NO. 45996-5-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

EUGENE ANDREW YOUNG, and
CLAUDE HUTCHINSON,
APPELLANTS

Appeal from the Superior Court of Pierce County
The Honorable Ronald Culpepper

No. 12-1-03740-1
12-1-03741-0

Brief of Respondent

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Table of Contents

Table of Authorities

State Cases

Federal and Other Jurisdictions

Constitutional Provisions

Statutes

Rules and Regulations

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

1. Did the trial court properly exercise its discretion by admitting text messages after testimony by witnesses with knowledge authenticated them?

2. After viewing the evidence in the light most favorable to the state, was sufficient evidence introduced at trial such that any rational trier of fact could have found the elements of communicating with a minor for immoral purposes?

3. Has defendant failed to show that prosecutor acted improperly by establishing which attorneys were present at a pretrial interview of a witness?

4. Has defendant failed to show the prosecutor acted improperly during closing argument by directing the jury to a particular instruction, reading a portion of that instruction aloud, then arguing that the evidence showed the legal standard in the instruction was met?

B. STATEMENT OF THE CASE.

1. Procedural History.

On October 5, 2012, appellants Claude Hutchinson and Eugene Young ("defendants") were charged with second degree rape and promoting sexual abuse of a minor. CP Hutchinson 131-132. CP Young

1-2. On January 3, 2013, the charges were amended to add three additional counts, first degree robbery, first degree kidnapping and communicating with a minor for immoral purposes. CP Hutchinson 133-135. CP Young 5-11. A second amendment to the charges was filed during the trial to modify the charging time period for several of the counts. CP Hutchinson 155-157. CP Young 33-35.

The case was assigned to a trial department on December 3, 2013. 1 RP Trial 4[1]. Pretrial motions and *voir dire* stretched over three days and trial testimony commenced on December 9, 2013. 1 RP Trial 165. The state called a total of thirteen witnesses and introduced several documentary exhibits, including cell phone text messages and internet prostitution solicitation pages printed from Backpage dot com. 2 RP Trial 206-12, 287, 292. 7 RP Trial 1094. The defense called one witness. 9 RP 1391.

At the conclusion of the trial, the court instructed the jury about the elements of all of the charged offenses. CP Hutchinson 241-291. CP Young 47-97. The instructions included a lesser included offense, attempted second degree theft, for the robbery count. *Id.* The instructions included an elements instruction for both defendants on the

[1] The trial transcripts in this case consist of nine volumes numbered and paginated in chronological order. Citations in this brief to the trial transcripts will include the volume and page number. Citations to other hearings will include a designation of the hearing type, the date and page number.

communicating with a minor charge and an accomplice instruction. Instructions No.s 7, 44 and 45.

Both sides quoted from and argued the accomplice instruction throughout their closing arguments. 9 RP Trial 1422. Neither side quoted an entire instruction. During closing arguments, the prosecutor took advantage of the jury having been provided working copies of the instructions to refer to. 9 RP Trial 1416. The prosecutor went through the instructions in numerical order. 9 RP Trial 1419. In connection with the accomplice instruction, the prosecutor argued:

> No. 7 is termed the "accomplice liability" instruction, and this is a very important instruction. It talks about how a person can be liable for the conduct of another person in a criminal context. First of all, it's important that you understand the person who's deemed the accomplice has to know the crime that he or she is alleged to be aiding or assisting in.
>
> So in this case, these defendants, as I said, are acting in concert with each other. They have a big picture enterprise happening here. They're recruiting young girls so that they can make money by means of these girls prostituting themselves. They're acting together.

9 RP Trial 1422.

The defense attorneys likewise referred to the instructions. In response to the acting in concert argument, the attorney for defendant Young argued that the two defendants were not acting in concert. 9 RP Trial 1508. He then paraphrased the instruction by saying, "with knowledge, that it will promote or facilitate the commission of the crime --

in this case "the crime" is rape -- and he or she solicits, commands, encourages, or requests another person to commit the crime. 9RP Trial 1509.

The jury found the defendants guilty on January 14, 2014. 9 RP Trial 1543. The jury found the defendants guilty as charged of the rape, the promoting and the communication charges from counts one, two and five. They found the defendants not guilty of count four, and guilty of the lesser included offense for count three. CP Hutchinson 292-297. CP Young 41-46.

