NO. 83589-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

EDWARD CARTE, JR.,

Appellant.

APPEAL FROM KING COUNTY SUPERIOR COURT

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. The prosecutor's lengthy closing argument included a single sentence suggesting Carte might have tailored his testimony to the trial evidence. Did Carte waive any potential error by failing to object below? Was any error harmless?

2. The prosecutor objected when defense counsel twice attempted to elicit hearsay during Carte's direct examination. Did the trial court correctly sustain these objections? Even if, *arguendo*, error occurred, was it harmless?

3. Did the trial court act within its discretion by admitting Cooper-McWade's hearsay statement to Deputy Damerow as an excited utterance? Was any error harmless when the challenged statement was cumulative to Cooper-McWade's live testimony?

4. Has Carte failed to establish cumulative error when multiple errors did not occur?

B. STATEMENT OF THE CASE

Morgan Cooper-McWade is a single mother of two young children, M.C. and C.W. RP 1210-12. The family lived in a small house near Ravensdale, Washington, where Cooper-McWade struggled to make ends meet working three jobs and juggling child-care. RP 1209, 1212, 1220. The COVID-19 pandemic "really, really hurt [Cooper-McWade's] finances," and the consequent accumulation of debt became "a huge looming stress." RP 1220.

Cooper-McWade met Carte through Facebook after he sent her an unsolicited friend request. RP 1214-16. They eventually met in person and were soon seeing each other daily, with Carte even accompanying Cooper-McWade and the children on family-style outings. RP 1219-23. At the time, Carte was living in a group home for recovering addicts. RP 1404.

Carte was initially "really supportive" of Cooper-McWade, assuring her that "[h]e could make the money

problems go away…[and] help with the kids." RP 1219-21. Carte moved into Cooper-McWade's home soon afterward. RP 1223. Although Cooper-McWade had "reservations" about the relationship, she also "needed the help…badly." RP 1226.

While Carte helped Cooper-McWade with childcare "every once in a while," his promises of financial assistance turned out to be greatly exaggerated. RP 1227-29. The relationship deteriorated quickly, and they were soon having "a lot of really explosive fights." RP 1232. Carte was extremely jealous, and he constantly accused Cooper-McWade of having "something going on with somebody somewhere." RP 1230-31, 1418.

1. OCTOBER 8, 2020.

Cooper-McWade was scheduled to work until 9 p.m. on October 8th while Carte watched her children. RP 1232-33. They had already been "fighting pretty badly" throughout the day, and the argument continued via text message during Cooper-McWade's shift. RP 1234. Cooper-McWade was

forced to leave work early when Carte sent her a text message implying he was suicidal and claiming he had overdosed on prescription drugs. RP 1234, 1415.

When Cooper-McWade returned home, she found Carte obviously intoxicated and her children asleep in their room. RP 1235, 1247. When Cooper-McWade texted a friend about the situation, Carte demanded to know who she was talking to and then wrestled the phone away from her. RP 1235. When Cooper-McWade refused to unlock her phone, Carte commanded her to "[p]ack [his] shit," and then "pulled [her] up by [her] neck and pushed [her] towards the [bed]room…" RP 1236, 1427.

Carte began throwing his belongings at Cooper-McWade, ordering her to "[g]et all of it" as he repeatedly kicked and shoved her. RP 1238. At one point, Carte told Cooper-McWade she made him "so fucking mad" and then grabbed her by the neck. RP 1239. Carte laughed as Cooper-McWade, unable to breathe, desperately tried to pry his hand off. RP 1239-41.

When Carte released his grip, Cooper-McWade went back to packing his things. RP 1239.

Carte showered Cooper-McWade with verbal abuse as she packed, calling her a "whore," accusing her of infidelity, and demanding to know why she could not "just show me love how I need it." RP 1239, 1247. Carte repeatedly worked himself into a rage, at which point he would continue assaulting Cooper-McWade. RP 1247. This pattern repeated itself 5-10 times "over the course of hours…[h]e would choke me, say nasty things to me, and then let me up…and then he would go right back on my neck…" RP 1249. Each time Carte would strangle Cooper-McWade until she became "really frantic," but let go before she lost consciousness. RP 1249.

Carte retained possession of Cooper-McWade's phone "the whole time." RP 1246. When Cooper-McWade tried to scream, Carte covered her mouth and threatened to "hurt [her] worse" unless she stopped. RP 1249. Carte also told Cooper-McWade he would kill her if she called the police, that he

would have his friends rape her first, and that it "would be slow and painful." RP 1247, 1251. Cooper-McWade believed that Carte was willing to kill her. RP 1251.

Carte eventually laid down on the bed and passed out. RP 1252. Cooper-McWade was able to discretely retrieve her phone from Carte's pocket and then went to sleep in her children's room. RP 1253. She did not call the police that night because she was afraid of what Carte might do. RP 1253.

The next morning, Carte acted like nothing had happened and told Cooper-McWade to just "forget about last night." RP 1253, 1287. Cooper-McWade left with her children and then texted Carte to move out, which he "did not take…very well." RP 1253. Carte did not leave the house until Cooper-McWade returned later that day with a male friend for protection. RP 1255.

Carte later messaged Cooper-McWade that he had "felt bad about what…happened…until you showed up with another dude." RP 1284. Carte also texted that "I know it doesn't

excuse what I did…I am willing to try and change…I don't like what I did. I don't like who I became." RP 1293-94. Carte attributed his actions to alcohol but claimed he was now sober: "I don't know if that's what happened, just me drinking, but I am not willing to risk it, so I am not drinking no more." RP 1295.

Cooper-McWade tried to end all contact with Carte but found him "extremely persistent." RP 1291. Carte repeatedly messaged her and offered to help with childcare. RP 1291-92. After ignoring Carte for several weeks, she resumed the relationship because she felt overwhelmed and "wanted to believe" that he had genuinely reformed. RP 1298-99. Carte attempted to take advantage of Cooper-McWade's desperation, sometimes conditioning his offers of financial assistance on her agreeing to perform degrading sexual acts. RP 1506-07, 1525.

Based on these facts, the State charged Carte with second degree assault (count 1) and felony harassment (count 2). RP

2048. The jury convicted Carte of both crimes as-charged. RP 2138; CP 346-47.

2. NOVEMBER 17, 2020.

Although Carte did not move back into Cooper-McWade's house, he often spent time there "to try to fix things and hang out to make things better." RP 1303. Cooper-McWade was closely acquainted with a woman named Luciana Argueta, who went by the nickname "Luigi." RP 1310. Although the relationship would later become romantic, Cooper-McWade and Argueta were still platonic friends on November 17th. RP 1310. Carte was nonetheless extremely jealous towards Argueta because he knew she was a lesbian and thus "automatically assumed that [Cooper-McWade] was cheating." RP 1311-12.

On November 17th, Carte became "irate" after discovering Cooper-McWade texting with Argueta. RP 1302-04. Carte then grabbed Cooper-McWade's phone and spat in her face several times. RP 1304-05, 1309. Carte also verbally abused Cooper-McWade, calling her "degrading names, telling

me I was disgusting, I was a whore, this, that." RP 1306. Carte left the house after Cooper-McWade started "screaming at the top of [her] lungs." RP 1306-07.

