Supreme Court No. 91793-1

(Court of Appeals No. 71218-7-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent

v.

PEDRO MENDOZA-ESCATEL,
Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Pedro Mendoza-Escatel, appellant below, seeks review of the Court of Appeals decision designated in Part B. Appendix.

B. COURT OF APPEALS DECISION

Mr. Mendoza-Escatel appealed from his conviction for assault in the second degree. This motion is based upon RAP 13.3(e) and 13.5A.

C. ISSUE PRESENTED FOR REVIEW

The State's duty to ensure a fair trial precludes a deputy prosecutor from misstating the law or shifting the burden of proof during trial. Where the deputy prosecutor misstated the law during closing argument, did this prosecutorial misconduct require reversal, and is the Court of Appeals decision thus in conflict with this Court's decisions, and with other decisions of the Court of Appeals, requiring review under RAP 13.4(b)(1) and (2)?

D. STATEMENT OF THE CASE

Pedro Mendoza-Escatel and Katie McAlpin were romantically involved for approximately five years. 10/8/13 RP 140-43. Katie and her older sister, Molly McAlpin, were both waitresses at Mama's

Mexican restaurant, a Belltown establishment owned by their father. Id. at 65-66.[1]

On May 7, 2013, Mr. Mendoza-Escatel and Katie went out for the evening; on this evening, Molly came along, too. Id. at 73. All three of them shared some food and drinks at one bar, then the two sisters walked over to another bar. Id. at 146-48. Katie thought that Mr. Mendoza-Escatel had been behaving in a jealous manner, so she told him not to come with them to the second bar. Id. At the second bar, Katie and Molly had two additional vodkas, bringing their consumption to four drinks apiece in approximately two hours. Id. at 148-49.[2]

Afterwards, Katie and Molly walked back to the apartment that Katie and Mr. Mendoza-Escatel shared. Id. at 149-50. According to Katie, the sisters ran into him in the street in front of the apartment building and had a confrontation. Id. at 150. According to Molly, the

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[1] Because Katie and Molly McAlpin share a last name, they are referred to by first name; no disrespect is intended.

[2] As far as the effect of Katie's alcohol consumption on her ability to recall the incident, there are several references to Katie's apparent slightness in the record. Katie testified that Mr. Mendoza-Escatel was "way bigger than me." 10/8/13 RP 152. Molly also described Katie's size, "But he's definitely a bigger man; she's a little girl." 10/8/13 RP 98.

young women had already reached the apartment and had been sitting around for half an hour before Mr. Mendoza-Escatel arrived, and the confrontation occurred in the living room. Id. at 77. Although the recollections of the two sisters were completely different, perhaps due to their alcohol consumption, the jury found it credible that a confrontation occurred.[3]

Katie said that when Mr. Mendoza-Escatel appeared at the apartment, his trousers were undone. 10/8/13 RP 150. Katie was immediately upset and made accusations of infidelity. Id. Mr. Mendoza-Escatel told Katie he had cheated on her, and they began to argue. Id. at 78-79, 150. At some point, the two began arguing inside the apartment – Katie acknowledged at trial that Mr. Mendoza-Escatel must have come up from the street to the apartment eventually, although her memory was hazy – and the argument escalated. Id. at 151-52.

Katie became so furious about the purported infidelity that she began hitting and "smack[ing]" Mr. Mendoza-Escatel on the sofa. Id. at 97. As the two were in the living room arguing, Molly slipped into the bathroom to call a friend and ask him to come take Mr. Mendoza-

[3] The trial took place just five months after the alleged incident.

Escatel somewhere else. Id. at 81-82. Molly then called 911 and reported that while she was in the bathroom, Mr. Mendoza-Escatel had tried to choke Katie three times. Id. at 83.

However, Molly admitted when she testified at trial that although she could hear a commotion, she was unable to actually see what had happened from her position in the bathroom. Id. at 84-85, 88 ("I walked out when it was ending twice"). Molly maintained at trial, "[Katie] told me it was three times, and I trust her." Id. at 88.

Katie testified that she grabbed at Mr. Mendoza-Escatel in order to get him off the couch and because she wanted him to leave their apartment. Id. at 151-53. She tried to pull him off the couch and yelled at him for having sex with someone else. Id. at 153. According to Katie, Mr. Mendoza-Escatel then grabbed her throat and squeezed it, to get her to sit down next to him. Id. at 154. She stated that she felt she could not breathe, and so she kicked him in the genitals to make him let go. Id. at 154-55. Katie stated that Mr. Mendoza-Escatel grabbed her around the throat two additional times, causing her pain, but that she never lost consciousness. Id. at 156-57.

