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NO. 69618-1-I

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

COURT OF APPEALS
STATE OF WASHINGTON
2013 JUN 11 PM 1:22

STATE OF WASHINGTON,

Respondent,

v.

JAMES V. SWANSON,

Appellant.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON CASES

FEDERAL CASES

U.S. CONSTITUTIONAL PROVISIONS

WASHINGTON STATUTES

COURT RULES

OTHER AUTHORITIES

I. ISSUES

1. Has defendant met his burden to establish that the prosecutor's conduct was improper and prejudicial, and if so, that any unfair prejudicial effect had a substantial likelihood of affecting the verdict that was not cured by the court's instructions?

2. Did the trial court put its stamp of approval on the prosecutor's argument by overruling defendant's objection and directing the jurors to apply the law as given in the court's instructions and thereby deny defendant a fair trial?

II. STATEMENT OF THE CASE

A. FACTS OF THE CRIME.

On May 25, 2011, Cayden Boyovich was working the 4:30 a.m. to 12:30 p.m. shift as a bikini barista at the Cowgirls Espresso stand in Lynnwood. The stand is raised about a foot and a half off the ground and has a double-sided window on each side for cars to drive up and place orders. The windows are four feet wide and extend from just below the barista's knees to about eight inches above the barista's head. Each window has two panes, each pane is two feet wide, and one pane slides over the other to open. Typically, a customer stops where the driver's window aligns with the open half of the window. There are two spot lights on each side

of the stand, one shines into the front of a vehicle parked next to the window and one shine from the back. A barista inside the stand looking out the four-foot-wide window can see the entire driver's seat of a vehicle next to the window. RP 48, 51, 53-57, 76-77, 82-85.

On May 25, 2011, at 5:00 a.m., James Vincent Swanson, defendant, was Boyovich's first customer at the espresso stand. Defendant was driving a Ford Ranger. He stopped about a foot further back than normal; this required the barista to lean out the window to serve him. Boyovich could see clearly into defendant's vehicle and observed that defendant's pants were unzipped and folded down, his right hand was on his penis and he was masturbating. He had a credit card in his left hand. Defendant ordered a drink and continued masturbating while Boyovich made the drink. Boyovich was scared by defendant's conduct. Boyovich exchange the drink for the credit card, swiped the card, and then handed defendant a clipboard with the credit card and receipt attached. Defendant stopped masturbating, signed the receipt and returned it to Boyovich. Defendant's penis was still exposed. As defendant drove away Boyovich wrote down defendant's license plate number. RP 55-65, 76-82.

Boyovich called the police; she gave a physical description of defendant, the license number and a description of the vehicle, and the information from the credit card. Deputy Huri ran the license and located the registered owner, Catherine Swanson, who said that her brother, James Swanson, was the actual owner of the vehicle and he was the person driving the vehicle. Deputy Huri prepared a photomontage and showed it to Boyovich. She identified defendant as the person she saw masturbating in the espresso drive-through. RP 64-68, 100, 104-106, 110-112.

B. PROCEDURAL HISTORY.

Defendant was charged with Indecent Exposure with Sexual Motivation. CP 84-85. Defendant stipulated that he had a prior conviction[1] for indecent exposure under RCW 9A.88.010. CP 55.

A jury found defendant guilty as charged. CP 34-35; RP 148-150. Defendant was sentenced to serve 14 months confinement, ordered to pay $600.00 in legal financial obligations, placed on 36 months community custody, ordered to have no contact with the victim, and required to register as a sex offender. CP 2-17; RP 165-168. Defendant appealed. CP 1.

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[1] The jury was instructed to consider evidence of the prior conviction only for the purpose of determining whether defendant had a prior conviction. CP 44.

