

NO. 46147-1-II

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

STATE OF WASHINGTON, Respondent

v.

DAVID LLEWELLYN NEWLAND, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.13-1-00090-3

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

A. RESPONSE TO ASSIGNMENTS OF ERROR..... 1

 I. ANY JURY WOULD HAVE CONVICTED NEWLAND
 BASED ON THE UNTAINTED EVIDENCE PRESENTED
 AT TRIAL..... 1

 II. THE TRIAL COURT DID NOT ERR IN FAILING TO
 GRANT A MISTRIAL 1

 III. THE PROSECUTOR DID NOT COMMIT MISCONDUCT .. 1

B. STATEMENT OF THE CASE..... 1

C. ARGUMENT 8

 I. ANY REASONABLE JURY WOULD HAVE CONVICTED
 NEWLAND BASED ON THE UNTAINED EVIDENCE 8

 II. THE TRIAL COURT PROPERLY DENIED NEWLAND’S
 MOTION FOR A MISTRIAL 11

 III. THE PROSECUTOR DID NOT COMMIT
 PROSECUTORIAL MISCONDUCT 13

D. CONCLUSION..... 19

TABLE OF AUTHORITIES

Cases

<i>Sofie v. Fibreboard Corp.</i> , 112 Wn.2d 636, 771 P.2d 711 (1989)	11
<i>State v. Brown</i> , 132 Wn.2d 529, 940 P.2d 546 (1997), <i>cert. denied</i> , 523 U.S. 1007 (1998).....	15
<i>State v. Burgeois</i> , 133 Wn.2d 389, 945 P.2d 1120 (1997).....	8
<i>State v. Davenport</i> , 100 Wn.2d 757, 675 P.2d 1213 (1984).....	15, 16, 18
<i>State v. Dhaliwal</i> , 150 Wn.2d 559, 79 P.3d 432 (2003)	15
<i>State v. Easter</i> , 130 Wn.2d 228, 922 P.2d 1285 (1996).....	9
<i>State v. Estill</i> , 80 Wn.2d 196, 492 P.2d 1037 (1972).....	18
<i>State v. Fisher</i> , 165 Wn.2d 727, 202 P.3d 937 (2009).....	15, 16
<i>State v. Gilcrist</i> , 91 Wn.2d 603, 590 P.2d 809 (1979).....	18
<i>State v. Gregory</i> , 158 Wn.2d, 759, 147 P.3d 1201 (2006)	15
<i>State v. Guloy</i> , 104 Wn.2d 412, 705 P.2d 1182 (1985), <i>cert. denied</i> , 475 U.S. 1020, 106 S. Ct. 1208, 89 L.Ed2d 321 (1986).....	8, 9
<i>State v. Hopson</i> , 113 Wn.2d 273, 778 P.2d 1014 (1989).....	11, 12
<i>State v. Hughes</i> , 118 Wn.App. 713, 77 P.3d 681 (2003).....	14
<i>State v. Magers</i> , 164 Wn.2d 174, 189 P.3d 126 (2008).....	14
<i>State v. Mak</i> , 105 Wn.2d 692, 718 P.2d 407, <i>cert. denied</i> , <i>Mak v. Washington</i> , 479 U.S. 995, 107 S. Ct. 599, 93 L.Ed.2d 599 (1986).....	11, 12
<i>State v. Pirtle</i> , 127 Wn.2d 628, 904 P.2d 245 (1995).....	14
<i>State v. Russell</i> , 125 Wn.2d 24, 882 P.2d 747 (1994).....	15
<i>State v. Stenson</i> , 132 Wn.2d 668, 940 P.2d 1239 (1997).....	14
<i>State v. Thorgerson</i> , 172 Wn.2d 438, 258 P.3d 43 (2011)	14
<i>State v. Traweek</i> , 43 Wn.App. 99, 715 P.2d 1148, <i>rev. denied</i> , 106 Wn.2d 1007 (1986)	13
<i>State v. Weber</i> , 99 Wn.2d 158, 659 P.2d 1102 (1983).....	12, 18
<i>State v. Wheeler</i> , 95 Wn.2d 799, 631 P.2d 376 (1981).....	18
<i>State v. Yates</i> , 161 Wn.2d 714, 168 P.3d 359 (2007)	8

