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

STATE OF WASHINGTON,	)	
	)	No. 29842-6-III
Respondent,	)	
	)	
v.	)	
	)	
RAUL ROBERT ALVAREZ,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	
	)	

Siddoway, A.C.J. — Raul Alvarez was charged with crimes arising out of what a jury found to be a gang-related drive-by shooting, based on his identification as the shooter by Ezekiel Almaguer. At trial, Mr. Almaguer denied having identified Mr. Alvarez, claiming that his statements when presented with a photo of Mr. Alvarez had been misunderstood.

In the course of buttressing the reliability of Mr. Almaguer's now-disavowed identification of Mr. Alvarez, the prosecutor communicated to the jury that he had been present when Mr. Almaguer had key conversations with two State witnesses. The prosecutor referred to his personal participation in those conversations in examining

witnesses and in closing argument. Mr. Alvarez was convicted on all counts and was sentenced to 88 years.

Because the prosecutor's cross-examination and argument amounted to unsworn testimony that was improper and prejudicial, we reverse Mr. Alvarez's judgment and sentence and remand for a new trial on all but the gang aggravators charged by the State. We dismiss those aggravators, as to which the State's evidence was insufficient.

FACTS AND PROCEDURAL BACKGROUND

On a summer evening in 2010, Jose Rodriguez, his brother Ismael, and his sister Maribel were relaxing and visiting near the front door of their parents' home in Sunnyside, with Ismael holding Maribel's 11-month-old son, when shots were fired in their direction. They dove to the ground and a number of shots narrowly missed them, striking the front of the home. It was shortly before dark and none of them saw who fired the shots or were otherwise able to identify anyone involved.

A neighbor, Ezekiel Almaguer, saw the shooter from his front door. He described the shooter as a young man who apparently arrived in the neighborhood with others in a white Chevrolet Trailblazer, which parked near the Almaguer home. When Mr. Almaguer first looked out his door to see what was happening, the shooter was standing outside the Trailblazer, firing at the Rodriguez home with a rifle. Mr. Almaguer then saw the shooter run toward the Trailblazer, where he was pulled inside by his companions,

who drove off. Mr. Almaguer spoke with Detective Robert Layman on the night of the shooting and told him that, while he did not know the shooter, he would be able to identify him from a photograph.

Approximately a week later, Mr. Almaguer telephoned the Sunnyside Police Department after seeing a television report of a police news conference, in which Mr. Alvarez's photograph was displayed as a suspect in another crime. In the recorded call, Mr. Almaguer told the dispatcher that he had witnessed an earlier drive-by shooting and that "there was a police officer holding a picture of a kid, and that kid right there was the same kid that was shooting." Report of Proceedings (RP) (Mar. 2, 2011) at 192. Detective Layman was informed of the call and followed up with Mr. Almaguer, presenting him a few weeks later with a photomontage that included the picture of Mr. Alvarez displayed in the televised news conference. Mr. Almaguer identified Mr. Alvarez as the shooter, initialing Mr. Alvarez's photograph within the montage to confirm his identification.

Following Mr. Almaguer's identification, the State charged Mr. Alvarez with four counts of first degree assault, one count of drive-by shooting, and one count of unlawful possession of a firearm. It sought firearm enhancements on each assault count and alleged that all six counts were committed "with intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang

. . . its reputation, influence, or membership," an aggravating circumstance provided by RCW 9.94A.535(3)(aa). Clerk's Papers (CP) at 9.

On the afternoon following the first day of trial, Kaitlin Mee, a paralegal with the prosecutor's office, contacted Mr. Almaguer about his expected appearance to testify the next morning. At that time, Mr. Almaguer stated he was not going to testify and expressed fear of retaliation. With notice to Mr. Almaguer, Ms. Mee placed their call on her speakerphone, so that the prosecutor could hear and participate in the conversation. Mr. Almaguer eventually agreed that he would appear the next morning but would "take the Fifth." RP (Mar. 2, 2011) at 343. There was some discussion with the prosecutor of whether Mr. Almaguer would be able to avoid testifying on that basis.

