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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. JORGE LUIS ACEVEDO, Appellant.	)	No. 41161-3-III UNPUBLISHED OPINION

COONEY, A.C.J. — Jorge Acevedo was charged with robbery in the first degree with a deadly weapon enhancement. A jury found him guilty and returned a special finding that he was armed with a deadly weapon during the commission of the offense. On appeal, Mr. Acevedo contends that (1) the trial court erred in denying his motion to dismiss for governmental misconduct, (2) the prosecutor committed misconduct by making improper remarks during his opening statement and closing argument, and (3) his attorney was ineffective by failing to object to those remarks and by not requesting a lesser-included theft instruction. We disagree with Mr. Acevedo's arguments and affirm.

BACKGROUND

On December 20, 2023, Mr. Acevedo entered an Albertsons grocery store in Pasco, Washington, and attempted to steal a rotisserie chicken, Hawaiian sweet rolls, and a bag of potato chips. As Mr. Acevedo exited the store, loss prevention officers Gabriel Martinez and Patricio Martinez[1] confronted him. Mr. Acevedo returned the rotisserie chicken and Hawaiian sweet rolls to the officers. The confrontation then escalated and Mr. Acevedo reached into his pocket, produced an object, and told Gabriel and Patricio that he was "going to fuck them up." Verbatim Tr. of Proc. (VTP) at 159. Mr. Acevedo fled with the bag of potato chips still concealed in his jacket.

Patricio reported the incident to law enforcement. Officer Mario Becho responded, interviewed the loss prevention officers, and obtained the surveillance video and photographs Gabriel took of Mr. Acevedo. After viewing the video and photographs, Officer Becho recognized the suspect as Mr. Acevedo. The State charged Mr. Acevedo with robbery in the first degree with a deadly weapon enhancement. The case proceeded to a jury trial.

During voir dire, the court advised the venire that the State bore the burden of proving beyond a reasonable doubt that Mr. Acevedo committed robbery in the first degree and the deadly weapon enhancement. The court further explained that Mr.

[1] Gabriel Martinez and Patricio Martinez are brothers who share the same surname. We refer to them by their first names for clarity. No disrespect is intended.

Acevedo had no burden to prove the existence of reasonable doubt and that he was presumed innocent throughout the trial. The court then empaneled the petit jury. Before opening statements, the court instructed the jury to decide the case based solely on the evidence admitted in the courtroom and the court's instructions on the law. The jury was also instructed that counsels' remarks were not evidence and to "disregard anything the lawyers say that is at odds with the evidence or the law in my instructions." VTP at 40.

In its opening statement, the prosecutor told the jury, "The State's going to call former Officer Mario Becho. 28 years on the service, retired after 28 years, absolutely he got out of it—honorably. This case isn't about anything that Officer Becho did on December 20th." VTP at 46-47. In his opening statement, Mr. Acevedo's attorney asserted that the State would be unable to prove the "use or threaten[ed] use of immediate force" element of robbery:

> The evidence will not show that my client used a weapon or a threat or anything else to take and carry away the property. My client was getting away with it until he was confronted by Loss Prevention personnel.
>
> And that's an important distinction, ladies and gentlemen, because if he used the threat of force or the fear of force to try and take the property, we'd be looking at something different. But he didn't; he gave it back when confronted and then proceeded to argue with them prior to leaving the scene without the items.

VTP at 48.

The State first called Patricio as a witness. He testified that he worked as a loss prevention associate for Albertsons in December 2023. According to Patricio, his

primary duty was to confront suspected shoplifters and "verbally talk to them about it." VTP at 52. He testified that he and Gabriel confronted Mr. Acevedo after observing him take potato chips, a rotisserie chicken, and Hawaiian sweet rolls. Gabriel photographed Mr. Acevedo before making verbal contact.

Patricio testified that Mr. Acevedo became aggressive and began shouting and swearing. Patrico further testified that Mr. Acevedo's fist was clenched and that he "saw just the blade [of a knife] protruding out of his clenched fist," which was "about like four inches." VTP at 54. Patricio told Mr. Acevedo he had not returned all of the merchandise, and Mr. Acevedo responded aggressively by yelling, swearing, and threatening to "shank" him. VTP at 55.

During Patricio's testimony, the court admitted three photographs: one depicting Mr. Acevedo walking away while apparently clenching something in his hand and two depicting the vehicle Mr. Acevedo used to leave the area. On cross-examination, Patricio testified that he prepared an incident report for his employer and believed it had been included with the police report. He could not confirm, however, that he personally provided the report to law enforcement.

The State next called Gabriel. The State published a screenshot from the surveillance video, and Gabriel identified the suspect as Mr. Acevedo. Gabriel testified that, after he and Patricio confronted Mr. Acevedo, Mr. Acevedo became aggressive and threatened to "shank[]" both of them. VTP at 93. Gabriel further testified that they were

unable to recover the knife or all of the merchandise. On cross-examination, Gabriel testified that loss prevention officers typically prepare shoplifting reports and that Patricio wrote a report and submitted it to law enforcement on the day of the incident.

