NO. 100328-5

**SUPREME COURT OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

JACK ROSS,

Petitioner.

Petition for Review

# STATE'S ANSWER

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## I. INTRODUCTION

The Defendant's petition does not raise a consideration which permits review under RAP 13.4(b). He argues that an objection that came long after the prosecutor's remark and even after the jury had completed deliberation was still timely. The trial court and court of appeals disagreed with him. Their decision is not in conflict with any case.

He asks that the Court change the legal standard for prosecutorial error to find it structural, without any showing of prejudice. For good reason, this is not the law. The prosecutor's rebuttal remarks are not imbued with the imprimatur of the judge's legal instructions.

## II. RESTATEMENT OF THE ISSUES

A. Has the Defendant demonstrated a conflict with any case such as would satisfy RAP 13.4(b)(1) and (2)?

B. In his request for a second look, has the Defendant raised any significant constitutional questions such as would permit review under RAP 13.4(b)(3)?

## III. STATEMENT OF THE CASE

The Offense

When the Defendant was living with his brother and his brother's family in Lakewood, he observed H.T., the 12-year-old babysitter, in the living room changing his niece D.R. into her swimsuit. RP 515-16, 523-25, 539, 570, 595. From behind H.T., the Defendant pushed past her shirt and inside her bikini top to touch her breasts. RP 525, 532-33, 538. After a moment of shock, H.T. extracted herself and resumed dressing D.R. RP 525, 533-34. The Defendant sat down on the couch between H.T. and the front door and continued to touch H.T., moving his hand up her leg, inside her surfer shorts and bathing suit, and into her vagina. RP 526, 534-39, 574.

Feeling the "sharp cold pain" of his fingers, H.T. "gave up" on dressing D.R. RP 535-37. She tried to leave, but 12-year-old H.T. was only five feet tall and about 115 pounds, where the Defendant was 27. RP 508, 516, 525, 542, 551, 648. She screamed very loudly for close to a minute. RP 660-61. D.R.

screamed as well. RP 661. With the momentum of rising up from her seat, H.T. "got him off of her" by "shov[ing] him off" in "one big movement."[1] RP 535-36, 538. H.T. ran to the pool, slamming the door and leaving D.R. behind. RP 526, 535-38. H.T. broke into tears as soon as she was out of the Defendant's presence. RP 537.

Soon after this, D.R.'s family, including the Defendant, packed up and moved out of the apartments. RP 542, 586.

Struggling to comprehend what had happened to her, H.T. kept the incident to herself for four years. RP 540-41, 543-45, 557-58, 564. And she began to avoid people. RP 541-42. She stopped babysitting, going to the pool, and spending time with friends. *Id*.

[1] H.T.'s initial statement to police included more detail than she was able to recall at trial. CP 2 (describing that the Defendant pushed her back onto the couch when she tried to stand and that she kicked him repeatedly until he slumped over and she was able to escape).

Four years after the assault, H.T. disclosed the rape during a counselor training exercise for church summer camp. RP 540-41, 545-46, 552-56, 604, 609. The camp director reported the disclosure to police. RP 618-20, 639.

It took a couple years for the detective to locate the Defendant in Bentonville, Arkansas. RP 649-55. The Defendant told Bentonville detective Jerrod Wiseman that he remembered putting his cold hands on H.T. and that they had wrestled. RP 681, 690-91, 695.

The Trial

Consistent with WPIC 4.01, the Honorable Judge John Hickman instructed the jury that if, after considering all the evidence or lack thereof, "you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt." CP 32; RP 47-48.

In jury selection, a potential juror at least momentarily endorsed the idea that the state should be required to prove the offense "beyond all doubt." RP 416-17. In closing argument,

the prosecutor observed that reasonable minds may differ on what is reasonable, but the burden of proof is not "beyond all doubt." RP 735. Witnesses are human and their ability to remember will be imperfect, especially where there is trauma. *Id.* Therefore, it is natural for witness statements made years apart to have some inconsistency. RP 736. Whatever doubts a juror may have related to those inconsistencies, under the court's definition,

> You can have a reasonable doubt. But if you still have an [a]biding belief in the truth *of the charge*, even with your reasonable doubts, then you are convinced beyond a reasonable doubt. Again, I anticipate that some of you, if not all of you, will go back and say things like [H.T.] was inconsistent in this place or that place. Again, ask yourself, number one, if that matters. And number two, if based on that inconsistency you still have an abiding belief of the truth *of the charge*, you are convinced beyond a reasonable doubt.