Mr. Mendoza-Escatel was charged with second degree assault. CP 1-2.[4] Following a jury trial, Mr. Mendoza-Escatel was convicted as charged. CP 6-7; 10/10/13 RP 3. As a first-time offender with a criminal history of zero, he was sentenced to six months incarceration. CP 56-61; 11/1/13 RP 7.

Mr. Mendoza-Escatel appealed his conviction, arguing the State had committed prosecutorial misconduct, and that there was insufficient evidence of assault in the second degree. On April 27, 2015, the Court of Appeals affirmed his conviction. Appendix.

He seeks review in this Court solely regarding prosecutorial misconduct. RAP 13.4(b)(1), (2).

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

THIS COURT SHOULD GRANT REVIEW, AS THE COURT OF APPEALS DECISION IS IN CONFLICT WITH DECISIONS OF THIS COURT. RAP 13.4(b)(1), (2).

a. Mr. Mendoza-Escatel's right to a fair trial was violated by prosecutorial misconduct.

Prosecutorial misconduct violates the due process right to a fair trial when there is a substantial likelihood the prosecutor's misconduct affected the jury's verdict. Greer v. Miller, 483 U.S. 756, 765, 107 S.Ct.

[4] The domestic violence aggravator was charged, as Mr. Mendoza-Escatel and Katie were living together. CP 1-2; RCW 10.99.020.

3102, 97 L.Ed.2d 618 (1987); State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984) ("only a fair trial is a constitutional trial"); U.S. Const. amend. XIV; Const. art. I, § 3.

This Court has held that a prosecutor's improper argument may deny a defendant his right to a fair trial, as guaranteed by the Sixth Amendment and by article I, section 22 of the Washington Constitution. State v. Monday, 171 Wn.2d 667, 676-77, 297 P.3d 551 (2011). A prosecutor, as a quasi-judicial officer, has a duty to act impartially and to seek a verdict free from prejudice and based upon reason. State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993) (citing State v. Kroll, 87 Wn.2d 829, 835, 558 P.2d 173 (1976)); State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969) (citation omitted); see also State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984).

To determine whether prosecutorial comments constitute misconduct, the reviewing court must decide first whether such comments were improper, and if so, whether a "substantial likelihood" exists that the comments affected the jury." Reed, 102 Wn.2d at 145. The burden is on the defendant to show that the prosecutorial

comments rose to the level of misconduct requiring a new trial. State v. Sith, 71 Wn. App. 14, 19, 856 P.2d 415 (1993).

b. Where the prosecutor committed misconduct by misstating the law and lowering the burden of proof, reversal was the proper remedy.

As this Court has long held, a prosecutor "has no right to mislead the jury." State v. Reeder, 46 Wn.2d 888, 893-94, 285 P.2d 884 (1955). Misleading arguments, when they are made by an attorney with the quasi-judicial authority accorded to the prosecutor's office, are substantially likely to taint the jury's verdict. Id.; State v. Fleming, 83 Wn. App. 209, 215, 921 P.2d 1076, rev. denied, 131 Wn.2d 1018 (1997) (finding manifest constitutional error and reversing conviction, where prosecutor misstated nature of reasonable doubt and shifted burden of proof to defense). After all, the role of the jury "is to determine whether the State has proved the charged offenses beyond a reasonable doubt." State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012).

In this case, the deputy prosecutor argued in rebuttal, "There has been no evidence in this case whatsoever to disprove that he strangled her-" 10/9/13 RP 90 (emphasis added). The trial court sustained Mr. Mendoza-Escatel's timely objection. Id. However, following the above

improper argument, the deputy prosecutor concluded his rebuttal by continuing to shift the burden to the defense:

> Okay. There has been – you have heard no evidence in this case that strangulation did not occur, and there has been numerous cross-examination of these witnesses. They all said the same thing: that he choked her or that Ms. McAlpin reported that she was choked. You heard from none of them that, well, she never claimed she was choked, or I thought he was choking her, but I might have been mistaken ... that's what I'm implying when I say there is no evidence. You've heard nothing to contradict that – those assertions.

10/9/13 RP 90-91 (emphasis added).

Following the State's rebuttal, the trial court reminded the jury that the defense objection to the argument that Mr. Mendoza-Escatel had not disproved the strangulation had been sustained. Id. at 92 (emphasis added). The court also read portions of Instruction No. 3, reminding the jury that the State has the burden of proof and must prove each element charged beyond a reasonable doubt. Id. at 92.