Defendants were sentenced at separate hearings. On January 7, 2104, the trial court sentenced defendant Young to an indeterminate standard range sentence of 250 months to life. CP Young 122-124. On March 13, 2014, the court sentenced defendant Hutchinson to an indeterminate standard range sentence of 180 months to life. CP Hutchinson 324-339. The defendants' timely notices of appeal were filed on January 7, 2014, in the case of defendant Young, and on March 24, 2014, in the case of defendant Hutchinson.

2. Facts

Twenty-five year old NH met defendant Hutchinson in June of 2012. 4 RP Trial 669-72. She entered into a romantic relationship with him, but also worked as a prostitute for both defendants. 4 RP Trial 692-94. In September 2012, she worked for several days as a prostitute

alongside seventeen year old CB, out of a Fife motel room that NH rented and that was situated one floor above a room occupied by the two defendants. 2 RP Trial 308. 4 RP Trial 693.

NH met CB and the defendants at the Tacoma Dome bus station. 4 RP Trial 675. The defendants had picked up CB from her father's house in Renton, and brought her to the Tacoma area. 2 RP Trial 272, 279. The defendants and the two young women went to a Fife motel. 2 RP Trial 273. The defendants told CB that they were going to make money through prostitution. 2 RP Trial 273-76. NH rented a room where she and CB worked as prostitutes for the next several days. 2 RP Trial 281. During that time CB slept for "[m]aybe like three hours, four hours" but the rest of the time provided sexual services to men who contacted her via the internet. 2 RP Trial 314-15.

NH befriended CB and showed her what to do in order to begin working as a prostitute for the two defendants. 2 RP Trial 312. 4 RP Trial 678-85. A short time after renting the room, defendant Hutchinson took pictures of NH and CB that were included in a Backpage dot com advertisement for prostitution. 2 RP Trial 283. 4 RP Trial 685-90. CB was scared when she was told to take her clothing off for the photos, but went along with it. 2 RP Trial 282-86. Defendant Young told CB that they would be posted on the internet "[s]o that guys would call us and then [she] would have sex with them." 2 RP Trial 286. He used her phone for

internet access and her debit card to set up the Backpage dot com account. 2 RP Trial 286-89. A short time after the images were posted, "[p]robably like 10 or 15 minutes afterward," customers began calling and arranging for acts of prostitution with one or the other of the two young women. 2 RP Trial 310-11.

The trial court admitted hard copies of the Backpage dot com prostitution ads after they were identified by CB and her mother. 2 RP Trial 292. Trial Exhibit 6A-1. The images included nude images of NH and underwear photos of CB engaged in provocative sexual displays. Trial Exhibit 6A-1.

While working as a prostitute for the two defendants, NH provoked defendant Young to anger by laughing. 4 RP Trial 695. As a result she was beaten and raped by the two defendants and a third man. 4 RP Trial 695-97. Defendant Young beat NH and forced her to perform sex acts on himself and two other men. 4 RP Trial 697. This took place in the defendants' room in CB's presence. 2 RP Trial 4 RP Trial 693, 700. NH testified that before the first forced sex act she said, "I'm not going to do nothing." 4 RP Trial 702-03. Thereafter, she was beaten and strangled by defendant Young. 4 RP Trial 709-10. Young lifted her off the floor by her neck, beat her repeatedly and forced to engage in multiple sex acts with the three men. 4 RP Trial 703-10.

A few days before transporting CB to Fife to work for them as a prostitute, the defendants made contact with another young woman, RE, under similar circumstances. 5 RP Trial 838, 841. At the time she met the defendants, she was a sixteen year old high school student. 5 RP Trial 838-39. She was at a Kent bus stop on September 18, 2012, on her way home from counseling. Defendant Hutchinson cornered her and started "talking about like things he wanted to do to me, kind of like rape kind of things, you know, kind of like oral sex." 5 RP Trial 841. After Hutchinson accosted her, defendant Young came up to her, told defendant Hutchinson to "back off", displayed what appeared to be a gun, and forced her to cash a fraudulent check. 5 RP Trial 246-48. He walked her to a bank where she deposited a $700 dollar check made out to another woman and withdrew approximately $260 dollars from her account which she gave to the defendants. 5 RP Trial 849-58.

After having walked RH to a bank to deposit the fraudulent check, defendant Young put his initials and phone number into her cell phone's contact application. 5 RP Trial 873-75, 882-83. He threatened to hurt her or her family if she said anything about the check. 5 RP Trial 875. She kept quiet for approximately a month, but continued to communicate with defendant Young by text messages and phone calls. 5 RP Trial 876-78, 909.

