NO. 44710-0-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

RAYMOND S. REYNOLDSON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Bryan Chushcoff

No. 06-1-01238-2

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

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2, Was counsel for defendant ineffective for not objecting more during the State's closing and rebuttal arguments?

3. Did a brief sidebar during the State's closing constitute a closed courtroom?

4. Has the issue of possible misconduct by a juror already been subject to appellate review and is therefore the law of the case?

B. STATEMENT OF THE CASE.

1. Procedure

On March 17, 2000 defendant kidnapped, attempted to rape, and assaulted D.M. CP 1-4. The defendant absconded and wasn't located until 2005, when he was found incarcerated out of state. CP 10. On March 15, 2006 he was charged with first degree kidnapping, attempted rape in the first degree, and second degree assault. Both the kidnapping and assault charges included the enhancement they were committed with sexual motivation. CP 1-4. It would take several years and an attempt at a writ of mandamus before defendant would be transferred to Pierce County. He was arraigned in Pierce County on April 29, 2009. Shortly thereafter he

was notified that the State alleged he was a persistent offender and was facing a sentence of life without the possibility of parole. CP 11-12, 21-22. On September 13, 2010 the case was called for trial by the Honorable Bryan Chuschoff. On October 1, 2010 the jury returned verdicts of guilty on all charges. CP 335-36. Sentencing was set for November 10. Defendant filed a motion for new trial alleging juror misconduct based upon an affidavit executed by a juror. CP 337-47. The court heard argument on October 28, 2010 and granted the defendant's motion for a new trial. CP 359-61. The State filed a timely appeal.

On May 30, 2012 this Court reversed the trial court and reinstated the verdict. ***State v. Reynoldson,*** 168 Wn. App. 543, 277 P.3d 700 (2012), *review denied*, 175 Wn.2d 1019, 290 P.3d 994 (2012). He was sentenced on April 4, 2013 to life without the possibility of parole. CP 396-411. A notice of appeal was filed the same day. This appeal is therefore timely.

2. Facts

There is no dispute that on March 17, 2000 defendant and the victim, D.M. agreed to several acts of prostitution for $50. 9 RP 733-34. Defendant drove himself and D.M. to his residence. 9 RP 739. D.M. testified that shortly after arriving at the house, the defendant locked the deadbolt, making her uncomfortable. 9 RP 768. She testified that she

attempted to perform oral sex, but was not successful. 9 RP 749. He became frustrated and told her to lay on her stomach on the bed. 9 RP 753-44. D.M. did not want to, but defendant flipped her over to her stomach. He removed her shirt and bra. He bound her hands behind her back with her bra. 9 RP 754. He used her socks to tie her feet. *Id.* D.M. testified she was barely able to breathe as she was face down in pillows on defendant's waterbed. 9 RP 755. He attempted to lift her up to engage in sexual intercourse. However, he was again unsuccessful. 9 RP 756, 761. More frustrated, he flipped her over to her back. At one point he pinched her nipples and asked her "Does it hurt? I know this has got to hurt." *Id.* She testified she was in intense pain, but did want to cry. He eventually stopped and left the bedroom. 9 RP 758. She could hear him in the house,

> [S]huffling around, looking for something. He was doing it so fast...I knew I only had a certain amount of time if I'm going to get free and not get tortured.

9 RP 760. She rolled over and threw herself through the bedroom window, shattering it. 9 RP 762. She said she went out the window because she was afraid for her life. 9 RP 808. She had been able to free her legs, but not her hands. She was also gagged. 9 RP 764-65. She was completely naked. 9 RP 763. Defendant went out the window after D.M. He was also naked. He began hitting and punching her. *Id.* The defendant was trying to drag her back into the house. 9 RP 764. The

neighbors were alerted by the sound of the breaking window and came to investigate. 9 RP 766. D.M. testified the defendant disappeared around the corner of the house and was gone. *Id.* A neighbor, Mrs. Tarneki came to her aid.

Mrs. Tarneki testified she raced outside after hearing the glass break. She saw the victim, naked and bound laying on the ground. The victim's hands were tied, she was in the fetal position, and was screaming through her gag. 10 RP 907. She saw the defendant, her neighbor, naked hitting the victim and pulling on her. She testified the victim was holding on to the grass to try and prevent the defendant from taking her. 10 RP 907-909. She brought the victim to her home. 10 RP 919. D.M. told her the defendant tortured her and she believed he was going to kill her. D.M. also told her the defendant twisted her nipples and tried to rape her. 10 RP 920. Cross examination of Mrs. Tarneki did not cause her to alter any of her responses to the important facts to which she testified.

The State called the nurse who examined D.M. at the hospital. 10 RP 926. In the course of treating D.M., Nurse Bloomstine testified the victim told her that her arms, legs, and mouth were bound and gagged. D.M. also told the nurse that she was hit and sexually assaulted. 10 RP 947. The nurse assisted when D.M. underwent both a vaginal and rectal examination. 10 RP 947. The nurse also testified that the victim's

demeanor was teary and crying. *Id.* Cross examination did not cause Ms. Bloomstine's to alter her answers to any of the material questions. 10 RP 952-958.

