No. 18-

IN THE

Supreme Court of the United States

JOHN WASHEK,

Petitioner,

v.

STATE OF VERMONT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE THE VERMONT SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Defendant/Petitioner John Washek's Fourth Amendment rights were violated because the police officer's Terry stop was based on observations much more consistent with innocent than criminal behavior.

2. Whether the trial court denied Defendant/Petitioner John Washek's constitutional right to present a complete defense to the criminal charge brought against him when he was barred from showing the jury the remaining portion of his processing video not shown by the State.

LIST OF PARTIES

1. Petitioner-Defendant John Washek.

2. Respondent-Plaintiff State of Vermont.

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PETITION FOR WRIT OF CERTIORARI

Defendant/Petitioner John Washek prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The Vermont Supreme Court issued an unpublished Entry Order affirming Mr. Washek's conviction, available at 2018 WL 4827706, attached at Appendix A.

BASIS FOR JURISDICTION

The Vermont Supreme Court issued its opinion affirming Mr. Washek's conviction on October 3, 2018. Appendix A, 1a. The Court granted Mr. Washek an extension of time until December 17, 2018, to file a motion for reargument, and Mr. Washek filed his motion on December 17. By Entry Order dated December 20, 2018, the Vermont Supreme Court denied Mr. Washek's motion for reargument. Appendix C, 13a. The instant Petition is timely, as it is within 90 days of the Vermont Supreme Court's denial of reargument.

Because Mr. Washek's Terry stop and trial violated his federal constitutional rights, this Court has jurisdiction to review the final judgment of the Vermont Supreme Court under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution Amendment IV.

> The right of the people to be secure in their persons, houses, papers, and effects, against

unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution Amendment VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

United States Constitution Amendment XIV.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

STATEMENT OF THE CASE

Two important federal questions arose in Mr. Washek's case and were wrongly decided. First, the police stopped Mr. Washek's vehicle for operation which was much more likely to be the result of Mr. Washek being who he in fact was – a lost, out-of-state traveler – than any criminal behavior. Second, at trial, the court did not allow Mr. Washek to introduce the last and important part of the video of his police station processing, impermissibly interfering with his right to put on a complete defense. Mr. Washek asks this Court to grant certiorari to address these important questions of federal law and to vacate Mr. Washek's conviction because of the constitutional violations upheld by the state court.

This case arises out of a driving under the influence, first offense, prosecution and conviction. On August 18, 2016, Officer Talley of the City of St. Albans, Vermont, police department observed Mr. Washek drive by his location and enter the parking lot of a hospital. Appendix A, 2a. It was after midnight. The vehicle turned around in the hospital parking lot and traveled back past the officer in the opposite direction. Officer Talley pulled out behind the vehicle, and saw from the license plate that the vehicle was from Massachusetts. After Mr. Washek properly stopped at a red light, and turned left, the officer observed that Mr. Washek was going approximately 25 m.p.h. in a 40 m.p.h. zone, and upon approaching a cross street slowed almost to a stop, despite having the right of way. Officer Talley claimed to have seen intra-lane weaving, and tires touching or crossing the center line, although this was not supported by the video. When the officer saw the alleged second touch of the yellow line, he activated his

blue lights and pulled Mr. Washek over. Id. As Mr. Washek explained to him, he was an out-of-state driver completely unfamiliar with the area, and he had been trying to follow his vehicle's GPS system to get to his hotel. Mr. Washek denied drinking, and questioned the officer's claim that he could smell alcohol coming from the vehicle when Mr. Washek had been driving a convertible. Id. All of the actions observed by the officer were completely consistent with Mr. Washek simply being lost and trying to navigate his way through unfamiliar roads.