III. ARGUMENT

Defendant alleges that the prosecutor committed misconduct by misstating the law during rebuttal closing argument. Appellant's Brief 12-22. Prosecutorial misconduct is grounds for reversal if "the prosecuting attorney's conduct was both improper and prejudicial" in the context of the entire record and circumstances at trial. State v. Monday, 171 Wn.2d 667, 675, 257 P.3d 551 (2011); State v. Hughes, 118 Wn. App. 713, 727, 77 P.3d 681 (2003). The use of dramatic rhetoric in arguing inferences supported by the evidence is not misconduct. State v. Brown, 132 Wn.2d 529, 568-569, 940 P.2d 546 (1997). Here, the prosecutor disagreed with defendant's interpretation of the law and told the jurors to read the court's instructions to determine the correct statement of the law. RP 137-138. It is not misconduct for a prosecutor to argue that the evidence does not support the defense theory. State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994).

A. DEFENDANT HAS NOT MET HIS BURDEN TO ESTABLISH THAT THE PROSECUTOR'S CONDUCT WAS IMPROPER AND PREJUDICIAL AND THAT ANY PREJUDICIAL EFFECT HAD A SUBSTANTIAL LIKELIHOOD OF AFFECTING THE VERDICT AND WAS NOT CURED BY THE COURT'S INSTRUCTIONS.

In a challenge to a prosecutor's statement during closing argument, the defendant bears the burden of establishing that the

prosecutor's conduct was both improper and prejudicial. State v. Emery, 174 Wn.2d 741, 756, 278 P.3d 653 (2012); State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997); State v. Gentry, 125 Wn.2d 570, 640, 888 P.2d 1105 (1995) (reversal is not required if the error could have been obviated by a curative instruction which the defense did not request). A prosecutor's comments during closing argument are reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. Brown, 132 Wn.2d at 561. Prosecutor's remarks, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to defense counsel's acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective. Russell, 125 Wn.2d at 86; State v. Dennison, 72 Wn.2d 842, 849, 435 P.2d 526 (1967); State v. Graham, 59 Wn. App. 418, 428-429, 798 P.2d 314 (1990). Reversal is only required if there is a substantial likelihood that the alleged prosecutorial misconduct affected the verdict. State v. Bryant, 89 Wn. App. 857, 874, 950 P.2d 1004 (1998), citing State v. Luvene, 127 Wn.2d 690, 701, 903 P.2d 960 (1995).

1. Prosecutor's Argument Was Not Unfairly[2] Prejudicial.

In analyzing closing arguments, courts do not look at the comments in isolation, but in the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury. Emery, 174 Wn.2d at 762 n.13; State v. Yates, 161 Wn.2d 714, 774, 168 P.3d 359 (2007); Brown, 132 Wn.2d at 561. Moreover, closing argument is, after all, *argument*. In that context, a prosecutor has wide latitude to draw reasonable inferences from the evidence and to express such inferences to the jury. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009); Stenson, 132 Wn.2d at 727; State v. Harvey, 34 Wn. App. 737, 739, 664 P.2d 1281, review denied, 100 Wn.2d 1008 (1983) (counsel has latitude in closing argument to draw and express reasonable inferences from the evidence). A dramatic use of rhetoric in arguing inferences supported by the evidence is not misconduct. Brown, 132 Wn.2d at 568-569. Here, the prosecutor's rebuttal argument

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[2] The Sixth Amendment to the United States Constitution guarantees a defendant a fair trial, but not a trial free from error. State v. Fisher, 165 Wn.2d 727, 746-747, 202 P.3d 937, 947 (2009), citing State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). In almost any instance, a defendant can complain that the prosecutor's argument is prejudicial in that it may contribute to proving beyond a reasonable doubt he committed the crime with which he is charged. Addition of the word "unfair" to prejudice clarifies that the court is obligated to evaluate the argument in the context of the entire record and circumstances at trial, to determine if there is a substantial likelihood that the conduct affected the verdict.

was confined to the evidence and reasonable inference to be drawn from the evidence and was within the scope of the court's instructions. The argument was not unfairly prejudicial and does not support defendant's claim of misconduct. State v. Prince, 42 Wn.2d 314, 315, 254 P.2d 731 (1953). The prosecutor's rebuttal argument was a pertinent reply to defense counsel's statement and is not grounds for reversal. Russell, 125 Wn.2d at 86.

a. The statute.