Cooper-McWade called 911 and responding police officers arrived shortly thereafter. RP 1083, 1090, 1096. Cooper-McWade was crying and appeared very frightened. RP 1092-93. The State later presented Facebook messages in which Carte appeared to admit spitting on Cooper-McWade, although he denied having written them at trial. RP 1956, 1980.

The State charged Carte with fourth degree assault (count 4) based on these facts, of which he was acquitted. RP 2053, 2138; CP 349.

3. NOVEMBER 30, 2020.

Cooper-McWade and Argueta began a short-lived romantic relationship in mid-November. RP 1310. They stopped seeing each other on November 24th after Argueta robbed and assaulted Cooper-McWade "pretty bad." RP 1313. Cooper-McWade then reached out to confide in Carte, who was

soon back living at her house. RP 1319. Despite the assault, Cooper-McWade soon resumed speaking with Argueta as well. RP 1318.

On November 30th, Carte became "extremely upset" after finding Cooper-McWade on the phone with Argueta. RP 1320. Cooper-McWade "instantly hung up," but Carte grabbed the phone from her and demanded to know who she was talking to. RP 1320. When Cooper-McWade refused to unlock her device for him, Carte "dragged" her into the bedroom by her neck. RP 1321, 1323. Argueta called back several times, but Carte repeatedly told her that Cooper-McWade was "busy" and then hung up. RP 1321.

Once in the bedroom, Carte began strangling Cooper-McWade with both hands. RP 1325. Cooper-McWade was unable to breathe for several seconds and began "seeing stars." RP 1327. As before, Carte would strangle Cooper-McWade for a few seconds at a time, just long "enough for [her] to panic." RP 1471-72. Cooper-McWade started screaming when Carte

released the pressure on her neck, prompting Carte to cover her mouth with his hand. RP 1327.

Cooper-McWade called out to C.W. for help as she was being assaulted. RP 1328, 1596. C.W. was woken up by Cooper-McWade shouting his name. RP 1596. He then recalled hearing "loud noises" and Cooper-McWade "saying stop." RP 1598. Cooper-McWade's younger son was living elsewhere at the time. RP 999, 1306.

Carte briefly calmed down at one point and returned Cooper-McWade's phone. RP 1346-48. Cooper-McWade then left the bedroom and gave her phone to C.W., instructing him to hide and call for help. RP 1346-48, 1597. Carte and Cooper-McWade soon began "tussling" again. RP 1348. Meanwhile, C.W. hid in the laundry room and quietly called 911. RP 1348, 1594.

C.W. told the 911 dispatcher he needed help because "my mom's boyfriend is hitting my mom." Ex. 15 at 2.[1] Cooper-McWade and Carte can be heard arguing in the background, and Cooper-McWade cries out in pain at one point. Ex. 15 at 2-3; Ex. 14 at 1:53; RP 1353. After a brief conversation, C.W. tells the dispatcher he "can't talk" and hangs up. Ex. 15 at 4. Carte left the house after realizing C.W. had called 911. RP 1348, 1613. Cooper-McWade then barricaded the front door and hid in a back closet with C.W. RP 1354.

Several police officers responded to C.W.'s 911 call, forcing the front door open when nobody answered. RP 997, 1047-48. Cooper-McWade and C.W. then emerged from hiding. RP 999, 1048. Carte was no longer at the residence. RP 999.

[1] The 911 recording was admitted as Exhibit 14. RP 1349-50. Exhibit 15 is a transcript of the call. Although admitted only for illustrative purposes, the State refers to the transcript for ease of reference.

Deputies immediately saw that Cooper-McWade "had a very large black eye…and…various different red marks around her neck and on the side of her face." RP 1009-13, 1126. There were also "little red marks" on Cooper-McWade's chest and what looked like a "thumbprint" on her chin." RP 1011-12. Cooper-McWade was "very upset" and started crying while recounting her ordeal to police. RP 1015. She ultimately identified several injuries inflicted by Carte but explained that many of the facial marks had been caused by Argueta's earlier assault. RP 1127-29, 1313-17, 1481-82.

Based on this evidence, the State charged Carte with second degree assault (count 3), of which he was convicted. RP 2051; CP 348. Carte was also charged with fourth degree assault (count 5) for shoving C.W. sometime during his relationship with Cooper-McWade. RP 2054. The jury was unable to reach a verdict on that count. RP 2138.

4. CARTE'S TESTIMONY.

Carte testified in his own defense at trial. RP 1752. He claimed his relationship with Cooper-McWade deteriorated because she insisted on searching through his phone every evening and became angry if he spoke with his ex-wife. RP 1766-75. He also portrayed Cooper-McWade as perpetually drunk or high. RP 1782-83.

Carte acknowledged that a loud argument occurred on October 8th about his relationship with his ex-wife, after which he allegedly decided to move out. RP 1774-75, 1973. Carte claimed that Cooper-McWade kicked him in the face while he was packing, causing a bloody facial injury. RP 1775. Carte testified he slept in a separate bedroom and left the following day. RP 1777. He denied ever assaulting Cooper-McWade. RP 1777-78, 1977.

Carte admitted sending the regretful text messages produced at trial, but testified he was only apologizing for verbal insults. RP 1906. He claimed that Cooper-McWade

continued trying to contact him after he moved out, even showing up intoxicated to his house one night uninvited. RP 1797, 1911. However, Carte also acknowledged using his relationships with other women to emotionally manipulate Cooper-McWade. RP 1939-40.

Carte acknowledged that another argument occurred on November 17th over Cooper-McWade's relationship with Argueta. RP 1790-93. Carte claimed that Cooper-McWade punched him in response to a verbal insult. RP 1974. He admitted making rude comments about Cooper-McWade's physique but denied ever assaulting her. RP 1974-75.

Carte stated that he resumed living with Cooper-McWade full time because she "wanted some protection" from Argueta. RP 1794. He admitted becoming "very upset" when he subsequently found Cooper-McWade talking to Argueta on November 30th. RP 1794.

Carte claimed Cooper-McWade blocked the door and grabbed his shirt when he tried to leave. RP 1795, 1894. He

testified Cooper-McWade then punched him in the mouth twice, but he denied ever striking her back. RP 1795, 1799. When confronted with Cooper-McWade's pained cries on the 911 call, Carte claimed she had "flopped onto the ground to be deadweight" when he dragged her away from the door. RP 1965.

Carte admitted demanding sexual acts for money but claimed he was only trying "to be mean" because he wanted to be left alone. RP 1793, 1800. He also admitted sending harassing text messages about Cooper-McWade's whereabouts. RP 1949. However, Carte denied authoring other vulgar messages, claiming Cooper-McWade must have hacked his account. RP 1945-46. According to Carte, Cooper-McWade believed she had to send him to prison or else CPS would remove her children. RP 1895.

C. ARGUMENT

1. CARTE WAIVED ANY CLAIM OF PROSECUTORIAL MISCONDUCT BY FAILING TO OBJECT AT TRIAL.

The prosecutor's lengthy closing argument contained a single sentence suggesting Carte's testimony was tailored. Carte, however, did not object at trial. Assuming without conceding that the remark was inappropriate, any error was waived because Carte cannot show the prosecutor's statement was flagrant, ill-intentioned, and caused incurable prejudice.

a. Additional Facts.