A. RESPONSE TO ASSIGNMENTS OF ERROR

I. **ANY JURY WOULD HAVE CONVICTED NEWLAND BASED ON THE UNTAINTED EVIDENCE PRESENTED AT TRIAL**

II. **THE TRIAL COURT DID NOT ERR IN FAILING TO GRANT A MISTRIAL**

III. **THE PROSECUTOR DID NOT COMMIT MISCONDUCT**

B. STATEMENT OF THE CASE

While investigating a child sexual abuse allegation, Detective Brandon McCarthy, of the Children's Justice Center, went to the residence of Melanie Newland and David Newland, Jr. on January 10, 2013, to check on the safety of a minor child living at that residence. RP 232, 237. Detective McCarthy had been working with a Child Protective Services (CPS) worker, Kim Karu, to attempt contact at this residence. RP 238-39. Ms. Karu was able to arrange a meeting time for 12:30 p.m. on January 10, 2013. RP 239. Per the arrangements, the suspect in the child sexual abuse case, David Newland, Jr., was not to be present at the home. CP 240.

Detective McCarthy is a 5'8" tall, 165 pound Clark County Sheriff's Deputy. RP 227-28. Detective McCarthy's training taught him that officer safety is at the forefront of almost everything he does as a

police officer. RP 230. As Detective McCarthy and Ms. Karu arrived in a vehicle outside of the residence of Newland, Jr., David Newland, Sr. (hereafter 'Newland') arrived at the same time in his vehicle. RP 241. Newland exited the vehicle as Detective McCarthy and Ms. Karu exited theirs, and he introduced himself and walked Detective McCarthy and Ms. Karu to the front door. RP 243. Melanie Newland, the mother of the minor child to be interviewed by Detective McCarthy and Ms. Karu, answered the door and they all went inside. RP 244. Detective McCarthy and Ms. Karu took off their shoes at the entry way to the home. RP 244. They went into the dining room and the minor child appeared; Ms. Karu introduced herself and Detective McCarthy and asked if there was some place they could talk. RP 245. Melanie Newland and the minor child consented to the child being interviewed, and the child started to lead them towards her bedroom. RP 246.

From behind Detective McCarthy, Newland yelled, "Hey, are you a cop?" RP 247. Detective McCarthy turned around and said, "Yes, I'm a cop." RP 247. Newland responded, "You can't talk to her." Detective McCarthy then told Newland that he could speak to the minor child and that is why he was there. RP 247. At this point Newland and Detective McCarthy were about 5 to 6 feet apart. RP 248. Newland then approached Detective McCarthy, closing the distance between them, and yelled at him

to sit down. RP 248. Newland got to within 6 inches to a foot of Detective McCarthy making Detective McCarthy feel threatened. RP 248. Newland was angry and yelling. RP 249. Detective McCarthy believed Newland's intent was to obstruct him, so he, Detective McCarthy, pushed Newland's right shoulder away. RP 250. Detective McCarthy did not use a great deal of force, and his intent was to move Newland away from him. RP 250. Newland then threw his right arm and elbow back at Detective McCarthy's face. RP 251-52. Newland's swing at Detective McCarthy came within inches of striking Detective McCarthy's face. RP 252. Detective McCarthy believed Newland could land the blow and he was fearful that he was going to be hit. RP 253. Detective McCarthy blocked Newland's swing with his right arm. RP 254.

Detective McCarthy did not have any fellow police officers with him at this time, no back-up, and felt he needed to control the situation. RP 253. Detective McCarthy took Newland to the ground, as his training had instructed him to do in situations like this. RP 253-54. As Detective McCarthy got him to the ground, Newland continued to struggle and fight with the Detective. RP 256. Detective McCarthy attempted to restrain Newland and told him to stop resisting several times. RP 256-57. As Newland continued to resist, Detective McCarthy kned Newland twice in the side. RP 258-59. Detective McCarthy asked Ms. Karu to get his utility

belt which contained his handcuffs from the vehicle. RP 259-60. Both Detective McCarthy and Newland sustained abrasions to their faces. RP 260-62.