Mr. Washek filed a motion to suppress, based in part on the officer's lack of the reasonable, articulable suspicion of criminal activity needed to subject him to a Terry stop, in violation of the Fourth Amendment of the United States Constitution. An evidentiary hearing was held on February 21, 2017. As summarized by the Vermont Supreme Court, the trial court made the following findings:

> In the early morning hours of August 18, 2016, a police officer observed defendant turn his car around in a hospital parking lot. Defendant was driving a convertible with out-of-state plates. After turning around, defendant proceeded back the way he had just come. The officer followed the car and observed defendant weave in his lane with the tires touching or crossing the solid yellow center line. Defendant was traveling 15 to 20 miles under the 40 miles per hour speed limit. He weaved to the white fog line and then back. As he approached an intersection, defendant slowed his vehicle nearly to a stop in his travel lane despite having the right of way and being followed by two

> cars. The officer observed defendant's tires again cross the center line. He then stopped defendant's vehicle. Although defendant denied consuming alcohol, the officer detected a faint odor of intoxicants emanating from defendant. He also observed that defendant's eyes were watery and bloodshot. Additionally, defendant's speech was somewhat slurred and he appeared confused about how to get to his destination. Defendant had been driving in the opposite direction of his stated destination.

State v. Washek, 2018 WL 4827706, at *1 (Vt. Supreme Court 10/3/18), Appendix A, 2a-3a. The trial court denied Mr. Washek's motion to suppress.

After conviction, Mr. Washek appealed this ruling to the Vermont Supreme Court. The Court affirmed. It held that the facts supported the conclusion that Officer Talley had a reasonable and articulable suspicion that the driver was engaged in criminal activity or had violated the traffic laws. Id. at *2, Appendix A, 5a. The Court held the stop was justified by intra-lane weaving, crossing the center line, driving significantly under the speed limit, and stopping in the middle of the road. Id.

With regard to the trial error, Mr. Washek's processing at the police barracks was videotaped and audiotaped. During processing, Mr. Washek was afforded the statutory right to consult with an attorney about whether to give an evidentiary sample of his breath. Approximately the first minute of Mr. Washek's conversation with the attorney was audiotaped, before the Officer deactivated the audio-recording system. Prior to trial, the parties stipulated

to admission of the processing video. At trial, however, they disagreed as to admission of the taped portion of Mr. Washek's conversation with his attorney. Mr. Washek argued that it should be shown to the jury. It showed Mr. Washek's demeanor and sobriety, and was consistent with Mr. Washek's position that he had been lost and trying to find his way to his hotel when stopped. The State argued against its admission. The trial court excluded that portion of the video, finding that it was cumulative and that it would be unfair to the State to introduce it.

Mr. Washek appealed this ruling, arguing that disallowing this portion of the video violated the rule of completeness, as memorialized in Vermont Rule of Evidence 106. Rule 106, which is effectively identical to Federal Rule of Evidence 106, is entitled "Remainder of or Related Writings or Recorded Statements," and provides:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

The Vermont Supreme rejected Mr. Washek's argument, noting that review was limited to plain error, and that the evidence was "reasonably excluded as cumulative and incomplete." Washek, 2018 WL 4827706, at *3, Appendix A, 6a-7a. On reargument, Mr. Washek argued that barring admission of the full audiotape violated his 6th Amendment constitutional right to present a complete defense. Defendant's Motion for Reargument, pp. 12-14. The Court denied Mr. Washek's motion for reargument in a single-sentence Entry Order. Appendix C, 13a.

REASONS FOR GRANTING THE PETITION

I. This Court should address the important federal question of whether a defendant's actions, which are much more consistent with innocent than criminal behavior, can objectively justify the constitutional infringement of a *Terry* stop.

The Fourth Amendment applies to police seizures of persons, including stops of a person's vehicle. United States v. Cortez, 449 U.S. 411, 417 (1981). Under Terry v. Ohio, 392 U.S. 1, 30 (1968), the police can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity "may be afoot." Defining the required reasonable, articulable suspicion has not been an easy task. Indeed, this Court has historically eschewed any formula for it. United States v. Sokolow, 490 U.S. 1, 7 (1989); United States v. Arvizu, 534 U.S. 266, 274 (2002). The Court has emphasized that the inquiry must be based on the totality of the circumstances, id., and that based on this "whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity." Cortez, 449 U.S. at 417-18.