The next morning, Mr. Almaguer did not appear. After attempting to reach him unsuccessfully, the prosecutor requested, and the trial court signed, a material witness warrant. Trial was recessed until the following week. Mr. Almaguer was quickly arrested, was appointed counsel, and agreed over the weekend that he would testify.

When called to testify the next week, Mr. Almaguer denied that Mr. Alvarez was the shooter. He claimed that he had called the police only to report "a similarity" between the individual whose photograph was displayed at the news conference and the shooter, based on "the side of his face." *Id.* at 187. He testified that when later presented with the photomontage by Detective Layman, he merely indicated that the photograph of

Mr. Alvarez included in the montage was identical to the photo displayed at the news conference, not that it was identical to the shooter. According to him, any reluctance he had expressed about testifying was only based on his fear that the State would press him to falsely identify Mr. Alvarez, and "'[o]f course, somebody's going to retaliate if they didn't do something and you accuse them of it.'" *Id.* at 202.

The State responded by questioning the plausibility of Mr. Almaguer's version of events and by playing a recording of the original call he had placed to the Sunnyside Police Department. It also called Detective Layman to testify to his conversations with Mr. Almaguer on the night of the shooting, at the time Mr. Almaguer identified Mr. Alvarez from the photomontage, and after picking him up on the material witness warrant. It called Ms. Mee, who had spoken with him a week before trial about his anticipated testimony in addition to speaking with him the afternoon before he was scheduled to testify, when he expressed reluctance about participating. Finally, it presented evidence that Mr. Almaguer had been seen speaking with members of Mr. Alvarez's family shortly before testifying at the trial.

Both Detective Layman and Ms. Mee testified that Mr. Almaguer never denied having identified Mr. Alvarez as the shooter, but expressed fear of retaliation against his family if he testified. In the course of examining Mr. Almaguer and these two State witnesses, the prosecutor established that he himself had participated in Mr. Almaguer's

conversation with Ms. Mee the afternoon before he was expected to testify and had also participated in a conversation with Mr. Almaguer and the detective after Mr. Almaguer was picked up on the material witness warrant. In questioning Mr. Almaguer and Ms. Mee about these conversations, the prosecutor conveyed that he had been present and knew what was said. The defense did not object.

In the defense case, Mr. Alvarez testified and presented evidence that he was at a barbeque in Grandview at the time of the shooting. One of the witnesses testifying in support of Mr. Alvarez's version of events was Robert Cruz Jr. Like Mr. Almaguer, Mr. Cruz had made statements to the prosecutor before trial. He, too, was questioned about his statements by the prosecutor; here again, the prosecutor commented on his own presence and participation without objection.

To prove the gang aggravators, the State offered evidence suggesting that the shooting was motivated by Mr. Alvarez's and the victims' rival gang associations. Jose and Ismael Rodriguez both denied personal involvement with gangs, but expressed the belief that their parents' home might have been targeted because of their relatives' gang associations. Maribel Rodriguez testified that her boyfriend's family associated with the Bell Garden Locos (BGL) gang, and that her older brother, who was in prison, was involved in a gang. Although Mr. Alvarez denied any gang association, considerable evidence suggested that he was a member of the Little Valley Locos (LVL) gang.

Officer Jose Ortiz, an expert on Yakima County gangs, testified that the home involved in the shooting was associated with the BGL gang, that the BGLs and LVLs are "mortal enemies," and that gang members in the community commit acts of violence against rival gang members to increase their status in the gang. *Id.* at 330.

The jury found Mr. Alvarez guilty on all counts, found by special verdict that he had committed each assault with a firearm, and found in favor of the gang aggravator on each count. The sentencing court imposed the 1065-month exceptional upward sentence requested by the State, with 240 months of that total imposed as a result of the gang aggravators. Mr. Alvarez appeals.

