. Ms. Bounds unintentionally included a folded up note Mr. Pine-

Nelson left on E.E.'s bed with other items she packed up and delivered to E.E. at his grandmother's house, where he was staying. RP 188. The note stated Mr. Pine-Nelson cared for E.E. and hoped they would eventually reconcile. Ex. 3. Ms. Bounds was unaware of the no-contact order. RP 189.

The State charged Mr. Pine-Nelson with second-degree assault and violation of a no-contact order for the note. CP 8-9.

At trial, Mr. Pine-Nelson asserted he acted in self-defense. RP 234; CP 30-33.

Defense counsel did not object to E.E. stating his mother said Mr. Pine-Nelson "put [his] hands on me," and "hurt" her, which E.E. understood to mean that Mr. Pine-Nelson "hit" her. RP 135-36. Defense counsel also did not object when the prosecutor recalled E.E. to testify about an incident E.E. claimed occurred about

six months before this incident in which Mr. Pine-Nelson shoved and pushed him over a homework dispute. RP 231.

The prosecutor impeached Ms. Bounds on her lack of communication with the prosecutor's office, pointing out that she met with Mr. Pine-Nelson and defense counsel before meeting with the prosecutor, and just before she provided testimony for the first time on the stand. RP 192. The prosecutor then urged the jury to consider the "suspicious nature of this meeting" that directly preceded Ms. Bounds' testimony. 2/08/23 RP 29. In closing argument, the prosecutor argued "this case represents" what "domestic violence" and "child abuse" look like when a child "is old enough to try to defend himself," without defense objection. 2/08/23 RP 18.

The Court of Appeals did not believe the prosecutor's improper statements constituted misconduct or that Mr. Pine-Nelson was prejudiced by ineffective assistance of counsel and affirmed Mr. Pine-Nelson's conviction. Slip Op. at 1.

D. ARGUMENT

1. Mr. Pine-Nelson was deprived of a fair trial by ineffective assistance of counsel.

Mr. Pine-Nelson's counsel did not object to the State recalling E.E. to testify that Mr. Pine-Nelson previously assaulted him. As the trial court who ruled on Mr. Pine-Nelson's motion for a new trial under CrR 7.5 found, this was evidence of a prior bad act that should have been excluded under ER 404(b), and his trial attorney was deficient for failing to object to this testimony. Defense counsel was also deficient for not objecting to E.E.'s testimony that Mr. Pine-Nelson had assaulted his mother. This objectively deficient

performance, considered in combination with E.E.'s allegation of a prior assault against him, prejudiced Mr. Pine-Nelson. This Court should accept review.

a. An attorney performs deficiently by failing to object to evidence that prejudices the accused.

A person accused of a crime has the right to the effective assistance of counsel. Const. amend. XIV; Const. art. I, § 22; *Strickland v. Washington*, 466 U.S. 668, 684-85, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Vazquez*, 198 Wn.2d 239, 247, 494 P.3d 424 (2021). Ineffective assistance of counsel occurs when "counsel's performance was deficient" and "the deficient performance prejudiced the defense." *Vazquez*, 198 Wn.2d at 247-48 (*citing Strickland*, 466 U.S. at 687).

Counsel performs deficiently by "failing to research or apply relevant law." *State v. Kyllo*, 166 Wn.2d 856, 862, 868, 215 P.3d 177 (2009). Counsel

must complete the preparation "necessary to an adequate defense." *State v. Lopez,* 190 Wn.2d 104, 115-16, 410 P.3d 1117 (2018). Counsel also has "a duty to make reasonable investigations." *Strickland,* 466 U.S. at 691.

Defense counsel provides ineffective assistance by not objecting to inadmissible evidence that prejudices the accused, without a tactical reason. *Vazquez,* 198 Wn.2d at 248; *Roe v. Flores-Ortega,* 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000).

A decision is not tactical or strategic if it is unreasonable under prevailing professional norms. *Vazquez*, 198 Wn.2d at 249. Under prevailing professional norms, attorneys must know the rules of evidence. *Id.* Failing to object to inadmissible, prejudicial testimony, when "the objection would likely have succeeded," is deficient performance. *Id.* at 248.

b. Counsel performed deficiently by not objecting to E.E.'s allegation of prior assaults.

ER 404(b) categorically prohibits evidence about the accused's character to show action in conformity therewith. In domestic violence cases "the risk of unfair prejudice is very high." *Id.* at 925. To overcome "this heightened prejudicial effect," the prosecution must show "prior acts of domestic violence" have "overriding probative value." *Id.* Absent "compelling justification," the evidence's "significant prejudicial effect" outweighs any legitimate purpose. *Id.* at 927.

i. Counsel was deficient for not objecting to E.E.'s allegation about a prior assault.

E.E. had only ever witnessed verbal arguments between his mother, Ms. Bounds, and Mr. Pine-Nelson. RP 131. On cross-examination, the prosecutor asked Mr. Pine-Nelson, "there's never been any violence from him [E.E.] or in the house before, correct?" RP 227. Mr.

Pine-Nelson responded, "I wouldn't say violence, no. There's been a few times he's gotten in my face for—over homework, stupid stuff." RP 227.

The prosecutor recalled E.E. to testify about a prior assault allegation of which Mr. Pine-Nelson's counsel appeared unaware. The prosecutor asked E.E:

> Q. Now there has been some kind of testimony that violence was not really a present thing in the house, but was there ever a previous time when he has gotten physical with you?
>
> A. Yes, once before.
>
> Q. And when was that?
>
> A. About six months before the incident.
>
> Q. Tell me what happened with that?
>
> A. Me and Nicholas were discussing some homework that I had done, and, basically, what happened is he thought one thing, I thought another. He started yelling at me. I finally said something back to him, and which he started pushing me into my room.
>
> Q. Okay. And did you fight back or did you just –

> A. He was pushing me, and I was pushing back in the opposite direction.