The assigned detective, Ed Baker, also testified. 10 RP 971-1,000. He testified that he scheduled an interview for D.M. at his office. She cooperated and submitted to the interview. 10 RP 986-88.

Detective Gene Miller testified that he received the case after Detective Baker left the police department. He requested that the condom recovered at the scene be examined for possible DNA. 11 RP 1005. The detective testified that a "single source female" was found on the outside of the condom. 11 RP 1007. "[C]ombined male and female profiles" were on the inside of the condom. *Id.* This is consistent with the victim's description of events. She testified that she placed a condom on the appellant prior to performing oral sex. 9 RP 749-50, 804. Detective Miller obtained DNA samples from both D.M. and defendant. 11 RP 1008. By stipulation of the parties, the jury was instructed that the results of the DNA analysis conclusively showed that the female DNA was that of the victim, and the male was the defendant. 11 RP 1009.

The defendant did not call any witnesses and did not testify on his own behalf.

The investigation was complete, but it would be some time before defendant would be available for prosecution. The defendant fled the scene that night in his son's pickup. He did not have permission to take it. 10 RP 1084. Ultimately the truck was located by the Oregon State Police in April of 2000. 10 RP 992. The State learned the defendant was in custody in Oregon. *Id.*

In 2006 the appellant was charged by bench warrant. CP 606. Shortly thereafter the State filed a *Petition & Affidavit for Writ of Habeas Corpus Ad Prosequendum.* CP 10. The writ was granted and provided to the federal penitentiary in Louisiana, where defendant was incarcerated at that time. However, custody of the defendant was not relinquished. Eventually, in 2009 the defendant was extradited back to the State of Washington and incarcerated in the Department of Corrections, at which time he was ultimately transferred to Pierce County. CP 607-609. He stood trial and was convicted of all charges in September, 2010. CP 396-411.

Defendant had previously been convicted of two counts of rape in the second degree[1] and one count of kidnapping in the second degree. On April 5, 2013 defendant was sentenced as a most persistent offender.

[1] Two separate victims and events.

C. ARGUMENT.

1. THE PROSECUTOR PROPERLY ARGUED THE REASONABLE INFERENCES FROM THE EVIDENCE IN CLOSING AND DID NOT COMMIT MISCONDUCT.

Defendant challenges twelve separate statements made by the prosecutor in closing and rebuttal as improper vouching of witness credibility.

"'Prosecutors may...argue an inference from the evidence and ...[it] will not [constitute] prejudicial error' unless it is 'clear and unmistakable' that counsel is expressing a personal opinion.'" ***State v. Brett***, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996). The standard of review is based upon a defendant's duty to object to a prosecutor's allegedly improper argument. Objections are required not only to prevent counsel from making additional improper remarks, but also to prevent potential abuse of the appellate process. ***State v. Weber***, 159 Wn.2d 252, 271-72, 149 P.2d 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. Sullivan***, 69 Wn. App. 167, 173, 847 P.2d 593 (1993).

In the present case, trial counsel did not object to eleven of the twelve challenged statements. As for those eleven, for defendant to obtain relief he must show both a substantial likelihood that the argument affected the jury's verdict and that the argument was flagrant and ill-intentioned such that the court could not have addressed the argument's impropriety with a curative instruction. ***State v. Emery***, 174 Wn.2d 741, 762, 278 P.3d 653 (2012). "When, as here, appellant fails to object at trial, he or she waives the misconduct claim unless the argument was 'flagrant and ill-intentioned' such that 'no curative instruction would have obviated any prejudicial effect on the jury.'" ***Emery***, 174 Wn.2d at 760-61, *quoting* ***State v. Thorgerson***, 172 Wn.2d 438, 455, 258 P.3d 43 (2011). In evaluating possible waiver, we focus our analysis on the trial court's ability to remedy the impropriety, rather than whether it was flagrant and ill-intentioned. ***Emery***, 174 Wn.2d at 762.

As for the remaining single statement to which defendant objected, defendant must show prosecutorial misconduct. Such reviews are done under an abuse of discretion. ***State v. Hughs***, 106 Wn.2d 176, 195, 721 P.2d 902 (1986). Defendant bears the burden of "establishing both the impropriety of the prosecutor's conduct and its prejudicial effect." ***State v. Furman***, 122 Wn.2d 440, 455, 858 P.2d 1092 (1993). Prosecutorial misconduct does not constitute prejudicial error unless the appellate court

determines there is a substantial likelihood the instances of misconduct affected the jury's verdict. ***State v. Evans***, 96 Wn.2d 1, 5, 633 P.2d 83 (1981). Defendant cannot meet this burden.

In evaluating all twelve of defendant's claims, we first start by assessing each of the twelve statements to determine if they constitute improper vouching of the credibility of a witness.