RCW 9A.88.010 defines the elements of indecent exposure.[3] This statute does not define or expressly incorporate any definition for the phrase "any open and obscene exposure of his or her person." State v. Vars, 157 Wn. App. 482, 489-490, 237 P.3d 378 (2010). Appropriate statutory interpretation uses simple logic and gives ordinary meaning to the words used in the statute. Ent v. Washington State Criminal Justice Training Comm'n, ___ Wn. App. ___, 301 P.3d 468, 470 (2013) citing State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). "When a statute fails to

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[3] (1) A person is guilty of indecent exposure if he or she intentionally makes any open and obscene exposure of his or her person or the person of another knowing that such conduct is likely to cause reasonable affront or alarm. ...
***
(2)(c) Indecent exposure is a class C felony if the person has previously been convicted under this section or of a sex offense as defined in RCW 9.94A.030.
RCW 9A.88.010.

define a term, the term is presumed to have its common law meaning and the Legislature is presumed to know the prior judicial use of the term." State v. Torres, 151 Wn. App. 378, 384–385, 212 P.3d 573 (2009), quoting State v. McKinley, 84 Wn. App. 677, 684, 929 P.2d 1145 (1997). Washington courts have defined the phrase "indecent or obscene exposure of his person" as "a lascivious exhibition of those private parts of the person which instinctive modesty, human decency, or common propriety require shall be customarily kept covered in the presence of others." State v. Galbreath, 69 Wn.2d 664, 668, 419 P.2d 800 (1966). Courts have found this conduct is the essence of the crime of indecent exposure. Vars, 157 Wn. App. at 490; State v. Eisenshank, 10 Wn. App. 921, 924, 521 P.2d 239 (1974).

b. Issues of the case.

In closing argument the parties addressed the issues of whether defendant intentionally made an open and obscene exposure of his person, and whether defendant knew his conduct was likely to cause reasonable affront or alarm.

c. Evidence in the case.

The evidence in the present case established that defendant drove up to the espresso stand and stopped next to the four-foot-

wide glass window, with defendant positioned near the center of the window. The area where defendant stopped was lighted from both the front and the rear. The barista was standing on the other side of the widow. The window went from just below the barista's knees to about eight inches above her head. The barista could clearly see into the vehicle and observed that defendant's pants were unzipped exposing his erect penis and that he was masturbating. Defendant ordered, received and paid for an espresso drink before driving away. There was no evidence that defendant accidentally or mistakenly drove up to the window; nor was there any evidence that defendant was accidentally or mistakenly masturbating. Specific criminal intent may be inferred from circumstantial evidence or from a defendant's conduct, where the requisite intent is plainly indicated as a matter of logical probability. Bryant, 89 Wn. App. at 870-871; State v. Billups, 62 Wn. App. 122, 126, 813 P.2d 149 (1991). Clearly, defendant's actions were intentional.

The gravamen of the crime of indecent exposure is an intentional and "obscene exposure" in the presence of another that offends society's sense of "instinctive modesty, human decency, and common propriety." Vars, 157 Wn. App. at 491. "Open" and "exposure" are synonymous. State v. Sayler, 36 Wn. App. 230,