RP 230-31.

Rather than object to this other acts evidence, Mr. Pine-Nelson's counsel questioned E.E. in a way that revealed he was unaware of this allegation against Mr. Pine-Nelson:

> Q. Okay. All right. I just wondering why this is coming up now. Did somebody ask you to say this about the pushing incident from six months prior to June 22?
>
> A. It came up in the conversation with your investigator.

RP 231.

Courts have "found deficient performance when counsel later admitted that she was unaware of a key matter in the case." *State v. Estes*, 188 Wn.2d 450, 461, 395 P.3d 1045 (2017). Had Mr. Pine-Nelson's counsel been aware of the findings of his own investigation, he would have moved to exclude this evidence of a prior

assault, and counseled Mr. Pine-Nelson about this allegation. Under an ER 404(b) balancing test, his objection would likely have succeeded given the prejudice of being similar to the charged offense. *See, e.g., State v. Gunderson*, 181 Wn.2d 916, 923, 337 P.3d 1090 (2014); *see also Vazquez*, 198 Wn.2d at 255 (similarity of inadmissible evidence to charged crime increased prejudice). The trial court must also give a limiting instruction to the jury if the evidence is admitted. *Id.* at 923.

Mr. Pine-Nelson filed a motion for a new trial for ineffective assistance of counsel immediately after trial. CP 53. The court agreed this failure to anticipate and object to this prior acts evidence was objectively unreasonable. *Id.*; CP 399. Counsel's failure to object was not tactical, as he was unaware of this allegation from the investigator's interview with E.E.

However, considering this deficiency in isolation, the trial court found the trial outcome would not have been different, and denied Mr. Pine-Nelson's request for a new trial. CP 399.

ii. Counsel was deficient for not objecting to E.E.'s testimony that his mother said Mr. Pine-Nelson hit her.

E.E. also testified that his mother said Mr. Pine-Nelson hit her, which was hearsay that should have been excluded under ER 404(b).

Hearsay is an out-of-court statement offered in evidence to prove the truth of the matter asserted. ER 801(c). Unless an exception or exclusion applies, hearsay is inadmissible. ER 802.

E.E. testified that when his mother came outside and told him they were going to leave she said to Mr. Pine-Nelson, "You put your hands on me, you hurt me." RP 135. Ms. Bounds denied saying these words. She

said only that Mr. Pine-Nelson was being "abusive," by which she meant verbally abusive. RP 182.

This was an out-of-court statement, purportedly made by Ms. Bounds to E.E. or Mr. Pine-Nelson, which made it hearsay. Even assuming there was an applicable hearsay exception, or it was found to not be hearsay because it went to E.E.'s state of mind regardless of its truth, it would still be subject to exclusion under ER 404(b).

Had counsel objected, the court would have been required to assess its admissibility under ER 404(b). *Gunderson*, 181 Wn.2d at 923. Where Ms. Bounds refuted saying what E.E. claimed she did, a court could find this allegation was not proved by a preponderance. The court also would have correctly found it was not relevant to the elements of assault, which only required the State prove Mr. Pine-Nelson intentionally

assaulted E.E. and recklessly inflicted substantial bodily harm. CP 29. Given the lack of relevance to the elements of assault and that what E.E. thought he heard was disputed hearsay testimony, the court would have found this statement that Mr. Pine-Nelson "hit" Ms. Bounds had limited probative value in light of its extreme prejudice, particularly due to the inherent prejudice of domestic violence allegations. *See Gunderson*, 181 Wn.2d at 925.

Even if the court had found this evidence met the exacting ER 404(b) requirements for admission, the court would have been required to issue a limiting instruction. *Gunderson,* 181 Wn.2d at 923. Instead, the jury was allowed to consider this evidence of a prior domestic violence assault without limit.

Defense counsel would have likely prevailed on a motion to exclude it or limit the jury's consideration of

Ms. Bounds' out-of-court statement, and it was objectively unreasonable for Mr. Pine-Nelson's counsel to not object to it. *Vazquez*, 198 Wn.2d at 250.

c. The prejudice of this deficient performance deprived Mr. Pine-Nelson of a fair trial.

A person is prejudiced by their attorney's deficient performance if there is a reasonable probability of a different outcome. *Vazquez,* 198 Wn.2d at 267.

"When evidence is likely to stimulate an emotional response rather than a rational decision, a danger of unfair prejudice exists." *State v. Powell*, 126 Wn.2d 244, 264, 893 P.2d 615 (1995). Allegations of domestic violence have this effect. *Gunderson*, 181 Wn.2d at 923.

In considering Mr. Pine-Nelson's motion for a new trial and counsel's failure to object to E.E.'s allegation that Mr. Pine-Nelson assaulted him six

months prior, the trial court found counsel's deficient failure to object would not have affected the trial outcome when considering this error in isolation. CP 399. In so ruling the court failed to consider the extreme prejudice of hearing that Mr. Pine-Nelson assaulted E.E. in the past, causing the jury to find he had the propensity to commit the charged crime.

The court's ruling also did not consider the additional allegation of a different assault against Ms. Bounds, which certainly heightens the "significant prejudicial effect" because it is an allegation of domestic violence. *Gunderson*, 181 Wn.2d at 923.

The prosecutor leveraged these other assault allegations in closing argument by treating them as propensity evidence, arguing: "The only time that there was any previous physical altercation, the defendant started it. He started shoving [E.E.]." 2/8/23 RP 26.

This compounded the impermissible propensity inference.

The prosecutor also repeated the substance of E.E.'s claim about Mr. Pine-Nelson assaulting Ms. Bounds in closing, restating that E.E. heard Ms. Bounds say "you hit me, you hurt me," and that E.E. felt compelled to "defend his mom verbally." 2/8/23 RP 19. The jury would take this statement about Ms. Bounds being assaulted as true, even though Ms. Bounds said she only spoke of verbal abuse.