The prosecutor made the following remarks during her rebuttal closing argument:

> …[the defense] spent a lot of time trying to suggest that the victim had been violent with Mr. Carte, that she punched him, that she kicked him…but even if all of that information were to be true, defense does not claim any self-defense here, so none of those allegations actually matter in this case.
>
> **[The defense gave] you the defendant's side of the story, the side of the story that he gave to you after he had the benefit of having heard all of the evidence in this case and hearing how everyone else testified in conforming his testimony to fit for certain facts, but not others.**

> But really the only thing that came out of Mr. Carte's mouth that is even remotely relevant to these charges that he is facing today is the fact that he's never assaulted her…according to him.
>
> Everything else is a lot of background noise that is meant to distract you and meant to prejudice you against the victim.

RP 2119 (emphasis added).

Carte did not object at trial. He assigns error to the bolded portion of the prosecutor's argument for the first time on appeal. RP 2119.

b. The Waiver Doctrine Applies in This Case.

All criminal defendants have "the right to appear and defend in person…" WASH CONST. art. I, § 22; Illinois v. Allen, 397 U.S. 337, 346, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970). Although the state and federal constitutions both guarantee the right to be present at one's own trial, article I, section 22, is analyzed independently from the Sixth Amendment. State v. Martin, 171 Wn.2d 521, 533, 252 P.3d 872 (2011).

A claim of "tailoring" alleges that the defendant conformed their testimony to the evidence they observed while attending the trial. State v. Hilton, 164 Wn. App. 81, 93, 261 P.3d 683 (2011). Tailoring arguments are considered "specific" if derived from the defendant's actual testimony, and "generic" if based solely on the defendant's presence at the proceeding. Id.

In Portuondo v. Agard, 529 U.S. 61, 73, 120 S.Ct. 1119, 146 L.Ed.2d 47 (2000), a majority of the U.S. Supreme Court held that tailoring arguments did not violate a defendant's constitutional right to be present at trial. Justice Ginsburg dissented, arguing that any tailoring allegations should be explored during cross-examination rather than raised for the first time in summation. Id. at 78 (Ginsburg, J., dissenting).

The Washington Supreme Court held that "Justice Ginsburg's view, that suggestions of tailoring are appropriate during cross-examination, is compatible with…article I, section 22." Martin, 171 Wn.2d at 535-36. Although Martin "expressly

declined to address generic tailoring," this Court later concluded that such arguments violate the Washington constitution. State v. Berube, 171 Wn. App. 103, 116, 286 P.3d 402 (2012); State v. Wallin, 166 Wn. App. 364, 367-77, 269 P.3d 1072 (2012). The Berube panel reasoned that Martin prohibited "a closing argument that burdens the exercise of constitutional rights without an evidentiary basis and in a fashion preventing the defendant from meaningful response." Berube, 171 Wn. App. at 116-17.

However, Washington courts typically require that an objection be made at trial to preserve an issue for appeal. State v. Emery, 174 Wn.2d 741, 762, 278 P.3d 653 (2012). This is "not only to prevent counsel from making additional improper remarks, but also to prevent potential abuse of the appellate process." Id.

If the defendant failed to object to prosecutorial misconduct at trial, any error is waived unless the complained-of argument was flagrant, ill-intentioned, and caused incurable

prejudice.[2] State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). Improper arguments can be waived even if they implicated a constitutional right. State v. Teas, 10 Wn. App. 2d 111, 122, 447 P.3d 606 (2019) (review denied by 195 Wn.2d 1008 (2020)).

The State assumes Carte will argue that waiver does not apply when an unobjected-to argument violates a constitutional right. Carte is incorrect, although the State acknowledges that Washington precedent has not always been a model of clarity on this issue.

In State v. Warren, 165 Wn.2d 17, 26, n.3, 195 P.3d 940 (2008), the supreme court "decline[d] to reach the issue of whether a constitutional error analysis might be appropriate if the prosecutorial misconduct directly violated a constitutional

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[2] A different analysis applies if "the prosecutor's misconduct implied racial bias," in which case the State must establish "beyond a reasonable doubt that the race-based misconduct did not affect the jury's verdict." State v. Zamora, 199 Wn.2d 698, 709, 512 P.3d 512 (2022). This standard does not apply here because Carte has not made any allegation of racial bias.

right." Just a few years later, the court somewhat contradictorily stated that "we have long held that the constitutional harmless error standard applies to direct constitutional claims involving prosecutors' improper arguments." Emery, 174 Wn.2d at 756-57. However, Emery nonetheless applied the incurable prejudice standard despite concluding that the prosecutor's argument "undermined the presumption of innocence." Id. at 758.

State v. Teas, *supra*, clarified the appropriate standard of review. The prosecutor in Teas improperly remarked upon the defendant's right to testify by arguing that he "[c]ouldn't deny the DNA…And so that's why he got on the stand…and…came up with a story to try and explain away what happened." 10 Wn. App. 2d at 123. Teas did not object at trial but, like Carte, argued the error was automatically reviewable on appeal because it was constitutional in nature. Id. at 121-22.

The panel rejected Teas's argument, holding that the reviewing court must first consider whether the alleged error

was preserved "[b]efore applying the constitutional error standard." Id. at 122. Thus, if a defendant failed to object at trial, they must show incurable prejudice even if the error violated a constitutional right. Id. Only then is the State required to prove that the error was harmless beyond a reasonable doubt. Id.

This Court recently reaffirmed Teas's waiver analysis in State v. Tesfasilasye, No. 81247-5, 2021 WL 3287706 at *9 (2021 Unpublished) (reversed on unrelated grounds by No. 100166-5, 518 P.3d 193 (2022)).[3] The court in Tesfasilasye observed that "[i]n cases where a defendant fails to object, Washington courts must decide whether the issue has been preserved for appeal before analyzing whether the error was harmless beyond a reasonable doubt." Id. (emphasis original).

[3] The Supreme Court "granted review of only the GR 37 issues" and thus did not address Division One's waiver holding. Tesfasilasye, 518 P.3d at 198.

Notably, the error in Tesfasilasye also involved a comment on the defendant's right to testify. Id.

Both Teas and Tesfasilasye relied on State v. Espey, 184 Wn. App. 360, 365-66, 336 P.3d 1178 (2014). The prosecutor in Espey violated the defendant's constitutional right to counsel by using the fact that he consulted with an attorney to infer guilt. Id. at 366. This Court concluded that it must first analyze waiver "[a]s a threshold matter." Id.

The panel applied the prosecutorial misconduct standard, ultimately concluding the error "was both incurable and substantially likely to affect the jury verdict…" Espey, 184 Wn. App. at 368. Only then did the court address whether the error was harmless, applying the constitutional standard to determine whether the State had shown beyond a reasonable doubt that the verdict was not affected. Id. at 369-70.