While it is improper for a prosecutor to personally vouch for the credibility of a witness, prosecutors may, however, argue an inference from the evidence, and prejudicial error will not be found unless it is "clear an unmistakable" that counsel is expressing a personal opinion. ***State v. Brett,*** 126 Wn.2d 136, 175, 892 P.2d 29 (1995) *citing* ***State v. Sargent***, 40 Wn. App. 340, 344, 698 P.2d 598 (1985). A prosecutor is free to argue an inference from the admitted evidence as why one witness's testimony is more reasonable or believable than another's. ***Brett*** 126 Wn.2d at 175. Furthermore, a prosecutor has wide latitude in closing argument to draw inferences from the evidence and may freely comment on witness credibility based on the evidence. ***State v. Allen***, 161 Wn. App. 727, 746, 255 P.3d 784, *affirmed*, 176 Wn.2d 611, 294 P.3d 679 (2013). Lastly, a prosecutor's remarks must be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the

argument, and the instructions given to the jury. ***Allen*** 161 Wn. App. at 746 *citing* ***State v. Brown***, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

In the present case, in closing argument, the State specifically referred the jury to the instruction that tells them they are the sole judges of the credibility of the witnesses. 12 RP 1089. The prosecutor elaborated. She said:

> Now, ...you that you are the sole judges of the credibility of the witnesses. You have the opportunity of the witness to observe or know the things this is what you are judging. The opportunity of the witness to know things that he or she testifies about. The ability of the witness to observe accurately. The quality of the witness's memory while testifying. The manner of the witness while testifying. The personal interest that the witness might have in the outcome or the issues. Any bias or prejudice that the witness may have shown. The reasonableness of the witnesses' testimony in the context of all of the other evidence.

12 RP 1089. Defendant's challenged statements must be evaluated in the context of the State's entire closing, to include this very clear and specific comment that the jury is the true judge of credibility.

Defendant contends that "the entirety of the state's case hinged on the credibility of the alleged victim, D.M." *Opening Brf. App.*, p. 13. That is not accurate. There was significant corroborating evidence of the victim's allegations. There is no dispute that defendant and victim had contact for agreed acts of prostitution. 9 RP 733-34. Similarly, there is no

dispute that they both ultimately ended up at defendant's home. 9 RP 739. The victim testified that the failed attempt of oral copulation with the defendant was consensual. 9 RP 749. The criminal allegations at issue are what happens *after* these acts. Therefore the fact the victim lied about the nature of her contact with the defendant to the first responding officer is not of great significance. This is because she readily admitted to the jury she lied to the officer and did not tell the officer it was an agreed act of prostitution. 9 RP 769-71, 797. The issue before the jury was whether the defendant's tying up of the victim, his attempt to have sexual intercourse with her after she was tied up, and his punching and hitting of her after she escaped out the shattered window was consensual. There was evidence independent of the victim to support each of these issues.

First, and most obvious, is the victim's method of escape. It is undisputed that D.M. left defendant's house by breaking out the window of the bedroom in which she was bound and jumping--or falling--out of it to the ground outside. 9 RP 762, 775, 783-84, *see* Exs. 43, 44, 77-79, 81 & 84. There is no dispute that the window was broken. The shattered window was photographed by the responding forensic officer. *See* Exs. 43, 44, 77-79, & 84. The victim was naked at the time. 9 RP 763. The remainder of her clothing was found in the bedroom. *See* Ex. 88. Again,

each of these facts is undisputed. However, it is clear that the most persuasive evidence came from the neighbor, Mrs. Tarneki.

Mrs. Tarneki testified she heard glass breaking outside and feared her car was being vandalized. 10 RP 906. She raced outside to investigate, and instead of seeing a car prowler, she testified she saw a naked girl, later identified as the victim, D.M., on the ground. 10 RP 906-08. When asked to elaborate, she responded:

> She was tied up with her hands, and she was like kind of in a fetal position trying to hold on, and she was screaming through-- muffled screams, so I heard her through her gag. I saw him over the top of her like trying to get her through her stomach trying to pull her back into the home, and she was holding onto the grass, just clinging, trying to hold she was trying so hard to get away.

10 RP 907. She described the victim,

> [B]eing naked, in the fetal position, and clinging to the grass.... she was trying to pull herself as he was trying to pull her. Because her gag...she couldn't scream, but I could hear her screaming through it. You could hear those screams.

10 RP 908-09. Tarneki told the jury that defendant was on top of the woman in the area just under the window. 10 RP 911. The appellant kept trying to pull the victim away, but [the victim] was holding on tight [to the grass]; she also recalled the defendant's hands were locked. 10 RP 912. She also testified this occurred while the defendant was undressed. 10 RP 910.