Albertsons loss prevention agent Haylee Schneider likewise testified that Patricio prepared a report "for [her] system" and that both "Patricio and Gabriel gave a report to the [Police Department]." VTP at 125.

Officer Becho testified that he worked for the Pasco Police Department "for just over 28 years" and had "just recently retired February 1st." VTP at 132. Officer Becho stated he did not recall receiving the report Patricio prepared and it was not attached to his report.

The State rested after Officer Becho's testimony. Defense counsel then moved to dismiss because the defense had not received Patricio's report.[2] Counsel argued that Mr. Acevedo's right to a fair trial was prejudiced by the absence of the report because the report could have informed witness examinations and aided in the defense's investigation. Counsel asserted that the State should have produced the report in discovery, and either had, or should have had, access to it. Although counsel acknowledged the State did not intentionally withhold the report, he argued that the

[2] Mr. Acevedo also moved to dismiss based on the defense's nonreceipt of Officer Becho's body-worn camera recording. On appeal, however, he asserts governmental misconduct only as to the missing report, not the body camera recording.

circumstances nevertheless deprived Mr. Acevedo of the ability to fully develop his defense.

The State responded that it was unaware that any internal report existed and noted that Officer Becho testified that any report would have been attached to his police report had it been provided. The State also argued there was no evidence the report was within the government's possession or control, and the government has no obligation to "get everything under the sun and be aware of everything under the sun." VTP at 148. The court found there was insufficient evidence to conclude that the State or law enforcement had received the report and denied Mr. Acevedo's motion to dismiss.

Mr. Acevedo testified in his own defense. He stated that he entered Albertsons, shoplifted items, and was aggressively confronted by Gabriel and Patricio as he attempted to leave. He admitted to taking merchandise, including a bag of chips that he put in his pocket. Mr. Acevedo testified that he felt threatened because the loss prevention officers were "aggressive." VTP at 158. He acknowledged that he told them "to back up or I'm going to fuck them up." VTP at 159. He testified that he forgot about the chips in his coat in the heat of the moment and tried to leave as quickly as possible because he believed the encounter would continue to escalate. Mr. Acevedo denied having a knife and testified that he only had a "vape." VTP at 160. He conceded that his conduct could have been perceived as threatening but maintained that he was trying to

leave as the loss prevention officers continued to act aggressively toward him. Defense counsel also questioned him about the brevity of the encounter.

On cross-examination, the prosecutor impeached Mr. Acevedo's credibility with a prior conviction for making false statements to law enforcement and two prior convictions for possession of a stolen motor vehicle. Mr. Acevedo also acknowledged that he fled Albertsons, in part, to avoid going to jail. He again denied possessing a knife during the encounter.

After the close of evidence, the court instructed the jury on the law, including the following:

> First, it is [your] duty to decide the facts in this case based upon the evidence presented to you during this trial. It is also your duty to accept the law from my Instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my Instructions to the facts that you decide have been proved and in this way decide the case. . . . The evidence that you are to consider during your deliberations consists of testimony that you have heard from witnesses and the exhibits that I have admitted during the trial. If evidence was not admitted or was stricken from the record, you are not to consider it in reaching your verdict.

VTP at 189-90. The court further instructed the jury that it was "the sole judges of the credibility of each witness" and must determine the "value or weight to be given to the testimony of each witness." VTP at 191-92. The court also reminded the jury that the "lawyers' statements are not evidence" and that the State "has the burden of proving each element of the crime beyond a reasonable doubt." VTP at 192-93.

During closing argument, the prosecutor stated that, following the shoplifting incident:

> [Patricio] has since got his Master's and [is] now involved in Education. Very mild-mannered, kind of quiet—I was having a hard time hearing him. When you go back and think about his testimony, think about Patricio and think if he was a—a violent guy, a real aggressive guy.

VTP at 205. The prosecutor also addressed Officer Becho's testimony, noting that Officer Becho "retired after 28 years, honorably retired." VTP at 207. The prosecutor further argued that Officer Becho testified in a "very matter-of-fact" manner and "did not seem, again, like an aggressive guy," adding that Officer Becho was "just going to tell you how it is." VTP at 207.

The prosecutor then walked through the elements of robbery and argued how the evidence established each element. Addressing the "retain possession" element, the prosecutor analogized the case to a bank robbery:

> Retain possession, prevent, or overcome resistance to the taking—so what are we talking about there? What we're saying there is that the taking was against the person's will—here we have a couple different—we have Gabriel and Patricio were obviously working on behalf of Albertsons, which corporate persons is the ones who actually own that property, but even if it isn't technically something that Patricio and Gabriel own specifically, they were still protecting it, right?
>
> And the same when someone might be a bank teller at a bank or work security at a bank—someone comes in and points a gun in your face and says give me the money in the register, right? You're the victim, as is the bank. It's not your money in the register, but you're the one with the gun pointed in your face.