Ms. Karu testified that part of her job as a CPS social worker is to investigate allegations of abuse and neglect and assess safety and risks to children. RP 330. Ms. Karu had made an appointment with Melanie Newland, the mother of a child that Ms. Karu wanted to interview. RP 333-34. Ms. Karu explained to Ms. Newland that she would be coming to interview the child and that a police officer would be with her. RP 334. Ms. Karu was not expecting Newland, Sr. to be at the residence. When she and Detective McCarthy arrived at the residence on January 10, 2013, Newland unexpectedly arrived simultaneously. RP 335-36. After they entered the home, Ms. Karu introduced herself to Ms. Newland and explained that she was going to interview the minor child alone, and Ms. Newland called the child over and Ms. Karu introduced herself to the child. RP 337. Ms. Karu also introduced Detective McCarthy to the child and told the child that he was going to come with them to talk. RP 337. The child led the way to her bedroom, and Ms. Karu followed her. RP 338. When she was almost to the bedroom, still in the hallway, Ms. Karu heard Newland ask if the detective was a cop and then heard him tell Detective McCarthy to "sit down." RP 339. When she heard Newland tell

the detective to sit down, Ms. Karu headed back to where they were and she saw Newland standing right in front of Detective McCarthy's face. RP 340. Ms. Karu testified Newland was angry and told the detective that he was not going to talk to anyone. RP 340. Ms. Karu then saw the two men on the floor, wrestling. RP 341. Ms. Karu did not see what happened between the verbal part of the argument and when they were both on the floor wrestling. RP 342.

Prior to trial starting, during motions in limine, the State and defense argued about whether the State should be allowed to have its witnesses testify as to the type of crime they were investigating when they went to the residence of Newland, Jr. RP 20-32. The State argued it was relevant to explain the situation to the jury and why the police officer was in the home asking to speak to a minor child. RP 20-21. The State offered no objection to a limiting instruction regarding the evidence to the jury. RP 23. Newland opposed a limiting instruction. RP 25. The trial court analyzed the issue under ER 401 and 403. RP 23. The trial court performed a balancing test to determine whether the probative value was outweighed by the risk of unfair prejudice. RP 24. The trial court found the evidence was relevant and the probative value outweighed the risk of unfair prejudice and believed a limiting instruction could cure, to some extent, any prejudice. RP 24. In the end, the trial court ruled that the

witnesses could refer to the allegations against Newland, Jr. only as “prior sexual abuse of a different minor.” RP 32.

Before the jury, during Detective McCarthy’s direct examination, the prosecutor and detective McCarthy engaged in the following exchange:

Q: Would it be fair to say that the allegations you were investigation were child sexual abuse?

A: They were.

RP 233.

On cross-examination, defense counsel asked a question which elicited Detective McCarthy’s response regarding the sexual abuse allegations against Newland, Jr.

Q: Did you at any time feel stupid for being a bully after you pushed him down?

A: No, I felt stupid because in trying to be accommodating to Mr. Newland, I let him into the house, I took off my shoes, okay, and I allowed that situation to be there, and I felt stupid because it—when he came up to me it became clear why he was there, which was to interfere with the investigation, to prevent us from talking to the 11-year-old when I had substantial criminal—or credible evidence that his son had raped—

Q: Okay. Hold, hold on, hold on right there.

A: --his granddaughter—

Q: Go ahead and stop please.

THE COURT: Wait for the next question, please. The jury will disregard that last word.

...

THE COURT: Okay. The jury will disregard that last remark from the witness.

RP 315-16.

In his initial closing argument, the prosecutor did not mention the allegations of sexual abuse against Newland, Jr. RP 494-504. In his rebuttal argument, the prosecutor mentioned the allegations only during this remark:

The evidence is that Mr. Newland showed up uninvited to the home, a place that he did not live at. We know Detective McCarthy was there because he was investigating the Defendant's son on allegations of child sexual abuse to make sure that the child and the other child in the home was safe. We know that Mr. Newland's initiated the contact in the first place....

RP 527.

Newland offered the recording of a 911 call that Melanie Newland made during the incident. RP 295-96. Neither the State nor defense called Melanie Newland as a witness during trial. In its closing, defense counsel played the 911 recording twice and argued the strength of the 911 call as evidence. RP 505, 516-18.

The jury returned a verdict of guilty on the charge of Assault in the Third Degree. RP 534, CP 82. Newland was sentenced to a standard range sentence. CP 91. This appeal timely follows.

C. **ARGUMENT**

I. **ANY REASONABLE JURY WOULD HAVE CONVICTED NEWLAND BASED ON THE UNTAINED EVIDENCE**

Newland claims the trial court erred in admitting evidence of the reason why Detective McCarthy was intending to interview the minor child on the date of this incident, and that this error was not harmless. This Court need not reach the issue of whether this evidence was properly admitted as it was clearly harmless, even if it was erroneously admitted.