ANALYSIS

Mr. Alvarez challenges the sufficiency of the evidence to support the assault convictions and the jury's gang aggravator findings, alleges misconduct on the part of the prosecutor in violating the witness-advocate rule and vouching for and against the credibility of several witnesses, and claims ineffective assistance of counsel.[1] We find the evidence sufficiency and prosecutorial misconduct challenges to be dispositive, and

[1] Mr. Alvarez argues that he received ineffective assistance of counsel at three stages of the proceedings: before trial, due to counsel's alleged failure to inform Mr. Alvarez of information bearing on whether to plead guilty; during trial, due to counsel's failure to object to the prosecutorial misconduct discussed below; and at sentencing, due to counsel's failure to request an exceptional downward sentence. Because we are remanding for a new trial, we need not reach these issues.

address them in turn.

I

In his first assignment of error, Mr. Alvarez argues that three of his four first degree assault convictions must be vacated due to insufficient evidence.

In deciding a defendant's challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the State and determine whether any rational trier of fact could have found the elements of the charged crime beyond a reasonable doubt. *State v. Brown*, 162 Wn.2d 422, 428, 173 P.3d 245 (2007). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence is recognized as just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980); *State v. Epefanio*, 156 Wn. App. 378, 384, 234 P.3d 253, *review denied*, 170 Wn.2d 1011 (2010). We defer to the fact finder on witness credibility issues. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

Mr. Almaguer testified at trial and was subject to cross-examination concerning his prior, inconsistent identification of Mr. Alvarez as the shooter. As a result, his identification is not hearsay and was admissible as substantive evidence. ER 801(d)(1)(iii). Where the jury is presented with evidence from which it can find that a witness's prior identification of a defendant was unequivocal, as was the case below, the

evidence of that prior identification is sufficient to support conviction. *State v. Hendrix*, 50 Wn. App. 510, 516, 749 P.2d 210 (1988); *cf. Commonwealth v. Brown*, __ A.3d __, 2012 WL 3570661, *20-21 (Pa. 2012) (collecting cases, and agreeing with the majority view that a recanted identification is sufficient to convict where the witness who made the identification testifies at trial and is subject to cross-examination). The intent to inflict great bodily harm that the State was required to prove as an element of the four charges of first degree assault may be inferred as a logical probability from all the facts and circumstances of the case. *State v. Wilson*, 125 Wn.2d 212, 217, 883 P.2d 320 (1994). [2]

Mr. Alvarez's principal argument, however, is that for three of the four counts of first degree assault, the State was required to rely on transferred intent, which he contends was not established. Under the principle of transferred intent, which our Supreme Court has held is embodied in RCW 9A.36.011, an assault "does not, under all circumstances, require that the specific intent match a specific victim." *State v. Elmi*, 166 Wn.2d 209, 216, 207 P.3d 439 (2009). Mr. Alvarez's argument assumes that the evidence showed that he was aware of only one victim of his assault. From this, he argues that we should embrace and apply the position of three dissenting justices in *Elmi*, who would have held

[2] The State charged Mr. Alvarez with assault in the first degree on the basis that with intent to inflict great bodily harm, he had assaulted the victims with a firearm. CP at 7-8, 75-78; RCW 9A.36.011(1)(a).

that transferred intent applies only to those assaults in which there is an actual battery against an unintended victim. Where no one was hit by the shooting, Mr. Alvarez argues, he can be charged with assaulting only an intended victim.

We reject Mr. Alvarez's argument for two reasons. First, unlike *Elmi*, where it was undisputed that the defendant was unaware of some of his asserted victims, the jury could find from the evidence presented in this case that Mr. Alvarez was aware of, and intended to cause great bodily harm to, all four victims. Each of the three testifying victims indicated that all four family members were outside the front door of the home during the shooting. From this evidence and the fact that more than 20 shots were fired in the family's direction, the jury could have reasonably inferred that Mr. Alvarez saw and intended to inflict great bodily harm upon each of the victims. Indeed the jury likely did draw that inference—Mr. Alvarez never presented evidence or argument distinguishing between intended and unintended victims, and the State did not argue transferred intent.