VTP at 211-12. In addressing the alleged threat of violence, the prosecutor argued, "Obviously, [it is] violence to tell someone that you're going to shank them. I have a couple kids, I don't have to tell them I'm going to F them up. I'm sure I will do that to them eventually, but they're not very old and I'm hoping I don't (indiscernible), but right?" VTP at 212. The prosecutor then concluded his argument by stating,

> I'll bring up those issues again, if I feel like I need to. I don't want to bludgeon a dead horse, okay?
>
> That being said, the fingers when [Mr. Acevedo] pointed at Patricio Martinez; when he pointed at Gabriel Martinez; he pointed at Albertsons; he pointed at Haylee Schneider; he pointed at Officer Becho to blame (indiscernible) Mr. Acevedo. And that's why after the State is done with closing arguments, Defense goes.

VTP at 219.

During closing argument, defense counsel emphasized that Mr. Acevedo had forgotten about the bag of chips in his jacket by the time he left the store because the loss prevention officers were so aggressive toward him. Counsel argued the evidence did not show Mr. Acevedo used a weapon to threaten the loss prevention officers at that point because Mr. Acevedo was simply trying to leave. Counsel further argued that, to convict, the jury had to find the State proved beyond a reasonable doubt that Mr. Acevedo intended to steal the bag of potato chips.

Defense counsel also highlighted what he characterized as weaknesses in the State's case, including (1) a missing report, (2) the absence of a body-worn camera recording, (3) the lack of exterior video capturing the confrontation, (4) conflicting

evidence about whether Mr. Acevedo had a knife, and (5) the loss prevention officers' failure to follow de-escalation techniques, which counsel argued exacerbated the encounter.

During rebuttal, the prosecutor asserted that Mr. Acevedo should have anticipated a confrontation would follow because he knew he was shoplifting. The prosecutor also told the jury, "So I don't mean to be a little bit too direct, but I would trust what we've got here." VTP at 229. Defense counsel did not object during the State's closing arguments. The jury found Mr. Acevedo guilty of robbery in the first degree and returned a special verdict finding Mr. Acevedo was armed with a deadly weapon. The court sentenced Mr. Acevedo to 92 months of confinement followed by 18 months of community custody.

Mr. Acevedo timely appeals.

ANALYSIS

MOTION TO DISMISS

Mr. Acevedo contends the trial court erred by denying his motion to dismiss for governmental misconduct. We disagree.

A trial court may dismiss a criminal prosecution under CrR 8.3(b) when governmental misconduct has prejudiced the defendant's rights. To obtain dismissal, the defendant must prove by a preponderance of the evidence both (1) governmental misconduct and (2) actual prejudice resulting from that misconduct. *See State v.*

Salgado-Mendoza, 189 Wn.2d 420, 427, 403 P.3d 45 (2017); *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

Appellate courts review a trial court's ruling on a CrR 8.3(b) motion to dismiss for abuse of discretion. *See Salgado-Mendoza*, 189 Wn.2d at 427.[3] A trial court abuses its discretion only if its decision is "'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" *State v. Miller*, 159 Wn. App. 911, 918, 247 P.3d 457 (2011) (quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). "A decision is based 'on untenable grounds' or made 'for untenable reasons' if it rests on facts unsupported in the record or was reached by applying the wrong legal standard." *Rohrich*, 149 Wn.2d at 654 (quoting *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995)).

"'[G]overnmental misconduct' need not be of an evil or dishonest nature, simple mismanagement is sufficient." *State v. Dailey*, 93 Wn.2d 454, 457, 610 P.2d 357 (1980) (citing *State v. Sulgrove*, 19 Wn. App. 860, 578 P.2d 74 (1978)); *State v. Oppelt*, 172 Wn.2d 285, 297, 257 P.3d 653 (2011). Under CrR 4.7(a)(1), the prosecutor must disclose certain information "within [the prosecutor's] possession or control no later than the

[3] Although *Salgado-Mendoza* addressed governmental misconduct under CrRLJ 8.3(b), that rule is identical to CrR 8.3(b). The court in *Salgado-Mendoza* also cited cases analyzing CrR 8.3(b). 189 Wn.2d at 432; *see also City of Seattle v. Holifield*, 170 Wn.2d 230, 238, 240 P.3d 1162 (2010) (applying past reasoning about CrR 8.3(b) to facts involving CrRLJ 8.3(b) because "[t]he language of CrR 8.3(b) is identical to CrRLJ 8.3(b), the rule before us here").

omnibus hearing." That disclosure includes "the names . . . of persons whom the prosecuting attorney intends to call as witnesses at the . . . trial, together with any written or recorded statements and the substance of any oral statements of such witnesses." CrR 4.7(a)(1)(i). The prosecutor's disclosure obligation, however, "is limited to material and information within the knowledge, possession or control of members of the prosecuting attorney's staff." CrR 4.7(a)(4).

If discoverable information is in the possession of another person, the prosecutor must, upon request, make a good faith effort to obtain and provide it to the defense. CrR 4.7(d); *see also* CrR 4.7(h)(7)(i). A "[v]iolation of the State's discovery obligations can support a finding of governmental misconduct." *Salgado-Mendoza*, 189 Wn.2d at 429. The State, however, has no duty to disclose information it is unaware of or does not possess or control. *State v. Mullen*, 171 Wn.2d 881, 895, 259 P.3d 158 (2011).

