Supreme Court No. 96482-3
Division III, No. 35381-8-III

IN THE
SUPREME COURT
OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

EDWARD LANE HART,

Petitioner

PETITION FOR REVIEW FOLLOWING
APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CHELAN COUNTY

The Honorable Judges T.W. Small and David Kurtz

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Edward Lane Hart asks this Court to accept review of the Court of Appeals' decision that affirmed his convictions for one count of second degree rape of a child (domestic violence) and one count of second degree child molestation (domestic violence).

B. DECISION FOR WHICH REVIEW IS SOUGHT

The Court of Appeals, Division III, unpublished opinion, filed on October 2, 2018. A copy of this opinion is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

Issue 1: Whether this Court should accept review under RAP 13.4(b)(2), (3) or (4), because the trial court erroneously disqualified Mr. Hart's retained attorney from representing him, depriving him of his Sixth Amendment right to counsel of choice.

Issue 2: Whether this Court should accept review under RAP 13.4(b)(1), (2) or (3), because the State committed misconduct in its closing arguments by making statements regarding plastic surgery that were prejudicial, incurable, and unsupported by the evidence presented at trial.

D. STATEMENT OF THE CASE

Edward Hart and Cami Stewart were in a relationship, and later married. (RP[1] 236-237, 301). Ms. Stewart has a daughter from a previous relationship, A.S.C., born in 1990. (RP 235-236, 301). Mr. Hart moved in with Ms. Stewart and A.S.C. when A.S.C. was approximately five or six years old. (RP 236, 303).

[1] The Report of Proceedings consists of a single volume reported by LuAnne Nelson, containing several pretrial hearings, and three consecutively paginated volumes reported by Karen E. Komoto containing additional pretrial hearings, the trial, and sentencing. The single volume reported by Ms. Nelson is referred to herein as "Nelson RP." The three consecutively paginated volumes reported by Ms. Komoto are referred to herein as "RP."

The family lived at several different addresses together, including an address on 2nd Street and an address on Miller Street. (RP 236, 245-250, 282, 305-307).

When A.S.C. was a teenager, she told Ms. Stewart that Mr. Hart had sexually abused her, but Ms. Stewart did not believe her. (RP 261, 281-283, 311-312, 333-334, 337-338).

When A.S.C. was approximately 16 years old, she told attorney Julie Anderson about the alleged sexual abuse by Mr. Hart. (RP 262-268, 430, 433-434). Ms. Anderson did not believe A.S.C. and did not report the allegations to law enforcement. (RP 262-268, 433-434). A.S.C. wrote a declaration addressed to family members of Mr. Hart, when she was 16 years old, stating she never said Mr. Hart did things to her. (RP 264-268, 283-284; Ex. 3). According to A.S.C., Ms. Anderson had her write this declaration. (RP 264-268, 283-284).

In approximately 2013, Ms. Stewart changed her mind and believed that Mr. Hart had sexually abused A.S.C. (RP 269, 313-314, 339-340). According to A.S.C. and Ms. Stewart, in 2014, Mr. Hart admitted he had sexually abused A.S.C. (RP 269-271, 290, 314-319, 340-341).

In October 2015, after Mr. Hart moved out of Ms. Stewart's house and the couple filed for divorce, A.S.C. reported the alleged sexual abuse against her by Mr. Hart to law enforcement. (CP 4, 8; RP 272-273, 291-292, 353-354). A.S.C. alleged Mr. Hart sexually abused her at the address on 2nd Street and at the address on Miller Street. (CP 2-9).

According to A.S.C., Mr. Hart had a distinctive oval-shaped mark on his penis. (RP 273-275, 292-293; Ex. 1). Ms. Stewart also stated that Mr. Hart had a mark on his penis. (RP 331-332, 341-344).

Law enforcement obtained a search warrant to search for and take photographs of a possible mark on Mr. Hart's penis. (RP 357-358, 407-409, 421). The photos do not show a mark on Mr. Hart's penis. (RP 358-359, 407-409, 413; Ex. 5).

The State charged Mr. Hart with two counts of first degree rape of a child (domestic violence), alleged to have occurred at an address on 2nd Street, and two counts of second degree rape of a child (domestic violence), alleged to have occurred at an address on Miller Street. (CP 15-18).

Mr. Hart retained Ms. Anderson as private counsel to represent him on the charges. (CP 73; Nelson RP 8).