As this Court has repeatedly recognized, this inquiry by necessity is based on "probabilities." "The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common sense conclusions about human behavior; jurors and fact finders are permitted to do the same – and so are law enforcement officers." Id. at 418; Illinois v. Wardlow, 528 U.S. 119, 125 (2000)(citing Cortez); Sokolow, 490 U.S. at 8

(quoting Cortez). If the probabilities of certain observed behaviors actually indicating criminal behavior are too low, the Constitution cannot permit a stop based on these behaviors. Such a stop would be unreasonable.

The most difficult – and arguably most important – application of the requisite reasonable articulable suspicion arises when the acts observed can reasonably be supported by innocent explanations. This Court has repeatedly held that the existence of possible innocent explanations for a person's acts does not bar a finding of reasonable articulable suspicion that the person is engaged in criminal activity. Sokolow, 490 U.S. at 9-10 (fact that observed facts were consistent with innocent travel did not mean that, taken together, they did not amount to reasonable suspicion); Wardlow, 528 U.S. at 125 (acts susceptible of an innocent explanation can support reasonable suspicion). As summarized in Arvizu, a "determination that reasonable suspicion exists, however, need not rule out the possibility of innocent conduct." 534 U.S. at 277.

Mr. Washek's case deserves this Court's consideration because it squarely raises the critical question not addressed in the above jurisprudence. What if a defendant's conduct not only is consistent with innocence, but is much more consistent with innocence. In other words, where the probability that a person's actions are innocent greatly outweighs the probability that a person's actions are criminal, will the Fourth Amendment consider a resulting stop reasonable? The answer should be no, and Mr. Washek asks this Court to expressly recognize this important principle of Fourth Amendment law.

Mr. Washek was an out-of-state driver lost in the City of St. Albans. The officer knew that Mr. Washek was from out-of-state. All of Mr. Washek's observed actions were consistent with a lost driver, and much more consistent with a lost driver than an intoxicated driver. Turning around in a hospital parking lot to go the other way, driving slowly, and coming close to a stop at an intersection with the right-of-way, all were because Mr. Washek was lost. Slight weaving and touching the center line is also completely consistent with a lost driver trying to navigate his way out of unfamiliar territory with GPS. Mr. Washek submits that on these facts, the obvious likelihood of him being lost greatly outweighed the likelihood that he was intoxicated. Following this Court's exhortations to assess probabilities and to use common sense, the constitutional conclusion should be that a Terry stop was not reasonable.

As this Court recognized in Reid v. Georgia, 448 U.S. 438 (1980), the innocent explanation probability can sufficiently outweigh the guilty probability such that a Terry stop would be unconstitutional. In Reid, the DEA detained a suspect at Atlanta Airport because 1) the suspect had arrived from Fort Lauderdale, Florida, a source city for cocaine; 2) he arrived early in the morning when there is less law enforcement; 3) he only had carry-on luggage; and 4) he and his companion appeared to be trying to conceal the fact that they were traveling together. Id. at 440-41. These facts, while reasonable and articulable, were inadequate to support a finding of reasonable suspicion. As the Court noted, all but the last fact "describe a very large category of presumably innocent travelers, who would be subject to virtually random seizures were the Court to conclude that as little foundation as there was in this case could justify a seizure." Id. at 441. If the quantum

of facts known to the police would "describe a very large category of presumably innocent travelers," it cannot be found to justify a seizure. The Court cannot countenance a standard which would allow for a large number of innocent people to be seized.

Another way of expressing the Reid principle is that if the observed facts are much more likely to be consistent with non-criminal behavior than criminal behavior, a seizure would be unreasonable. Where it is much more likely that there is no criminal activity involved, allowing seizure would mean that an unacceptably large number of innocent people would be subject to seizure. As correctly articulated in United States v. Williams, 808 F.3d 238, 251 (4th Cir. 2015), "Under the applicable standard, the facts, in their totality, should eliminate a substantial portion of innocent travelers."