To establish actual prejudice, the defendant must show the alleged error "'had practical and identifiable consequences in the trial of the case.'" *State v. WWJ Corp.*, 138 Wn.2d 595, 603, 980 P.2d 1257 (1999) (quoting *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992)). In the dismissal context, prejudice exists when delayed disclosure interjects "new facts" shortly before trial, forcing the defendant to choose between the right to a speedy trial and the right to be represented by adequately prepared counsel. *Salgado-Mendoza*, 189 Wn.2d at 432 (citing *State v. Price*, 94 Wn.2d 810, 814,

620 P.2d 994 (1980)). The defendant bears the burden of showing how the late disclosure materially prejudiced the defense. *Id.* at 436.

Mr. Acevedo argues the State committed governmental misconduct by failing to disclose Patricio's report. He contends that, even if the prosecutor was unaware the report existed, the nondisclosure still constitutes unintentional misconduct because the State has a continuing duty to provide discovery. Mr. Acevedo further asserts he was prejudiced because the late revelation of the report forced him to choose between competing constitutional rights and his right to representation by adequately prepared counsel.

The State responds that no governmental misconduct occurred because the report was neither within the State's possession or control, nor known to the prosecution. The State further argues that, even if nondisclosure could be characterized as misconduct, Mr. Acevedo has not shown actual prejudice. His claimed harms are speculative, and he did not seek a continuance—an available remedy that would not have required him to forgo his speedy trial rights. We conclude the State's failure to disclose a report that it did not know existed, and did not possess or control, does not constitute governmental misconduct.

After the State rested, Mr. Acevedo moved to dismiss on the grounds that he had not received Patricio's report. The court denied the motion. At trial, Patricio testified that he prepared an incident report for Albertsons. Ms. Schneider likewise confirmed that

Patricio wrote a report. Gabriel testified that Patricio wrote the report and submitted it to law enforcement. Patricio, however, could not confirm that he provided the report to law enforcement. Officer Becho testified that he did not recall receiving any written reports by Patricio.

Mr. Acevedo concedes the prosecutor was unaware the report existed but contends the prosecutor nevertheless "should have asked for and obtained this written report before trial." Br. of Appellant at 15. That argument fails because the State's discovery obligations do not extend to materials outside of the State's possession or control. Here, the report was Albertsons's document, not a record of the State. Officer Becho testified he did not recall receiving any written report from Patricio and that, had he received one, it would have been attached to his police report. The record establishes the State neither possessed the report nor knew of its existence.

Mr. Acevedo's claim also fails under CrR 4.7(d), which requires a defendant to request and designate materials in possession of a third party that the defendant seeks to obtain through the prosecutor. Although Mr. Acevedo generally sought discovery, the record reflects the State was unaware the Albertsons report existed, it did not possess it, and Mr. Acevedo did not specifically request or designate the report under CrR 4.7(d). On these facts, the court had tenable grounds to deny Mr. Acevedo's motion to dismiss. Accordingly, the court did not abuse its discretion in denying the motion. Because there

is no governmental misconduct, we need not address Mr. Acevedo's arguments related to his competing constitutional rights claims.

PROSECUTORIAL MISCONDUCT

Mr. Acevedo contends his conviction must be reversed because the prosecutor repeatedly made improper, prejudicial statements that were so flagrant and ill-intentioned that no curative instruction could have remedied the harm. The State responds that the challenged statements were not misconduct and, even if any were improper, any prejudice could have been cured by an instruction. We agree with the State.

Prosecutorial misconduct warrants 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) (quoting *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009)). The defendant bears the burden of proving that the prosecutor's conduct was both improper and prejudicial. *State v. Emery*, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). In closing argument, the prosecutor must confine argument to the law as set out in the court's instructions. *State v. Walker*, 164 Wn. App. 724, 736, 265 P.3d 191 (2011). A prosecutor acts improperly by misstating or mischaracterizing the law and where there is a substantial likelihood that the misstatement affected the verdict. *Id.*

In evaluating a claim of prosecutorial misconduct, the challenged conduct is not considered in isolation. *Monday*, 171 Wn.2d at 675. Rather, the court examines the prosecutor's remarks in the "full trial context, including the evidence presented, 'the

context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.'" *Id.* (internal quotation marks omitted) (quoting *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)). This contextual review focuses on prejudice because misconduct warrants relief only if there is a substantial likelihood the misconduct affected the verdict. *Id.* Accordingly, the inquiry centers not merely on what was said or done, but on the effect of the challenged conduct. *Emery*, 174 Wn.2d at 762.

If a defendant fails to object at trial to the prosecutor's alleged misconduct, then "the defendant is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." *Id.* at 760-61. "Under this heightened standard, the defendant must show that (1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.'" *Id.* at 761 (quoting *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)).

Mr. Acevedo argues the prosecutor committed misconduct by (1) improperly vouching for witnesses, (2) making inflammatory statements, (3) shifting the burden of proof to Mr. Acevedo, and (4) expressing an improper personal opinion. He further contends the alleged misconduct cumulatively prejudiced his right to a fair trial. We address each contention in turn.