The State filed a motion to disqualify Ms. Anderson from representing Mr. Hart. (CP 44-51). The State argued Ms. Anderson had a conflict of interest, because she had a personal relationship with A.S.C. and her family (Mr. Hart and Ms. Stewart), and A.S.C. made disclosures to Ms. Anderson regarding alleged acts against her by Mr. Hart. (CP 44-51). The State argued "Ms. Anderson's representation is also materially limited because she is unable to testify as to issues that could materially impact the presentation of Mr. Hart's case." (CP 48).

Mr. Hart filed a memorandum in opposition to the State's motion to disqualify Ms. Anderson. (CP 54-72). Mr. Hart also submitted a declaration of Ms. Anderson. (CP 73-77). Mr. Hart argued Ms. Anderson did not have a conflict of

interest, because A.S.C. had never been a client of Ms. Anderson. (CP 54-72). Mr. Hart argued he "would be extremely prejudiced if [Ms. Anderson is] disqualified as his counsel, because of the likelihood that he will not be able to find private counsel before the trial date." (CP 55).

The trial court held a hearing on the State's motion. (Nelson RP 4-15). The State argued "it is the State's position that Ms. Anderson is potentially a material witness for Mr. Hart and that for those reasons, we think she should be disqualified." (Nelson RP 5-6, 9-10).

The trial court asked Ms. Anderson to respond to the State's concern that she is a potential witness. (Nelson RP 6). Ms. Anderson argued that RPC 3.7 did not prohibit her from acting as an advocate in this case, because the testimony relates to an uncontested issue: "it is an uncontested issue that disclosures were made back when [A.S.C.] was 16 or 17." (Nelson RP 6-7). Ms. Anderson stated "we're not going to contest in this trial that she did make some disclosures when she was 16 or 17[.]" (Nelson RP 7, 9). Ms. Anderson stated "Mr. Hart has no intention of calling me as a witness." (Nelson RP 8-9).

Ms. Anderson also argued that her disqualification would work substantial hardship on Mr. Hart, given that she has been Mr. Hart's attorney for 20 years, and "he can't afford to hire another private attorney in this matter." (Nelson RP 8-9).

The trial court granted the State's motion to disqualify Ms. Anderson from representing Mr. Hart. (CP 78; Nelson RP 10-15). The trial court reasoned "I think that Mr. Hart would be deprived potentially of a witness that might be favorable for him in terms of you and your knowledge of the event back many years ago if you are

acting as his attorney in this case." (Nelson RP 11, 14-15). The trial court appointed counsel to represent Mr. Hart. (CP 79, 80-85; Nelson RP 16-20; RP 25).

The case against Mr. Hart proceeded to a jury trial. (RP 49-545). Witnesses testified consisted with the facts stated above. (RP 234-487).

In addition, A.S.C. testified she does not remember any sort of physical relationship with Mr. Hart at the 2nd Street address. (RP 246-249). She testified that sexual acts with Mr. Hart occurred at the Miller address, and the acts stopped when she was 14 years old. (RP 249-259, 285). A.S.C. described the emotional impact these acts had on her. (RP 260-261). A.S.C. also testified that between 16 and 18 years old, she used drugs. (RP 268-269, 278, 281).

Ms. Stewart testified that when A.S.C. "was about 13, 14[,]" she noticed some behavioral changes in A.S.C. (RP 309-310). She testified A.S.C. was in a rebellious state between the ages of 14 and 16 years old. (RP 336-337, 339). Ms. Stewart testified she did not report the alleged sexual abuse of A.S.C. by Mr. Hart when A.S.C. was 16 years old because "I wasn't sure if it was true or not." (RP 340). She testified A.S.C. had told her that nothing had happened. (RP 338, 340).

Wenatchee Police Department Detective Steven Evitt testified he executed the search warrant on Mr. Hart's penis. (RP 357-358). He testified he was able to locate a mark, but that he was not able to get a photograph of the mark. (RP 358-359, 409-411, 413, 415-417; Ex. 5).

The State called Mr. Hart's disqualified attorney Ms. Anderson as a witness. (RP 428-437). Ms. Anderson testified that when A.S.C. was 16 or 17 years old, A.S.C. spoke to her about sexual abuse allegations against Mr. Hart. (RP 430, 433-

434). She testified she did not have anything to do with the declaration A.S.C. wrote to family members of Mr. Hart when she was 16 years old. (RP 430-433, 435; Ex. 3). She testified she never spoke to A.S.C. about the allegations against Mr. Hart again. (RP 433). Ms. Anderson testified A.S.C. was having behavioral problems around the time she made the allegations. (RP 435-437).