Applying Reid and its progeny to Mr. Washek, it is much more likely that Mr. Washek was what he claimed to be – a lost driver – than an intoxicated driver. Upholding Mr. Washek's seizure effectively permits the police to seize any lost driver who is acting like a lost driver should – turning around when going the wrong way and driving slowly, including at intersections. Under the language of Reid, this behavior "describe[s] a very large category of presumably innocent travelers." Reid, 448 U.S. at 441.

This Court's cases have recognized that a possible innocent explanation is not an automatic bar to reasonable suspicion. But that does not answer the different scenario when an innocent explanation is much more likely to be the truth. Following from Reid, the Court should hold that where the innocent explanation is much more likely,

reasonable suspicion does not exist for Fourth Amendment purposes. Otherwise, the small odds of criminal activity would swallow the greater odds of innocence, and an unacceptably large number of innocents would be subject to seizure. The relative likelihood or "probabilities" are a legitimate part of the inquiry. Cortez, 449 U.S. at 418. In Mr. Washek's case, the relative likelihood of innocence compels a finding that his seizure was unconstitutional.

II. This Court should hold that Mr. Washek's constitutional right to present a complete defense was violated when he was barred from showing the complete video of his processing.

The "Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" Crane v. Kentucky, 476 U.S. 683, 690 (1986)(quoting California v. Trombetta, 467 U.S. 479, 485 (1984)). This applies to state court criminal trials, either because the right is "rooted directly in the Due Process Clause of the Fourteenth Amendment," or by virtue of application of the Sixth Amendment's Compulsory Process or Confrontation clauses applicable to state criminal trials through the Fourteenth Amendment. Crane, 476 U.S. at 691. "An essential component of procedural fairness is an opportunity to be heard." Id. See also Holmes v. California, 547 U.S. 319, 324 (2006)(South Carolina rule restricting defendant's evidence of third-party guilty violated constitutional guarantee of "meaningful opportunity to present complete defense").

Although not rooted in the constitutional guarantee, Rule 106 serves a complementary purpose. Both Vermont Rule 106 and Federal Rule 106, which are effectively

identical, originate from the "common-law 'rule of completeness'". Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 171 (1988). As succinctly summarized by Wigmore, "'The opponent, against whom a part of an utterance has been put in, may in his turn complement it by putting in the remainder, in order to secure for the tribunal a complete understanding of the total tenor and effect of the evidence.'" Id. (quoting 7 J. Wigmore, Evidence in Trials at Common Law § 2113, p. 653 (J. Chadbourn rev. 1978)).

In Mr. Washek's criminal trial, both his constitutional right to present a complete defense and his evidentiary right under Rule 106 were violated. The parties stipulated to admission of Mr. Washek's processing video at the police station. The State, however, objected to the playing of approximately one minute of the video, where Mr. Washek was speaking with the on-call attorney. Mr. Washek sought admission, arguing that it would show his demeanor. The portion was also incredibly important, as it reinforced Mr. Washek's claims that he had been lost at the time he was stopped, that his GPS was guiding him in the wrong direction, and that he felt that he had not been drinking.

A constitutionally complete defense required the complete video. Completeness under Rule 106 required the complete video. The trial court's decision to the contrary broke both of those bedrock rules of fairness in criminal trials.

The rule of completeness requires the admission of an entire recorded statement when the opposing party offers evidence of some of it. United States v. Walker, 652 F.2d 708, 710 (7th Cir. 1981). It is essentially a rule of fairness, and functions as a "defensive shield" against potentially misleading evidence proferred by an opposing

party. United States v. Wilkinson, 862 F.3d 1023, 1038 (10th Cir. 2017). The proferred rebuttal portions of the statement must be relevant to the issues, and qualify or explain the subject matter of the portion offered by the opponent. Walker, 652 F.2d at 710. If they so qualify, denying admission is error.

Here, Mr. Washek's one-minute conversation with his attorney during the processing was highly relevant. It showed his demeanor while interacting with someone other than a hostile police officer, presenting a much more accurate portrait of his demeanor. It also qualified to explain the remaining portions of the processing admitted by stipulation, reinforcing that Mr. Washek had been merely a lost-traveler and not an intoxicated driver.