Vouching

Mr. Acevedo contends the prosecutor improperly vouched for the credibility of Officer Becho and Patricio. "Improper vouching generally occurs (1) if the prosecutor expresses his or her personal belief as to the veracity of the witness or (2) if the prosecutor indicates that evidence not presented at trial supports the witness's testimony." *State v. Ish*, 170 Wn.2d 189, 196, 241 P.3d 389 (2010). Vouching is also improper when the prosecutor "places the prestige of the government behind the witness[es]." *State v. Rodriguez-Perez*, 1 Wn. App. 2d 448, 458-59, 406 P.3d 658 (2017). A prosecutor may, however, argue "reasonable inferences from the evidence, including evidence respecting the credibility of witnesses." *Thorgerson*, 172 Wn.2d at 448.

Mr. Acevedo contends the prosecutor improperly vouched for Officer Becho by telling the jury in his opening statement that Officer Becho "absolutely" retired "honorably." VTP at 46. According to Mr. Acevedo, this argument "impl[ied] that [Officer Becho] did nothing wrong in this investigation." Br. of Appellant at 22. In closing argument, the prosecutor returned to the same theme, again stating that Officer Becho retired honorably and that "[Officer Becho is] just going to tell you how it is." VTP at 207. Mr. Acevedo did not object to either remark.

Mr. Acevedo contends these remarks conveyed to the jury that the Pasco Police Department permitted Officer Becho to retire "honorably," thereby implying the department would not have done so had he engaged in wrongdoing. Br. of Appellant at

23. He further argues the prosecutor tied that purported departmental endorsement to Officer Becho's testimony in this case, inviting jurors to credit Officer Becho because of his "honorable" retirement. Br. of Appellant at 23.

Mr. Acevedo correctly observes that the record contains no evidence Officer Becho retired "honorably." Officer Becho testified only that he retired after 28 years of service. To the extent the prosecutor's use of "honorably" suggested facts not in evidence, the remark was improper. However, it is not apparent that the isolated adjective amounted to an expression of personal belief in veracity or an invocation of evidence outside the record to bolster the officer's credibility. Nor does the record support Mr. Acevedo's speculation that the jury would infer the Pasco Police Department would not have permitted an "honorable" retirement had Officer Becho done something wrong. Even assuming the remark constituted vouching, any misconduct was limited and not pervasive or inflammatory, and it was not so flagrant and ill-intentioned that a timely curative instruction could not have remedied any potential prejudice.

Likewise, the prosecutor's remark that Officer Becho would "tell them how it is" does not amount to improper vouching. VTP at 207. It was a brief, colloquial comment and is readily distinguishable from statements held to be vouching. *See State v. Jones*, 144 Wn. App. 284, 294, 183 P.3d 307 (2008).

Mr. Acevedo also contends the prosecutor vouched for Patricio during closing argument by describing him as "mild-mannered" and stating that he had since earned his

master's degree. VTP at 205. Patricio did not testify about his education. Mr. Acevedo argues that the prosecutor's reference to the degree injected facts not in evidence to bolster Patricio's credibility and to support the State's position that Patricio was not violent or aggressive.

Mr. Acevedo is correct that the record contains no evidence Patricio obtained a master's degree; that assertion came solely from the prosecutor. Because the prosecutor referenced a fact outside the evidence, the remark was improper. However, the remark was isolated and not so flagrant or ill-intentioned that any minimal prejudice could not have been cured by an instruction. Patricio's relevance to the case concerned his actions and observations as a loss prevention officer during the incident. Any later academic achievement does not meaningfully bear on his perception, memory, or demeanor at the time, and thus does not create a substantial likelihood of affecting the verdict.

The prosecutor's description of Patricio as "mild-mannered" was a reasonable inference from the evidence. Nothing in the record suggests Patricio was aggressive or loud in his testimony, and the jury could assess his demeanor for itself. In any event, the court expressly instructed the jury that it was "the sole judges of the credibility of each witness." CP at 37; VTP at 191.

Nor did the verdict turn on Officer Becho's or Patricio's credibility individually. The jury was presented with other evidence supporting the verdict, including Mr. Acevedo's own testimony where he admitted that he shoplifted and threatened Patricio

and Gabriel when confronted. Viewed in context, the prosecutor's brief remarks do not amount to vouching.

Alleged Inflammatory Statements

Mr. Acevedo contends the prosecutor made inflammatory remarks during closing argument. Prosecutors are afforded "'wide latitude' in closing argument, but their argument must be based on the evidence and must not misstate the applicable law." *State v. Crossguns*, 199 Wn.2d 282, 296-97, 505 P.3d 529 (2022). Washington courts also recognize that counsel may use analogies to help jurors understand and apply the law. *See State v. Barajas*, 143 Wn. App. 24, 40, 177 P.3d 106 (2007); *In re Pers. Restraint of Richmond*, 16 Wn. App. 2d 751, 756, 482 P.3d 971 (2021). When a prosecutor ties an analogy directly to the defendant, the prosecutor must choose their words carefully and avoid improper argument. *Barajas*, 143 Wn.2d at 40. Additionally, a prosecutor may not invite a verdict based on prejudice or passion by making arguments designed to inflame the jury. *In re Pers. Restraint of Glassmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012).