Before it rested its case, the trial court allowed the State to file an amended information, charging one count of second degree rape of a child (domestic violence) and one count of second degree child molestation (domestic violence), both alleged to have occurred at an address on Miller Street, "on or between January 1, 2002, December 31, 2004[.]" (CP 120-122; RP 457-470, 482).

Mr. Hart submitted an exhibit containing photographs of his penis that were taken on the day they were offered into evidence. (RP 473, 479, 482-487; Ex. 6). These photos do not show a mark on Mr. Hart's penis. (Ex. 6). Defense investigator Juan Miranda testified he took the photographs, and that he did not notice any markings on Mr. Hart's penis. (RP 484). On cross-examination by the State, Mr. Miranda testified as follows:

> [The State:] . . . [Y]ou were aware that there was an allegation of a mole being on Mr. Hart's penis, and photos being taken of it in April of last year.
> [Mr. Miranda:] Correct.
> [The State:] So it's been 13 months, since those allegations came forward; is that correct?
> [Mr. Miranda:] That sounds right, correct.
> [The State:] Okay. And, during that time, are you aware of any surgical procedure that Mr. Hart underwent?
> [Mr. Miranda:] I'm not aware of any.
> [The State:] Have you received all of Mr. Hart's medical records?
> [Mr. Miranda:] I have not.
> [The State:] Have you asked him whether or not he had the mole removed?

[Mr. Miranda:] I did not.

(RP 486-487).

Mr. Miranda was the only witness called by the defense. (RP 482-487).

In its closing argument, the State argued as follows:

> What wouldn't a person do, to get out of a crime? When you know what you're being accused of, you've read the reports against you, and you know that these witnesses have told you - - have told police, He has this mark, on his penis. So where is - - what's a person going to do? I'm going to get rid of the mark. When you're charged with a crime - - a serious crime - - like what Mr. Hart's charged with, I think you'd do just about anything.

(RP 510-511).

Defense counsel did not object. (RP 510-511).

In its rebuttal closing argument, the State argued as follows:

> Mr. Hart is a very smart man. I will give him credit for that. Because the day of the last day of trial, he presents us with pictures of his penis, where he says that there's no mole here anymore. Mr. Hart has had 13 months to produce something like that. But today is the day that we get those photos.
> That is a problem. And that should ring question into your ear, about, if you determine that there's no mole on his penis, why is there no more mole? And why are we just finding out about it, today? Why are we just getting pictures of that today?
> There are some amazing advances in plastic surgery these days. Where if someone gets a nose job - - you can't tell.

(RP 533-534).

At this point in the argument, defense counsel objected. (RP 534). The trial court sustained the objection, but did not strike the argument or give a curative instruction. (RP 534). The State continued its argument:

> He had ample opportunity to remove a mole, from his penis; 13 months' worth. He knew what the allegations were, he knew what the testimony was going to be against him, so what are you going to do? And when am I going to tell them about it?

The day of trial.

(RP 534).

Defense counsel did not object. (RP 534).

The jury found Mr. Hart guilty as charged in the amended information. (CP 120-122, 176-179; RP 541-545). Mr. Hart appealed. (CP 219-220). He argued he was denied his Sixth Amendment right to counsel of choice when the trial court disqualified Ms. Anderson from representing him, and that the State committed misconduct in its closing arguments by making statements regarding plastic surgery.[2]

The Court of Appeals affirmed Mr. Hart's convictions. *See* Appendix A. He now seeks review by this Court.

E. ARGUMENT

A petition for review will be accepted by the Supreme Court only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

[2] Mr. Hart also raised some sentencing errors, which he is not seeking review of by this Court.

Issue 1: Whether this Court should accept review under RAP 13.4(b)(2), (3) or (4), because the trial court erroneously disqualified Mr. Hart's retained attorney from representing him, depriving him of his Sixth Amendment right to counsel of choice.