The text messages were "sexual" and about making money. 5 RP Trial 878-79. RH clarified during the messaging what the defendants wanted of her by asking, " 'What are you talking about' kind of thing, and he brought up prostitution. And I wasn't down for anything like that at all." 5 RP Trial 897. Copies of the text messages were admitted into evidence via 21 pages of photographs taken by law enforcement of RH's cell phone. 5 RP Trial 881-88. Exhibit 26.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING TEXT MESSAGES AFTER WITNESSES PROVIDED SUFFICIENT AUTHENTICATION OF THEM.

Authentication as a condition precedent to the admission of documentary or physical evidence is "satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." ER 901(a). A non-exclusive listing of examples of sufficient authentication includes: (1) testimony of a witness with knowledge that a matter is what it is claimed to be, ER 901(b)(1); (2) that the "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances" demonstrate authenticity, ER 901(b)(4), and (3) evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result", ER 901(b)(9).

Admission of evidence is reviewed for abuse of discretion. ***State v. Magers,*** 164 Wn.2d 174, 181, 189 P.3d 126(2008), citing ***State v. Pirtle,*** 127 Wn.2d 628, 648, 904 P.2d 245(1995). "Abuse of discretion occurs when a trial court's decision is manifestly unreasonable or based on untenable grounds." ***State v. Bradford,*** 175 Wn. App. 912, 927, 308 P.3d 736(2013), citing ***State v. Magers,*** 164 Wn.2d at 181.

Bradford is similar to this case. In ***Bradford,*** text messages were introduced in a domestic violence stalking case. The messages were admitted both via verbatim notes compiled by the investigating officer and read to the jury, and via cell phone records produced by a "phone dump" of the victim's friend's cell phone. *Id.* at 918-19. The court in ***Bradford*** upheld the admission of the text messages. ***State v. Bradford,*** 175 Wn. App. at 930. The court reasoned that the overall circumstances in which the messages were sent "demonstrated Bradford's desperate desire to communicate with [the victim]." *Id.* at 929. The circumstances included a void in the chronology of the text messages that coincided with the defendant having been incarcerated. *Id.* at 929-30. Moreover, "the content of the text messages themselves indicated that Bradford was the individual who sent them." *Id.* at 929. In short, the ***Bradford*** court determined that, "There was no trial court error in the admission of the

challenged evidence. The State properly authenticated the evidence of Bradford's text messages pursuant to ER 901(a)."

Id. at 930.

The argument advanced by the defense in ***Bradford*** is the same argument asserted by the defendants in this case, namely that there was insufficient foundation evidence that the text messages were sent by the defendant, rather than another person using the defendant's phone.

As in ***Bradford***, there was sufficient evidence admitted at trial in this case to find the messages were sufficiently authenticated. Victim RE testified that after the two defendants made contact with her at a Kent bus stop and forced her to commit check fraud, defendant Young typed his initials into her cell phone, indicating that he needed to maintain contact with her because the full amount of money from the fraudulent check had not been given to him. RE's testimony more than met the authentication requirement. She not only recognized who it was she was communicating with, but she also described the process by which her phone stored the communications. This included the contact application. Defendant Young not only typed his phone number into RE's phone, but he also created a new contact listing for himself in her contacts. Thereafter, her phone created a record of text messages and phone calls to his number. RE used this feature to send both messages and make calls to defendant Young. The messages were two way communications in many instances.

The phone calls were sometimes unanswered and sometimes connected. While a theoretical argument could be made that someone other than defendant Young or his co-defendant accomplice sent these, this goes to weight, not admissibility. ***State v. Tatum,*** 58 Wn.2d 73, 75, 360 P.2d 754 (1961). In ***Tatum,*** the Supreme Court held that photographic evidence admitted of check fraud was properly admitted despite similar theoretical arguments. The court stated that, "The authentication supplied by the testimony summarized above, of course, did not preclude appellant from attempting to prove that the individual portrayed was someone other than appellant, that the photograph was inaccurate in one or more respects, that appellant was somewhere else at the moment the photograph was taken, or any other such defense. But these arguments go to the weight rather than to the admissibility of the exhibits in question." *Id.* at 75-76.