Moreover, it is certain the jury would discount Ms. Bounds' testimony about what she actually said to E.E. because he insisted Ms. Bounds lied about the incident. RP 160-62; 2/8/23 RP 30; *see* RP 182 (Ms. Bounds testifying she told E.E. Mr. Pine-Nelson was being verbally abusive).

And, as will be discussed in section 2, *infra*, the prosecutor impermissibly leveraged this prejudice by characterizing this as an ongoing domestic violence situation in closing argument. 2/08/23 RP 18. Defense counsel's deficient performance was highly prejudicial considered in light of the allegations of not just one, but two previous assaults, which depicted Mr. Pine-Nelson as a serial domestic violence abuser. Counsel's deficient performance prejudiced Mr. Pine-Nelson and deprived him of a fair trial. This Court should accept review. RAP 13.4(b)(3).

2. The prosecutor committed incurable misconduct by injecting the theme of domestic violence and child abuse in closing, impugning defense counsel, and diluting the burden of proof.

The prosecutor's misconduct further deprived Mr. Pine-Nelson of a fair trial. This Court should accept review. RAP 13.4(b)(3).

The Sixth and Fourteenth Amendments and article I, sections 3 and 22 protect the fundamental right to a fair trial. *Estelle v. Williams*, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976); *In re Glasmann*, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012). Prosecutors are presumed to act impartially "in the interest of justice." *State v. Loughbom*, 196 Wn.2d 64, 69, 470 P.3d 499 (2020). Courts expect prosecutors to "subdue courtroom zeal, not to add to it, in order to ensure the defendant receives a fair trial." *Id.*

A prosecutor's comments to the jury must not deliberately appeal to the jury's passion and prejudice and encourage the jury to base the verdict on the improper argument rather than properly admitted evidence. *Glasmann*, 175 Wn.2d at 711. And "[p]rosecutorial statements that malign defense counsel can severely damage an accused's opportunity

to present his or her case and are therefore impermissible." *State v. Lindsay*, 180 Wn.2d 423, 432, 326 P.3d 125 (2014).

Misconduct that prejudices the accused "deprive[s] a defendant of his constitutional right to a fair trial." *Glasmann*, 175 Wn.2d at 703-04. When defense counsel does not object to a prosecutor's misconduct at trial, reversal is required if the "conduct was so flagrant and ill intentioned that a jury instruction would not have cured the prejudice." *Loughbom*, 196 Wn.2d at 70 (cleaned up).

Here, the prosecution committed incurable misconduct by inflaming the jury through argument that this was a case of domestic violence and child abuse for which Mr. Pine-Nelson should be held accountable, impugning defense counsel, and diluting the burden of proof and presumption of innocence.

a. The prosecutor's argument about child abuse and domestic violence inflamed the jury.

Certain kinds of evidence taint the proceedings and cannot be cured, even by a properly sustained objection or instruction to disregard. *State v. Belgarde*, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). Courts recognize that, despite instructions to disregard prejudicial evidence, jurors may not always do so, as "the practical and human limitations of the jury system cannot be ignored." *Bruton v. United States*, 391 U.S. 123, 135, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968). In some instances, the bell simply cannot be unrung. *See State v. Holmes*, 122 Wn. App. 438, 446, 93 P.3d 212 (2004) (recognizing prejudicial effect from comments on defendant's exercise of constitutional rights because "the bell is hard to unring"); *see also Dunn v. United States*, 307 F.2d 883, 887 (5th Cir. 1962) ("If you throw

a skunk into the jury box, you can't instruct the jury not to smell it.").

In *Loughbom*, the prosecutor introduced the theme of the "war on drugs" in opening and closing argument. This was a thematic narrative designed to appeal to a broader social cause that ultimately deprived the accused of a fair trial. 196 Wn.2d at 70. The defendant did not object, but this misconduct was flagrant and ill- intentioned and the court reversed. *Id.*

Here the prosecutor introduced the even more flagrantly prejudicial theme of child abuse and domestic violence in closing argument, urging the jury to hold Mr. Pine-Nelson accountable for unpunished misconduct.

The prosecutor did not charge this as a case of "domestic violence." 6/27/23 RP 252. Nor was Mr. Pine-Nelson charged with child abuse. CP 8-9. Yet the

prosecutor began his closing argument by arguing this was what this case was about:

> We hear 'domestic violence,' we think maybe one spouse abusing another spouse. We hear 'child abuse,' we think of maybe an adult beating on a small child who is unable to defend themselves. This case represents what those principles look like when that child is old enough to try to defend himself.

2/08/23 RP 18.

Framing this as a case of ongoing, unpunished domestic violence and child abuse insinuated Mr. Pine-Nelson had a history of domestic and child abuse. This theme had already been introduced through E.E.'s testimony about other acts evidence throughout trial. This argument urged conviction to protect victims of domestic violence and child abuse, and was underscored by the prosecutor's final request of the jury to hold Mr. Pine-Nelson "accountable." 2/08/23 RP 47. It is improper for prosecutors to urge jurors to

convict the accused in order to send a message. *Loughbom,* 196 Wn.2d at 72.

Here the theme of domestic violence and child abuse was a "skunk" thrown into the "jury box." *Dunn*, 307 F.2d at 887. This argument emphasized conviction not based on the evidence, but on the impermissible, prejudicial allegations that Mr. Pine-Nelson was a serial abuser and a guilty verdict would right the wrongs of child abuse and domestic violence.

b. The prosecutor impugned defense counsel by implicating him in a "suspicious" meeting with Ms. Bounds right before trial.

Prosecutors must "refrain from impugning, directly or through implication, the integrity or institutional role of defense counsel." *United States v. Bennett,* 75 F.3d 40, 46 (1st Cir. 1996); *State v. Warren*, 165 Wn.2d 17, 29-30, 195 P.3d 940 (2008) (It is

improper for the prosecution to "comment[] on defense counsel's role" during argument).