Once she had the victim at her home, she noted the victim was crying and was bound with an item of clothing and socks. 10 RP 919. In addition to her observations, she also told the jury what the victim said. Mrs. Tarneki testified the victim told her the appellant was torturing her and that she believed she was going to die. She repeatedly said he was going to kill her. Tarneki also said the victim told her the defendant raped her and had twisted her nipples. 10 RP 920. Tarneki stated that she cut off the gag around the victim's mouth. *Id.* Though she recalled the victim's hands were bound, she was not sure who removed the binding. 10 RP 916-17, 920-21. Cross-examination did not cause Ms. Tarneki to alter any of her responses regarding these facts. 10 RP 922-924.

The jury heard Mrs. Tarneki's testimony and had the opportunity to observer her demeanor. It is undisputed that she was an unbiased eyewitness who saw the victim struggling against defendant after fleeing out the window. She also observed the victim's fearful demeanor. She recounted the statements the victim made immediately upon being rescued. This clearly represents significant corroboration of the victim's account. This was not a case where it was solely the word of one party against another. There were other witnesses beside the neighbor that corroborated the victim's account.

Nurse Bloomstine testified that in the course of treating the victim at the hospital, the victim told her that her arms, legs, and mouth were bound and that she was hit and sexually assaulted. 10 RP 944-45. She also noted that the victim was teary and crying. 10 RP 947. Bloomstine testified the victim submitted to a vaginal and rectal physical exam. 10 RP 947. The victim's cooperation with such an invasive examination is corroboration that she was a victim, not a willing participant in the defendant's assault. Arguably, a woman might decline such an exam if she were being untruthful about the allegation. Other than asking the nurse if she classified victim's scratches and marks on her body as "superficial," cross-examination did not cause this witness to alter her responses as to the facts represented above. 10 RP 958.

The assigned detective, Ed Baker, also testified. He explained the course of his investigation, which included asking the victim to come in for a taped interview. D.M. complied with the request and submitted to the interview. 10 RP 988. This also demonstrated the victim's cooperation with the investigation, a fact that contradicts the allegation she agreed to engage in the behavior perpetrated upon her by defendant.

Lastly, though reluctant, defendant's son also served to support the allegations. He testified that the truck defendant was seen driving away from the home was his. He left it and the keys at the house where his dad

was staying. 10 RP 964. Detective Baker testified that the truck and ultimately the defendant were located in Oregon. The defendant was incarcerated. 10 RP 984. The fact that the defendant fled the area immediately after the victim was rescued also corroborates the allegations.

The next step is to evaluate each of the prosecutor's statements in the context in which they were made.

a. 10 RP 1044 "*The State believes that the information that was elicited from these witnesses.*"

Here is the portion of the State's argument where the statement occurs:

> Now, let me say this, first, what I would like to do here is go through the facts of this case. I know that you were listening. You were taking your notes. You were paying attention to what each of these witnesses testified to. I would like to go back through at least we are all on the same page on what it is that the State believes that the information that was elicited from these witnesses. And then after I go through those facts, what I would like to do is then compare those facts with the elements of the offenses that the State needs to prove beyond a reasonable doubt so that we can ask you to bring back the verdicts that we think are supported by the evidence.

10 RP 1044-45. It is clear that the prosecutor is preparing to review the testimony as she recalls it. She acknowledges that the jury heard the testimony and had the opportunity to take notes. This statement can really only be construed as saying that the jurors' recollections and notes control,

as distinguished from what she may recall of the testimony. The State simply said, in essence, this is my recollection of the testimony. She immediately proceeds to go through the testimony of each of the witnesses. There is no reasonable way to construe this comment as vouching for any particular witness or expressing an opinion as to the defendant's guilt or innocence. It was not improper. Even if this Court were to find it was, the statement was not objected to, therefore it was waived. Appellant cannot demonstrate this statement was flagrant and ill-intended.

b. 10 RP 1056 "*Thank God for the neighbor....*"

Here is the context:

> He tries to pull her back into the house. And thank God for the neighbor Deborah Tarnecki. Deborah told you that she was seated in her home. She was with her family. They heard this glass breaking. She thought, darn it, somebody is breaking into my car....

10 RP 1056. It is clear that the prosecutor is retelling the events, including the victim's escape. In the context of the events that occurred, it is not improper to comment on the good fortune of the victim that Mrs. Tarnecki heard the glass shattering and was willing to come to her aid. Given the nature of the brutal assault described to the jury, it is not improper to comment on the favorable event of the victim being rescued. This

comment was not objected to and the defendant cannot demonstrate it went to the credibility of any witness and that even if it did, it was not flagrant and ill-intentioned.

c. RP 1063 and 1064 "*She told the truth.*"

Here is the context of the prosecutor's statements and the court's ruling and comment in response to appellant's objection:

> STATE: When she went, she told those detectives exactly what it is that she told you. She didn't keep along with that story that she initially told Officer Sheskey about how was that she and the defendant made contact. She told the truth.
>
> DEFENDANT: I object that these facts are not in evidence.
>
> THE COURT: Well, jury has been instructed the lawyers' remarks, statements, and arguments are not the evidence and not the law. They are the deciders of that. I will let them make that decision.
>
> STATE: She told the truth as she told you the events that took place on that day while she was seated in that box for you to be able to witness and see how her demeanor as she described those events to you.