RP 736 (emphasis added).

In response, defense counsel did not object, but instead immediately clarified for the jury that by "charge," the prosecutor intended "elements":

> Just to respond to what you just heard, if you get to the end of your deliberations and you have a reasonable doubt as to any of *the elements* in either of these counts, then it is your duty to deliver a verdict of not guilty. That's what a reasonable doubt means. It's not accurate to suggest that you can have a reasonable doubt as to any of *the elements* and still return a verdict of guilty.

RP 737 (emphasis added). Defense counsel then attempted to amplify every alleged[2] discrepancy as a reasonable doubt. RP 738-43.

Although H.T. consistently reported that D.R. had been in diapers, counsel argued that she should have had a more precise recall for D.R.'s age. RP 517, 740. But H.T. had babysat many children and only watched D.R. "two or three times" when she

[2] Some of the discrepancies were in defense's counsel's retelling, not the witness'. For example, contrary to counsel's argument (RP 741), H.T. consistently reported that the Defendant had hugged her on occasion. RP 578, 661. And H.T. had never reported that she had been touched on the back. RP 738. She had reported that the Defendant touched her on the shoulders and neck *from* the back as he stood behind her. CP 2; RP 659. Contrary to the Defendant's misrepresentation (RP 738; BOA at 28), H.T. did not contradict this earlier report at trial. She only rejected counsel's characterization of the "first" assault, i.e. the grope of her breasts, as being "actually" just a touch to the back of her shoulders. RP 539, 575.

herself was only twelve. RP 518-19. The Defendant and her mother corroborated the relevant fact, that H.T. had watched D.R. that summer. RP 595, 694-95.

Counsel argued that H.T. should have a sharper memory for the clothes she had briefly thrown on over her own swimsuit. RP 739 ("loose-fitting top" and "surfer shorts") ("I'll need a picture of those"). But H.T. never wavered in describing the critical detail that the Defendant's hands went under her swimsuit to assault her. CP 2; RP 536, 538.

The defense expressed disbelief that no witness was produced to corroborate the girls' screaming. RP 739-40. Even if there were any adults around during the day, which was not established, the sounds of children screaming near a swimming pool on a summer day would be unlikely to attract attention. RP 578.

Defense counsel expressed disbelief that H.T.'s mother did not observe a change in her daughter's behavior. RP 741. In fact, the testimony was that H.T. "started to *slowly* stop doing the

things that I liked to do." RP 541 (emphasis added). H.T.'s mother was a single, working mom of six children. RP 589-92. She did not have any specific memories of that summer, but only a general recollection that her children would have played at the park and gone swimming and camping. RP 599-600.

Counsel noted that the detective had understood H.T. to have told him in 2016 that the Defendant used to play outdoors *with* the apartment complex children. RP 661-62. But at trial, H.T. testified he had only *watched* them play outdoors. RP 570-71, 578. Counsel argued the discrepancy was in H.T.'s memory. RP 741. The discrepancy could have easily been in the detective's perception and/or memory. *See e.g.* RP 628-29 (witness misperceiving question).

The prosecutor disagreed with defense counsel's argument that reasonable doubts as to tangential details gave rise to a reasonable doubt about the actual allegation. RP 749. She explained that human memory is prone to minor discrepancies

on innocuous details. RP 750-51. "[T]he inconsistencies actually provide authenticity about the incident." RP 752.

The prosecutor pushed back against the defense argument that minor discrepancies on non-elements provided the jury with a reasonable doubt. She explained: "if you have a reasonable doubt *and you are convinced beyond that reasonable doubt, you have an abiding belief in the truth of the charge* and you can find the defendant guilty." RP 749 (emphasis added).

After the jury reached a verdict, defense counsel requested the court instruct the jury again on reasonable doubt or, in the alternative, declare a mistrial. RP 770-71. He claimed the prosecutor's argument had diminished the burden of proof. *Id*. The prosecutor observed that the time for instructions had passed. RP 772-73.