Despite the court's additional instruction to the jury, however, the State's flagrant and repeated assertions during rebuttal that Mr. Mendoza-Escatel had not presented evidence to refute the accusation undermined the presumption of innocence and shifted the burden of proof. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 707, 286

P.3d 673 (2012) (reversal granted where misconduct prejudicial and impervious to curative instruction).

c. Because the misconduct was prejudicial and impervious to curative instruction, and because the Court of Appeals decision is thus in conflict with decisions of this Court and with the Court of Appeals, review should be granted under RAP 13.4(b)(1), (2).

Although a curative instruction was ultimately given by the trial court, appellate review is not precluded if the misconduct is so flagrant and ill-intentioned that no curative instruction could have erased the prejudice. Glasmann, 175 Wn.2d at 707. Here, the cumulative effect of repeated burden-shifting during rebuttal was so flagrant that no instruction or series of instructions could have erased its combined prejudicial effect. Id.; see State v. Walker, 164 Wn. App. 724, 737, 265 P.3d 191 (2011).

The Court of Appeals found Mr. Mendoza-Escatel's reliance on Glasmann to be unpersuasive. Slip op. at 10-11. Although the Court did not find that misconduct did not occur in Mr. Mendoza-Escatel's trial, the Court simply found the misconduct in Glasmann to be more appalling. See id.("the prosecutorial misconduct in Glasmann was far more egregious than any statements made in this case"). While hardly a ringing endorsement of the State's tactics here, the Court of Appeals

simply found that Mr. Mendoza-Escatel's deputy prosecutor failed to produce a "media event" in order to improperly shift the burden of proof or influence the juror. See Glasmann, 175 Wn.2d at 708; Slip op. at 11.

Such extreme tactics are not required for relief under our Constitution or our case law. Because there is a substantial likelihood the prosecutor's improper remarks in closing argument affected the jury's verdict, the proper remedy was reversal of Mr. Mendoza-Escatel's conviction. Monday, 171 Wn.2d at 676-77; Glasmann, 175 Wn.2d at 707; Reed, 102 Wn.2d at 146-47; Fleming, 83 Wn. App. at 214.

Accordingly, because the Court of Appeals decision is in conflict with decisions of this Court, and with other decisions of the Court of Appeals, review should be granted. RAP 13.4(b)(1), (2).

F. CONCLUSION

For the above reasons, Mr. Mendoza-Escatel respectfully requests that review be granted, as the Court of Appeals decision is in conflict with decisions of this Court, and with other decisions of the Court of Appeals. RAP 13.4(b)(1), (2).

DATED this 27th day of May, 2015.

Respectfully submitted,

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The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 71218-7-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Supreme Court No. _____
No. 71218-7-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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APPENDIX TO PETITION FOR REVIEW

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. PEDRO MENDOZA-ESCATEL, Appellant.	)	NO. 71218-7-I DIVISION ONE UNPUBLISHED OPINION FILED: April 27, 2015

LAU, J. — Pedro Mendoza-Escatel appeals his conviction for assault in the second degree. He contends (1) there was insufficient evidence to prove the strangulation element beyond a reasonable doubt and (2) statements made during the State's rebuttal argument amount to prosecutorial misconduct that deprived him of his right to a fair trial. But because we conclude (1) that the State presented sufficient evidence such that any reasonable trier of fact could conclude the element of strangulation proven beyond a reasonable doubt and (2) that the prosecutor's comments, even if improper, were cured by the trial court's curative instruction, we affirm the judgment and sentence.

FACTS

Pedro Mendoza-Escatel was romantically involved with Katie McAlpin. On May 6, 2013, Mendoza-Escatel met Katie and her sister Molly[1] for food and drinks at the Little Water Cantina. While there, Mendoza-Escatel became drunk, angry, and loud, so Katie and Molly left without him. Katie and Molly gave slightly different accounts of where they went after leaving the Little Water Cantina. Molly testified that they went directly to Katie's apartment. Katie testified that she and Molly had additional drinks at a different restaurant before returning to her apartment.

Regardless, at some point the sisters returned to Katie's apartment where they met Mendoza-Escatel on the street in front of the building. Katie then got into an argument with Mendoza-Escatel.[2] Specifically, Mendoza-Escatel's pants were undone and he admitted to having sexual relations with another woman.