In turn, improper vouching occurs when a prosecutor supports the credibility of a witness by placing the prestige of the office behind the witness's testimony. *United States v. Trujillo*, 376 F.3d 593, 607-08 (6th Cir. 2004). The prosecutor's argument that Ms. Bounds' credibility was suspect because she chose to meet with defense counsel while resisting the prosecutor's effort to contact her first both denigrated defense counsel and invoked the prestige of his office, which was misconduct.

The prosecutor questioned Ms. Bounds about her lack of communication with the prosecutor's office, asking whether, before meeting with him, she wanted to speak with Mr. Pine-Nelson and his attorney. RP 191. Then the prosecutor questioned her about meeting

with Mr. Pine-Nelson and his defense attorney "10 to 15 minutes" before she spoke with the prosecutor for the first time, just before trial. RP 191-92.

In closing, the prosecutor insinuated that Ms. Bounds' lack of responsiveness to his office was suspect:

> You heard about my office's attempts to get in contact with her -- numerous phone calls, sending an investigator out multiple times, leaving letters -- everything. . . . I had never been able to talk to her. And then all of a sudden, at 3:00 on Monday, she shows up in the courtroom. No word. And when asked why she came here, the defendant asked her to. No cooperation with my office. No contact with my office.

2/08/23 RP 28. This is bolstering because it told the jury that a witness who does not cooperate with the prosecutor's office is suspect. In turn, the prosecutor argued it was suspicious to meet with defense counsel first:

> I'm not suggesting by any means that Mr. Roth did anything untoward, right, but the suspicious

> nature of this meeting beforehand with the defendant, knowing that she's about to come over to be interview[ed] by me, and the first time we ever hear any of her side of anything is 3:30 on Monday.
>
> This is the first time we're hearing, 'Well, I was in the car, I didn't see or hear anything.' The first time we've heard, 'I must have inadvertently took this note over.'

2/08/23 RP 29.

The prosecutor's claim that he was not suggesting anything "untoward" suggested just that. "[A]pophasis" is "a common rhetorical device in which the speaker or writer brings up a subject couched in a denial or dismissal and stated expressly to make the point denied or dismissed." *Dougherty v. Harvey*, 317 F. Supp. 3d 1287, 1291 (N.D. Ga. 2018). This rhetorical device is used to emphasize a point "while maintaining plausible deniability." *Id.*

The prosecutor's implication that Mr. Pine-Nelson's counsel participated in this "suspicious"

meeting was an improper argument that impugned the role of defense counsel, who has an obligation to prepare for trial, and should not be accused of participating in or preparing a witness to fabricate testimony. In turn, it told the jury that witnesses should be meeting with prosecutors first, as if their office was the arbiter of witness truth. This argument both maligned defense counsel and asserted the prestige of the prosecutor's office in assessing witness credibility, which was misconduct.

c. The prosecutor's argument diluted the burden of proof and the presumption of innocence.

The prosecution must prove every element of an offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). It is error for the State "to suggest otherwise." *State v. Warren*, 165 Wn.2d 17, 26–27, 195 P.3d 940 (2008).

In *Warren* the court found the prosecutor undermined the State's burden of proof by telling the jury, "it doesn't mean, as the defense wants you to believe, that you give the defendant the benefit of the doubt[.]" *Id.* at 27. This "was simply improper." *Id.* Because "[t]he jury knows that the prosecutor is an officer of the State," it is "particularly grievous that this officer would so mislead the jury regarding the bedrock principle of the presumption of innocence, the foundation of our criminal justice system" *Id.*

Here the prosecutor undermined the presumption of innocence and its burden of proof in a similar way. The prosecutor urged the jury to disregard Mr. Pine-Nelson's presumption of innocence in assessing his credibility, arguing: "Now, [Mr. Pine-Nelson] testified, and you judge his testimony, his credibility exactly the same as you would anybody else's. He doesn't get any

extra weight. *He doesn't get any extra benefit of the doubt*." 2/08/23 RP 23 (emphasis added). This is incorrect. Mr. Pine-Nelson *is* entitled to the benefit of the doubt, even if he testifies.

The argument that Mr. Pine-Nelson does not get an *extra* benefit of the doubt compared to other witnesses imposes a false equivalence. It is not the jury's job to decide whether Mr. Pine-Nelson or E.E. was telling the truth; the issue for the jury is whether the State proved the charges beyond a reasonable doubt. *State v. Crossguns*, 199 Wn.2d 282, 298, 505 P.3d 529 (2022) ("Inviting the jury to decide a case based on who the jurors believe is lying or telling the truth improperly shifts the burden away from the State.").

The prosecution commits misconduct when it makes an argument that misstates or trivializes the

prosecution's burden to prove guilt beyond a reasonable doubt. *Lindsay,* 180 Wn.2d at 434. The prosecutor further undercut the burden of proof by confusingly arguing to the jury he only had the burden of proof beyond a reasonable doubt for three instructions: "Reasonable doubt does not apply to every single instruction in the packet. It does not apply to every single fact of this case. It applies to what we call the to-convict instructions, and there are two of them, and it also applies to self-defense." 2/08/23 RP 20.

The prosecutor reiterated: "Those numbered items, in the absence of self-defense, are the only things the state has to prove beyond a reasonable doubt. The other instructions are definitions that help you make that determination." *Id.* The State again insisted on a limited burden of proof to only three instructions: "This is, as I said, the to-convict

instruction. And these three numbered items are the only things -- again, about self-defense -- the only things that you have to find to find him guilty beyond a reasonable doubt." 2/08/23 RP 31.

This is incorrect. The prosecutor had to prove every element beyond a reasonable doubt. This necessarily includes the definitions for the elements. For instance, the prosecutor had to prove beyond a reasonable doubt Mr. Pine-Nelson had "knowledge" of the protection order, CP 37, "intent" to assault as defined by the instructions, CP 38, and acted with "recklessness," CP 39, that resulted in "substantial bodily harm," CP 40. Telling the jury the prosecutor was not required to prove the necessary facts set forth in these instructions beyond a reasonable doubt diluted what the State had to prove.