The Honorable Judge John Hickman denied the motion, explaining that, if the Defendant had made a timely objection,

> … more likely than not I would have simply told the jury that whatever argument they are making regarding these instructions is not evidence and that

> "you are the sole judges of what the instructions mean and you are to rely on your interpretation of the instructions, and argument is just that, their opinion. And it's not evidence." And I would have noted the objection for the record, made that statement, and moved on.

RP 775.

The court of appeals found the prosecutor's remarks were error, but not reversible as any confusion would have been curable with a timely objection. Unpublished Opinion at 9. It found defense counsel's failure to lodge a timely objection was also not prejudicial. Unpub. Op. at 15-16.

## IV. ARGUMENT

### A. There is no conflict with *Lindsay*.

The Defendant asserts that the court of appeals' discussion of prosecutorial error is in conflict with *State v. Lindsay*, 180 Wn.2d 423, 326 P.3d 125 (2014). Pet. at 11-12. The court of appeals found the *Lindsay* case distinguishable. Unpub. Op. at 10. There is no conflict.

The court of appeals found that the Defendant did not make a contemporaneous objection, raising his challenge *after*

*the jury had reached its verdict*. RP 770, 774-75; Unpub. Op. at 3. It was too late to instruct the jury further. Failing to object waives the claim unless the remark was so flagrant and ill intentioned that it caused an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). "When evaluating whether misconduct is flagrant and ill intentioned, we 'focus 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. Slater*, 197 Wn.2d 660, 680–81, 486 P.3d 873, 884–85 (2021) (quoting *State v. Emery*, 174 Wn.2d 741, 762, 278 P.3d 653 (2012)). The court of appeals found the error was not reversible where a timely instruction would have cured any prejudice. Unpub. Op. at 9.

The Defendant challenges the standard, claiming that the court still could have instructed the jury even though the jury had already reached a verdict. He claims this is what occurred in *Lindsay*. Pet. at 12. In fact, in *Lindsay*, the objection came

"directly following the prosecutor's closing rebuttal argument" thereby giving the court an opportunity to consider a curative instruction "before deliberation." Unpub. Op. at 10 (quoting *Lindsay*, 180 Wn.2d at 430-31). Because the cases are distinguishable, there is no conflict.

The Defendant cites other cases claiming they stand for the proposition that a motion for mistrial can preserve error after a verdict has been reached. Pet. at 13 (citing *State v. Fagalde*, 85 Wn.2d 730, 731-32, 539 P.2d 86 (1975) (reviewing defense's timely objection to testimony on the basis of doctor-patient privilege); *State v. Ray*, 116 Wn.2d 531, 540-42, 806 P.2d 1220 (1991) (reviewing state's mid-trial motion to exclude defendant's alibi witness); *Seattle v. Harclaon*, 56 Wn.2d 596, 598-99, 354 P.2d 928 (1960) (affirming civil judgment where appellant failed to preserve challenge to jury instruction with any timely objection); *Eqede-Nissen v. Crystal Mountain, Inc.*, 93 Wn.2d 127, 141, 606 P.2d 1214 (1980) (maintaining the court of appeals' reversal on instructional grounds while addressing an

unpreserved issue regarding the trial judge's partiality so as to avoid repetition of the error on retrial). The Defendant has misrepresented the cases. Two regard timely objections. One rejects a claim because the objection was untimely. One addresses an issue that might arise upon retrial. And none of the pinpoint cites regard claims of prosecutorial error, therefore none would apply this standard of review.

The Defendant argues that the prosecutor's comment could have affected the verdict. Pet. at 14. But that is not the standard. He must show that any prejudice resulting from that comment could not have been cured with an instruction from the judge. Here, with a timely objection, the judge could have cured any prejudice simply by redirecting the jury to the existing instruction. The Defendant concedes that the error would have been curable with a timely objection. Pet. at 12 (arguing the court could have instructed the same jury to begin deliberations anew). Because the Defendant failed to enter an objection until

after the jury had reached a verdict, the court of appeals properly held that the challenge was waived.