For the same reasons, exclusion violated Mr. Washek's constitutional right to present a complete defense. To afford defendant "a meaningful opportunity to present a complete defense," Trombetta, 467 U.S. at 485, the trial court cannot employ evidence rules in a manner that is "arbitrary or disproportionate to the purposes they are designed to serve." Holmes, 547 U.S. at 324 (quotations omitted). There was no good reason for the trial court to exclude Mr. Washek's proffered minute of video. The notion that this would be cumulative is indeed an arbitrary application of the evidentiary rules. It makes no sense to exclude one minute of video as "cumulative" when the remaining tape was lengthy. More important, it was not cumulative, because it showed for the only time Mr. Washek's demeanor while interacting with someone whom he was not hostile towards. This was critical evidence for Mr. Washek, and preclusion violated the tenets of fundamental fairness guaranteed to criminal defendants.

CONCLUSION

The petition for writ of certiorari should be granted.

DATED at Middlebury, Vermont, this 12th day of March, 2019.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF THE VERMONT SUPREME COURT, DATED OCTOBER 3, 2018

SUPREME COURT OF VERMONT

Supreme Court Docket No. 2018-009

STATE OF VERMONT,

v.

JOHN WASHEK.*

September Term, 2018

October 3, 2018, Decided

APPEALED FROM: Superior Court, Franklin Unit, Criminal Division. DOCKET NO. 1021-8-16 Frcr. Trial Judge: A. Gregory Rainville (motion to suppress); Martin A. Maley (final judgment).

Present: REIBER, C.J., SKOGLUND, and ROBINSON, JJ.

ENTRY ORDER

In the above-entitled cause, the Clerk will enter:

Defendant appeals from his conviction, by jury, of driving under the influence (DUI). He argues that the

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* Missing text.

court erred in denying his pretrial motion to suppress and dismiss and in denying his request to introduce a portion of his conversation with the public defender that was inadvertently recorded. Defendant also asserts that the prosecutor engaged in misconduct during her closing argument. We affirm.

Defendant was charged with DUI following an August 2016 traffic stop. He filed a motion to suppress and dismiss, arguing that the arresting officer lacked reasonable grounds to stop him. Following a hearing on February 21, 2017, the court denied the motion. It made the following findings. In the early morning hours of August 18, 2016, a police officer observed defendant turn his car around in a hospital parking lot. Defendant was driving a convertible with out-of-state plates. After turning around, defendant proceeded back the way he had just come. The officer followed the car and observed defendant weave in his lane with the tires touching or crossing the solid yellow center line. Defendant was traveling 15 to 20 miles under the 40 miles per hour speed limit. He weaved to the white fog line and then back. As he approached an intersection, defendant slowed his vehicle nearly to a stop in his travel lane despite having the right of way and being followed by two cars. The officer observed defendant's tires again cross the center line. He then stopped defendant's vehicle. Although defendant denied consuming alcohol, the officer detected a faint odor of intoxicants emanating from defendant. He also observed that defendant's eyes were watery and bloodshot. Additionally, defendant's speech was somewhat slurred and he appeared confused about how to get to his destination. Defendant had been driving

in the opposite direction of his stated destination.

The officer had defendant exit his vehicle and perform roadside sobriety exercises. He concluded that defendant did not satisfactorily complete these exercises. He placed defendant under arrest and processed him for DUI at the police station. The officer put defendant in contact with an attorney. Defendant started immediately conversing with the attorney after the officer handed him the phone, and it took a few seconds for the officer to gather his papers and leave the room. Because of this, sixty seconds of defendant's conversation with the attorney was inadvertently recorded. There was no evidence that any of the recorded call contained information material to defendant's defense. Defendant refused to provide an evidentiary breath test after speaking with an attorney.