By limiting the requirement of proof beyond a reasonable doubt to three instructions, the State misstated and trivialized its burden of proof, which was misconduct. *Lindsay*, 180 Wn.2d at 434.

d. The prosecutorial misconduct was incurably prejudicial and merits this Court's review.

A claim of misconduct is considered in "the context of the entire record and the circumstances at trial." *State v. Slater*, 197 Wn.2d 660, 681, 486 P.3d 873 (2021). No instruction would have cured the prosecutor's injection of the themes of child abuse, domestic violence, and distrust of defense counsel. These themes are inherently prejudicial, but especially here in light of E.E.'s additional allegations of domestic abuse as discussed in section 1, *supra*. The prosecutor's dilution of the burden of proof further compounds the prejudice, all of which deprived Mr. Pine-Nelson of a fair trial. This Court should accept review.

E. CONCLUSION

Based on the foregoing, the petitioner respectfully requests this that review be granted pursuant to RAP 13.4 (b)(3).

In compliance with RAP 18.17, this petition contains 4,830 words.

DATED this 23rd day of July, 2024.

Respectfully submitted,

KATE L. BENWARD (43651)
Washington Appellate Project
(91052)
Attorneys for Appellant

APPENDIX

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Court of Appeals
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State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. NICHOLAS JAMES PINE-NELSON, Appellant.	No. 85494-1-I DIVISION ONE UNPUBLISHED OPINION

SMITH, C.J. — After an altercation with his girlfriend's 16-year-old son, Nicholas Pine-Nelson was charged with and convicted of assault in the second degree and violation of a no-contact order. On appeal, Pine-Nelson contends that his trial counsel was ineffective for failing to object to inadmissible testimony of prior bad acts and that the prosecutor committed misconduct by injecting themes of domestic violence and child abuse in closing, by impugning defense counsel, and by misstating the burden of proof. Because counsel's failure to object did not result in prejudice and because the prosecutor's statements did not constitute misconduct, we disagree and affirm Pine-Nelson's convictions.

FACTS

In June 2021, Nicholas Pine-Nelson was living with his long-term girlfriend, Chelsea Bounds, and her 16-year-old son, E.E., in Concrete, Washington. Although Bounds and Pine-Nelson were not married, E.E. considered Pine-Nelson as his stepfather and Pine-Nelson thought of himself as a father figure to E.E.

The relationship between Pine-Nelson and Bounds was tumultuous at times. E.E. noted that Pine-Nelson's relationship with his mother had been getting "progressively worse" and that the two had "a lot of loud, verbal arguments." In early summer of 2021, Pine-Nelson and Bounds were in "a perpetual argument" with "a lot of screaming," and E.E. would sometimes stay with his grandmother when the fighting escalated.

On the afternoon of June 22, 2021, E.E. was outside digging a post hole for a fence while his mother and Pine-Nelson argued inside. Eventually, Bounds came outside and informed E.E. that they were going to stay at his grandmother's house. E.E. gathered his belongings and waited for his mother outside by the car. At one point, E.E. heard his mother tell Pine-Nelson, "You put your hands on me, you hurt me." In response, E.E. told Pine-Nelson, "If you put your hands on my mom, you're dead." Pine-Nelson then started walking toward E.E., taunting him. When Pine-Nelson reached E.E., he grabbed him by the throat, pushed him up against the car, and used his other hand to start punching E.E. in the shoulder. In an effort to defend himself, E.E. started hitting Pine-Nelson. E.E. testified that Pine-Nelson had him on the ground and "was directly on top" of E.E. with his face "just a couple of inches above [E.E.'s]." While E.E. and Pine-Nelson brawled, Bounds attempted to break them apart. Eventually, Bounds was able to pull Pine-Nelson off of E.E. Bounds and E.E. then left the house and drove to the Skagit County Sheriff's Department in Concrete. E.E. told the sheriffs what had transpired and reported that his leg hurt. After leaving

the sheriff's department, Bounds dropped E.E. off at his grandmother's house before returning to the home she shared with Pine-Nelson.

Pine-Nelson was later arrested and charged with assault in the fourth degree. Before being released, the district court issued a pretrial domestic violence no-contact order prohibiting Pine-Nelson from contacting E.E. further.

The day after the assault, Bounds took E.E. to a nearby hospital emergency room after he reported being unable to walk on his injured leg. Emergency room doctors diagnosed E.E. with a fractured leg.

A few days later, while still at his grandmother's house, E.E. requested that Bounds bring him his X-Box gaming console. When Bounds dropped off the console, E.E. discovered a handwritten note from Pine-Nelson taped to the bottom.

After learning of E.E.'s diagnosis and the note from Pine-Nelson, the State elevated Pine-Nelson's assault charge to assault in the second degree and also charged Pine-Nelson with one count of violating a no-contact order.

In February 2023, Pine-Nelson proceeded to trial. Following a jury trial, Pine-Nelson was convicted of assault in the second degree and of violating a no-contact order. Before sentencing, Pine-Nelson moved for a new trial, arguing that he received ineffective assistance of counsel at trial because he was unable to meet with his counsel to discuss the case, counsel did not inform him of a plea offer, and because his counsel failed to object to testimony about a prior altercation between Pine-Nelson and E.E. The court denied Pine-Nelson's motion. The court concluded that counsel's performance was not deficient with

regard to communicating with and advising Pine-Nelson. The court also concluded that counsel's failure to object to the testimony about a prior altercation fell below the objective standard of reasonableness for counsel's performance but that Pine-Nelson was not prejudiced by his counsel's failure to object. Pine-Nelson was sentenced to six months of confinement and twelve months of community custody.

Pine-Nelson appeals.