Second, even if the evidence established that Mr. Alvarez was unaware of three of the four victims, the majority opinion in *Elmi* held that intent to cause great bodily harm can transfer from an intended victim to an uninjured, unintended victim. We may not disregard directly controlling authority of our Supreme Court in favor of a dissenting opinion that Mr. Alvarez concludes is better reasoned. *1000 Virginia Ltd. P'ship v.*

Vertecs Corp., 158 Wn.2d 566, 578, 146 P.3d 423 (2006); *MP Med. Inc. v. Wegman*, 151 Wn. App. 409, 417, 213 P.3d 931 (2009).

Substantial evidence supports the first degree assault convictions.

II

Mr. Alvarez next argues that substantial evidence does not support the jury's gang aggravator findings. We review a jury's verdict on an aggravating factor for substantial evidence just as we do when evaluating the sufficiency of the evidence supporting the elements of a crime. *State v. Webb*, 162 Wn. App. 195, 205-06, 252 P.3d 424 (2011).

In order for the court to impose the aggravated sentence requested by the State on account of the gang aggravators charged, the State was required to show that Mr. Alvarez committed each offense "with intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang[,] its reputation, influence, or membership." CP at 86 (Jury Instruction 21); RCW 9.94A.535(3)(aa). No reported cases address this relatively new aggravating factor, added by the legislature in 2008. However, a handful of cases have passed upon RCW 9.94A.535(3)(s), a similar aggravator frequently employed in gang cases, which requires a showing that the defendant committed a crime to "obtain or maintain his . . . membership or to advance his . . . position in the hierarchy of an organization, association, or identifiable group."

Cases addressing the sufficiency of the evidence to support the aggravating circumstance provided by RCW 9.94A.535(3)(s) require a nexus between the crime charged and a defendant's actual gang-related motivation. *See State v. Yarbrough*, 151 Wn. App. 66, 96-97, 210 P.3d 1029 (2009) (sustaining the gang aggravator where the evidence established that the defendant made a gang reference before shooting, perceived the victim as a member of a rival gang, and a recent gang altercation had occurred prior to the shooting); *State v. Monschke*, 133 Wn. App. 313, 135 P.3d 966 (2006) (testimony established that the defendant wanted to advance in a white supremacist group and had advocated the assault so that another member of the group could earn recognition for it). The mere fact that the defendant and the victims belong to rival gangs, together with generalized testimony from law enforcement officers about gang behavior and motivation, does not prove the aggravating motive required beyond a reasonable doubt. *See State v. Bluehorse*, 159 Wn. App. 410, 432, 428-29, 248 P.3d 537 (2011) (vacating a gang aggravator in a drive-by shooting case involving rival gang members where the State presented only generalized evidence of territorial conflict between rival gangs). The evidence must instead establish that the specific criminal act was committed by the defendant for the reason alleged.

From the evidence presented here, the jury could reasonably have concluded that Mr. Alvarez was a gang member and that the victims and the home fired upon had

indirect associations with rival gangs. But no evidence established that Mr. Alvarez was aware of the victims' or the home's affiliations or that he was motivated by that knowledge in committing the assault. The State's evidence was enough to support gang motivation as a hypothesis, but not enough for a rational juror to find gang motivation beyond a reasonable doubt. The evidence does not support the jury's special verdict finding the aggravating circumstance provided by RCW 9.94A.535(3)(aa).

III

Mr. Alvarez next argues that the prosecutor committed misconduct by violating the witness advocate rule and implicitly vouching for or against the veracity of three witnesses: Mr. Almaguer, Ms. Mee, and Mr. Cruz. He contends that the prosecutor's line of questioning to each witness and comments during closing argument inappropriately suggested that the prosecutor had personal knowledge as to whether these witnesses were testifying truthfully. A defendant claiming prosecutorial misconduct must establish the impropriety of the prosecution's comments and their prejudicial effect. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006).