Based on these findings, the court concluded that the officer had reason to believe that defendant committed a motor vehicle violation and thus, he was justified in stopping his vehicle. It explained that crossing the center line of the road alone justified the stop. The officer, based on his training and experience, also had a reasonable suspicion that defendant was driving while impaired based on the totality of the circumstances. See *State v. Pratt*, 2007 VT 68, ¶¶ 5-6, 182 Vt. 165, 932 A.2d 1039 (explaining that stop is justified when officer has reasonable suspicion of impaired driving, and "[r]easonable suspicion is assessed by examining the totality of the circumstances," including officer's expertise "in recognizing signs of impaired operation"). In this case, the officer observed defendant traveling well under the speed limit, weaving

within his lane, crossing the centerline, and stopping in the traveled portion of the road for no apparent reason. The officer testified that, based on his experience, defendant's driving was consistent with impaired operation.

The court also determined that because the officer had reasonable grounds to suspect that defendant was driving under the influence, he was justified in ordering defendant to exit his vehicle to conduct a further investigation. The court rejected defendant's assertion that the exit order was based solely on the officer smelling a faint odor of intoxicants. It explained that the officer observed numerous indicia of impairment prior to requesting defendant to exit, including a faint odor of intoxicants in the face of a denial of having consumed any alcohol, defendant's bloodshot and watery eyes, and his slurred and confused speech. As recounted above, the officer had also observed operation that indicated impairment. Finally, the court rejected defendant's assertion that the inadvertent recording of a brief portion of his consultation with an attorney inhibited his ability to have a meaningful legal consultation. The court thus denied defendant's motion to suppress and dismiss.

A jury trial was held in December 2017 and the jury found defendant guilty of DUI. This appeal followed.

On appeal defendant argues that the officer lacked reasonable grounds to stop him and to order him to exit his vehicle. He suggests that the stop was based on intra-lane weaving alone and that the exit order was based solely on the officer smelling a faint odor of intoxicants. Defendant

cites to testimony from the jury trial, which post-dates the trial court's ruling on his motion to suppress.

Defendant did not order a transcript of the suppression hearing. He therefore waived his right to challenge the court's findings. See V.R.A.P. 10(b)(1) ("By failing to order a transcript, the appellant waives the right to raise any issue for which a transcript is necessary for informed appellate review."); *Evans v. Cote*, 2014 VT 104, ¶ 7, 197 Vt. 523, 107 A.3d 911 ("Without the transcript, this Court assumes that the trial court's findings are supported by the evidence."). The court's findings support its conclusions here. See *State v. Lawrence*, 2003 VT 68, ¶ 9, 175 Vt. 600, 834 A.2d 10 (mem.) (explaining that on review of denial of motion to suppress, Supreme Court defers to trial court's factual findings, but reviews do novo ultimate legal conclusion drawn from those facts).

A stop is justified if a police officer has "a reasonable and articulable suspicion that the driver is engaged in criminal activity or has committed a traffic violation." *State v. Howard*, 2016 VT 49, ¶ 5, 202 Vt. 51, 147 A.3d 88. In this case, as reflected above, the court did not rely solely on intra-lane weaving to uphold the stop. In addition to the intra-lane weaving, the court cited defendant's act of crossing the centerline of the road, driving significantly under the speed limit, and stopping in the middle of the road. See *id.* ¶ 7 (explaining that "[c]rossing the center line of the road" is traffic violation that justifies stop); see also *Pratt*, 182 Vt. 165, 2007 VT 68, ¶ 5, 932 A.2d 1039 (recognizing that Court has "upheld investigatory stops for suspicions of DUI based on erratic driving," including intra-lane weaving). The officer testified that, based on

his experience, defendant's driving was consistent with impaired operation. The court did not err in concluding that the stop was justified.

The court's conclusion as to the exit order is also supported by its findings. "[W]hen an officer can point to specific, articulable facts that a suspect is driving under the influence, he may order the suspect to exit his vehicle for the purpose of conducting further investigation." *State v. McGuigan*, 2008 VT 111, ¶ 13, 184 Vt. 441, 965 A.2d 511. The exit order was not based solely on the faint odor of intoxicants, as defendant asserts. Instead, it was based on the totality of the circumstances recounted above. We find no error.