ANALYSIS

Ineffective Assistance of Counsel

Pine-Nelson contends that his trial counsel was ineffective for failing to object to E.E.'s testimony that Pine-Nelson had previously assaulted him and, on a separate occasion, Bounds. We agree with Pine-Nelson that counsel's failure to object to E.E.'s testimony about Pine-Nelson assaulting him on an earlier occasion was deficient performance, but disagree that any prejudice resulted. We also conclude that E.E.'s testimony about Pine-Nelson assaulting Bounds falls under the res gestae exception and, therefore, that Pine-Nelson's counsel was not deficient for failing to object to this testimony.

Criminal defendants are entitled to effective assistance of counsel. U.S. CONST. amend. VI; WASH. CONST. art. I § 22; State v. Grier, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). To succeed on a claim of ineffective assistance of counsel, a defendant must show (1) that their counsel's performance was deficient and (2) that prejudice resulted from that deficiency. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State

v. Thomas, 109 Wn.2d 222, 225, 743 P.2d 816 (1987) (adopting two-pronged Strickland test).

Counsel's performance is deficient if "it [falls] below an objective standard of reasonableness." State v. McFarland, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995). "Competency of counsel is determined based upon the entire record below." McFarland, 127 Wn.2d at 335. There is "a strong presumption that [defense] counsel's performance was reasonable." State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). "When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient." Kyllo, 166 Wn.2d at 863. "Counsel engages in a legitimate trial tactic when foregoing an objection in circumstances when counsel wishes to avoid highlighting certain evidence." State v. Crow, 8 Wn. App. 2d 480, 508, 438 P.3d 541 (2019). However, "[i]f a defendant centers their claim of ineffective assistance of counsel on their attorney's failure to object, then 'the defendant must show that the objection would likely have succeeded.' " State v. Vazquez, 198 Wn.2d 239, 248, 494 P.3d 424 (2021) (quoting Crow, 8 Wn. App. 2d at 508). Failure to object to inadmissible evidence constitutes deficient performance requiring reversal if the defendant can show that the result would likely have been different without the inadmissible evidence. Vazquez, 198 Wn.2d at 248-49.

To show prejudice, a defendant must demonstrate that there is "a reasonable probability that, but for counsel's [deficient performance], the result of the proceedings would have been different." Strickland, 466 U.S. at 694. This " 'reasonable probability' " standard is "lower than a preponderance standard"

and requires a defendant to "affirmatively prove prejudice" by showing more than a " 'conceivable effect on the outcome.' " State v. Estes, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017) (internal quotation marks omitted) (quoting Strickland, 466 U.S. at 694; State v. Crawford, 159 Wn.2d 86, 99, 147 P.3d 1288 (2006)). When reviewing whether counsel's conduct resulted in prejudice, we consider the "totality of the evidence" and "presume . . . that the judge or jury acted according to law." Strickland, 466 U.S. at 694-95.

Claims of ineffective assistance of counsel present a mixed question of law and fact that we review de novo. State v. Lopez, 190 Wn.2d 104, 116-17, 410 P.3d 1117 (2018).

1. Testimony About Prior Assault on E.E.

Pine-Nelson first asserts that his counsel performed deficiently by failing to object to E.E.'s testimony that Pine-Nelson had assaulted him on a prior occasion. He also argues that counsel's failure to object was not tactical because counsel was unaware of the allegation of a prior assault. We agree that this failure to object fell below the objective standard of reasonableness for counsel's performance, but disagree that Pine-Nelson suffered any prejudice as a result.

Under ER 404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." To determine whether ER 404(b) evidence is admissible, the court must " '(1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be

introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.' " State v. Gresham, 173 Wn.2d 405, 421, 269 P.3d 207 (2012) (quoting State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)).

During cross-examination, the prosecutor asked Pine-Nelson whether there had ever been "any violence from [E.E.] or in the house before." Pine-Nelson replied: "I wouldn't say violence, no. There's been a few times that he's gotten in my face for—over homework, stupid stuff." The State then recalled E.E. to testify. The prosecutor asked E.E.,

[STATE]: Now there has been some kind of testimony that violence was not really a present thing in the house, but was there ever a previous time when he has gotten physical with you?

[E.E.]: Yes, once before.

[STATE]: And when was that?

[E.E.]: About six months before the incident.

[STATE]: Tell me what happened with that?

[E.E.]: Me and [Pine-Nelson] were discussing some homework that I had done, and, basically, what happened is he thought one thing, I thought another. He started yelling at me. I finally said something back to him, and which he started pushing me into my room.

[STATE]: Okay. And did you fight back or did you just—

[E.E.]: He was pushing me, and I was pushing back in the opposite direction.

[STATE]: And were the police called or anything on that incident?

[E.E.]: No.

[STATE]: Who started making things physical in that incident?

[E.E.]: Nick did, in an attempt to, basically, put me in my room.

Pine-Nelson's counsel did not object to this testimony and the State did not argue that the testimony served any purpose other than to prove action in conformity therewith. Therefore, this testimony was inadmissible 404(b) evidence. Because an objection by Pine-Nelson's counsel would likely have been sustained, counsel's performance was deficient.

Furthermore, Defense counsel's performance cannot be characterized as legitimate trial tactics. On cross-examination, defense counsel revealed that they were unaware of any allegation of a prior assault:

> [DEFENSE]: [E.E.], this incident from six months prior, the pushing incident, we're hearing about this just now? Did you tell the prosecutor about this before?
>
> [E.E.]: Yes.
>
> [DEFENSE]: Okay. All right. I was just wondering why this is coming up now. Did somebody ask you to say this about the pushing incident from six months prior to June 22?
>
> [E.E.]: It came up in the conversation with your investigator.
>
> [DEFENSE]: Okay. Did it come up with the conversation with the prosecutor?
>
> [E.E.]: Only after I had mentioned it to your investigator.