Additionally, the content of the messages provided confirmation to RE that defendant Young or his accomplice, defendant Hutchinson, sent the messages considering references to (1) her prior knowledge of defendant Young as a fellow bus rider, (2) the circumstances of their meeting at the bus station, (3) the sexually explicit communication that defendant Hutchinson had used to initiate contact with her at the bus station, and (4) the fraudulent check transaction,

RE recognized the text messages on her phone as having been from defendant Young's number and she provided sufficient

authentication for their admission. Defendants have failed to show an abuse of discretion in the admission of this evidence.

2. SUFFICIENT EVIDENCE WAS INTRODUCED AT TRIAL TO PROVE THE ELEMENTS OF COMMUNICATING WITH A MINOR FOR IMMORAL PURPOSES BEYOND A REASONABLE DOUBT.

The test for 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 the essential elements of the crime beyond a reasonable doubt." ***State v. Hosier***, 157 Wn.2d 1, 8, 133 P.3d 936 (2006).

In an insufficiency claim, the defendant "admits the truth of the State's evidence" and all reasonable inferences that can be drawn from it. ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence." ***State v. Delmarter***, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The court defers "to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." ***State v. Thomas***, 150 Wn.2d 821, 874–75, 83 P.3d 970, *abrogated in part on other grounds* by ***Crawford v. Washington***, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Only when no rational trier of fact could have found that the State proved all of the elements of the crime beyond a reasonable doubt can a

claim of insufficiency be sustained. ***State v. Smith***, 155 Wn.2d 496, 501, 120 P.3d 559 (2005).

The jury in this case was instructed that "It is your duty to determine which facts have been proved in this case from the evidence produced in court. . . ." CP Hutchinson 241-291, CP Young 47-97, Instruction No. 1. The first sentence of the first paragraph of the first jury instruction conveyed to the jury their role as the finders of fact as is provided for by the Washington Constitution. Washington Constitution, Article 1§21. ***State v. Furth***, 5 Wn.2d. 1, 104 P.2d 925, 933-34(1940). Neither the court nor witnesses may invade the province of the jury because "the jury is consigned under the constitution 'the ultimate power to weigh the evidence and determine the facts." ***State v. Montgomery***, 163 Wn.2d 577, 590, 183 P.3d 267(2008).

The jury was also properly instructed on the elements of the communicating with a minor offense:

> (1) That on or about the 18th day of September, 2012, the defendant or an accomplice communicated with [RE] for immoral purposes of a sexual nature;
>
> (2) That [RE] was a minor; and
>
> (3) That this act occurred in the State of Washington.

CP Hutchinson 241-291. CP Young 47-97. Instructions Nos. 44 and 45.

Review of the above elements shows that two of the three elements were undisputed. RE testified that she was seventeen at the time of trial, and that her date of birth was in 1996; in September of 2012, at the time of the incident, she was sixteen years old. 5 RP Trial 838-40. There was no dispute that all of RE's contact with the defendant's was either in person or by phone in the State of Washington. 5 RP Trial 843-50. 6 RP Trial 878-85.

Although not undisputed, there was overwhelming evidence of the third element. RE testified that defendant Hutchinson came up to her first and "walked up to me and kind of got me in a corner, almost, and started talking about like things he wanted to do to me, kind of like rape kind of things, you know, kind of like oral sex." 5 RP Trial 841-42. She had never met Hutchinson before. Her description was of a stranger who wanted to engage in non-consensual sexual intercourse of her. RCW 9A.44.010. Another word for what she described was that defendant Hutchinson communicated that he wanted to rape her. RCW 9A.44.060. This communication was sufficient to uphold Hutchinson's conviction for communicating with RE.

RE's testimony included subsequent immoral communications of both a sexual nature and non-sexual nature. She testified that after defendant Hutchinson initiated the rape-charged contact with her, defendant Young pretended to tell Hutchinson to back off. 5 RP Trial

845-48. But in a very short period of time, defendant Young forced RE to go with both of them to a bank to commit check fraud, under threat of harm by a gun. 5RP Trial 848-51, 858-59. The defendants also forced RE to withdraw a total of $260 from her account and give it to the defendants. 5 RP Trial 858. Defendant Young ensured that they could continue communicating with RE by putting his phone number in her phone's contact application with the code initials "YG". 6 RP Trial 873-75. Although RE never saw the two defendants face to face again, she communicated further with defendant Young by voice and text telecommunication. 6 RP 878. She initiated some of the communications by calling about getting her money back. Defendant Young answered and told her that he would meet her at a Federal Way bus station. 6 RP 878. She also received sexual text messages and messages from him about how she could earn as much as $3,000.00 to $5,000.00 a day from prostitution. 6 RP 878-80, 914. "I thought he was talking about drug dealing and so I kind of asked him like, "What are you talking about" kind of thing, and he brought up prostitution. And I wasn't down for anything like that at all." 6RP Trial 879. This communication is sufficient to uphold Young's conviction for communicating with RE.