Defendant next argues that the court should have allowed the jury to hear an inadvertently recorded sixty-second portion of his conversation with his attorney.** He argues, for the first time on appeal, that its admission was required under "the rule of completeness." See *State v. Hemond*, 2005 VT 12, ¶ 8, 178 Vt. 470, 868 A.2d 734 (mem.) (discussing "rule of completeness" codified in V.R.E. 106). Rule 106 provides that "[w]hen a writing

** We note that defendant does not provide any citation to the record for where this issue was discussed, nor does he provide record citations for his allegations, discussed below, that the prosecutor engaged in misconduct by labeling his driving "scary" and describing his behavior as "threatening." Our rules require defendant to provide citations to the "parts of the record on which [he] relies," V.R.A.P. 28(a)(4)(A), and as a general rule, the Court will not "search the record for error" on defendant's behalf. *Livingston v. Town of Hartford*, 2009 VT 54, ¶ 10, 186 Vt. 547, 979 A.2d 459 (mem.).

or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." Defendant also asserts that this recording was important to show the jury his demeanor, articulation, and comprehension of events.

We find no error. The record shows that the parties stipulated to the admission of the processing video before trial. Both parties recognized that a small portion of defendant's conversation with his attorney had been inadvertently captured on the processing video. Defendant's attorney stated that "that part can be fast forwarded" and the State agreed that it "would just jump over that part, of course." The processing video was later played for the jury. The State indicated the point at which the video should be stopped to prevent showing the attorney-client discussion. The State argued that it would be inappropriate to play the snippet of the conversation unless the whole conversation was admitted. Defendant argued that the snippet should be admitted to show his demeanor. The State responded that such evidence would be cumulative as defendant's demeanor was evident throughout the processing video as well as in a roadside video that had been admitted. The State, not defendant, argued that the snippet should not be admitted under the rule of completeness. The trial court concluded that the snippet was cumulative. It also found that playing a snippet of the interview — and not the entire interview — would be unfair to the State.

The court reasonably excluded this evidence as cumulative and incomplete. See *State v. Russell*, 2011 VT 36, ¶ 6, 189 Vt. 632, 22 A.3d 455 (mem.) (explaining that this Court applies "a deferential standard of review to the trial court's evidentiary rulings and will reverse its decision only when there has been an abuse of discretion that resulted in prejudice" (quotation omitted)). Defendant did not argue below that the rule of completeness required admission of this snippet, and he fails to show plain error. See *State v. Longley*, 2007 VT 101, ¶ 24, 182 Vt. 452, 939 A.2d 1028 (explaining that "[p]lain error lies only in the rare and extraordinary cases where a glaring error occurred during trial that was so grave and serious that it strikes at the very heart of defendant's constitutional rights" (quotation omitted)).

Finally, defendant asserts that the prosecutor engaged in misconduct during her closing argument by referring to his driving as "scary" and stating that defendant "threatened" the officer. He argues that her comment about his driving went directly to the theory of the defense that he was lost and trying to find his way to his hotel. Defendant also asserts that the prosecutor's statement about his threatening behavior was unsupported by the record and that it constituted a personal and prejudicial attack on his character. Defendant maintains that the comments rise to the level of plain error.

The record shows the following. In her closing argument, the prosecutor described the totality of the evidence that the officer had relied upon in deciding to stop defendant. She stated that "it wasn't one thing" that led

the officer to make the stop, but rather, many things that began to add up. She stated that in the officer's conversation with defendant immediately after the stop, defendant agreed that he had been weaving and doing "kind of scary driving." She explained that during processing, defendant became "slightly argumentative" with the officer, stating that he was "going to call the police chief, because he thinks [the officer's] done some unlawful procedures." She contrasted this with the officer's respectful and courteous behavior. She referred the jury to the video that they had seen. In his closing argument, defense counsel acknowledged that defendant was "drifting" and "hugging … one side of the road," but asserted that this was not "scary driving." He maintained that it was evidence that defendant was lost and trying to figure out where he was going. In her rebuttal closing argument, the prosecutor rebutted defendant's characterization of his driving. She stated that the driving was "scary" because defendant was "doing several things and it's adding up," noting there could be grave consequences to other motorists if defendant was in fact driving while impaired. After discussing the evidence, the prosecutor stated that in its totality, "everything from the driving, from the interaction of the officer at roadside, from the field sobriety, during processing when he continues to ask questions, when he's threatening of the officer, these are all things that demonstrate that he is under the influence."