State v. Pinson, 183 Wn. App. 411, 333 P.3d 528 (2014), is also in accord. The prosecutor in that case committed a blatant constitutional violation, arguing that Pinson's custodial

silence was "evidence of his guilt, that he has something to hide…" Id. at 415. Because Pinson failed to object at trial, however, the court held that any error was waived unless "an instruction could not have cured any resulting prejudice." Id. at 419. Only after finding this standard satisfied did the court discuss whether the error required reversal. Id. at 419-20.

Finally, in State v. Gouley, 19 Wn. App. 2d 185, 199-200, 494 P.3d 458 (2021), this Court observed that "[t]he defendant's burden of establishing prejudice in a prosecutorial misconduct claim is not altered where the challenged conduct 'touched upon the defendants' constitutional rights…'" Id. at 202. Thus, the court required incurable prejudice even though the prosecutor's statement "may have been an improper comment on Gouley's prearrest silence." Id. at 203.

Carte relies heavily on State v. Gauthier, 174 Wn. App. 257, 298 P.3d 126 (2013), State v. Johnson, 80 Wn. App. 337, 908 P.2d 900 (1996), and State v. Burke, 163 Wn.2d 204, 181 P.3d 1 (2008), to support his position that the court should

forego a prosecutorial misconduct analysis and automatically apply the constitutional harmless error standard. Brief of App. at 34. These cases do not advance Carte's argument.

Gauthier held that a prosecutor violates article I, section 7, by inferring guilt from the defendant's refusal to consent to a warrantless search. 174 Wn. App. at 263. However, because Gauthier had not objected below, the court first addressed waiver. Id. at 263. Only after finding manifest constitutional error under RAP 2.5 did the court conclude the error was reviewable and proceed to determine whether it was harmless beyond a reasonable doubt. Id. at 263-70. This two-step process is consistent with Teas.

In Burke, the State offered testimony inferring guilt from the defendant's decision not to speak with police. 163 Wn.2d at 208. The dissent would have found any error waived because Burke did not object at trial. Id. at 228 (Madsen, J., dissenting). The majority, however, sidestepped the waiver issue by concluding that Burke's argument had been preserved by a

post-verdict motion for a new trial. Id. at 211. There was no similar motion in this case, and thus Burke does not support Carte's position.

Finally, Johnson had no need to discuss waiver because the defense attorney in that case objected to the alleged error at trial. 80 Wn. App. at 340-41.

Our supreme court "has rejected the use of the constitutional harmless error standard in all but the most egregious cases of prosecutorial misconduct, such as when the prosecutor appeals to racial bias or prejudice." Gouley, 19 Wn. App. 2d at 204. Even to the extent this standard applies, however, the court must first determine whether any error was waived. Teas, 10 Wn. App. 2d at 121-23. As discussed, *infra*, Carte has not shown incurable prejudice, and the alleged error in this case was therefore not preserved for appeal.

c. Carte Has Not Shown Incurable Prejudice.

Under the typical prosecutorial misconduct standard, a defendant's failure to object at trial waives any error unless it was flagrant, ill-intentioned, and incurable. Emery, 174 Wn.2d at 760. However, "[r]eviewing courts should focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured." Id. at 762.

Prejudice is incurable when the jury's impartiality has been so undermined that a fair trial is no longer possible. Emery, 174 Wn.2d at 762. In such cases "there is, in effect, a mistrial and a new trial is the only and the mandatory remedy." Id. However, remarks "are not per se incurable" simply because they commented upon a constitutional right. Id. at 763.

This court reviews any improper remarks "in the context of the entire argument, the issues in the case, the evidence

addressed in the argument, and the instructions to the jury." State v. Pierce, 169 Wn. App. 533, 280 P.3d 1158 (2012).

Had Carte objected, the trial judge could have stricken the complained-of remark and instructed the jury not to draw any adverse inferences from his decision to testify. Jurors are presumed to follow the court's instructions. State v. Dye, 178 Wn.2d 541, 556, 309 P.3d 1192 (2013). Carte's failure to object deprived the trial court of any opportunity to remedy the alleged error. State v. Sakellis, 164 Wn. App. 170, 185, 269 P.3d 1029 (2011).

Carte suggests prejudice was more likely because the challenged remark was made in rebuttal argument, a theory that Washington courts have previously endorsed. State v. Lindsay, 180 Wn.2d 423, 443, 326 P.3d 125 (2014); Brief of App. at 33. However, "the placement of the [improper] comments alone is insufficient to amount to incurable prejudice." State v. Belander, No. 54409-1, 2022 WL 1223186 at *11 (2022 Unpublished).

Courts also look to the pervasiveness of the alleged misconduct. A single, fleeting inappropriate comment is likely curable, whereas prejudice may be unavoidable when an improper argument is repetitive and thematic. See State v. Brown, 21 Wn. App. 2d 541, 571, 506 P.3d 1258 (2022) ("Any error was fleeting as opposed to pervasive and prejudicial"); see also Matter of Lui, 188 Wn.2d 525, 397 P.3d 90 (2017) ("Even if the prosecutor's discussion…[was] sufficiently flagrant and ill-intentioned, we do not find the…singular reference….when considered in context with the State's entire closing argument, produced pervasive prejudice…"); see also In re Glasmann, 175 Wn.2d 696, 707, 286 P.3d 673 (2012) ("…the misconduct here was so pervasive that it could not have been cured…").

The prosecutor's argument in this case was lengthy, encompassing over an hour of court time and approximately 59 transcript pages. RP 2021-65, 2067, 2116-31. The challenged statement, however, was only a single sentence that was never repeated. RP 2119. An admonition from the court could have

cured any prejudice stemming from this passing remark. See Emery, 174 Wn.2d at 764, n.14 (suggesting defendant could not show prejudice in part because "the prosecutor's misconduct here came at the end of an eight-day trial and was limited to nine sentences"); see State v. Mansour, 14 Wn. App. 2d 323, 470 P.3d 543 (2020) (unpublished portion) ("Given the isolated nature of these comments within a lengthy closing, a curative instruction would have obviated any resulting prejudice"); see Matter of Mendes, No. 48709-8, 2017 WL 2954707 at *11 (2017 Unpublished) (defendant could not establish prejudice in part because "the challenged argument was a minor comment during a lengthy argument"); see State v. Duenas, No. 48119-7, 2017 WL 2561589 at *13 (2017 Unpublished) ("The prosecutor's statements resulted in little prejudice as they were brief and isolated statements that occurred during the prosecutor's lengthy closing argument").

Washington courts have also viewed the fact of an acquittal on some counts as evidence the defendant was not

prejudiced. See State v. Brockob, 159 Wn.2d 311, 350, 150 P.3d 59 (2006) ("that the jury was able to see past Cobabe's drug associations and acquit him on the firearm charge suggests that the reference to drugs…was not prejudicial"); see also State v. Bahl, 137 Wn. App. 709, 159 P.3d 416 (2007) (in severance context) (reversed in part on unrelated grounds by 165 Wn.2d 739 (2008)); State v. Graham, No. 73107-6, 2016 WL 1627796 at *6 (2016 Unpublished) (improper character evidence); State v. Jefferson, No. 78037-9, 2019 WL 3287072 at *4 (2019 Unpublished) (ineffective assistance of counsel).