Fortunately the defendants did not lure RE into prostitution as they had with CB. However, when what happened to CB is considered alongside what nearly happened to RE, a reasonable inference can be

drawn that the defendants were engaged in a common scheme or plan to induct young girls into the prostitution trade, and perhaps the reason they moved on from RE to CB was that they encountered another less cautious, more willing sixteen year old girl to victimize. CP Hutchinson 293. CP Young 42. 2 RP Trial 248. Thus, evidence of what happened to CB is also relevant to whether there was sufficient evidence of the crime committed against RE.

CB testified that she met the defendants at a transit stop as had RE. 2RP Trial 251. They first asked her to commit check fraud by cashing a check through her account. 2 RP Trial 253-55. The defendants then accompanied CB to her home and thereby conveyed to her that they knew where she and her family lived. 2 RP Trial 261. She gave them her number and put defendant Hutchinson's number into her phone under an alias. 2 RP Trial 264-68. Thereafter CB communicated with the defendants, and in particular with defendant Hutchinson, by voice and text telecommunications. 2RP Trial 268-70 The subject of the communications referenced the check fraud: "Well, they needed to get the rest of the money." The defendants went to CB's father's house, picked her up and tried to get money from her bank account, then forced her to work as a juvenile prostitute for them. 2 RP Trial 270-76.

Considering the graphic, and at times violent, and disturbing testimony about what the defendants did to sixteen year old CB, there was more than sufficient evidence from which the jury could infer that the defendants' motive for communicating with both of the two teenage girls was "immoral purposes of a sexual nature." CP Hutchinson 241-291, CP Young 47-97, Instructions Nos. 44 and 45.

The evidence showed that the defendants preyed on young girls they found at bus stops, by talking to them, using fear to gain control over them, involving them in fraudulent activities, with the ultimate goal of getting them to work as prostitutes. The fact that defendants did not succeed in getting RE to work as a prostitute is immaterial. It surely cannot be said that no rational trier of fact could have found that the State proved all of the elements of the crime of communicating as to RE beyond a reasonable doubt.

3. DEFENDANT HAS FAILED TO SHOW THE PROSECUTOR COMMITTED ERROR OR ACTED IMPROPERLY BY ESTABLSIHING WHO WAS PRESENT AT A PRE- TRIAL INTERVIEW OF A WITNESS.

To prevail on a claim of prosecutorial error[2] a defendant must show that the prosecutor's action was improper and prejudicial. ***State v. Warren***, 165 Wn.2d 17, 26, 195 P.3d 940(2008). A prosecutor's action is prejudicial "only where 'there is a substantial likelihood the misconduct affected the jury's verdict.' " ***State v. Yates***, 161 Wn.2d 714, 774-75, 168 P.3d 359(2007), citing, ***State v. McKenzie***, 157 Wn.2d 44, 52, 134 P.3d 221(2006), quoting ***State v. Brown***, 132 Wn.2d 529, 561, 940 P.2d 546(1997).

Personal attacks on defense counsel can constitute prosecutorial error. ***State v. Reed***, 102 Wn.2d 140, 145–46, 684 P.2d 699 (1984).

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[2] ' In responding to the defendants' arguments, the State will use the phrase "prosecutorial error." The State urges this Court to use the same phrase in its opinions. 'Prosecutorial misconduct' is a term of art but is really a misnomer when applied to mistakes made by the prosecutor during trial." ***State v. Fisher***, 165 Wn.2d 727, 740 n. 1, 202 P.3d 937(2009). Recognizing that words pregnant with meaning carry repercussions beyond the pale of the case at hand and can undermine the public's confidence in the criminal justice system, both the National District Attorneys Association (NDAA) and the American Bar Association's Criminal Justice Section (ABA) urge courts to limit the use of the phrase "prosecutorial misconduct" for intentional acts, rather than mere trial error. *See* American Bar Association Resolution 100B (Adopted Aug. 9-10, 2010), http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/100b.authcheckdam.pdf (last visited Aug. 29, 2014); National District Attorneys Association, Resolution Urging Courts to Use "Error" Instead of "Prosecutorial Misconduct" (Approved April 10 2010), http://www.ndaa.org/pdf/prosecutorial_misconduct_final.pdf (last visited Aug. 29, 2014). A number of appellate courts agree that the term "prosecutorial misconduct" is an unfair phrase that should be retired. *See*, e.g., ***State v. Fauci***, 282 Conn. 23, 917 A.2d 978, 982 n. 2 (2007); ***State v. Leutschaft***, 759 N.W.2d 414, 418 (Minn. App. 2009), *review denied*, 2009 Minn. LEXIS196 (Minn., Mar. 17, 2009); ***Commonwealth v. Tedford***, 598 Pa. 639, 960 A.2d 1, 28-29 (Pa.2008).