We find no plain error. It is well-established that "prosecutors are entitled to a good deal of latitude in their closing arguments," but they must also "keep within the limits of fair and temperate discussion circumscribed by

the evidence in the case." *State v. Rehkop*, 2006 VT 72, ¶ 35, 180 Vt. 228, 908 A.2d 488 (quotation and alteration omitted). "Because we afford prosecutors a great deal of latitude when making their closing arguments, we have found plain error only if the argument is manifestly and egregiously improper." *Id.* ¶ 37 (quotation omitted). In other words, a defendant must show "that the prosecutor's closing argument was not only improper, but also that it impaired the defendant's right to a fair trial." *Id.* (quotation omitted).

In this case, it was fair for the prosecutor to use the word "scary" to describe what it argued was erratic driving. This description is grounded in the evidence presented at trial, including the officer's testimony that he observed defendant crossing the centerline, weaving, and coming to a stop at an intersection where there was no stop sign. The prosecutor's statement that defendant threatened the officer is also grounded in the evidence. The officer testified that during processing, defendant threatened to report him to the police chief for allegedly conducting illegal procedures. None of the isolated comments identified by defendant were "manifestly and egregiously improper," and they did not impair defendant's right to a fair trial.

Affirmed.

APPENDIX B — RELEVANT DOCKET ENTRY FROM THE VERMONT SUPERIOR COURT, FRANKLIN CRIMINAL DIVISION NO. 1021-8-16 FRCR

Vermont Superior Court — Franklin Criminal Division

Docket No.	1021-8-16 Frcr	State vs. Washek, John	1021-8-16 Frcr

Prosecutor:	Heather J. Brochu	Defendant:	John Washek
		DOB:	04/14/1961
Motions pdg:		POB:	
Bail set:		Atty:	John B. St. Francis
Incarcerated:	released		
	Conditions:	Aliases:	
Case Status: Disposed		Address:	946 Great Plain Avenue Needham MA 02492
Next Hearing:			

Dspt	Docket No.	Ct.	Statute	F/M/0
1	1021-8-16 Frcr	1	23 1201(a) (2)	mis 04/06/18 Verdict by jury of DUI #1-INFLUENCE

***

Appendix B

Date Filed	Docket Text
12/07/17	Jury Trial held by Martin A. Maley. (CDVIDEO) Brochu/St Francis/Def present Guilty by jury DA - Def wants to appeal. Trial verdict on dispute 1: guilty by jury. Sentence on dispute 1: $300.00 fine. $47.00 surcharge assessed. $45.00 victim's restitution surcharge assessed. $60.00 BAC Test surcharge assessed. $100.00 Special Investigative Unit surcharge assessed. Motion To Stay (Oral) filed by Attorney John B. St. Francis for Defendant John Washek on dispute 1. Motion To Stay (Oral) granted. Status Conference set for 01/08/18 at 02:00 PM. Has appeal been filed, imposition of sentence.

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APPENDIX C — DENIAL OF REARGUMENT OF THE VERMONT SUPREME COURT, FILED DECEMBER 20, 2018

VERMONT SUPREME COURT

SUPREME COURT DOCKET NO. 2018-009

STATE OF VERMONT,

v.

JOHN WASHEK.*

DECEMBER TERM, 2018

APPEALED FROM:
Superior Court, Franklin Unit
Criminal Division

DOCKET NO. 1021-8-16 Frcr

ENTRY ORDER

In the above-entitled cause, the Clerk will enter:

Insofar as appellant's motion for reargument fails to identify points of law or fact overlooked or misapprehended in the Court's decision in this case, his motion for reargument is denied. See V.R.A.P. 40(b)(1).

Appendix C

BY THE COURT:

/s/_____
Paul L. Reiber, Chief Justice

/s/_____
Marilyn S. Skoglund, Associate Justice

/s/_____
Beth Robinson, Associate Justice