Of the five charges Carte faced, the jury acquitted of one and hung on another. This suggests the jury did not summarily dismiss Carte's testimony as tailored, which in turn suggests he was not incurably prejudiced. See State v. Ross, No. 48321-1, 2018 WL 1393792 at *10 (2018 Unpublished) (defendant could not show prejudice because, *inter alia*, jury acquitted or hung on several charges).

The record plainly shows that a timely curative instruction would have abated the alleged prejudice. Thus, any error was waived by Carte's failure to object below.

d. Any Error Was Harmless Even under the Constitutional Standard.

Under the constitutional standard, an error is harmless only if the court is convinced "beyond a reasonable doubt that the State's misconduct did not affect the verdict." Emery, 174 Wn.2d at 756.

The prosecutor's fleeting remark was harmless beyond a reasonable doubt for the same reasons discussed, *supra*. In addition, the evidence against Carte was quite strong. It was undisputed that Carte and Cooper-McWade's relationship was highly volatile. Cooper-McWade's account of the assault was supported by physical evidence of her injuries,[4] the direct testimony of C.W., the 911 recording, and Carte's texts

[4] It was undisputed that some of these injuries were caused by Argueta. However, Cooper-McWade's acknowledgement of this fact likely only served to strengthen her credibility.

apologizing for his behavior. Carte's attempt to portray Cooper-McWade as domineering was undermined by text messages, which he admitted sending, demanding she perform degrading sexual acts in return for his help. RP 1793, 1800.

There were other significant inconsistencies in Carte's representation of events. For example, Carte testified he only consumed 1 or 2 drinks the night of October 8th but was then unable to explain why text messages he admitted sending blamed his behavior on alcohol. RP 1928, 1962. Carte asserted he was "not a confrontational person," but was then impeached with a text message where he threatened to beat up another man. RP 1952. Carte claimed that Cooper-McWade broke his nose, but never offered any photographs, medical records, or third-party testimony as corroboration. RP 1775-76, 1958, 1981.

Finally, misconduct in closing argument is more likely to be harmless than other forms of error "[b]ecause jurors are directed to disregard any argument that is not supported by the

law and the court's instructions." Emery, 174 Wn.2d at 759. The jury in this case was properly instructed both on the appropriate standard for assessing witness credibility, and also that "the lawyers statements' are not evidence." CP 307-09.

Carte has failed to establish reversible error regardless of which standard of review the court ultimately applies. His convictions should be affirmed.

2. THE COURT ACTED WITHIN ITS DISCRETION WHEN IT SUSTAINED THE PROSECUTOR'S HEARSAY OBJECTIONS.

The prosecutor objected when Carte thrice attempted to quote Cooper-McWade during his direct examination. The trial court correctly sustained these objections because the challenged testimony was either direct hearsay itself or necessarily called for hearsay. Even if, *arguendo*, error occurred, it was harmless because these statements were of negligible value and Carte was able to fully present his theory of the case without them.

a. Additional Facts.

The following exchange occurred during defense counsel's direct examination of Carte:

> [Defense Counsel]: Okay…at some point did it become apparent that you were talking to your ex-wife as far as Morgan Cooper-McWade was concerned?
>
> [Carte]: Yes.
>
> [Defense Counsel]: Okay, and after that, what happened? What transpired?
>
> [Carte]: One night I was laying in bed having a conversation with Jen [Carte] and [Cooper-McWade] threw the bedroom door open and asked me who I was talking to…
>
> [Prosecutor]: Objection, your honor, calls for hearsay.
>
> [Defense Counsel]: It is not offered for the truth of the matter asserted.
>
> The Court: So…Mr. Carte, I am asking you not to say what somebody else who is not here in court said. You can talk about what happened next, but let's see if we can avoid quoting somebody else; they are just not here. Can you please…[r]edirect the witness.

RP 1773-74.

Another objection occurred during defense counsel's re-direct examination:

> [Defense Counsel]: On the 30th, did [C.W.] ever come out of his room when you guys were engaged in this back-and-forth?
>
> [Carte]: Yes, we were in the room. She was actually screaming [C.W.]'s name and he came into the bathroom, which was in between the bedrooms.
>
> [Defense Counsel]: Okay, and did he ever come into the bedroom with you and [Cooper-McWade]?
>
> [Carte]: Not that I recall. He came into the bathroom, she handed him the phone, and he went and called the police.
>
> [Defense Counsel]: Okay, did you hear her say, "Call the police and tell them Bo[5] is hitting me"?
>
> [Carte]: That is exactly what she said.
>
> [Defense Counsel]: Okay.
>
> [Prosecutor]: Objection, your honor, hearsay.
>
> The Court: [Defense counsel]?
>
> [Defense Counsel]: Part of the res gestae. It does not necessarily go to the truth of the matter asserted, but it goes to his frame of mind at that point.

[5] "Bo" is Carte's nickname. RP 1214.

The Court: Objection sustained…[t]he jury will disregard.

RP 1977-78.

Finally, the following exchange also occurred during Carte's re-direct examination:

[Defense Counsel]: Was [Cooper-McWade] concerned about getting in trouble for kicking you?

[Carte]: She asked me not to call the police that day –

[Prosecutor]: Objection, your honor, hearsay.

[The Court]: Sustained.

[Prosecutor]: Move to strike.

[Defense Counsel]: Was [Cooper-McWade] concerned, without telling us what she said?

[Carte]: Yes, she was very concerned.

RP 1986.

b. The Objected-to Statements Were Inadmissible.

All criminal defendants have a constitutional right to present a defense. State v. Blair, 3 Wn. App. 2d 343, 349, 415

P.3d 1232 (2018). However, "the scope of that right does not extend to the introduction of otherwise inadmissible evidence." State v. Aguirre, 168 Wn.2d 350, 363, 229 P.3d 669 (2010). Thus, the defense presentation remains governed by "established rules" of court. State v. Cayetano-Jaimes, 190 Wn. App. 286, 296, 359 P.3d 919 (2015).

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801. Hearsay is generally inadmissible, even if otherwise relevant, unless it falls within one of several recognized exceptions. ER 802; State v. Garcia, 179 Wn.2d 828, 845, 318 P.3d 266 (2014).

A statement is not considered hearsay when offered only to show its effect on the listener. State v. Hudlow, 182 Wn. App. 266, 278, 331 P.3d 90 (2014). Thus, questions and inquiries are generally admissible if "the questioner is not asserting a fact or a belief." State v. Kelly, 19 Wn. App. 2d 434, 448, 496 P.3d 1222 (2021). Similarly, the hearsay rule "does

not forbid the introduction of evidence that a request has been made when the making of the request is significant irrespective of the truth or falsity of its content." Id. at 449.

Whether an exception to the hearsay rule applies is reviewed for an abuse of discretion. State v. Blake, 172 Wn. App. 515, 535, 298 P.3d 769 (2012). However, the more fundamental question at issue here - whether a statement was hearsay at all - is reviewed *de novo*. State v. Heutink, 12 Wn. App. 2d 336, 356, 458 P.3d 796 (2020).