It is well established that "the prosecutor has a special obligation to avoid 'improper suggestions, insinuations, and especially assertions of personal knowledge.'" *United States v. Roberts*, 618 F.2d 530, 533 (9th Cir. 1980) (quoting *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935)). It is improper for a

prosecutor to personally vouch for or against a witness's credibility. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). Most reported Washington decisions that address improper vouching involve a prosecutor's explicit statement of personal opinion as to a witness's credibility. *See, e.g.*, *State v. Allen*, 161 Wn. App. 727, 746, 255 P.3d 784, *review granted*, 172 Wn.2d 1014 (2011); *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003).

A prosecutor may also vouch for or against the credibility of a witness by communicating to a jury, explicitly or implicitly, his or her personal knowledge about the underlying facts of a case. Assertions of personal knowledge run afoul of the advocate-witness rule, which prohibits attorneys from testifying in cases they are litigating. *United States v. Edwards*, 154 F.3d 915, 921 (9th Cir. 1998); *see also* RPC 3.7 cmt. 1 (recognizing that "[c]ombining the roles of advocate and witness can prejudice the tribunal and the opposing party"). Once the jury is aware that the prosecutor has personal knowledge about matters at issue, the communication of that knowledge can be implicit in the prosecutor's cross-examination or argument. Lawyers are not permitted to impart to the jury personal knowledge about an issue in the case under the guise of either direct or cross-examination when such information is not otherwise admissible in evidence. *State v. Denton*, 58 Wn. App. 251, 257, 792 P.2d 537 (1990) (citing *State v. Yoakum*, 37 Wn.2d 137, 222 P.2d 181 (1950)).

Mr. Alvarez relies on the reasoning of *Edwards*, in which the Ninth Circuit Court of Appeals reversed a conviction on prosecutorial misconduct grounds, finding that the prosecutor improperly blurred the roles of advocate and witness by implicitly vouching for the testimony of police witnesses. 154 F.3d at 923. The prosecutor had searched a bag admitted into evidence at trial and discovered a bail receipt bearing the defendant's name. *Id*. at 918-19. He sought to introduce the receipt through the testimony of two police officers who were present when he discovered it. *Id*. Over a defense objection that the prosecutor would improperly become both an advocate and a "silent witness" vouching for the authenticity of the evidence, the trial court admitted the receipt through the officers' testimony. *Id.* at 923. The defendant was convicted.

In reversing the conviction, the Ninth Circuit reasoned that "[o]nce the members of the jury learned that the prosecutor found the receipt, it is almost certain that they attributed the authority of the prosecutor's office to the receipt's discovery" and that "by putting witnesses on the stand and having them testify regarding the circumstances under which *he* found the evidence, the prosecutor implicitly and improperly vouched for the accuracy of their testimony." *Id*. at 922; *cf. United States v. Hosford*, 782 F.2d 936, 939 (11th Cir. 1986) (recognizing that while "the dual role of prosecutor and quasi-witness is subject to strictest scrutiny," no misconduct occurred where the prosecutor did not imply that he was privy to special knowledge or that witnesses had misrepresented facts).

In arguing similar misconduct here, Mr. Alvarez relies on the prosecutor's repeated references to his personal knowledge of Mr. Alvarez's conversations with Ms. Mee and Detective Layman. The prosecutor's first reference was in questioning Mr. Almaguer about the telephone call the afternoon before Mr. Almaguer was expected to testify:

> Q: . . . [W]hen it came to Wednesday of last week, were you on the phone from anyone with our office [ ], the Prosecutor's Office?
> A: (no audible response)
> Q: That afternoon?
> A: (no audible response)
> Q: Were you on the phone with Ms. Mee?
> A: I don't know who it was.
> Q: Okay. Was it a woman?
> A: Yeah.
> Q: Okay. *And did somebody else get on the phone at that time?*
> A: *You.*
> Q: *Okay. Did you again acknowledge that you're 100% certainty in this case* [ ]*?*
> A: *No.*

RP (Mar. 2, 2011) at 200-01 (emphasis added).