Because defense counsel's actions cannot validly be construed as a legitimate trial tactic, we agree with Pine-Nelson that his counsel was deficient for failing to object to inadmissible evidence. But establishing deficient performance is not the end of our analysis. Pine-Nelson must also demonstrate that his counsel's performance resulted in prejudice.

Here, Pine-Nelson contends that E.E.'s testimony resulted in extreme prejudice that was compounded when the prosecutor later referenced the

allegations during closing. During closing, the prosecutor told the jury: "[T]he only time that there was any previous physical altercation, the defendant started it. He started shoving [E.E.]."

We disagree that E.E.'s testimony coupled with the prosecutor's reference to the earlier incident was enough to sway the outcome of the proceedings. Even without E.E.'s testimony about the prior incident, overwhelming and undisputed evidence exists that Pine-Nelson assaulted E.E. in the present case. Pine-Nelson, Bounds, and E.E. all testified to the same chain of events: that Pine-Nelson approached E.E., that there were blows exchanged between the two of them, and that Pine-Nelson was on top of E.E. and hitting him. We also note that E.E.'s later testimony about the earlier incident was much shorter, did not involve any exchange of blows, and was not as descriptive as his testimony about the incident at issue in the present case. Similarly, the prosecutor's reference to a prior incident was only in passing; it was not a repeated theme throughout closing argument and was unlikely to have altered the outcome of trial.

2. Testimony About Prior Assault on Bounds

Pine-Nelson next contends that his counsel was deficient for not objecting to E.E.'s testimony that his mother said Pine-Nelson had hit her, which he contends was inadmissible hearsay that should have been excluded under ER 404(b). The State counters that such testimony was admissible under the res gestae exception. We agree with the State.

Res gestae evidence is evidence " 'admissible to complete the story of a crime or to provide the immediate context for events close in both time and place to the charged crime.' " State v. Dillon, 12 Wn. App. 2d 133, 148, 456 P.3d 1199 (2020) (quoting State v. Lillard, 122 Wn. App. 422, 432, 93 P.3d 969 (2004)). "Such evidence is not of *other* misconduct of the type addressed in ER 404(b)." State v. Sullivan, 18 Wn. App. 2d 225, 237, 491 P.3d 176 (2021).

Here, E.E.'s testimony that he heard Bounds say, "You put your hands on me, you hurt me," to Pine-Nelson provides context for the altercation between E.E. and Pine-Nelson. Bounds's statement triggered E.E. to tell Pine-Nelson, "If you put your hands on my mom, you're dead." Because the testimony explained why Pine-Nelson and E.E. were fighting, it provided immediate context for the charged crime. Such testimony was admissible under the res gestae exception and any objection to the testimony would likely have been overruled. Therefore, Pine-Nelson's counsel was not deficient for failing to object. And because counsel was not deficient, we conclude that Pine-Nelson suffered no prejudice.

Prosecutorial Misconduct

Pine-Nelson also asserts that the prosecutor committed misconduct during closing argument by mentioning domestic violence and child abuse, by disparaging defense counsel, and by misstating the burden of proof. Because Pine-Nelson fails to show that this conduct was so flagrant and ill-intentioned as to result in incurable prejudice, we disagree.

We review claims of prosecutorial misconduct for an abuse of discretion. State v. Brett, 126 Wn.2d 136, 174-75, 892 P.2d 29 (1995). To prevail on a claim

of prosecutorial misconduct, a defendant must establish " 'that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial.' " State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011) (internal quotation marks omitted) (quoting State v. Magers, 164 Wn.2d, 174, 191, 189 P.3d 126 (2008) (plurality opinion)). However, when a defendant does not object to improper conduct at trial, the error is waived on appeal unless the defendant shows that the prosecutor's conduct "is 'so flagrant and ill-intentioned that it cause[d] an enduring and resulting prejudice that could not have been neutralized by a curative instruction.' " In re Pers. Restraint of Lui, 188 Wn.2d 525, 539, 397 P.3d 90 (2017) (alteration in original) (quoting In re Pers. Restraint of Caldellis, 187 Wn.2d 127, 143, 385 P.3d 135 (2016)). "In other words, the defendant who did not object must show the improper conduct resulted in *incurable* prejudice." State v. Zamora, 199 Wn.2d 698, 709, 512 P.3d 512 (2022).

1. Statements About Child Abuse and Domestic Violence During Closing Argument

Pine-Nelson first argues that the prosecutor's statements during closing argument about domestic violence and child abuse were designed to deliberately inflame the jury. We disagree.

"During closing argument, prosecutors have 'wide latitude to argue reasonable inferences from the evidence,' but they 'must seek convictions based only on probative evidence and sound reason.' " State v. Loughbom, 196 Wn.2d 64, 76-77, 470 P.3d 499 (2020) (internal quotation marks omitted) (quoting State

v. Glasmann, 175 Wn.2d 696, 704, 286 P.3d 673 (2012)). A prosecutor's statements during closing argument should be viewed in "context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). " 'The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.' " Glasmann, 175 Wn.2d at 704 (quoting AM. BAR ASS'N, Standards for Criminal Justice std. 3-5.8(c) (2d ed. 1980)).

Here, Pine-Nelson contends that the prosecutor inflamed the jury by discussing themes of domestic violence and child abuse where Pine-Nelson was not charged with a crime related to domestic violence. But Pine-Nelson *was* charged with a such a crime: he was charged with one count of violating a domestic violence no-contact order that protected E.E., a minor child. And contrary to Pine-Nelson's assertion that the prosecutor's argument painted Pine-Nelson as a "serial abuser," we note that the prosecutor mentioned the phrases "domestic violence" and "child abuse" a handful of times only at the beginning of closing argument.[1]

Moreover, we note that the testimony at trial also supports an inference that this is a case about domestic violence involving a child. E.E., Bounds, and

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[1] During closing argument, the prosecutor stated:

> When we hear words and phrases like domestic violence, domestic abuse, child abuse, we get this idea in our head of what we think that means. We hear "domestic violence," we think maybe one spouse abusing another spouse. We hear "child abuse," we think of maybe an adult beating on a small child who is unable to defend themselves. This case represents what those principles look like when that child is old enough to try to defend himself.