Carte first argues that Cooper-McWade's alleged statement to C.W. asking him to "[c]all the police and tell them [Carte] is hitting me" was not hearsay because it was a request as opposed to an assertion. Brief of App. at 47. Carte is incorrect because the statement, while phrased as a directive, was offered only for its purported falsity.

A request or command is only considered non-hearsay when "the making of the request is significant irrespective of the truth or falsity of its content." Kelly, 19 Wn. App. 2d at

449. Cooper-McWade's statement was only helpful to Carte if interpreted as instructing C.W. to wrongfully accuse him of assault. Tellingly, Carte's brief asserts the statement "was direct evidence that [Cooper-McWade's] allegations…were false." Brief of App. at 51. Thus, the statement was not being offered merely to show that a request was made or to demonstrate an effect on the listener. Rather, Carte was trying to establish that the accusation of assault intrinsic to the request was false. RP 2080, 2108. Because the statement's relevance depended on the truth or falsity of its content, it was hearsay. Kelly, 19 Wn. App. 2d at 449.

Carte next claims he should have been permitted to testify that Cooper-McWade "asked [him] who [he] was talking to." Brief of App. at 48. He is correct that questions are generally not considered hearsay. State v. Collins, 76 Wn. App. 496, 498, 886 P.2d 243 (1995). However, taken in context, it appears the statement was elicited to assert that Cooper-McWade was spying on Carte's communications. "[W]here the

declarant intends [a] question to communicate an implied assertion, and the proponent offers it for this intended message, the question falls within the hearsay definition." U.S. v. Torres, 794 F.3d 1053, 1055 (5th Cir. 2015).

Cooper-McWade's alleged question was essentially rhetorical since, according to Carte, she already knew he was talking to his ex-wife through monitoring his accounts and devices. RP 1774. This interpretation is supported by Carte's subsequent answers during the same line of questioning:

> [Defense Counsel]: Okay, and could you tell us what incidents happened that day?
>
> [Carte]: I had a conversation with [my ex-wife], and then I was questioned about that conversation. There was no way that [Cooper-McWade] could have known that I was having that conversation because I was laying in bed and she knew things about the conversation that there was no way she could have known.
>
> [Defense Counsel]: Okay.
>
> [Carte]: [Cooper-McWade] told me that –
>
> [Defense Counsel]: You can't say what she said.

> [Carte]: It came out that she was reading my conversations.
>
> [Defense Counsel]: And then did you guys have a protracted argument about that?
>
> [Carte]: Yes.

RP 1774-75. The prosecutor objected on several other occasions when Carte attempted to offer hearsay statements about Cooper-McWade allegedly snooping on his phone and social media accounts. RP 1767, 1770, 1773.

The trial court plainly understood that inquiries are generally admissible, as it overruled the prosecutor's objection to another question purportedly posed by Cooper-McWade:

> [Carte]: We were friends on Facebook. We didn't know each other. It was the Fourth of July weekend. I received a message from [Cooper-McWade]. She asked me if I was willing to answer some questions.
>
> [Prosecutor]: Objection, your honor, calls for hearsay.
>
> The Court: It is not being offered for the truth. Overruled.

RP 1752. This suggests the court sustained the challenged objection not because it erroneously interpreted the hearsay rule, but because it agreed that Carte was actually attempting to offer an assertion.

Finally, Carte argues he should have been allowed to testify that Cooper-McWade asked him "not to call the police" to report that she "kicked him in the face." Brief of App. at 48-49. However, intrinsic to this alleged request was a contested factual assertion that Cooper-McWade had assaulted Carte. Because Cooper-McWade's request was only relevant if this underlying assertion was true, it fell within the definition of hearsay. Kelly, 19 Wn. App. 2d at 449.

The prosecutor's hearsay objections were correctly sustained. There was no error.

c. Even If, *Arguendo*, Error Occurred, It Was Harmless.

Evidentiary error is harmless "unless, within reasonable probabilities, had the error not occurred, the outcome of the trial

would have been materially affected." State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986). Constitutional error, by contrast, is harmless if the reviewing court is convinced "beyond a reasonable doubt that any reasonable jury would have reached the same result without the error." State v. Jones, 168 Wn.2d 713, 724, 230 P.3d 576 (2010). Naturally, Carte argues the constitutional standard applies because the trial court allegedly violated his right to present a defense. Brief of App. at 43.

The constitution simply guarantees a fair "opportunity to defend against the State's accusations." State v. Jennings, 199 Wn.2d 53, 66, 502 P.3d 1255 (2022). "Accordingly, when the defendant has an opportunity to present his theory of the case, the exclusion of some aspects of the defendant's proffered evidence will not amount to a violation of the defendant's constitutional rights." State v. Ritchie, __ Wn. App. 2d __, 520 P.3d 1105, 1116 (December 5, 2022). In other words, the Sixth Amendment does not automatically "transform all evidentiary

errors into errors of constitutional magnitude." State v. Barry, 183 Wn.2d 297, 301, 352 P.3d 161 (2015).

Carte was able to fully present his theory of the case without the challenged statements, and the court should therefore apply the evidentiary standard. However, any error was harmless even under a constitutional analysis.

i. Any error in excluding Cooper-McWade's alleged instruction to [C.W.] was harmless.

Cooper-McWade's alleged request to C.W. was ambiguous. Carte wanted the jury to infer that Cooper-McWade was asking C.W. to falsely report an assault. But Cooper-McWade testified that she was, in fact, assaulted numerous times that evening. RP 1325. Thus, the evidence could just as easily be interpreted as Cooper-McWade asking C.W. to report what was actually happening. The value of this evidence thus depended entirely on the jury crediting Carte's testimony that he never assaulted Cooper-McWade, which it plainly did not do.

Whether Cooper-McWade told C.W. to "call the police and tell them Bo is hitting me," or simply asked him to "call for help," was essentially immaterial. RP 1348, 1977. Because the challenged statement was ambiguous, and since the jury otherwise rejected Carte's interpretation of events on November 30th, it is not plausible that excluding it affected the verdict.

ii. Any error in excluding Cooper-McWade's alleged October 8th statement to Carte was harmless.

Broadly speaking, the purpose of this testimony was to show that Cooper-McWade was extremely jealous and controlling. However, Carte was able to amply present this theory using other evidence.

Carte testified without objection that he was speaking with his ex-wife when Cooper-McWade entered the room. RP 1773. Following the prosecutor's interjection, defense counsel asked an obviously telegraphed follow-up question allowing Carte to explain that Cooper-McWade was spying on him and "reading my conversations." RP 1774.

Accusations that Cooper-McWade was jealous, erratic, suspicious, and intrusive pervaded Carte's testimony. RP 1941 ("[Cooper-McWade is] the most jealous person I have ever been with"), RP 1766 ("I woke up to [Cooper-McWade] going through my phone"), RP 1771 ("[Cooper-McWade] told me flat out she would go through [my phone] every night after I went to sleep"), RP 1973-74 (testifying that Cooper-McWade punched him during an argument about Carte's ex-wife), RP 1797 (testifying that Cooper-McWade showed up at his home drunk and uninvited).