236, 673 P.2d 870 (1983). "Expose" means: "to cause to be visible or open to view." Merriam-Webster, www.merriam-webster.com/dictionary/expose. "Open" means: "not buttoned or zipped; completely free from concealment: exposed to general view or knowledge." Merriam-Webster, www.merriam-webster.com/dictionary/open. There is no expectation of privacy shielding that portion of an automobile which can be viewed from outside by the general public. Texas v. Brown, 460 U.S. 730, 740, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983); State v. Kennedy, 107 Wn.2d 1, 10, 726 P.2d 445 (1986); State v. Gonzales, 46 Wn. App. 388, 397, 731 P.2d 1101 (1986); State v. Neeley, 113 Wn. App. 100, 109, 52 P.3d 539 (2002). "Obscene" is a common word, of common usage, and enjoys a commonly recognized meaning.[4] Galbreath, 69 Wn.2d at 668. "Obscene" means: "disgusting to the senses: repulsive; abhorrent to morality or virtue; specifically: designed to incite to lust or depravity." Merriam-Webster, www.merriam-webster.com/dictionary/obscene. The word "obscene" is not unconstitutionally vague. Roth v. United States, 354 U.S. 476, 491, 77 S.Ct. 1304, 1312, 1 L.Ed.2d 1498 (1957);

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[4] RCW 7.48A.010 (2)(b)(ii) defines "obscene matter" as any matter which explicitly depicts ... masturbation.

State v. J-R Distributors, Inc., 82 Wn.2d 584, 600-601, 512 P.2d 1049 (1973), modified State v. Regan, 97 Wn.2d 47, 640 P.2d 725 (1982). Therefore, the term "obscene" must be examined in the light of the facts of the case at hand, not in the abstract. United States v. Mazurie, 419 U.S. 544, 550, 95 S.Ct. 710, 42 L.Ed.2d 706 (1975). While intelligent minds may continue to analyze and to debate the definition of "obscenity," exposed, public masturbation is clearly proscribed by RCW 9A.88.010 as an "open and obscene exposure [of the person] ... likely to cause reasonable affront or alarm." Clearly, defendant's exposure was open and obscene.

The crime of indecent exposure has been committed when an obscene exposure takes place when another is present and the offender knew the exposure likely would cause reasonable alarm. Vars, 157 Wn. App. at 491. Whether defendant thought the barista could see him is irrelevant. A mistaken reasonable, subjective belief may constitute knowledge. State v. Johnson, 119 Wn.2d 167, 174, 829 P.2d 1082 (1992). The jury is permitted to find actual subjective knowledge if there is sufficient information which would lead a reasonable person to believe that a fact exists. Id.; RCW 9A.08.010(1)(b). The evidence in the present case showed beyond doubt that defendant intentionally made an open and obscene

exposure of his person with knowledge that it was likely to cause reasonable affront or alarm.

d. Jury instructions.

The jury was properly instructed on the offense,[5] the elements that the state had the burden to prove beyond a reasonable doubt,[6] and the definitions of intent[7] and knowledge.[8] The instructions proposed by the parties were essentially identical to the instructions given by the court.[9] CP 61-64.

e. Context of the total argument.

Prosecutor's closing argument. In closing argument the prosecutor focused on the elements of the offense and the State's burden of proof. The prosecutor argued that State had to prove that defendant made and open and obscene exposure of his person and that defendant's action was intentional. The prosecutor said that if the jury thought defendant's action was a mistake or that he did not do that action, it was their duty to find defendant not

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[5] CP 45 (Jury Instruction 7, WPIC 47.01).

[6] CP 46 (Jury Instruction 8, WPIC 47.02).

[7] CP 47 (Jury Instruction 9, WPIC 10.01).

[8] CP 48 (Jury Instruction 10, WPIC 10.02).

[9] The only differences were that defendant's proposed instructions excluded the phrase "had been previously convicted of Indecent Exposure under RCW 9A.88.010, found in instructions 7 and 8. See CP 61, 62. The court denied defendant's motion to bifurcate the issue of his prior conviction. RP 7-27, 91-97, 116-118.

guilty. The prosecutor discussed the definition of intent in instruction 9 and offered examples of accidental action and intentional actions in support of his argument that defendant acted intentionally. The prosecutor argued the State did not have to prove that defendant intended his action to be offensive, but that the State had the burden to prove that defendant knew that his conduct was likely to cause reasonable affront or alarm. The prosecutor discussed the definition of knowledge in instruction 10 and pointed out that acting intentionally necessarily included knowingly, but clarified that finding defendant's open and obscene exposure was intentional did not relieve the jury from finding that defendant knew that his conduct was likely to cause reasonable affront or alarm. The prosecutor emphasized that the jury had to keep those two mental states separate. RP 120-127.