Once inside the apartment, both Katie and Molly asked Mendoza-Escatel to leave. When Mendoza-Escatel did not leave, Katie attempted to physically pull him off of the couch he was sitting on in an attempt to force him out of the apartment. After several unsuccessful attempts to remove him from the couch, Mendoza-Escatel grabbed Katie's throat and began to squeeze. Katie testified that the choking obstructed her breathing.

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[1] Because Katie and Molly share the same last name, we refer to them by their first names.

[2] Katie's testimony differs slightly with Molly's on this point as well. Katie testified that the argument started in the street outside the apartment. Molly testified that the argument started in the apartment. Regardless of where the argument began, it continued inside the apartment and culminated with violence inside the apartment.

> [Prosecutor]: How long did it feel to you?
> [Katie]: It felt like I was losing my breath; like I couldn't breathe, I couldn't talk.
> [Prosecutor]: Okay. And how hard was he actually pressing on your neck area?
> [Katie]: Really hard.
> [Prosecutor]: Okay.
> [Katie]: Like squeezing it really hard.
> [Prosecutor]: And can you show us again the hold that he was using?
> [Prosecutor]: He squeezed right here where my windpipe is.

Report of Proceedings (RP) (Oct. 8, 2013) at 155. Mendoza-Escatel continued to hold Katie down on the couch and choke her. At some point he released her, and Katie screamed for Molly, who was in the bathroom trying to call a male friend to come over and help. After Molly came out of the bathroom, Mendoza-Escatel grabbed Katie's throat a second time:

> [Prosecutor]: And was it the same type of hold that he had [used the first time]?
> [Katie]: Yeah.
> [Prosecutor]: How hard was he squeezing that part of your neck?
> [Katie]: It was really hard. It hurt really bad. It felt like something maybe was even like fractured in there after he did it.
> [Prosecutor]: And during the second time that he did this, were you able to talk or breathe?
> [Katie]: No.
> [Prosecutor]: Did you lose consciousness at any point in time?
> [Katie]: No.
> [Prosecutor]: And during this period of time, were you able to communicate with Molly the second time he squeezed [your throat]?
> [Katie]: No. She came up and said, what are you doing to my sister, and she slapped him, and he let go.

RP (Oct. 8, 2013) at 156. Molly then left the room to call the police. After Molly left, Mendoza-Escatel choked Katie a third time and then tried to "put his hand down [her] throat." RP (Oct. 8, 2013) at 158. Eventually, Katie got away and she and Molly left the

apartment to wait for police, who arrived 20 minutes later. Police arrested Mendoza-Escatel, who was noticeably drunk.

During the State's rebuttal closing argument, the prosecutor stated that "[t]here has been no evidence in this case whatsoever to disprove that he strangled her." RP (Oct. 9, 2013) at 90. Defense counsel objected to the statement because it suggested Mendoza-Escatel failed to meet an evidentiary burden. The court sustained the objection. The prosecutor continued:

> Okay. There has been—you have heard no evidence in this case that strangulation did not occur, and there has been numerous cross-examination of these witnesses. They all said the same thing: that he choked her or that Ms. [Katie] McAlpin reported that she was choked. You heard from none of them that, well, she never claimed she was choked, or I thought he was choking her, but I might have been mistaken. Well, his hand was kind of around her face and I thought she was being choked. You didn't hear none of that. And that's what I'm—that's what I'm implying when I say that there is no evidence. You've heard nothing to contradict that—those assertions.

RP (Oct. 9, 2013) at 90–91. At the close of the prosecutor's rebuttal, the court reminded the jury of the defense objection and that Mendoza-Escatel had no evidentiary burden:

> Ladies and gentlemen, the Prosecutor argued to you that the Defense had not disproved that strangulation occurred. Defense counsel objected, I sustained the objection, and I want to reiterate that. And I'm reading from Instruction No. 3, the State is the Plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The Defendant has no burden of proving that a reasonable doubt exists as to these elements.

RP (Oct. 9, 2013) at 92. The jury convicted Mendoza-Escatel of assault in the second degree.[3] The court sentenced Mendoza-Escatel to six months incarceration. Mendoza-Escatel appeals.

ANALYSIS

Sufficiency of the Evidence

First, Mendoza-Escatel argues the State failed to prove assault by strangulation because the evidence was insufficient to show that he obstructed Katie's blood flow or ability to breathe or that he intended to obstruct Katie's blood flow or ability to breathe. We disagree.