Portraying Cooper-McWade as violently jealous was a key aspect of Carte's defense theory, which trial counsel had no difficulty presenting to the jury. RP 2070-2116. This suggests the challenged statement "was not highly probative evidence, the exclusion of which could give rise to a constitutional violation." Ritchie, 520 P.3d at 1117. It is simply not plausible that one additional cumulative statement purporting to

demonstrate Cooper-McWade's jealousy might have affected the verdict.

iii. Any error in excluding Cooper-McWade's alleged request not to report her assault of Carte to the police was harmless.

Immediately after the relevant objection was sustained, Carte was allowed to testify that Cooper-McWade was "very concerned" about the potential consequences of assaulting him. RP 1986. The jury could not have failed to understand the intended meaning of this testimony. More importantly, Carte described the alleged assault himself during direct examination and had an opportunity to cross examine Cooper-McWade on the subject as well. RP 1420, 1775.

Carte had no difficulty arguing that Cooper-McWade was herself abusive without this evidence. It is not plausible that admitting this uncorroborated statement could have changed the verdict. Any error was harmless.

3. THE COURT ACTED WITHIN ITS DISCRETION BY ADMITTING COOPER-MCWADE'S STATEMENT TO DEPUTY DAMEROW AS AN EXCITED UTTERANCE. ANY ERROR WAS HARMLESS.

When Cooper-McWade spoke to responding police officers on November 30th, the evidence showed she was still affected by the fear and stress caused by Carte's assault. Thus, the trial court acted within its broad discretion by admitting her statement as an excited utterance. Even if, *arguendo*, error occurred, it was harmless because Cooper-McWade's hearsay statement was largely cumulative to her live testimony.

a. Additional Facts.

There was no testimony taken during motions *in limine.* Instead, the State made an offer of proof to support the admission of Cooper-McWade's November 30th statements to Deputy Damerow. RP 39. The prosecutor noted that police officers arrived at Cooper-McWade's house approximately 12 minutes after C.W.'s 911 call. RP 39-40. After kicking in the front door, they found Cooper-McWade and C.W. hiding in a

closet. RP 39-40. Cooper-McWade then made several statements to Deputy Damerow describing Carte's assault. CP 402.

Cooper-McWade told Deputy Damerow that Carte had become enraged after finding her on the phone with Argueta. CP 402. When she refused to unlock her device for him, Carte strangled her, dragged her around the apartment, and threatened to kill her. CP 402-03; RP 40-41. Carte then left and Cooper-McWade hid in a closet with C.W. until police arrived. RP 41. Cooper-McWade believed that Carte was capable of killing her but "hoped that he wouldn't because she's a single mom." CP 403. Deputy Damerow observed that Cooper-McWade was "afraid and crying" during their conversation. RP 41; CP 403.

Carte objected, arguing the record was unclear as to whether Cooper-McWade was sufficiently agitated for her statements to qualify as excited utterances. RP 44-45, 1017. The trial court overruled Carte's objection:

> The key…is spontaneity…there was a very short time period between the time of the [911] call and the time that the officers had the conversation with the complaining witness.
>
> This means that the witness would not have had time to fabricate or make up some kind of report.
>
> …if the issue was one of assault, strangulation, whatever she is claiming happened, those would be startling events. The statements made to the officer would be made while the declarant was under the stress or excitement caused by…those events, and it would therefore not be objectionable as hearsay.

RP 48, 1018.

At trial, Deputy Damerow testified that Cooper-McWade appeared "mostly calm" when police first arrived but started crying when officers began speaking with her. RP 1015. He observed that Cooper-McWade was "shaking" while talking to him, and that her voice was "stuttery." RP 1022. Deputy Damerow recalled it being "very obvious…that [Cooper-McWade] was scared and…very upset…" RP 1022.

Carte renewed his objection, arguing that Cooper-McWade's statements did not qualify as excited utterances. RP

1018. The trial court declined to revisit its prior ruling. RP 1018.

b. A Reasonable Judge Could Have Determined That Cooper-McWade's Statements to Deputy Damerow Were Excited Utterances.

Although typically inadmissible, hearsay can be offered at trial when authorized by court rule or statute. ER 802. One recognized exception to the hearsay rule is found in ER 803(a)(2), which allows courts to admit "statement[s] relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

Courts have historically reasoned that statements made while under the stress of an exciting event "could not be the result of fabrication, intervening actions, or the exercise of choice or judgment." State v. Rodriquez, 187 Wn. App. 922, 939, 352 P.3d 200 (2015). In a sense, such statements are "an event speaking through the person, as distinguished from a

person merely narrating the details of an event." State v. Pugh, 167 Wn.2d 825, 837, 225 P.3d 892 (2009).

The party seeking to admit a statement as an excited utterance "must satisfy three 'closely connected requirements' that (1) a startling event or condition occurred, (2) the declarant made the statement while under the stress of excitement of the startling event or condition, and (3) the statement related to the startling event or condition." State v. Ohlson, 162 Wn.2d 1, 168 P.3d 1273 (2007). However, "[t]he statement need not be spontaneous or contemporaneous," and thus "response[s] to questions may still be admitted as excited utterances." State v. Bache, 146 Wn. App. 897, 904, 193 P.3d 198 (2008).

Reviewing courts may consider circumstantial evidence when assessing the statement, including "the declarant's behavior, appearance, and condition; appraisals of the declarant by others; and the circumstances under which the statement is made." Rodriquez, 187 Wn. App. at 938. A statement is more likely to qualify, for example, if the declarant is agitated,

emotional, frantic, or "obviously injured." State v. Davis, 116 Wn. App. 81, 86, 64 P.3d 661 (2003); State v. Perez, 184 Wn. App. 321, 342-43, 337 P.3d 352 (2014); Bache, 146 Wn. App. at 904. However, a mere "state of nervousness or anxiety" is not, by itself, sufficient. Burmeister v. State Farm Ins. Co., 92 Wn. App. 359, 370, 966 P.2d 921 (1998).

The statement's temporal proximity to the stressful event is one factor to consider. State v. Flett, 40 Wn. App. 277, 287, 699 P.2d 774 (1985). However, the "passage of time alone" is not dispositive. State v. Ramirez-Estevez, 164 Wn. App. 284, 291, 263 P.3d 1257 (2011). The Washington Supreme Court has found delays of up to 3.5 hours between the startling event and the excited utterance acceptable in some circumstances. State v. Thomas, 150 Wn.2d 821, 855, 83 P.3d 970 (2004); State v. Woods, 143 Wn.2d 561, 598-99, 23 P.3d 1046 (2001); State v. Strauss, 119 Wn.2d 401, 416-17, 832 P.2d 78 (1992).

A court's decision to admit statements under the excited utterance exception is reviewed only for an abuse of discretion.

DeVogel v. Padilla, 22 Wn. App. 2d 39, 58, 509 P.3d 832 (2022). An abuse of discretion occurs if "no reasonable judge would have made the same ruling." Thomas, 150 Wn.2d at 854.

The first and third factors of the analysis are easily satisfied. The State's offer of proof indicated that C.W. called 911 to report Cooper-McWade being actively assaulted, evidence of which could be heard in the background of the recording. RP 38-39. Cooper-McWade was expected to, and ultimately did, testify that Carte strangled her until "she started to see stars and thought she was going to pass out." RP 40, 1327.