The prosecutor next questioned Mr. Almaguer about statements made after he was picked up on the material witness warrant, in which it became clear that the prosecutor had been personally present for these statements as well:

> Q: Okay. And was a warrant issued for you?
> A: I believe. You guys picked me up, so[—]
> Q: Okay. Were you ever arrested?
> A: Actually *the officer picked me up and took me to your office, and then you guys arrested me there.*

> Q: Okay.
> *Now, at that time, did you again reaffirm—*
> A: *I told you—*
> Q: *—that you were 100% sure it was him?*
> A: No. I told you guys I wasn't going to get on the stand and put somebody in—put somebody that wasn't there [ ], that I wasn't going to do that.

Id. at 203 (emphasis added).

With the jury now aware that the prosecutor participated in Mr. Almaguer's conversation with Ms. Mee as well as the meeting in the prosecutor's office with Detective Layman, the prosecutor persisted in asking questions that implied his personal knowledge of what Mr. Almaguer had said:

> Q: *Isn't it true, not only on the telephone call but in my office in front of Detective Layman, that you again acknowledged that you were 100% sure it was him, but you wouldn't do it because you were afraid about retaliation against your children?*
> A: I don't believe I acknowledged that it was—I don't believe I said that it was 100% him, no, I didn't.

Id. at 205 (emphasis added).

When the prosecutor called Ms. Mee to impeach Mr. Almaguer's recantation, his line of questioning reinforced that he, like she, was personally knowledgeable about the three-way conversation:

> Q: . . . .
> *Now, did anybody else come into that—walk up to your desk by happenstance?*
> A: *Actually, yes. At that point you had walked up and I had asked Mr. Almaguer if I could put him on speakerphone.*

Q: Okay. And, so, did the conversation continue?
A: Yeah. Yes.
Q: And, again, were the facts talked about of what he had seen?
A: Yes.
Q: Okay. And did, did he repudiate those facts at that time, or did he acknowledge that those were true?
A: He acknowledged again that it was the, the same series of events as to his involvement.
Q: Did he, did he acknowledge his level of certainty as far as the Defendant being the shooter?
A: Yes.
Q: Okay. And what'd he say? What'd he acknowledge?
A: He, he said that the Defendant was the shooter.
Q: Okay.
A: And he[—]
Q: Okay. *And once we started talking*, what did he say—did he say anything specifically about why he did not want to testify?
A: His—Yes. One of his primary concerns was that he felt that there may be four or five, maybe even six kids in the car and, and in quotes he—so these were his words, if he seen them, then they seen him. Word travels fast and that he has four kids that love, love—and he loves them very much and he couldn't live with himself if anything happened to them.
Q: Okay. Did at any point in time at this stage, this is again this is Wednesday around 5:00 [ ], did he ever back off from his certainty or his identification of the Defendant as the shooter?
A: No, other than the only thing he indicated was that he didn't want to testify.

Id. at 341-43 (emphasis added).

Finally, the prosecutor's questioning of Mr. Cruz, a witness for the defense who testified that Mr. Alvarez was at a barbeque at the time of the shooting, was presented in a similar manner:

Q: . . . So this day—Now, this barbeque, *and we talked a little bit*

> *before—a little earlier this morning. I was there*, [defense counsel] was there and Detective Layman was there, correct?
> A: (no audible response)
> Q: Alright. And you indicated, didn't you—And you were asked about how can you be sure this barbeque was this weekend, right? *And didn't I ask you*, "Couldn't it have been the weekend before," or, "Couldn't there have been a barbeque the week after," right?
> A: Yeah.
> Q: Okay. And you denied that there was a barbeque either the week before or a week after, correct?
> A: I didn't, I didn't deny—
> Q: That was just a short time ago. Didn't you deny that there was a—specifically that the—you denied that there was a barbeque the week after on the 17th, didn't you?
> A: The week after?
> Q: The weekend after. The next Saturday.
> A: I don't remember denying that.

RP (Mar. 3, 2011) at 392 (emphasis added).