The prosecutor concluded by discussing the State's burden of proof and the jurors' duty to decide the case. RP 127-129.

Defendant's closing argument. Defense counsel began her closing argument by stating that the instructions said "it's not a crime to masturbate in your car." Defense counsel argued, "It's only a crime to masturbate in your car if you intend for someone there to see what you are doing and to – with the knowledge that

they are going to be alarmed at the sight of it." Defense counsel argued that defendant had to intend that the barista see him. "The intention is that it be open; that it be seen by someone else. That's what the State has to prove beyond a reasonable doubt, that Mr. Swanson, in going through that Espresso drive-through, intended that barista to see what he was doing in his car." Defense argued that the jury could infer that defendant's actions were clandestine and did not satisfy the requirement that defendant "has to intend for her to be able to see what he's doing inside the vehicle." ... "That's what the Court's instructions gave you. You have to believe, beyond any reasonable doubt, that he intended for her to see what he was doing in that car."[10] RP 130-133.

In discussing whether defendant knew his action was likely to cause a reasonable affront, defense counsel argued: "If he's hiding it is not an intentional, open act. He is not intending for her to see it. So if he is hiding, you have to find him not guilty. The

[10] To the contrary, the State had to prove defendant intentionally caused an open and obscene exposure of his person to be visible to general view. The State did not have to prove defendant intended for the barista to see him masturbating. Vars, 157 Wn. App. at 491.

State hasn't met their burden."[11] Counsel focused on whether the barista made any indication to make defendant aware that she could see what he was doing in the car.[12] RP 133-135. Defense counsel's argument blurred the mental states regarding whether defendant's actions were intentional with defendant's knowledge that his conduct was likely to cause a reasonable affront or alarm.

Defense counsel concluded her argument by stating that defendant's actions were not those "of someone who intended a person in the window to see what he was doing within his car." ... "In order to find him guilty, you have to find beyond any reasonable doubt that he was intending for her to see what he was doing in his car, and the State has not met their burden and the elements." RP 136.

Prosecutor's rebuttal argument. The prosecutor responded that what the jury just heard was a misstatement of the law, and directed the jurors to consult the court's instructions in determining the correct law. RP 137. The prosecutor pointed out

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[11] The law is contrary to this statement; attempting to hide shows knowledge that the exposure is likely to cause reasonable affront or alarm. See Vars, 157 Wn. App. at 493 (defendant furtively crouching in bushes when he knew he was being watched supported finding he knew that his exposure was likely to cause reasonable affront or alarm).

[12] To the contrary, the crime of indecent exposure is completed when the inappropriate exhibition takes place in the presence of another, without any consideration of that person's response. Vars, 157 Wn. App. at 490.

that the misstatement involved defense interpretation of the language of instruction 7: "A person commits the crime of indecent exposure when he or she intentionally makes any open and obscene exposure of his or her person ...." The prosecutor pointed out that instructions 7 and 8, considered together, make it clear that defendant had to make an open and obscene exposure of his person and that he intended the act. "That's why I spent the time earlier saying you don't have to intend it to be a crime; you have to intend the act that turns out to be a crime." Defense objected and the court instructed the jury to apply the court's instructions. The prosecutor told the jurors that they had the prerogative to read the instructions the way defense suggested, but cautioned the jurors to read the first line of instruction 7 in the context of the other instructions. RP 137-138.