During closing argument, the prosecutor analogized the facts here to an armed bank robbery. Mr. Acevedo argues the prosecutor's use of first-person framing—"'[y]ou're the victim . . . you're the one with the gun pointed in your face'" was highly prejudicial and irrelevant because this case involved neither a bank robbery nor a firearm. Br. of Appellant at 27-28 (quoting VTP at 212). He also challenges the prosecutor's

remark, "I have a couple kids, I don't have to tell them I'm going to F them up." VTP at 212.

Mr. Acevedo relies on *State v. Pierce*, 169 Wn. App. 533, 280 P.3d 1158 (2012), where this court held the prosecutor committed misconduct by using first-person rhetoric that appealed to jurors' emotions and by presenting facts not in evidence. In *Pierce*, the prosecutor not only spoke in the first person but also construed a speculative narrative about what the defendant was thinking before the alleged double murder. *Id.* at 556. This court concluded the comments served no legitimate purpose other than to inflame the jury's emotions. *Id.* at 555.

Mr. Acevedo's reliance on *Pierce* is misplaced. Unlike the prosecutor in *Pierce*, here, the prosecutor did not invite the jury to convict based on a speculative narrative about what Mr. Acevedo was thinking or intending beyond the evidence. Rather, the hypothetical was offered to illustrate the "retain possession" component of robbery. In context, the analogy served an explanatory purpose tied to the elements the jury was required to apply, not an improper appeal to passion or prejudice. Even if the comparison was inartful, it was an isolated remark that could have been addressed by a timely objection and curative instruction. Finally, the analogy did not misstate the law; it was used to explain how the "retain possession" element operates, not to alter the State's burden or the court's instructions.

As for the prosecutor's reference to his children, the purpose of the remark is not apparent from the record, and Mr. Acevedo is correct that it was irrelevant to any issue the jury was asked to decide. However, the statement was isolated and brief, and it was not so flagrant or ill-intentioned that any potential prejudice could not have been cured by a timely objection and a curative instruction.

Alleged Burden Shifting

Mr. Acevedo contends the prosecutor impermissibly shifted the burden of proof during closing argument. "A prosecutor commits misconduct if they shift the burden of proof to the defendant." *State v. Stotts*, 26 Wn. App. 2d 154, 170-71, 527 P.3d 842 (2023). A prosecutor does not necessarily shift the burden merely by criticizing or commenting on the defense's theory. *See State v. Russell*, 125 Wn.2d 24, 91, 882 P.2d 747 (1994).

Mr. Acevedo argues the prosecutor crossed the line when he told the jury that Mr. Acevedo was "point[ing] . . . finger[s]" at the other witnesses. VTP at 231, 219. He contends this framing suggested "there was something suspicious about Mr. Acevedo putting on a defense and questioning the State's evidence." Br. of Appellant at 30. He further emphasizes that "[t]he prosecutor made these statements in closing argument, not rebuttal, so they were not in response to arguments made by Mr. Acevedo." Br. of Appellant at 30.

The cited remarks do not amount to burden shifting. The court instructed the jury—both before opening statements and again before closing arguments—that the prosecutor bore the burden of proof. Against that backdrop, the prosecutor's "pointing fingers" comment was a fair response to the defense's theory and to Mr. Acevedo's own testimony, not an argument that Mr. Acevedo had to prove anything.

From the outset, the defense asserted Mr. Acevedo did not use or threaten force to remove property from Albertsons. Mr. Acevedo then testified that the loss prevention officers were the aggressors during the encounter. Consistent with that testimony, defense counsel argued in closing that the officers acted aggressively and failed to de-escalate as trained. Counsel further suggested that, given the intensity of the confrontation, Mr. Acevedo forgot the chips were in his jacket and made threats only because he felt threatened. In context, the prosecutor's remarks simply challenged that narrative and the credibility of Mr. Acevedo's account; they did not shift the burden of proof.

Although the prosecutor made the remarks in his initial closing argument rather than in rebuttal, Mr. Acevedo's testimony had already laid out the defense's narrative and effectively previewed the argument counsel would advance in summation. Even if the prosecutor's comments could be construed as burden shifting, any resulting prejudice was not so flagrant and ill-intentioned that it could not have been cured by a timely objection and a curative instruction.

Alleged Personal Opinion

Mr. Acevedo contends the prosecutor improperly injected his opinion about the strength of the State's case. Prosecutors have wide latitude in closing argument, but they may not argue facts not in evidence or express an opinion about the defendant's or a witness's credibility. *Glassman*, 175 Wn.2d at 706; *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984)). Given that latitude, argument is not misconduct unless "it is clear and unmistakable that counsel is not arguing an inference from the evidence but is expressing a personal opinion." *State v. Papadopoulos*, 34 Wn. App. 397, 400, 662 P.2d 59 (1983).