A trial court's decision to admit evidence is subject to harmless error analysis. *State v. Guloy*, 104 Wn.2d 412, 432, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S. Ct. 1208, 89 L.Ed2d 321 (1986).

“Where evidence is improperly admitted, the trial court’s error is harmless ‘if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole.’” *State v. Yates*, 161 Wn.2d 714, 764, 168 P.3d 359 (2007) (quoting *State v. Burgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997)). This type of error is harmless if this Court is “convinced beyond a reasonable doubt that any reasonable jury would

have reached the same result absent the error.” *State v. Easter*, 130 Wn.2d 228, 922 P.2d 1285 (1996). Washington applies the “overwhelming untainted evidence” test as the standard for harmless error analysis. *Guloy*, 104 Wn.2d at 426. Under this test, the Court “looks only at the untainted evidence to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. *Id.* The record does not support Newland’s contention that the issue of the allegation of his son’s sex abuse infiltrated and tainted the entire trial. Though it was an issue discussed at length in pre-trial motions, and outside the jury’s presence, the actual evidence regarding the allegation of sex abuse that the jury heard was extremely minimal. Almost all the evidence the jury heard is untainted.

The jury heard that Detective McCarthy and Ms. Karu had arranged to visit the home to speak with a child, and that at the same time of their arrival, Newland arrived. RP 239, 243. The jury heard that when Detective McCarthy attempted to follow Ms. Karu and the child to go talk, Newland told him that he could not speak with the child. RP 247. The jury heard that Newland closed the distance between himself and Detective McCarthy, making Detective McCarthy feel threatened. RP 248. At this time, Newland’s demeanor was angry and he was yelling. RP 249. Intending to move Newland away from him, Detective McCarthy pushed Newland on the shoulder and Newland threw his right arm and elbow at

Detective McCarthy's face, coming within inches of striking Detective McCarthy. RP 250-52. The jury heard that Detective McCarthy and Newland then struggled on the floor before Detective McCarthy was able to gain control over Newland. RP 256-57. None of this evidence discussed or implicated the issue of sexual abuse allegations. This evidence is all untainted. The entirety of the evidence that supports the jury's finding that the elements of the crime were proven is untainted. It is clear that any reasonable jury would have convicted beyond a reasonable doubt even if this jury had never heard that Newland's son was accused of sexual abuse of a child. Furthermore, the prosecutor never mentioned the sexual abuse allegations in his closing argument, and it was briefly mentioned one time in his rebuttal. RP 494-504, 527. The sexual abuse allegations were not the central issue of the trial, and it was only briefly raised in front of the jury. This subject, whether properly admitted or not, did not have an impact on the jury's verdict, and it is clear that any reasonable jury would have convicted Newland based on the untainted evidence presented at trial.

Newland received a fair trial and the admission of the evidence of the allegations of sexual abuse against his son was not prejudicial and was harmless beyond a reasonable doubt.

II. **THE TRIAL COURT PROPERLY DENIED
NEWLAND'S MOTION FOR A MISTRIAL**

Newland claims the trial court improperly denied his motion for a mistrial after the detective violated the motion in limine by saying Newland, Jr. was under investigation for child rape. The trial court did not abuse its discretion in denying the mistrial and Newland received a fair trial.

A trial court's decision to deny a motion for a mistrial is reviewed for abuse of discretion. *State v. Mak*, 105 Wn.2d 692, 701, 719, 718 P.2d 407, cert. denied, *Mak v. Washington*, 479 U.S. 995, 107 S. Ct. 599, 93 L.Ed.2d 599 (1986). "An appellate court finds abuse only 'when no reasonable judge would have reached the same conclusion.'" *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989) (quoting *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 667, 771 P.2d 711 (1989)). A mistrial should only be granted if a defendant has been so prejudiced that nothing short of a mistrial will ensure he receives a fair trial. *Mak*, 105 Wn.2d at 701. This Court should examine the seriousness of the irregularity, whether it involved cumulative evidence, and whether the trial court properly instructed the jury to disregard the evidence in determining the effect of the irregularity. *Hopson*, 113 Wn.2d at 284 (citing *Mak*, 105 Wn.2d at 701 and *State v. Weber*, 99 Wn.2d 158, 165-66, 659 P.2d 1102

(1983)). Furthermore, a trial judge is best suited to judge the prejudice of a statement. *Weber*, 99 Wn2d at 166.