The prosecutor's remarks were a pertinent reply to defense counsel's argument. A prosecutor's remarks are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to defense counsel's acts and statements. Russell, 125 Wn.2d at 86; Dennison, 72 Wn.2d at 849; Graham, 59 Wn. App. at 428-429. It was not misconduct for the prosecutor to argue that the evidence did not support the defense interpretation of the law.

Russell, 125 Wn.2d at 87.

2. The Claimed Misconduct Was Not Preserved For Review.

The standard of review is based on a defendant's duty to object to a prosecutor's allegedly improper argument. Emery, 174 Wn.2d at 761. "Objections are required not only to prevent counsel from making additional improper remarks, but also to prevent potential abuse of the appellate process." Emery, 174 Wn.2d at 762, citing State v. Weber, 159 Wn.2d 252, 271–272, 149 P.3d 646 (2006) (were a party not required to object, a party could simply lie back, not allowing the trial court to avoid the potential prejudice, gamble on the verdict, and then seek a new trial on appeal); State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990) (counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal). "An objection is unnecessary in cases of incurable prejudice only because 'there is, in effect, a mistrial and a new trial is the only and the mandatory remedy.'" Emery, 174 Wn.2d at 762, quoting State v. Case, 49 Wn.2d 66, 74, 298 P.2d 500 (1956).

In order to preserve error for consideration on appeal, the alleged error must be called to the trial court's attention at a time

that will afford the court an opportunity to correct it. State v. Wicke, 91 Wn.2d 638, 642, 591 P.2d 452 (1979). An objection is sufficient at the time made, if the party "makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor." CR 46.[13] During rebuttal argument defense merely stated, "I'm going to object, your Honor." No clarification for the basis of the objection was offered. RP 138. Defendant did not request a curative instruction at the time of the objection. Nonetheless, the court directed the jury to apply the court's instructions.[14] RP 138. After the jury announced they had reached a verdict, defense counsel attempted to clarify her earlier objection regarding the prosecutor's rebuttal argument and request a curative instruction. Defense counsel acknowledged that it was too late for a curative instruction. The court found that defendant's request was untimely and declined to further instruct the jury after the verdict had been reached. Defendant did not move for a mistrial. RP 143-147.

Objections must be made timely to preserve errors for appeal. Wicke, 91 Wn.2d at 642. Counsel's attempt to clarify the

[13] CrR 8.7 incorporates CR 46 by reference.

[14] The court's instruction's also told the jury: "You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case." CP 37 (Instruction 1, WPIC 1.02).

earlier objection after the jury had reached its verdict was untimely. The fact that defendant did not timely request a curative instruction or request a mistrial, strongly suggests that the argument did not appear critically prejudicial to defendant in the context of the trial. State v. Pastrana, 94 Wn. App. 463, 480, 972 P.2d 557 (1999). Under the circumstance of the present case, the claimed misconduct was not preserved. State v. Brown, 74 Wn.2d 799, 803, 447 P.2d 82 (1968).

3. The Argument Did Not Engender An Incurable Feeling Of Prejudice That Had A Substantial Likelihood Of Unfairly Affecting The Verdict.

A prosecutor's conduct is prejudicial only if there is a substantial likelihood the misconduct affected the jury's verdict. State v. Finch, 137 Wn.2d 792, 839, 975 P.2d 967 (1999); State v. Evans, 96 Wn.2d 1, 5, 633 P.2d 83 (1981). The court's focus is on whether any resulting prejudice had a substantial likelihood of affecting the verdict. State v. Sakellis, 164 Wn. App. 170, 184, 269 P.3d 1029 (2011) review denied, 176 Wn.2d 1004, 297 P.3d 68 (2013). Reversal is required only if a substantial likelihood exists that the misconduct affected the jury's verdict, thereby depriving the defendant of a fair trial. Finch, 137 Wn.2d at 839; Evans, 96 Wn.2d at 5. "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?" Emery, 174 Wn.2d at 762, quoting Slattery v. City of Seattle, 169 Wash. 144, 148, 13 P.2d 464 (1932). The mere possibility of prejudice is not sufficient to meet the burden of showing actual prejudice. State v. Norby, 122 Wn.2d 258, 264, 858 P.2d 210 (1993). Defendant has failed to show how the prosecutor's comments engendered an incurable feeling of prejudice in the mind of the jury.