Comments that permit the jury "to nurture suspicions about defense counsel's integrity" can deny a defendant's right to effective representation. ***State v. Neslund***, 50 Wn. App. 531, 562, 749 P.2d 725, *review denied*, 110 Wn.2d 1025 (1988). The defendant bears the burden of demonstrating that a prosecutor's action was improper and its effect prejudicial. ***State v. Brown***, 132 Wn.2d 529, 564-65, 940 P.2d 546(1997). "Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request." *Id.* at 565, quoting ***State v. Russell***, 125 Wn.2d 24, 85, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995).

In this case, questions from the prosecutor of CB on re-direct prompted an objection from both defense counsel. On direct, defendant Hutchinson's counsel had questioned CB from a transcript about statements that she had made during a pre-trial interview. On re-direct, the prosecutor asked a series of questions about CB's memory of the interview and the circumstances in which it had been given:

> Q [CB], I want to start off where defense counsel just left off. He asked you a question about a specific entry in an interview you did with defense counsel September 27th of this year; is that correct?
>
> A. Yeah.
>
> Q So that's about three months ago, almost, two and a half months ago. Where were you when you participated in that interview?

A Here.

Q And who was present?

A There was like four different people in there.

Q Do you remember who they were?

A No.

Q Were the defense attorneys present?

A One of them was, I think.

Q Which one?

A The one I just talked to.

Q And the other one, Ms. Corey, was not?

A No.

4 RP Trial 571

No objection was made by either defense counsel to the foregoing foundational questions. 4 RP Trial 571. It was only when the prosecutor sought to complete the foundation as to who CB remembered as having been present that counsel for defendant Hutchinson objected. 4 RP Trial 572. The objection was to relevance. It was immediately joined by defendant Young and was immediately overruled. *Id.* No curative instruction was requested. Later, both defense counsel moved for a mistrial. 4 RP Trial 592-96.

Nothing in the prosecutor's foundational question can be said to have disparaged either defense attorney. No questions were asked that could be said to highlight a lack of questioning of CB or to suggest that the defense attorney was unaware of facts that she should have been aware of. Accordingly, there is no showing that the prosecutor's questions were error, much less error that created a "substantial likelihood the misconduct affected the jury's verdict.' " ***State v. Yates***, 161 Wn.2d 714, 774-75, 168 P.3d 359(2007), citing, ***State v. McKenzie***, 157 Wn.2d 44, 52, 134 P.3d 221(2006), quoting ***State v. Brown***, 132 Wn.2d 529, 561, 940 P.2d 546(1997).

During a subsequent mistrial motion, the defense attorney claimed that the prosecutor's foundation question was intended as criticism of her preparation for trial. 4 RP Trial 592-96. That claim was so out of context that the trial court had to ask, "What exactly was the disparagement that you heard?" 4 RP Trial 594. After the defense attorney explained what she was referring to, the court stated, "Well, I can certainly prohibit Mr. Greer from arguing to the jury that your not attending that interview means your client is guilty. I'll direct Mr. Greer not to make that argument." 4 RP Trial 595.

In this case, the prosecutor's questions were not intended to, and did not in fact, disparage defense counsel's preparation. The prosecutor merely placed before the jury proper evidence of CB's memory of the

defense interview in preparation for asking her questions about certain statements that she had made during the interview. In light of the defense attorney's overall performance during the trial, including thorough and lengthy cross examinations of all of the state's witnesses, the argument that the questions was prejudicial or that it had an effect on the jury's verdict is not supported by the record.