### B. A prosecutor's remarks cannot be structural error where the court has instructed the jury on the matter.

The court of appeals found that defense counsel's failure to object in a timely manner was ultimately not prejudicial. Unpub. Op. at 15. The Defendant asks this Court to find that an inaccurate remark by the prosecutor is structural error, always prejudicial, notwithstanding the trial court's correct instruction of the law. Pet. at 19. This is not the law and should not be the law. The longstanding standard properly recognizes the difference between a court's written instruction and an attorney's oral remark.

A prosecutor's remarks do not have the advantages of the court's instructions. The former are drafted on the fly, responsive to testimony that is often different than anticipated and responsive in the moment to opposing counsel's argument. Court instructions, on the other hand, are deliberately crafted and thoroughly litigated. The standard instruction recognizes this by

instructing the jury: "The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions." CP 29.

There is no dispute that the judge properly instructed the jury on reasonable doubt and the burden of proof consistent with WPIC 4.01. CP 32. WPIC 4.01 has been approved as a complete and accurate definition of reasonable doubt that adequately permits both the government and the accused to argue their theories of the case. *State v. Bennett*, 161 Wn.2d 303, 307, 317, 165 P.3d 1241 (2007).

That the law should be as it is, treating attorney remarks on the fly differently from the court's crafted instructions, is not a significant constitutional question.

The Defendant argues that the court of appeals erred in rejecting his other claims of ineffective assistance. Specifically he objects to the court of appeals' finding that the prosecutor did not: argue facts not in evidence (Pet. at 21-23; Unpub. Op. at 11-

12); make an improper appeal to the jury's passions and prejudices (Pet. at 24-25; Unpub. Op. at 13-14); or misstate the law on forcible compulsion (Pet. at 28-30; Unpub. Op. at 15). But a petition for review will "only" be accepted by the Supreme Court if it presents a consideration under RAP 13.4(b). He does not allege or demonstrate any such consideration as to these issues. None exists.

### C. Where the defendant repeatedly forced himself upon a child overcoming her resistance as communicated in word and physical resistance, there is no significant constitutional question regarding the sufficiency of the evidence

The Defendant maintains his challenge to the sufficiency of the evidence for forcible compulsion. Pet. at 31-33. Again he fails to demonstrate how this claim satisfies RAP 13.4(b). He argues that he raises a significant constitutional question. Merely raising a question under the constitution will not satisfy the standard.

Forcible compulsion is force which overcomes resistance. CP 38; RCW 9A.44.010(6). It is the defendant's force that must

be physical. *Id.* But a victim's resistance need not be physical in all cases. *State v. McKnight*, 54 Wn. App. 521, 525, 774 P.2d 532, 534 (1989). A victim's resistance may be demonstrated in other ways, for example by repeated requests for the defendant to stop. *McKnight*, 54 Wn. App. at 525-27 (noting that public policy militates against a requirement that victims put themselves at risk of greater harm by physically and futilely resisting).

In our own case, the evidence for forcible compulsion is sufficient. When the Defendant Ross pushed past H.T.'s shirt and put his icy fingers under her bikini top, she resisted by extracting herself and stepping and facing away. She resumed going about the business of changing D.R.'s clothes. But the Defendant overcame this communicated and physical resistance. He placed himself between her and the door and then carried on touching her – this time forcing his fingers under her shorts and swimsuit and into her vagina, causing pain. H.T. screamed a loud and prolonged scream. D.R. took up the scream. Even then,

it took momentum behind the shove which got the Defendant off of her.

The evidence in this case is much greater than that which was found sufficient in *McKnight*. The power differential was significantly greater. The Defendant was 27 assaulting a 12 year old. McKnight was 17 assaulting a 14 year old. Like McKnight's victim, H.T. was scared, alone, and physically weak. Unlike McKnight's victim, H.T. was not in her own home. Her scream and great shove were necessary to extract herself from the continuing rape.

These facts do not present a significant constitutional question.

## V. CONCLUSION

The State requests this Court deny discretionary review where no consideration under RAP 13.4 is present.

This document contains 3088 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 19th day of November, 2021.

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## PIERCE COUNTY PROSECUTING ATTORNEY

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