4. The Rebuttal Argument Was Not Unfairly Prejudicial.

If a defendant demonstrates improper prosecutor conduct, then defendant's claim of prejudice is evaluated on the merits under two different standards of review depending on whether the defendant objected at trial. Sakellis, 164 Wn. App. at 183.

a. Failure to object.

If the defendant fails to object to the prosecutor's misconduct at trial, the appellate court applies a level of scrutiny to ascertain whether the prosecutor's misconduct was so flagrant and ill-intentioned that it caused an "enduring and resulting prejudice" incurable by a jury instruction. Sakellis, 164 Wn. App. at 184, citing State v. Gregory, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006). This standard requires defendant to establish that (1) the misconduct

resulted in prejudice that "had a substantial likelihood of affecting the jury verdict," and (2) no curative instruction would have obviated the prejudicial effect on the jury. Sakellis, 164 Wn. App. at 184; citing State v. Thorgerson, 172 Wn.2d 438, 455, 258 P.3d 43 (2011); Russell, 125 Wn.2d at 86 (a defendant cannot demonstrate "enduring and resulting prejudice" without demonstrating "a substantial likelihood that the alleged prosecutorial misconduct affected the verdict"). Here, defendant has not shown that the prosecutor's rebuttal argument was flagrant and ill-intentioned or that it caused an enduring and resulting prejudice that unfairly affected the verdict.

b. Objections.

Alternatively, if the defendant objects to the misconduct, the reviewing court determines whether the misconduct resulted in prejudice that had a substantial likelihood of affecting the verdict. Sakellis, 164 Wn. App. at 184; State v. Anderson, 153 Wn. App. 417, 427, 220 P.3d 1273 (2009) review denied, 170 Wn.2d 1002, 245 P.3d 226 (2010). If the misconduct did not result in prejudice that had a substantial likelihood of affecting the verdict, the inquiry ends and the claim fails. Sakellis, 164 Wn. App. at 184; Anderson, 153 Wn. App. at 429 (defendant's prosecutorial misconduct claim

failed on appeal when he objected to prosecutor's misconduct at trial but failed to demonstrate that the misconduct had a substantial likelihood of affecting the verdict). Here, defendant has not shown that the prosecutor's rebuttal argument resulted in prejudice that had a substantial likelihood of unfairly affecting the verdict.

5. Any Potential Prejudice From The Prosecutor's Argument Was Cured By The Court's Instructions.

The statements and remarks by counsel are not evidence and should not be so considered. State v. Rice, 120 Wn.2d 549, 573, 844 P.2d 416 (1993); State v. Huber, 129 Wn. App. 499, 504, 119 P.3d 388 (2005). The court may mitigate potential prejudice by so instructing the jury. State v. Guizzotti, 60 Wn. App. 289, 296, 803 P.2d 808, review denied, 116 Wn.2d 1026, 812 P.2d 102 (1991). In the present case the trial court instructed the jury that the prosecutor's statement was argument, not evidence, and that the jury "must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions." CP 38 (Jury Instruction 1, WPIC 1.02). Further, when defendant objected to the prosecutor's argument, the court told the jury to apply the court's instructions. RP 138. The jury is presumed to follow the court's instructions. State v. Stein, 144 Wn.2d 236, 247, 27 P.3d

184 (2001). In the present case the court's instructions eliminated any possible confusion and cured any potential prejudice stemming from the prosecutor's remarks. Defendant has failed to show how any potential prejudice from the prosecutor's argument was not obviated by the court's instructions to the jury.