4. THE PROSECUTOR DID NOT COMMIT PROSECUTORIAL ERROR BY REFERRING THE JURY TO ITS WORKING COPIES OF THE INSTRUCTIONS OR BY ARGUING THAT THE EVIDENCE SHOWED THE DEFENDANTS ACTIONS SHOWED THEY WERE ACCOMPLICES OF EACH OTHER.

The standard of review for allegedly improper comments during closing argument requires that the comments be reviewed in context. ***State v. Russell***, 125 Wn.2d 24, 882 P.2d 747 (1994). The comments are examined in light of the entire argument, the issues in the case, the evidence addressed in the argument, and the instructions given. *Id.* at 86. ***State v. Graham***, 59 Wn. App. 418, 428, 798 P.2d 314 (1990), ***State v. Gregory***, 158 Wn.2d 759, 810, 147 P.3d 1201 (2006).

Prejudice from allegedly improper prosecution argument is established only where "there is a substantial likelihood that the instances of misconduct affected the jury's verdict." ***State v. Dhaliwal***, 150 Wn.2d 559, 578, 79 P.3d 432 (2003), quoting ***State v. Pirtle***, 127 Wn.2d 628, 672, 904 P.2d 245 (1995). Where no objection is made at trial, a defendant is

deemed to have waived any error and must show not only improper conduct and prejudice, but must also show that the alleged error was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice. ***State v. Emery***, 174 Wn.2d 741, 760-61, 754, 278 P.3d 653 (2012).

A prosecutor is permitted latitude to argue the facts in evidence draw reasonable inferences from the evidence and express those inferences to the jury. ***State v. Stenson***, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997), citing ***State v. Hoffman***, 116 Wn.2d51, 94–95, 804 P.2d 577 (1991), *cert. denied*, 523 U.S. 1008 (1998), and ***State v. Fiallo–Lopez***, 78 Wn. App. 717, 726, 899 P.2d 1294 (1995). A prosecutor may also argue the jury instructions but may not misstate the law. ***State v. Allen***, ___ Wn.2d ___, 341 P.3d 268, 273(2015).

The prosecutor in this case utilized the actual jury instructions as his outline for his closing argument. Each juror had a copy of the instructions for reference and to which the attorneys could direct his or her attention. 9 RP Trial 1416.

The defendants now claim the prosecutor acted improperly by referring the jury to a specific instruction, but then only quoting a portion of the instruction. The full context of the prosecutor's argument is as follows:

> The instructions specifically says, and you'll read it -- it's No. 7 -- "A person who is present at the scene and

> ready to assist by his or her presence in aiding the commission of the crime." And that word "aid" includes words, acts, encouragement, support, or presence.
>
> I'll read it again. "The word 'aid' means all assistance, whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime."
>
> That's what the instruction says and that's what I say. He's there with knowledge of what's happening. It's not just that he doesn't do a gentlemanly thing or an honorable thing by forcing Mr. Hutchinson to stop. By his mere presence and acquiescence to what Mr. Hutchinson is doing, he's assisting; he's giving it 9 his stamp of approval.

9 RP Trial 1439-40. As can be seen from this record, the jury was directed to specific instructions, and facts or testimony touching on those instructions was then discussed. The foregoing argument addressed the second degree rape charge. The prosecutor completed his argument by pointing out, concerning defendant Hutchinson, "[d]oes somebody force him to take his pants down or pull his penis out? No. He does that. That's assisting. That's being involved. That's not some innocent bystander. That's not mere presence. He's an active participant." 9 RP Trial 1441. The prosecutor can hardly have been said to have misconstrued the mere presence aspect of accomplice liability when he pointed out that one defendant was forcing the victim to engage in intercourse with the other. Neither defendant can be said to have been

merely present. The prosecutor did not commit error by arguing that the defendants were accomplices in the vicious rape of NH.

A prosecutor does not commit error by directing the jury to the actual instruction and then arguing that the evidence in the case meets the legal standard set out in the instruction.

D. CONCLUSION.

For the foregoing reasons, the convictions and sentences of the two defendants should be affirmed.

DATED: Monday, March 16, 2015

MARK LINDQUIST
Pierce County
Prosecuting Attorney

Kathleen Proctor for
JAMES SCHACHT
Deputy Prosecuting Attorney
WSB # 17298

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.

3-16-15 Theresa Kal
Date Signature

PIERCE COUNTY PROSECUTOR

March 16, 2015 - 1:49 PM

Transmittal Letter

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