12 RP 1063-64.

By the limited amount of transcript initially provided by appellant, it might appear the prosecutor commented or vouched for the victim's credibility, but when viewed in context, it is apparent she is arguing the reasonable inferences from the testimony. She reminded the jury that the

victim acknowledged she lied to the responding officer, Officer Sheskey. However, the victim explained why she lied. 9 RP 769. A prosecutor may freely comment on a witness's credibility based on the evidence. ***State v. Allen***, 161 Wn. App. 727, 746, 255 P.3d 784, *affirmed*, 176 Wn.2d 611, 294 P.3d 679 (2013).

In context, the prosecutor's argument was not improper. Even if the court were to find they were, the court commented in response to defendant's objection, that the jury is the decision maker as it relates to credibility. 12 RP 1064. The jury was properly advised and defendant cannot support his burden that but for these two comments, there is a substantial likelihood the verdict would have been different.

d. RP 1084 "*We believe....*" (Two times)

These two comments appear in the context of nine pages of transcript as the prosecutor goes through each element of each offense, including the lesser included offenses. 12 RP 1081-89. She painstakingly goes through each element and then argues the facts that support each beyond a reasonable doubt. *Id.* The two comments are in the context of the prosecutor concluding her remarks regarding the crimes of attempted rape in the second and third degree. 12 RP 1084. She argues that when the elements are compared with the evidence, in this case the evidence

supports the convictions. The Court is to review the entire argument not mere highlighted snippets of argument out of context. ***State v. Carver***, 122 Wn. App. 300, 306, 93 P.3d 947 (2004). The comments were not improper.

Defense did not object to either statement. If the Court were to find the comments improper, they were not flagrant and ill-intended.

e. 12 RP 1088 "*We believe....*"

The prosecutor's comments are directly related to a review of testimony and then a discussion of evaluating the credibility of witnesses. The comment represents what the State believes the evidence supports, and that the analysis leads to an abiding belief. She said:

> You take that information and decide whether or not you think these people are credible. Are they believable people? Does this make sense? Does it fit the elements of the crimes that are charged. Once you do, we believe that you should be or should have an abiding belief in the truth of the charge.

12 RP 1088. This comment was not improper. Defendant did not object to this statement. The comment was not flagrant and ill-intended.

f. 12 RP 1089 "*...[S]he was honest*"

This comment comes immediately after the prosecutor addresses the jury instruction regarding jurors being the sole judges of the credibility of witnesses. *See earlier in brief.*

> What I would submit to you is that when D.M. testified to you, she was honest. She told you about her lifestyle then. She told you about her life now, how that has changed. She told you that she initially lied and why she lied.
>
> She told you what she had agreed upon with the defendant even though it is, clearly, embarrassing for her to tell you that. She clearly told you what it is that she started to do, how it is that she started to perform this sexual act on the defendant, which, again, clearly, is embarrassing for her to relay that to a bunch of people....

12RP 1089. When the comment is read following the recitation of the instruction emphasizing the jurors are the judges of credibility, and then followed by examples of why the jury should conclude the victim was credible, the comment is not improper. The State argues that the victim testified to multiple statements that would be considered embarrassing or humiliating, yet the victim still admitted to them in her testimony. These statements were offered as examples of why the victim should be found credible.

If this Court concludes the comment was improper, the defendant bears the burden of demonstrating that it was flagrant and ill-intentioned and was prejudicial to the outcome of the trial. Given the evidence in its entirety, defendant cannot meet his burden.

g. 12 RP 1090 "*...[L]ooked honest.*"

The context:

> You heard from Officer Sheskey. Officer Sheskey told you, look, I don't recall everything that happened in this case. She needed her report to refresh her recollection about a lot of things that happened. She didn't get up there and try to make up things. She got up there and looked honest. She tried to look through her report to answer any questions that were asked of her about the evidence that was found there.

12 RP 1090. Though perhaps ill-worded, in context it seems clear the prosecutor is using the examples of the officer's lack of memory as being indicative of her honesty. That is, if Officer Sheskey were inclined to embellish or be dishonest, she would have "filled in" the gaps in her memory or elaborated in a way more favorable for the State. Instead, it is apparent that the State is conceding that the first responding officer remembered little, but was honest about her lack of memory. This witness added little to support any elements of the charges, but did provide defendant with the untruthful statements of the victim. 10 RP 868-70. The victim gave a false story to Sheskey as to why she was with the defendant. The victim later admitted it was an agreed to an act of prostitution. 9 RP 733-4, 739. Defendant referred to this lie numerous times in his closing. 12 RP 1103-04, 1107, 1113-14. Ironically, in his argument the defendant impliedly argues the officer must be truthful when he argues the victim's statements. In other words, he is advocating the

honesty and accuracy of Sheskey so that the jury accepts the officer's testimony regarding the victim's untruthful statements.