In *Hopson*, a witness told the jury that the defendant had previously been in prison. *Hopson*, 113 Wn.2d at 284. The trial court did not believe this statement affected the fairness of the trial and did not find the statement to be “earth-shattering.” *Id.* In affirming the trial court’s denial of the mistrial motion, the Supreme Court found that the irregularity was not serious enough as to materially affect the outcome of the trial and the jury had overwhelming evidence favoring conviction. *Id.* at 286. In this case, the Supreme Court also found it significant that the trial court instructed the jury to disregard the statement and moved the trial along, noting that jurors are presumed to follow instructions. *Id.* (citing *Mak*, 105 Wn.2d at 407).

The irregularity in Newland’s case is similar to that in *Hopson*. The statement was brief and minimal; the statement was stricken and the jury was told to disregard the statement. The jury is presumed to have followed that instruction. Furthermore, the judge, being the best person to judge the impact of this statement, found it did not affect Newland’s ability to receive a fair trial. This is further evidenced by the fact that this subject matter was not a theme of the trial or significantly discussed with the jury, and the State did not even mention it in its initial closing. The

trial court properly applied the law and came to the conclusion that Newland could still receive a fair trial despite the detective's reference to rape. The trial court did not abuse its discretion and properly denied Newland's motion for a mistrial.

III. **THE PROSECUTOR DID NOT COMMIT PROSECUTORIAL MISCONDUCT**

Newland alleges the prosecutor committed misconduct by arguing to the jury that they did not know what the 911 caller saw. Newland's claim is without any merit.

Newland cites to case law that holds it is improper for a prosecutor to argue to the jury that the defendant could have called witnesses and did not. For example, in *State v. Traweck*, 43 Wn.App. 99, 715 P.2d 1148, *rev. denied*, 106 Wn.2d 1007 (1986), the prosecutor stated, "...That doesn't mean the defense counsel can't put other witnesses on if they have explanations for any of these questions, any of this evidence. Where has it been? Why hasn't it be [*sic*] presented if there are explanations, which there aren't?..." *Traweck*, 43 Wn.App. at 106. This is a far cry from the statement Newland complains of. Newland's defense counsel played the 911 call twice during his closing argument and relied heavily upon the 911 caller as the original source and best witness to the incident. RP 505, 516-18. The prosecutor simply told the jury that they did not know what the

911 caller actually saw. RP 521. The prosecutor argued to the jury, based on their ability to evaluate evidence, why the 911 call was not as reliable or credible as defense argued it was. The prosecutor in no way said the defendant failed to call witnesses, or even alluded to the fact that he should have called this witness. The prosecutor simply argued that the 911 call did not give a full picture of what the caller saw or what her motivations could have been in making the call. RP 521-23.

A defendant has a significant burden when arguing that prosecutorial misconduct requires reversal of his convictions. *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011). To prevail on a claim of prosecutorial misconduct, a defendant must establish that the prosecutor's complained of conduct was "both improper and prejudicial in the context of the entire record and the circumstances at trial." *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008) (quoting *State v. Hughes*, 118 Wn.App. 713, 727, 77 P.3d 681 (2003) (citing *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997))). To prove prejudice, the defendant must show that there was a substantial likelihood that the misconduct affected the verdict. *Magers*, 164 Wn.2d 191 (quoting *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). A defendant must object at the time of the alleged improper remarks or conduct. A defendant who fails to object waives the error unless the remark is "so

flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). When reviewing a claim of prosecutorial misconduct, the court should review the statements in the context of the entire case. *Id.*

In the context of closing arguments, a prosecuting attorney has “wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence.” *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (citing *State v. Gregory*, 158 Wn.2d, 759, 860, 147 P.3d 1201 (2006)). The purported improper comments should be reviewed in the context of the entire argument. *Id.* The court should review a prosecutor’s comments during closing in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003); *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998).