Mr. Acevedo contends the prosecutor crossed the line during rebuttal when he stated, "So I don't mean to be a little bit too direct, but I would trust what we've got here." VTP at 229. He relies on *State v. Case*, 49 Wn.2d 66, 298 P.2d 500 (1956), where our Supreme Court reversed a conviction because the prosecutor's misconduct was so flagrant that its prejudicial effect could not have been cured by an instruction. In *Case*, the defendant was convicted of carnal knowledge. *Id.* at 68. During closing argument, the prosecutor told the jury he had arranged for the complaining witness to stay with Jehovah's Witnesses because, "*in my good judgment these people were going to protect* [*the complaining witness*] *against this man*." *Id.* at 68-69. Defense counsel objected to the prosecutor injecting his opinion, but the trial court overruled the objection. *Id.* The

prosecutor then repeatedly and explicitly conveyed his personal belief in the defendant's guilt:

> 'I doubt in my mind that anyone at this point has any question in their mind about the guilt or innocence of this man. I doubt that you haven't already made up your mind. Now, you must have, as human beings. But if you haven't, don't hold it against me. I mean, that is my opinion about what this evidence shows and how clearly this evidence indicates that this girl has been violated. *This girl has been sexually attacked* by a person; by a man *by her father*. It is called statutory rape. Carnal knowledge is just a nice name for statutory rape. *This girl has been raped by her own father*. It is not a nice thing.'

Id. at 68.

The Supreme Court characterized the prosecutor's remarks as extremely prejudicial and unethical. *Id.* The prosecutor launched into what the Supreme Court called a "dissertation on sex deviation, which ha[d] no support in the record and [was] entirely extraneous." *Id.* at 69. Although defense counsel objected and the trial court directed the prosecutor to confine argument to the evidence, the prosecutor assured the court he would do so and then again strayed and returned to his discussion of the Jehovah's Witnesses. *Id.* at 69-70. The Supreme Court noted additional instances of improper argument not specifically enumerated. *Id.* Considering the cumulative effect of the prosecutor's repeated, egregious comments—including derogatory references to the defendant's character witnesses—the Supreme Court held the misconduct was so flagrant that "no instruction or series of instructions to disregard what he had said could have cured the prejudicial error." *See id.* at 73-74.

Unlike *Case*, the prosecutor's remark here was isolated and brief—"fleeting," as the State puts it. Resp't's Br. at 19. Even assuming the comment could be construed as an improper opinion, a single, passing remark does not warrant reversal. This record lacks the repeated, escalating pattern of unethical, extraneous argument present in *Case*. Nor did defense counsel object, request a curative instruction, or move for a mistrial. There is also no basis to conclude the remark had a cumulative prejudicial effect that could not have been remedied by an instruction. The State appropriately concedes that "such statements should be avoided." Resp't's Br. at 20. But viewed in the context of the State's entire closing argument, the challenged comment was not pervasive and was not so flagrant or ill-intentioned that a timely curative instruction could not have obviated any prejudice.

Alleged Cumulative Effect

Finally, Mr. Acevedo argues the prosecutor's alleged misconduct was so pervasive that its cumulative prejudicial effect could not have been cured by an instruction. "Under the cumulative error doctrine, a defendant may be entitled to a new trial when cumulative errors produce a trial that is fundamentally unfair." *Emery*, 174 Wn.2d at 766. That doctrine does not apply here. Even assuming some remarks were improper, they were isolated and minimal in context and did not deprive Mr. Acevedo of a fair trial. Moreover, none of the challenged statements were so flagrant or ill-intentioned that any

potential prejudice could not have been cured by a timely objection and curative instruction.

Accordingly, the prosecutor did not commit prejudicial misconduct, either individually or cumulatively, based on the statements Mr. Acevedo challenges.

INEFFECTIVE ASSISTANCE OF COUNSEL

Mr. Acevedo contends he received ineffective assistance of counsel because trial counsel (1) failed to object to the alleged prosecutorial misconduct discussed above, and (2) failed to request a lesser-included instruction on theft. The State responds that no prosecutorial misconduct occurred and that defense counsel's decision not to seek a lesser-included theft instruction was a legitimate trial strategy. We agree with the State.

Defendants have a constitutionally guaranteed right to effective assistance of counsel. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22; *State v. Lopez*, 190 Wn.2d 104, 115, 410 P.3d 1117 (2018). A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal. *State v. Nichols*, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007). Ineffective assistance of counsel claims are reviewed de novo. *State v. White*, 80 Wn. App. 406, 410, 907 P.2d 310 (1995).

In an ineffective assistance of counsel claim, the appellant bears the burden of showing (1) that his counsel's performance fell below an objective standard of reasonableness based on consideration of all the circumstances and, if so, (2) that there is a reasonable probability that but for counsel's poor performance, the outcome of the

proceedings would have been different. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If either element is not satisfied, the inquiry ends. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

A defendant alleging ineffective assistance of counsel bears the burden of showing deficient representation. *McFarland*, 127 Wn.2d at 335. In reviewing the record, there is a strong presumption that counsel's performance was reasonable. *Id.* "The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances." *Kimmelman v. Morrison*, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986). "When counsel's conduct can be characterized as legitimate trial strategy or tactics, [their] performance is not deficient." *Kyllo*, 166 Wn.2d at 863. "We can presume counsel did not request limiting instructions to avoid reemphasizing damaging evidence." *State v. Dow*, 162 Wn. App. 324, 335, 253 P.3d 476 (2011); *see also State v. Yarbrough*, 151 Wn. App. 66, 210 P.3d 1029 (2009) (failure to request a limiting instruction presumed to be a legitimate trial tactic not to reemphasize damaging evidence); *State v. Kloepper*, 179 Wn. App. 343, 356, 317 P.3d 1088 (2014) ("The decision to not object to or seek a cure for damaging evidence is a classic tactical decision.").