Defendant did not object to this comment. If this Court were to decide the comment improper, from the context, it is clear it is not flagrant and ill-intentioned. Just as the court responded earlier, any prejudice clearly could have been adequately addressed with a curative instructive.

h. RP 1091 "*These are credible people.*"

Context:

> You heard from Tonya Bloomstine, who treated D.M.; from Brett Reynoldson, who was a bit reluctant to tell you that his father was actually staying in the home, but did; former Detective Ed Baker came in to talk to you; and you also heard from Detective Miller about his actions. Each one of these people provided you with the information that they had so that you can make a decision. These are credible people. The testimony that they gave [sic] is in line with the evidence that you have --has been submitted to you.

12 RP 1091. Though again, perhaps not artfully worded, the context demonstrates that the cited witnesses have no relationship to the victim and therefore can be viewed as unbiased witnesses. In the case of defendant's son, he is not a witness likely to be helpful to the State. When viewing each of these witnesses, the argument is that they appeared, simply told what they knew, with no known reason to be untruthful or dishonest, and therefore can be believed.

Defendant did not object and therefore waived his objection. Even if this Court were to find the comment improper, it is not flagrant and ill-intentioned. Any alleged prejudice to appellant could easily have been cured by a curative instruction.

i. RP 1123 "*[The victim] can be believed.*"

> [The victim] can be believed. She told you that she lied. She came in here and told you that. She told you the reasons why. She told you that she was ashamed. She told you to the best of her ability her memory, what it was that took place.

12 RP 1123. The State is not vouching for the victim's credibility. The prosecutor is not telling the jury her personal opinion or otherwise saying that because of her role as a prosecutor, the victim should be believed. Instead the prosecutor is giving the jury *reasons* by referring to the testimony *why* the victim can be believed. This is proper argument. This is precisely what is meant when it is said that prosecutors are given wide latitude in closing argument to draw inferences from the evidence and may freely comment on the witness credibility based on the evidence. ***State v. Allen***, 161 Wn. App. 727, 746, 255 P.3d 784, *affirmed*, 176 Wn.2d 611, 294 P.3d 679 (2013). Furthermore, this comment and the one that follows, were both made in the State's rebuttal argument and are responses to statements made by defendant's counsel in closing. Prosecutorial remarks, even if improper, are not grounds for reversal if invited by

defense counsel or if they are a pertinent reply to defense counsel's argument. ***State v. Carver***, 122 Wn. App. 300, 307, 93 P.3d 947 (2004).

Examples of defendant's closing remarks include:

> She made up most of her testimony, I would submit to you. She told the officers that night that she was hitchhiking.

12 RP 1103.

> These are all of the lies that she made up within minutes, ladies and gentlemen, of going out the window because we heard the testimony of the police. They came within minutes. She makes all of this stuff up. If she can make up all of this stuff that quickly, it's pretty clear that she knows how to lie.

12 RP 1104.

> Now, all these things show that she has a strong motive to lie, ladies and gentlemen. If she was charged with prostitution, she has a problem. With somebody who has been living a life of prostitution for as long as she has, she probably had experiences of being arrested in the past, and she didn't like it.
>
> Now, is the testimony of this admitted liar testimony that you can find beyond a reasonable doubt that these offenses happened? I would submit to you that it's not. If you look at, prostitution is living a lie.

12 RP 1107. And lastly,

> She has selective memory. She lies. She lies when has to. She lies when she has to get out of trouble. She is living a life of lies. She can't be believed or trusted.

12 RP 1113-14.

It is apparent that the State's comments in rebuttal are direct responses to defendant's unabashed reference to the victim being a liar.

Again there was no objection. Defendant cannot show this comment was so flagrant and ill-intentioned that it could not have been addressed by a curative instruction.

j. 12 RP 1125 "*She told you like it was.*"

> She had the crack pipe on her. She didn't deny that. She told you that morning that she had taken heroin. She told you that she had a crack pipe in her possession. She told you that she didn't use it. There is no reason for her to lie about that one piece. She could have said, yes, I used it along with the heroin. She told you like it was.

12 RP 1124-25. It is unlikely had defense objected to this comment, that it would have been sustained. Both on its face and in context, it is evident the State is citing to testimony in support of her argument that the victim admitted to a number of embarrassing or inculpating facts. The inference clearly being that her willingness to do so is indicative of her truthfulness. This argument is based upon the evidence elicited and is not improper.

Defendant did not object to this comment and as stated above, it is unlikely that defendant could support an argument that it would have been sustained. In any event, defendant cannot demonstrate that a curative instructive would have been insufficient and that the comment was flagrant and ill-intended.