Being beaten and strangled by another person is certainly a stressful event, and the court's conclusion to this effect was reasonable. See, e.g., Ohlson, 162 Wn.2d at 9 (Non-contact assault was sufficient to establish a "startling event"). It also cannot be seriously disputed that Cooper-McWade's statement concerned the startling event.

The second factor is also present. Officers arrived at Cooper-McWade's house 12 minutes after C.W. called 911. RP 39. Even considering the time it took deputies to force entry, Cooper-McWade was contacted within approximately 20 minutes of the stressful event. RP 39, 43. A 20-minute delay is well within the appropriate time frame recognized for the admission of excited utterances. Thomas, 150 Wn.2d at 854. Thus, the court reasonably concluded that Cooper-McWade would still have been under the stress of the assault after this "very short time period." RP 48.

Furthermore, Cooper-McWade was still hiding in fear when the police arrived, which weighs in favor of admission. RP 42; see State v. Guizzotti, 60 Wn. App. 289, 295-96, 803 P.2d 808 (1991) (statement admissible as excited utterance despite 7 hour delay because declarant had been hiding and "thought the defendant was looking for"). Deputy Damerow's observations that Cooper-McWade was "afraid," "crying," "shaking," and "stutter[ing]" also suggested she was still

affected by Carte's assault. RP 41, 1022. Even defense counsel initially conceded that "when you read it on paper, it appears that [the statements] could be excited utterances…" RP 44.

Carte relies largely on Deputy Damerow's testimony that Cooper-McWade initially seemed calm upon contact. RP 1015. This information was not available during motions *in limine* but was part of defense counsel's renewed objection at trial. Brief of App. at 58. While this fact arguably weighed against admission, it does not establish an abuse of discretion on this body of evidence.

"It is obvious that different people can and do react in different ways to…extreme stress…" Gregory-Bey v. Hanks, 332 F.3d 1036, 1050, n.18 (7th Cir. 2003). The key inquiry under ER 803(a)(2) is not how any particular individual manifests their response to stress, but whether they were under the influence of an exciting event. State v. Flett, 40 Wn. App. 277, 699 P.2d 774 (1985).

Courts recognize that a declarant can become distressed "even if she has been calm for a period of time prior to her excited utterance." State v. Villareal-Cruz, No. 67424-2-1, 2013 WL 950865 at *3 (2013 Unpublished). Furthermore, "the declarant need not show signs of excitement immediately upon…experiencing [the] startling event." U.S. v. Vigil, No. 20-2160, 2021 WL 4888616 (10th Cir. 2021 Unpublished). Finally, just because a person exhibits some indicia of calmness does not mean they are actually relaxed. See State v. Fleming, 27 Wn. App. 952, 956, 621 P.2d 779 (1980) (declarant of excited utterance "didn't say much of anything. She just kind of stared…"); see U.S. v. Clemmons, 461 F.3d 1057, 1061 (8th Cir. 2006) (gunshot victims' statements were excited utterances even though he was "talking on his cell phone in a calm manner").

When a person experiences trauma "and then displays no outward emotion, shock – not calm – would be the best assessment of her state of mind. And a statement made while in

shock is an excited utterance." Maggard v. Ford Motor Co., 320 Fed. Appx. 367, 375, 2009 WL 928604 (6th Cir. 2009 Unpublished).[6] The "calm" described by Deputy Damerow quickly turned to tears after Cooper-McWade emerged from hiding. It was not the sort of state conducive to reflection or fabrication but was more likely a sort of shock. The trial court was in the best position to make this judgment and acted within its broad discretion by admitting Cooper-McWade's statements.

c. Any Error Was Harmless.

The improper admission of hearsay evidence is generally not constitutional error if the declarant testified at trial. State v. Owens, 128 Wn.2d 908, 913-14, 913 P.2d 366 (1996). Evidentiary error requires reversal "only if there is a reasonable probability it affected the verdict." Id.

[6] Unpublished federal opinions can be cited if "issued on or after January 1, 2007." FRAP 32.1(a). Washington allows citation to foreign unpublished opinions if "permitted under the law of the jurisdiction of the issuing court." GR 14.1(b).

An erroneous hearsay ruling is harmless when comparable testimony is properly admitted, thus rendering the hearsay statement cumulative. Ramirez-Estevez, 164 Wn. App. at 293; State v. Dixon, 37 Wn. App. 867, 874-75, 684 P.2d 725 (1984). While Ramirez-Estevez and Dixon were bench trials, this principle has also been applied to jury verdicts. State v. Ramires, 109 Wn. App. 749, 760, 37 P.3d 343 (2002) (admission of hearsay harmless when "cumulative to the [officer-witness's] trial testimony of the same nature").

Deputy Damerow testified to the following material statements by Cooper-McWade: (1) that Carte became upset after finding her on the phone with Argueta; (2) that Carte grabbed Cooper-McWade's phone and demanded she unlock it; (3) that when she did not move fast enough, Carte grabbed her by the throat, dragged her to the bedroom, threw her on the bed, and used both hands to strangle her; (4) that Cooper-McWade "couldn't breathe" and "started to see stars"; (5) that she screamed for help, after which Carte covered her mouth and

threatened to kill her if she called the police; (6) that she believed Carte's threats were genuine and feared for her life; (7) that Carte returned Cooper-McWade's phone, which she then gave to C.W.; and (8) Carte broke shelves and threw items before leaving the apartment, after which Cooper-McWade and C.W. hid in a closet. RP 1016-25.

Cooper-McWade testified to almost all these facts in greater detail during her live testimony. RP 1320-27, 1346-55, 1474. There was only one significant discrepancy; Cooper-McWade did not expressly testify that a threat to kill occurred on November 30th as reported by Deputy Damerow. RP 1247. However, Carte was only charged with harassing Cooper-McWade on October 8th, not November 30th. CP 38-40. Thus, no count was based on this aspect of Deputy Damerow's testimony, which was limited to a single passing remark.

The admission of Cooper-McWade's hearsay statement, even if erroneous, could not have materially prejudiced Carte since it was almost entirely duplicative of her trial testimony.

Furthermore, Cooper-McWade's live testimony was far more detailed and emotional than Deputy Damerow's superficial recollection. Any error was harmless.

4. CARTE HAS NOT ESTABLISHED CUMULATIVE ERROR.

The cumulative error doctrine requires reversal when a defendant establishes that multiple accrued errors rendered a trial "fundamentally unfair," even if these errors were individually harmless. Emery, 174 Wn.2d at 766.

Carte cannot demonstrate cumulative error because multiple errors did not occur. Carte was afforded a fair trial and his convictions should be affirmed.

D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm Carte's judgment and sentence.

This document contains 9,694 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 6th day of January, 2023.

Respectfully submitted,

LEESA MANION (she/her)
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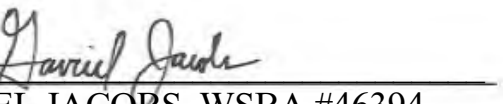
By: 
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