In a criminal prosecution, the State must prove each element of the charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d. 368 (1970). A person is guilty of the crime of assault in the second degree by strangulation where he "[a]ssaults another by strangulation." RCW 9A.36.021(1)(g). "'Strangulation' means to compress a person's neck, thereby obstructing the person's blood flow or ability to breathe, or doing so with the intent to obstruct the person's blood flow or ability to breathe." RCW 9A.04.110(26). "The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. A claim of insufficiency admits the

[3]The amended information also charged the lesser-included crime of fourth degree assault.

truth of the State's evidence and all inferences that reasonably can be drawn therefrom." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citations omitted).

Under this onerous standard, we conclude the State presented sufficient evidence such that any rational trier of fact could have concluded that Mendoza-Escatel was guilty of assault by strangulation. See Salinas, 119 Wn.2d at 201.

Katie specifically testified that Mendoza-Escatel obstructed her breathing when he strangled her. She stated that he grabbed and squeezed her throat three times during the altercation. Regarding the first instance, Katie said that Mendoza-Escatel "squeezed" her "windpipe" "really hard" such that she "couldn't talk" and "couldn't breathe." RP (Oct 8, 2013) at 155. Katie testified that, during the second instance, Mendoza-Escatel squeezed her throat so hard it felt like something had fractured. She again stated she could not talk or breathe during Mendoza-Escatel's second attack. Katie stated that Mendoza-Escatel choked her a third time and then attempted to insert his fist down her throat. She stated that this also affected her ability to breathe. Katie also identified bruises on her neck in photographs taken a few days after the incident.

Other witnesses corroborated Katie's testimony. For instance, the responding officer testified that Katie accused Mendoza-Escatel of choking her:

> [Prosecutor]: Okay. And what did [Katie] say had happened?
> [Officer]: She said that her and her boyfriend, the Defendant, had gotten into an argument . . . She asked him to leave, and he then assaulted her by grabbing her around the neck with her or with his right hand and choking her, cutting off her breathing. She was able to fight him off a little bit and then he continued. He did it twice more in the same manner with his right hand cutting off her breathing each time.

RP (Oct. 8, 2013) at 23 (emphasis added). Molly also testified that Mendoza-Escatel choked Katie three times. She witnessed Katie's labored breathing as a result of the attack:

> [Prosecutor]: Okay. And when you walked out [of the bathroom], what did you see?
> [Molly]: A red face with her eyes—he let go of her when I walked out and she was crying and she was gasping for air.

RP (Oct. 8, 2013) at 82. She later described Katie as "sitting down trying to get her air." RP (Oct. 9, 2013) at 83.

Viewing this evidence and the reasonable inferences in the light most favorable to the State, ample evidence supports Mendoza-Escatel's conviction. Assault by strangulation requires that the defendant "compress a person's neck, thereby obstructing the person's blood flow or ability to breathe, or doing so with the intent to obstruct the person's blood flow or ability to breathe." RCW 9A.04.110(26). The testimony from several witnesses during Mendoza-Escatel's trial indicates that he either obstructed Katie's ability to breathe or compressed her neck with the intent to obstruct her ability to breathe.[4] Therefore, we conclude the State presented sufficient evidence such that any reasonable trier of fact could have found the strangulation element proven beyond a reasonable doubt. See Salinas, 119 Wn. 2d at 201.

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[4] Mendoza-Escatel claims that "[a]lthough she stated that she was 'losing my breath' during this incident, Katie acknowledged that she never lost consciousness." Br. of Appellant at 8. But whether Katie lost consciousness or not is irrelevant. The State need only prove that Mendoza-Escatel compressed Katie's neck with the intent to obstruct her blood flow or breathing or that he actually obstructed her blood flow or breathing. As explained above, the State presented sufficient evidence to prove this element.

Prosecutorial Misconduct

Next, Mendoza-Escatel argues the prosecutor's improper statements during rebuttal deprived him of his right to a fair trial. We conclude, however, that Mendoza-Escatel has failed to show that any prosecutorial conduct—even if improper—had a substantial likelihood of affecting the jury verdict.

A defendant claiming prosecutorial misconduct on appeal must demonstrate that the prosecutor's conduct at trial was both improper and prejudicial. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). "Once a defendant has demonstrated that the prosecutor's conduct was improper, we evaluate the defendant's claim of prejudice on the merits under two different standards of review depending on whether the defendant objected at trial." State v. Sakellis, 164 Wn. App. 170, 183, 269 P.3d 1029 (2011). "If the defendant objected to the misconduct, we must determine whether the misconduct resulted in prejudice that had a substantial likelihood of affecting the verdict." State v. Anderson, 153 Wn. App. 417, 427, 220 P.3d 1273 (2009). If the defendant failed to object, we must 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. State v. Stenson, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997). "This standard requires the 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 (quoting State v. Thorgerson 172 Wn.2d 438, 455, 258 P.3d 43 (2011)).