Improper argument does not require reversal unless the error was prejudicial to the defendant. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). The court in *Davenport* stated:

Only those errors [that] may have affected the outcome of the trial are prejudicial. Errors that deny a defendant a fair trial are per se prejudicial. To determine whether the trial

was fair, the court should look to the trial irregularity and determine whether it may have influenced the jury. In doing so, the court should consider whether the irregularity could be cured by instructing the jury to disregard the remark. Therefore, in examining the entire record, the question to be resolved is whether there is a substantial likelihood that the prosecutor's misconduct affected the jury verdict, thereby denying the defendant a fair trial.

Davenport, 100 Wn.2d at 762-63.

In Newland's case, there was no improper statement in the prosecutor's rebuttal argument, but any potential misstatement this Court finds did not affect the jury verdict. Newland was not denied a fair trial. The closing argument must be taken in the entire context of which it was given. Newland focuses his argument of prosecutorial misconduct on two statements the prosecutor made during rebuttal. Br. of Appellant, p. 41-42. These sentences must be taken in the entire context of the surrounding comments and the entire argument. *State v. Fisher*, 165 Wn.2d at 747. These statements also must be taken in the context of the response to defense counsel's argument. Defense counsel repeatedly referred to the 911 call as the "source." RP 517. Defense counsel stated that the 911 caller's statement is "made at the source." RP 517. This is during defense counsel's argument that water is purest at the source, prior to it being "soiled" by things the water picks up along the way. RP 517. Defense counsel argued this 911 call and the statements made in it were

made “without opportunity for deliberation, forethought, fabrication, without the statement being soiled and tarnished by time and self-interest.” RP 517. And after playing the 911 tape for the jury a second time during his argument, defense counsel characterized the call as “the source. That’s the water bubbling out of the ground, okay?” RP 518. Defense counsel made a strategic decision not to call the 911 caller, Melanie Newland, as a witness because of her bias and motive to lie because this detective involved in this case investigated her husband for sex abuse allegations, allegations which led to charges and convictions for her husband. RP 395-401.

The prosecutor’s rebuttal to defense’s significant reliance on the accuracy and credibility of the 911 call was reasonable and proper. Defense counsel heralded this 911 call and the caller as the pure source of clean water, essentially, the only untainted evidence the jury heard. This simply was not true and the prosecutor only pointed out that the jury did not hear evidence of the 911 caller’s motivations or what she actually saw. RP 521-23. This argument was proper, and the case law Newland relies upon does not support his argument. The prosecutor never suggested Newland had any burden to produce witnesses; the prosecutor only commented on the evidence defense relied upon and argued to the jury

why it was not as credible or reliable as defense argued it was. This is permissible argument. Newland's claim fails.

Even if there was prosecutorial misconduct for improper argument, a case will not be reversed because of an improper argument "unless such error is prejudicial to the accused and only those errors which may have affected the outcome of the trial are prejudicial." *Davenport*, 100 Wn.2d at 762 (citing *State v. Estill*, 80 Wn.2d 196, 200, 492 P.2d 1037 (1972) and *State v. Gilcrist*, 91 Wn.2d 603, 612, 590 P.2d 809 (1979)). This court should inquire as to whether the improper argument influenced the jury. *Id.* at 762 (citing *State v. Weber*, 99 Wn.2d 158, 165, 659 P.2d 1102 (1983)). If there is a substantial likelihood that the prosecutor's misconduct affected the jury verdict, the defendant was denied a fair trial. *State v. Wheeler*, 95 Wn.2d 799, 807, 631 P.2d 376 (1981). There is no possibility here that these statements affected the jury's verdict. The jury was instructed that the arguments of counsel are not evidence. The prosecutor urged the jury to convict based on the evidence it had been presented. RP 524-27. The jury instructions, which the jury is presumed to follow, told the jury that it had to find all elements beyond a reasonable doubt. There is no reasonable possibility that the jury believed Newland had to prove his innocence. Newland received a fair trial.

D. CONCLUSION

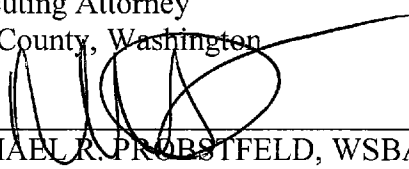
Newland's arguments are without merit. The evidence of allegations against Newland's son for child sexual abuse did not affect the outcome of the trial, and Newland received a fair trial. The prosecutor made no improper argument during his closing and rebuttal, and no statements he made denied Newland a fair trial. Newland's claims fail and the trial court should be affirmed in all respects.

DATED this 20th day of February, 2015.

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