2. COUNSEL FOR DEFENDANT WAS NOT INEFFECTIVE FOR NOT OBJECTING MORE DURING THE STATE'S CLOSING AND REBUTTAL ARGUMENTS.

Counsel's decisions regarding whether and when to object "fall firmly within the category of strategic or tactical decisions." ***State v. Johnston***, 143 Wn. App. 1, 19, 177 P.3d 1127 (2007). The failure to object constitutes counsel incompetence justifying reversal only in egregious circumstances on testimony central to the State's case. ***State v. Johnston***, 143 Wn. App. at 19. Even if the defendant shows deficient performance, he then must establish prejudice by showing that there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have differed. ***State v. Grier***, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011).

To establish that counsel's failure to object to evidence constituted ineffective assistance, Jones must show that (1) counsel's failure to object fell below prevailing professional norms, (2) the trial court would have sustained the objection if counsel actually had made it, and (3) the result of the trial would have differed if the trial court excluded the evidence. ***State v. Sexsmith***, 138 Wn. App. 497, 509, 157 P.3d 901 (2007), *review denied,* 163 Wn.2d 1014 (2008). "The test of the skill and competency of counsel is: After considering the entire record, was the accused afforded a

fair trial[?]" ***State v. Lei***, 59 Wn.2d 1, 6, 365 P.2d 609 (1961). Appellant must show that "'there is no conceivable legitimate tactic explaining counsel's performance.'" ***Grier,*** 171 Wn.2d at 33 (*quoting* ***State v. Reichenbach***, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)). One conceivable legitimate tactic explaining counsel's performance could exist if counsel did not want to risk emphasizing the damaging testimony with an objection. ***State v. Donald***, 68 Wn. App. 543, 551, 844 P.2d 447, *review denied*, 121 Wn.2d 1024 (1993).

First, as outlined with each challenged comment, most, if not all, of the State's comments do not constitute improper vouching of a witness. Therefore, an objection would not have been proper. Second, defendant must demonstrate that the trial court would have sustained the objection. Given the court's response to counsel's objection, defendant cannot support this requirement. Third, even if a statement were to be found improper, one could reasonably argue that it was a reasonable strategy or tactic. Lastly, given the substantial corroborating evidence admitted in this case, defendant cannot meaningfully support an argument that, but for the State's comments in closing, the result of the trial would have been different.

Defendant received the effective assistance of counsel.

3. A BRIEF SIDEBAR DURING THE STATE'S CLOSING DID NOT CONSTITUTE A CLOSED COURTROOM.

The following exchange took place not long into the State's closing argument:

> STATE: Your Honor, can I address the court for just a moment?
>
> THE COURT: At sidebar?
>
> STATE: : Yes.
>
> THE COURT: Okay.
>
> (Sidebar)
>
> THE COURT: Okay, Ms. Ahrens, please continue.
>
> STATE: As I'm talking, ladies and gentlemen, I want you to feel free to, just like throughout trial, that if you feel like you may be nodding off or if you are uncomfortable, you get up and move around and stretch your legs, if you need to. I have a lot to talk about. I don't want to bore you, but there are things that I want to make sure that I want to cover. If for some reason you need to kind of jolt your bodies, please feel free to do that.

12 RP 1053.

From the context, one might conclude that the subject matter of the sidebar may have had to do with a drowsy juror. However, the record is silent as to what transpired at sidebar. Not every interaction between the court, counsel and the defendants will implicate the right to a public trial, or constitute a closure if closed to the public. ***State v. Sublett***, 176 Wn.2d

58, 71, 292 P.3d 715 (2012). The ***Sublett*** court introduced the "experience and logic" test to address the issue of a violation of the public trial right. *Id.* Both prongs of the experience and logic test must be met to implicate the constitutional right.

The appellate court is confined to the record to determine the nature of the alleged closure. Here, the record only shows that a sidebar occurred at the State's request. 12 RP 1053. There is no further information as to what was discussed. The record is not adequate to allow this court to make a meaningful determination as to whether the public trial right was even implicated.

Recently this court held that the attorneys' exercise of peremptory challenges during side bar did not violate the right to a public trial. ***State v. Dunn***, (WL 1379172) Div. 2, Apr. 2014. Division 3 has held that neither prong of the experience and logic test suggests that the exercise of cause or peremptory challenges must take place in public. ***State v. Love***, 176 Wn. App. 911, 920, 309 P.3d 1209 (2013).

These two recent cases clearly indicate that brief sidebar events do not support a finding that the constitutional right of a public courtroom is implicated. Given the very brief exchange, there is nothing in the record to indicate that any argument was taken, nor any ruling made. There is

nothing to indicate that an event meaningful to the overall trial occurred. Therefore based upon the record and case law, this claim must fail.