Even if we find that counsel's performance was deficient, a defendant must affirmatively prove prejudice. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). This requires more than simply showing that "the errors had some conceivable

effect on the outcome." *Strickland v. Washington*, 466 U.S. 668, 693, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Prejudice is demonstrated by showing that the proceedings would have been different but for counsel's deficient representation. *McFarland*, 127 Wn.2d at 337.

Failure to Object

Mr. Acevedo contends trial counsel rendered ineffective assistance by failing to object to the prosecutor's allegedly improper remarks. He argues this omission was deficient because reasonably competent counsel would have objected. He further asserts prejudice, claiming there is a reasonable probability the outcome would have been different had counsel objected and the court addressed the remarks.

If a defendant bases their claim of ineffective assistance of counsel on their attorney's failure to object, "'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 *State v. Crow*, 8 Wn. App. 2d 480, 508, 438 P.3d 541 (2019)). "A few or even several failures to object are not usually cause for finding that an attorney's conduct has fallen below the objective standard of conduct." *Id.* at 250. "'Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal.'" *Id.* at 248 (quoting *Crow*, 8 Wn. App. 2d at 508). But, if defense counsel fails to object to inadmissible evidence, then they have performed deficiently and reversal is required so long as the defendant can show the result of trial

would have been different without admission of the inadmissible evidence. *Id.* at 248-49. Counsel's failure to object can be a legitimate trial strategy because an objection could draw attention to the adverse evidence. *State v. Gladden*, 116 Wn. App. 561, 564, 66 P.3d 1095 (2003).

Even assuming some of the prosecutor's remarks were improper and objectionable, none was central to the State's case or likely to have affected the verdict. The jury heard extensive testimony about the confrontation, viewed a video recording of the theft, and heard Mr. Acevedo admit he shoplifted. In addition, Mr. Acevedo's credibility was impeached with prior crimes of dishonesty and his own testimony about violating the law in the past to avoid jail.

Nor has Mr. Acevedo shown deficient performance. Decisions about when to object are quintessentially tactical, and counsel may reasonably decline to object to avoid highlighting a remark for the jury. Mr. Acevedo therefore fails to overcome the strong presumption of effective representation. Because he cannot establish either deficient performance or resulting prejudice, his ineffective assistance claim fails.

Failure to Request a Lesser-Included Instruction

Mr. Acevedo next contends that his attorney was ineffective for failing to request a jury instruction for theft in the third degree, a lesser-included offense of robbery. "[A] defendant is entitled to a lesser included offense instruction if (1) each of the elements of the lesser offense is a necessary element of the offense charged (legal prong)

and (2) evidence in the case supports an inference that the lesser crime was committed (factual prong)." *State v. Coryell*, 197 Wn.2d 397, 400, 483 P.3d 98 (2021) (citing *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978)). "[T]hird degree theft is a lesser included offense of first degree robbery." *State v. Herrera*, 95 Wn. App. 328, 330 n.1, 977 P.2d 12 (1999). Mr. Acevedo contends that since he admitted to theft and his case allowed such an instruction, there was no strategic reason for his attorney not to request one.

Requests for lesser-included jury instructions offer a middle ground for jurors faced with either convicting a defendant or letting them go free. *State v. Bertrand*, 3 Wn.3d 116, 131, 546 P.3d 1020 (2024). They offer a "compromise verdict" where the defendant is convicted of a crime, just not the one the State charged. *Id.* "The inclusion or exclusion of lesser included offense instructions is a tactical decision for which defense attorneys require significant latitude." *State v. Grier*, 171 Wn.2d 17, 39, 246 P.3d 1260 (2011).

Mr. Acevedo acknowledges that counsel may strategically decline to request a lesser-included instruction to force the jury to choose between finding guilt on the charged offense and acquittal. He argues, however, that because he admitted to shoplifting, he did not present a "'complete innocence'" defense and therefore could only benefit from a compromise verdict on theft. Br. of Appellant at 47 (quoting *Bertrand*, 3 Wn.3d at 131).

That argument fails because acquittal on the robbery charge remained a realistic outcome. From the outset, the defense's theory was that the State could not prove the "use or threaten use of immediate force" element of robbery. VTP at 48. If the jury accepted that theory, it would have been required to acquit on robbery—regardless of Mr. Acevedo's admission to shoplifting. Thus, it is not accurate that Mr. Acevedo "only benefited" from the possibility of a compromise verdict. Br. of Appellant at 47. Counsel could reasonably conclude that requesting a lesser-included theft instruction would dilute the all-or-nothing strategy and provide the jury with an additional path to conviction. On this record, the decision not to request the lesser-included instruction was a legitimate tactical choice and does not establish ineffective assistance.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Cooney, A.C.J.

WE CONCUR:

Murphy, J.

Hill, J.