Review by this Court is merited because the Court of Appeals' decision conflicts with other decisions of the Court of Appeals setting forth what is required to disqualify an attorney pursuant to RPC 3.7. *See State v. Sanchez*, 171 Wn. App. 518, 545, 288 P.3d 351 (2012); *Am. States Ins. Co. ex rel. Kommavongsa v. Nammathao*, 153 Wn. App. 461, 466, 220 P.3d 1283 (2009); RAP 13.4(b)(2). Review by this Court is also merited because the issue raises a significant question of law under the United States Constitution, a defendant's Sixth Amendment right to his choice of private counsel. *See* U.S. Const., amend. VI; *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006); RAP 13.4(b)(3). Review is also merited because ensuring the right to private counsel of a defendant's choice is an issue of substantial public interest. RAP 13.4(b)(4).

Mr. Hart retained private counsel, Ms. Anderson, to represent him in this case. After the State argued Ms. Anderson was a potential witness, the trial court granted the State's motion to disqualify Ms. Anderson from representing Mr. Hart. The trial court erred in disqualifying Ms. Anderson from representing Mr. Hart, because her representation of Mr. Hart was not prohibited under RPC 3.7. By disqualifying Ms. Anderson, Mr. Hart was denied his Sixth Amendment right to counsel of choice. This is structural error requiring that Mr. Hart receive a new trial.

The Sixth Amendment to the United States Constitution provides, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const., amend. VI. "The right to the assistance of counsel under the Sixth Amendment to the United States Constitution generally includes the defendant's right to his or her choice of private counsel." *State v. Hampton*, 184 Wn.2d 656, 662, 361 P.3d 734 (2015); *see also Gonzalez-Lopez*, 548 U.S. at 144 (acknowledging this constitutional right). "Where the right to be assisted by counsel of one's choice is wrongly denied . . . it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation." *Gonzalez-Lopez*, 548 U.S. at 148.

A violation of the Sixth Amendment right to counsel of choice is not subject to a harmless error analysis. *Id*. at 148-150. A violation of this right is "structural error." *Id*. at 150. "A choice-of-counsel violation occurs *whenever* the defendant's choice is wrongfully denied." *Id*. (emphasis in original). However, "even for defendants with private attorneys, the right to counsel of choice is not absolute." *Hampton*, 184 Wn.2d at 663 (citing *Gonzalez-Lopez*, 548 U.S. at 151).

Under RPC 3.7:

> A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
> (1) the testimony relates to an uncontested issue;
> (2) the testimony relates to the nature and value of legal services rendered in the case;
> (3) disqualification of the lawyer would work substantial hardship on the client; or
> (4) the lawyer has been called by the opposing party and the court rules that the lawyer may continue to act as an advocate.

RPC 3.7(a).

When interpreting the provisions of RPC 3.7, "courts have been reluctant to disqualify an attorney absent compelling circumstances." *Pub. Util. Dist. No. 1 of Klickitat Cty. v. Int'l Ins. Co.*, 124 Wn.2d 789, 812, 881 P.2d 1020 (1994). "A motion for disqualification under RPC 3.7 must be supported by a showing that (1) the attorney will give evidence material to the determination of the issues being litigated, (2) the evidence is unobtainable elsewhere, and (3) the testimony is or may be prejudicial to the testifying attorney's client." *Sanchez*, 171 Wn. App. at 545.

An appellate court reviews a trial court's ruling under RPC 3.7 for abuse of discretion. *Nammathao*, 153 Wn. App. at 466. "Discretion is abused when it is exercised on untenable grounds or for untenable reasons." *Id.*

Here, the trial court erred in disqualifying Ms. Anderson from representing Mr. Hart under RPC 3.7. Ms. Anderson was not a necessary witness in this case. The State could establish its case without calling Ms. Anderson as a witness. *See Nammathao*, 153 Wn. App. at 466-68 (where this Court reversed a trial court's disqualification of an attorney where the opposing party could establish its counterclaim without calling the attorney as a witness, and therefore, the attorney was not a necessary witness for the opposing party's case).

In upholding the trial court's disqualification of Ms. Anderson, the Court of Appeals reasoned "[h]er testimony was necessary for both sides." *See* Appendix A, pg. 8. However, the defense did not call Ms. Anderson as a witness. (RP 482-487). And, her testimony as a witness for the prosecution did not help the prosecution's case. (RP 428-437). Ms. Anderson denied any

involvement with A.S.C.'s recantation written on her firm's pleading paper. (RP 431-433, 435). Her testimony contradicted the testimony of A.S.C.; it did not assist the State in proving their case. (RP 264-268, 283-284, 431-433, 435).