4. THE ISSUE OF POSSIBLE MISCONDUCT BY A JUROR HAS ALREADY BEEN SUBJECT TO APPELLATE REVIEW AND IS THE LAW OF THE CASE.

Defendant relies on an affidavit submitted by a juror to allege the jury relied on extraneous information. *Opening Brf. App.,* P. 19. This Court has already ruled that the juror's affidavit should not be considered. ***State v. Reynoldson,*** 168 Wn. App. 543, 544, 277 P.3d 700 (2012), *review denied* 175 Wn.2d 1019, 290 P.3d 994 (2012). It should not be considered at this time either. This court cited ***State v. Gay***, 82 Wash. 423, 144 P. 711 (1914) as a case on point with the issues in this case.

> [T]he matters stated in the affidavit are matters inhering in the verdict, and cannot be received to impeach the verdict.

Gay, 82 Wash. at 438. The Court continued,

> The rule is of universal acceptance that jurymen will not be permitted to impeach their own verdict, and thus declare their own perjury, for one oath would but offset the other. Both public decency and public policy alike demand the rejection of such testimony.

Gay, 82 Wash. at 438.

The juror's affidavit is precisely what is precluded by law from being considered as grounds for a new trial. The juror clearly included

statements made by jurors during deliberation. Such testimony cannot be used to set aside a verdict. ***Gardner v. Malone***, 60 Wn.2d 836, 841, 376 P.2d 651 (1962). This claim must fail.

Furthermore, this is another attempt to relitigate an issue already conclusively decided by this court. The doctrine of the law of the case precludes re-addressing this issue. Cloaking the issue slightly differently does not change the evaluation.

Under the law of the case doctrine, "once there is an appellate court ruling, its holding must be followed in all of the subsequent stages of the same litigation. ***State v. Schwab***, 163 Wn.2d. 664, 672, 185 P.3d 1151 (2008) *citing* ***Roberson v. Perez***, 156 Wn.2d 33, 41, 123 P.3d 844 (2005). An appellate court has discretion to revisit a prior appeal if "the prior decision was clearly erroneous, and the erroneous decision would work a manifest injustice to one party." ***Roberson v. Perez***, 156 Wn.2d at 42. Defendant has made no showing that the May, 2012 published opinion is clearly erroneous. Furthermore, there has been no subsequent case that has changed the applicable law.

RAP 2.5(c)(2) provides that if the same case is again before the appellate court, if justice would be best served, the Court may decide the case on the status of the law at the time of later appellate review. Here, justice would not be best served by revisiting its opinion of 2012.

Defendant has neither argued nor demonstrated that current law, but two years later, has changed such that it would require a different result.

Lastly, if this Court is inclined to consider this issue the State asserts the affidavit does not support defendant's argument. The juror affidavit that was submitted by trial counsel does not state that a juror was informed of defendant's prior convictions. The affidavit itself says,

> [S]everal jurors...opined about how many times [defendant] may have done this and gotten away with it.

CP 342.

This declaration was done under penalty of perjury wherein the juror admitted that she lied to the trial court not once, but twice when the jury was polled, causing a question about the juror's credibility. Second, nowhere in this statement or declaration, does the juror say that the jury learned or otherwise saw any information indicating appellant had prior convictions. The jury was not aware the defendant was being tried as a persistent offender. If they did not know, they would not presume defendant had any prior convictions. Defendant has not pointed to any evidence whatsoever that any juror was ever exposed to any extrinsic information or evidence.

For the reasons stated above, this claim must fail.

D. CONCLUSION.

The prosecutor did not commit misconduct when she argued the reasonable inferences from the evidence in her closing and rebuttal arguments. Defendant did not object to eleven of the twelve challenged statements. He cannot demonstrate that the challenged statements would necessarily have been sustained. Additionally, defendant cannot support the contention that any possible improper statement could not have been successfully addressed by a curative instruction. Lastly, the record does not support a conclusion that any of the statements were flagrant and ill-intentioned. This argument fails.

Trial counsel was not ineffective for not objecting to each of the challenged statements. Counsel did object and the court overruled his objection declaring the jury was instructed that counsel's statements are not evidence. There is no obligation to make futile objections. There clearly were tactically considerations in making objections during closing argument. This argument also fails.

A brief sidebar during the State's closing argument did not amount to a closed courtroom. Recent case law clearly indicates that such exchanges at sidebar do not necessarily implicate the public trial right. Furthermore, the record in this case contains no information or context

regarding what was discussed, therefore the record precludes the court from reaching this issue. This claim fails.

The issue regarding the actions of the jurors has been litigated and is controlled by the law of the case doctrine. The defendant cannot support any reason why the opinion of this court two years ago should not control. Furthermore, defendant has not produced any support in the record that the jury was aware of, or otherwise exposed to, any evidence or information not properly introduced at trial. This claim must also fail.

The State respectfully requests this Court affirm defendant's convictions.

DATED: April 24, 2014

MARK LINDQUIST
Pierce County
Prosecuting Attorney

KAWYNE A. LUND
Deputy Prosecuting Attorney
WSB # 19614

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. ~~mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

4/24/14
Date Signature

PIERCE COUNTY PROSECUTOR

April 24, 2014 - 3:16 PM

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