Pine-Nelson all testified as to the same chain of events involving an altercation between Pine-Nelson (who is like a stepfather to E.E.) and E.E. (who had just turned 16 years old at the time). Because domestic violence was mentioned infrequently and because the evidence and issues involved indicated that this was a case about domestic violence, we disagree with Pine-Nelson that the prosecutor's conduct in mentioning domestic violence and child abuse during closing was so flagrant and ill-intentioned as to cause incurable prejudice.

2. Impugning Defense Counsel

Pine-Nelson next contends that the prosecutor impugned defense counsel during closing argument by remarking that it was "suspicious" that Bounds refused to meet with the State before meeting with defense counsel. We are unpersuaded.

"It is improper for the prosecutor to disparagingly comment on defense counsel's role or impugn the defense lawyer's integrity." Thorgerson, 172 Wn.2d at 451. For example, referring to defense counsel's presentation as "bogus," involving "sleight of hand," or as "crock" impugns defense counsel because such terms imply deception and dishonesty. State v. Lindsay, 180 Wn.2d 423, 433-34, 326 P.3d 125 (2014).

Here, during closing argument, the prosecutor highlighted Bounds's lack of responsiveness:

> You heard about my office's attempts to get in contact with her—numerous phone calls, sending an investigator out multiple times, leaving letters—everything. And you heard—and she admitted all of this—you heard that, as of the moment we started this trial, I had never been able to talk to her. And then all of a

> sudden, at 3:00 on Monday, she shows up in the courtroom. No word.
>
> And when asked why she came here, the defendant asked her to. No cooperation with my office. No contact with my office. She was very confusing and vague about whether she knew this trial was going on—she obviously knew this trial was going on. She obviously did not want to show up and participate, but she did when the defendant asked her to show up.
>
> . . .
>
> When she did show up here, I asked her, you know, can I go talk to you, you know, do you mind coming over to my office so we request to do a quick interview?
>
> Well, I'm going to talk to, you know, I'm going to talk to Nicholas first and Mr. Roth. I'm not suggesting by any means that Mr. Roth did anything untoward, right, but the suspicious nature of this meeting beforehand with the defendant, knowing that she's about to come over and be interview[ed] by me, and the first time we ever hear any of her side of anything is 3:30 on Monday. This is the first time we're hearing, "Well, I didn't see or hear anything." The first time we've heard, "I must have inadvertently took this note over."

These statements refer to Bounds's credibility and potential bias and are not intended to impugn defense counsel. The prosecutor's use of the word "suspicious" referred to Bounds's actions, not those of defense counsel. Also, the prosecutor's statements did not imply, as Pine-Nelson suggests, that the prosecutor's office is the "arbiter of witness truth." Instead, these statements highlighted what the jury should have considered in judging Bounds's credibility. Because the prosecutor's statements did not impugn defense counsel, we disagree that they constituted misconduct.

3. Whether the Prosecutor Misstated the Burden of Proof

Pine-Nelson also asserts that the prosecutor diluted the burden of proof and the presumption of innocence by telling jurors that the State only needed to

prove the elements of the crimes charged and by telling the jurors that Pine-Nelson did not get any "extra" benefit of the doubt. We disagree.

"[I]t is an unassailable principle that the burden is on the State to prove every element and that the defendant is entitled to the benefit of any reasonable doubt. It is error for the State to suggest otherwise." State v. Warren, 165 Wn.2d 17, 26-27, 195 P.3d 940 (2008).

Pine-Nelson contends that the prosecutor urged the jury to disregard the presumption of innocence by telling the jury: "Now, [Pine-Nelson] testified, and you judge his testimony, his credibility exactly the same way as you would anybody else's. He doesn't get any extra weight. He doesn't get any extra benefit of the doubt." But these statements do not undermine the presumption of innocence; they speak to how the jury is to judge Pine-Nelson's credibility. The comments about "extra weight" and "extra benefit of the doubt," taken in context, were merely an inarticulate way of telling the jury that Pine-Nelson's testimony was to be scrutinized in the same manner as testimony from any other witness. This is not an inaccurate statement of law, and therefore, not misconduct.

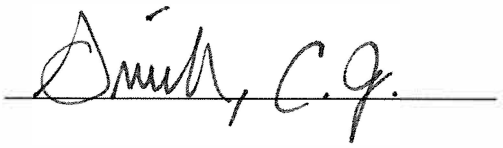
Pine-Nelson also maintains that the prosecutor misstated the burden of proof by telling the jury that the State only had to prove the elements in the to-convict instructions and the self-defense instruction beyond a reasonable doubt. Instead, Pine-Nelson contends that the prosecutor had to prove every element of the charged crimes beyond a reasonable doubt and that this "necessarily includes the definitions for the elements." This is a misstatement of law and Pine-Nelson provides no authority for this proposition. The State's burden is to

prove the essential elements of the crimes charged; this does not necessarily include definitions of terms within the jury instructions.

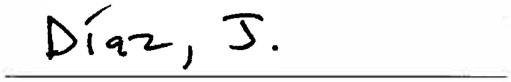
4. Cumulative Prejudice

Finally, Pine-Nelson maintains that even if a single instance of misconduct was not prejudicial, the cumulative effect of multiple alleged instances of misconduct was incurably prejudicial. We disagree. Because none of the prosecutor's statements were prejudicial, the statements taken together are not incurably prejudicial.

Affirmed.



WE CONCUR:



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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. 85494-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Nathaniel Block
[nblock@co.skagit.wa.us]
Skagit County Prosecuting Attorney
[skagitappeals@co.skagit.wa.us]

☐ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Paralegal
Washington Appellate Project

Date: July 23, 2024

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