In closing argument, the prosecutor made use of the information about his personal involvement that he had placed into evidence, arguing to the jury:

> [W]hen it came to the day before, Wednesday afternoon, he's suddenly taking the position that he doesn't want to come in. He refuses to testify. *And when questioned about it by both*—and you heard the testimony of Kaitlin Mee regarding this interaction, *especially when the Prosecutor, yours truly came into the conversation on speakerphone*, [Mr. Almaguer] said he was going to take the Fifth. He reiterated again, "Yes, that's definitely the guy," but because he nosed around and asked around, he now knew details about Raul Alvarez and his brother. He was scared to death. He said not for him, but for his family. . . . Again, he didn't dispute or toss aside that this was the guy, that the Defendant was the shooter that he saw firing and then get into that vehicle. He didn't repudiate that at this time. He just said he'd take the Fifth and he would take any consequences that came down, because if he had to get on the stand, he would refuse to testify because of that fear.

Id. at 473-75 (emphasis added).

Having conveyed his personal participation to the jury, the prosecutor's questioning of the accuracy of Mr. Almaguer's and Mr. Cruz's testimony suggested to the jury that anything other than a "yes" answer was inaccurate. His eliciting testimony supportive of the State's case from Ms. Mee suggested to the jury that he endorsed the accuracy of what she was saying. The danger in having a prosecutor testify as an implicit witness is that "jurors will automatically presume the prosecutor to be credible and will not consider critically any evidence that may suggest otherwise." *Edwards*, 154 F.3d at 921.

That danger was realized here, and supports a finding of misconduct. Given that defense counsel did not object to the questioning or argument, however, Mr. Alvarez is required to demonstrate a heightened degree of prejudice in order to obtain relief. Where a defendant timely objects to a prosecutor's comment, we determine prejudice by asking whether there is a substantial likelihood the misconduct affected the jury's verdict. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Where, as here, a defendant fails to object to an allegedly improper comment, any error is waived unless the comment "is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice" that a curative instruction could not have alleviated. *Id.*

In assessing whether this enhanced prejudice is present, our focus is "less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured." *State v. Emery*, 174 Wn.2d 741, 762, 278 P.3d 653 (2012). "'The criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?'" *Id*. (alteration in original) (quoting *Slattery v. City of Seattle*, 169 Wash. 144, 148, 13 P.2d 464 (1932)).

Vouching by a prosecutor from personal knowledge, as distinguished from personal opinion, is particularly problematic. As observed in *Edwards*, "[a]n improper message conveyed in this manner is even more prejudicial to the defense than the usual vouching message," because it suggests that the prosecutor has special knowledge pertaining to the defendant's guilt and personally believes in his own observations. 154 F.3d at 922. Analyzing the problem in witness-advocate conflict terms, the Second Circuit has recognized implicit testimony by a prosecutor as especially prejudicial because "'an unsworn witness [is not] subject to cross-examination or explicit impeachment.'" *United States v. Kwang Fu Peng*, 766 F.2d 82, 86 (2nd Cir. 1985) (quoting *United States v. Cunningham*, 672 F.2d 1064, 1075 (2nd Cir. 1982)).

The prejudice created in this case could not have been adequately cured by an instruction. It went to the lynchpin of the case: whether Mr. Almaguer's recantation of

his identification of Mr. Alvarez was plausible. The prosecutor's communication of his personal knowledge of Mr. Almaguer's conversations placed the prestige of the government behind the testimony of Ms. Mee and Detective Layman, the State's key witnesses. It presented that same prestige as a direct challenge to Mr. Almaguer's conflicting version of events. It did so with no possibility of cross-examining what amounted to the prosecutor's unsworn testimony. A new trial is required.

We reverse the judgment and sentence and remand for a new trial, without the aggravating factor provided by RCW 9.94A.353(3)(aa).

A majority of the panel has determined that 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.

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Siddoway, A.C.J.

WE CONCUR:

_____ _____
Sweeney, J. Brown, J.