B. THE TRIAL COURT DID NOT PUT ITS STAMP OF APPROVAL ON THE PROSECUTOR'S ARGUMENT NOR WAS DEFENDANT DENIED A FAIR TRIAL.

Defendant argues that by overruling his objection the trial court multiplied the likelihood that the verdict was affected by the prosecutor's rebuttal argument. Appellant's Brief 22-23.

Defendant's reliance on State v. Davenport, 100 Wn.2d 757, 675 P.2d 1213 (1984) and State v. Perez-Mejia, 134 Wn. App. 907, 143 P.3d 838 (2006) is misplaced. In Davenport the prosecutor's rebuttal argument introduced the extraneous matter of accomplice liability, which was not before the jury. The comment was an incorrect statement of the law of the case and not in harmony with submitted instructions. Accordingly, the Court held the prosecutor's argument was not invited and exceeded proper rebuttal. Davenport, 100 Wn.2d at 761. Here, the prosecutor's rebuttal argument was a pertinent response to defense counsel's statements and argued the law contained in the jury instructions.

In Perez-Mejia the prosecutor's closing argument put before the jurors several prejudicial issues, including nationality, ethnicity, patriotism, and fear of crime, and invited a verdict based on passion or prejudice, rather than on proper evidence. The court found the misconduct upset the balance struck by the trial court's principled evidentiary rulings and likely affected the jury's verdict. Accordingly, the court held the defendant did not receive a fair trial. Perez-Mejia, 134 Wn. App. at 919. Here, the prosecutor's rebuttal argument was not unfairly prejudicial. The argument was in response to defense counsel's argument and was confined to the evidence and the court's instructions. Additionally, the court directed the jurors to apply the law contained in the jury instructions. The prosecutor's rebuttal argument did not unfairly affect the jury's verdict.

The trial court did not put a stamp of approval on the prosecutor's argument by overruling the defense objection. Even under the defense interpretation of the law, a rational trier of fact could have found each element of indecent exposure was proved beyond a reasonable doubt from the evidence in this case. Defendant was not denied a fair trial by the prosecutor's rebuttal argument.

IV. CONCLUSION

For the reasons stated above, defendant's conviction should be affirmed.

Respectfully submitted on July 10, 2013.

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Joan T. Cavagnaro, Chief Deputy
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July 10, 2013

COURT OF APPEALS DIV I
STATE OF WASHINGTON
2013 JUL 11 PM 1:22

Richard D. Johnson, Court Administrator/Clerk
The Court of Appeals - Division I
One Union Square
600 University Street
Seattle, WA 98101-4170

Re: STATE v. JAMES V. SWANSON
COURT OF APPEALS NO. 69618-1-I

Dear Mr. Johnson:

The respondent's brief does not contain any counter-assignments of error. Accordingly, the State is withdrawing its cross-appeal.

Sincerely yours,

JOHN J. JUHL, #18951
Deputy Prosecuting Attorney

cc: Nielsen, Broman & Koch
Appellant's attorney

a properly stamped envelope
for the defendant that
document.
of perjury under the laws of the

10th July 13

COURT OF APPEALS DIV I
STATE OF WASHINGTON
2013 JUL 11 PM 1:22

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

THE STATE OF WASHINGTON, Respondent, v. JAMES V. SWANSON, Appellant.	No. 69618-1-I AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 10th day of July, 2013, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

THE COURT OF APPEALS - DIVISION I
ONE UNION SQUARE BUILDING
600 UNIVERSITY STREET
SEATTLE, WA 98101-4170

NIELSEN, BROMAN & KOCH
1908 EAST MADISON STREET
SEATTLE, WA 98122

containing an original and one copy to the Court of Appeals, and one copy to the attorney for the appellant of the following documents in the above-referenced cause:

BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 10th day of July, 2013.

DIANE K. KREMENICH
Legal Assistant/Appeals Unit