Here, Mendoza-Escatel notes that defense counsel objected to some of the prosecutor's statements but failed to object to others. But we conclude Mendoza-Escatel's claim for prosecutorial misconduct fails under either standard. Even if we assume, without deciding, that the prosecutor's comments were improper, Mendoza-Escatel has failed to show a substantial likelihood that these comments affected the verdict. See Sakellis, 164 Wn. App. at 184.

Any prejudicial effect from the prosecutor's comments was mitigated by the trial court's curative instruction. Following rebuttal, the trial court admonished the jury that it sustained defense counsel's objection. The trial court also turned the jury's attention to jury instruction 3, which reiterated that the State had the burden of proving all elements of the crime beyond a reasonable doubt and that the defendant had no burden of proving a reasonable doubt existed.

Curative instructions such as the one provided by the court here generally cure prejudicial comments made by prosecutors. See State v. Warren, 165 Wn.2d 17, 28–29, 195 P.3d 940 (2008). In Warren, a prosecutor suggested that the jury need not "give the defendant the benefit of the doubt." Warren, 165 Wn.2d at 25. The trial court then provided a curative instruction explaining the role of reasonable doubt in reference to the relevant jury instruction. Warren, 165 Wn.2d at 25. Our Supreme Court found this instruction cured any prejudice: "Had the trial judge not intervened to give an appropriate and effective curative instruction, we would not hesitate to conclude that such a remarkable misstatement of the law by a prosecutor constitutes reversible error. However, reviewing the argument in context, because Judge Hayden interrupted the prosecutor's argument to give a correct and thorough curative instruction, we find that

any error was cured." Warren, 165 Wn.2d at 28. Similarly, in State v. Emery, 174 Wn.2d 741, 278 P.3d 653 (2012), a prosecutor made improper comments during closing argument. Defense counsel, however, failed to object and the trial court gave no curative instruction. Emery, 174 Wn.2d at 763–64. The court found the defendants' claim failed because an instruction would have cured any prejudice had it been given:

> [T]he misstatements here could have been cured by a proper instruction. If either [defendant] had objected at trial, the court could have properly explained the jury's role and reiterated that the State bears the burden of proof and the defendant bears no burden. Such an instruction would have eliminated any possible confusion and cured any potential prejudice stemming from the prosecutor's improper remarks.

Emery, 174 Wn.2d at 764 (emphasis added). The curative instruction described by the court in Emery is precisely the instruction provided by the trial court in this case. Further, "[w]e presume the jury was able to follow the court's instruction." Warren, 165 Wn.2d at 28. Accordingly, even if the prosecutor's comments were improper, any prejudicial effect was cured by the trial court's instruction. Therefore, Mendoza-Escatel failed to show a substantial likelihood that the prosecutor's comments affected the verdict.

Mendoza-Escatel relies on In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 286 P.3d 673 (2012) for the proposition that "the cumulative effect of repeated burden-shifting during rebuttal was so flagrant that no instruction or series of instructions could have erased its combined prejudicial effect." Br. of Appellant at 12. But the prosecutorial misconduct in Glasmann was far more egregious than any statements made in this case. In Glasmann, the prosecutor used a slide show during closing argument containing several prejudicial images of the defendant with superimposed

captions such as "GUILTY!" Glasmann, 175 Wn.2d at 700–02. The court found that the use of this slideshow amounted to reversible misconduct: "Given the multiple ways in which the prosecutor attempted to improperly sway the jury and the powerful visual medium he employed, no instruction could erase the cumulative effect of the misconduct in this case. The prosecutor essentially produced a media event with the deliberate goal of influencing the jury to return guilty verdicts on the counts against Glasmann." Glasmann, 175 Wn.2d at 708. Nothing in this case matches the severity of the misconduct in Glasmann.

CONCLUSION

Because the State presented sufficient evidence such that any reasonable trier of fact could conclude the element of strangulation proven beyond a reasonable doubt, and because Mendoza-Escatel fails to show a substantial likelihood that any of the prosecutor's comments affected the verdict, we affirm the judgment and sentence.

WE CONCUR:

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Appendix to Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 71218-7-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: May 28, 2015

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Transmittal Letter

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