Even if this Court determines that Ms. Anderson was a necessary witness in this case, RPC 3.7 permits an attorney to continue to act as an advocate if her testimony relates only to an uncontested issue. *See* RPC 3.7(a)(1). Ms. Anderson's testimony related only to an uncontested issue: that A.S.C. had disclosed to her that Mr. Hart had sexual abused her. (Nelson RP 6-7, 9; RP 428-437); *see Pub. Util. Dist. No. 1 of Klickitat Cty.*, 124 Wn.2d at 811-812 (finding the trial court did not abuse its discretion in denying the defendants' motion to disqualify the plaintiff's attorney, where the defendants were unable to establish the evidence to be provided by the attorney was otherwise unobtainable). Mr. Hart informed the trial court he would not contest that information. (Nelson RP 7, 9). Ms. Anderson's testimony is not regarding evidence that is unobtainable elsewhere, and therefore, disqualification under RPC 3.7 was erroneous. *See Pub. Util. Dist. No. 1 of Klickitat Cty.*, 124 Wn.2d at 811-812; *see also Sanchez*, 171 Wn. App. at 545.

In addition, even if this Court determines that Ms. Anderson was a necessary witness in this case, RPC 3.7 permits an attorney to continue to act as an advocate if disqualification would work a substantial hardship on the client. *See* RPC 3.7(a)(3). Disqualification of Ms. Anderson worked a substantial hardship on Mr. Hart, where she had been Mr. Hart's attorney for 20 years and he

could not afford to hire another private attorney to represent him. (Nelson RP 8-9).

The trial court abused its discretion in disqualifying Ms. Anderson from representing Mr. Hart under RPC 3.7. By disqualifying Ms. Anderson from representing Mr. Hart, he was denied his Sixth Amendment right to counsel of choice. *See Hampton*, 184 Wn.2d at 662; *Gonzalez-Lopez*, 548 U.S. at 144. Mr. Hart is not required to show prejudice. *See Gonzalez-Lopez*, 548 U.S. at 148. The constitutional violation that occurred here is structural error, not subject to a harmless error analysis. *See Gonzalez-Lopez*, 548 U.S. at 148-150. The case should be reversed and remanded for a new trial.

Issue 2: Whether this Court should accept review under RAP 13.4(b)(1), (2) or (3), because the State committed misconduct in its closing arguments by making statements regarding plastic surgery that were prejudicial, incurable, and unsupported by the evidence presented at trial.

Review by this Court is merited because the Court of Appeals' decision finding Mr. Hart did not prove the State committed misconduct conflicts with decisions of the Supreme Court addressing prosecutorial misconduct. *See State v. Emery*, 174 Wn.2d 741, 759, 761-62, 278 P.3d 653 (2012); *State v. Thorgerson*, 172 Wn.2d 438, 442-43, 258 P.3d 43 (2011); *State v. Stenson*, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997); RAP 13.4(b)(1). Review by this Court is also merited because the Court of Appeals' decision conflicts with another decision of the Court of Appeals addressing prosecutorial misconduct. *See State v. Boehning*, 127 Wn. App. 511, 519, 111 P.3d 899 (2005) (stating "a prosecutor may not make statements that are unsupported by the evidence and prejudice the defendant."); RAP 13.4(b)(2). In addition, review by this Court is merited because the issue

raises a significant question of law under the United States Constitution and the Washington Constitution, a defendant's right to a fair trial. *See* U.S. Const., amends. VI, XIV; WA Const. Art. 1, § 22; *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 703–04, 286 P.3d 673 (2012); *State v. Hecht*, 179 Wn. App. 497, 503, 319 P.3d 836, 840 (2014); RAP 13.4(b)(3).

In its closing arguments, the State committed misconduct by making statements regarding Mr. Hart obtaining plastic surgery to remove the mark from his penis. The misconduct was prejudicial and incurable, and therefore, requires a new trial.

"Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial." *Glasmann*, 175 Wn.2d at 703-04 (citing *Davenport*, 100 Wn.2d at 762); *see also Hecht*, 179 Wn. App. at 503. "To prevail on a claim of prosecutorial misconduct, the defendant must establish that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial." *Thorgerson*, 172 Wn.2d at 442 (internal quotation marks omitted) (*quoting State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)); *see also Emery*, 174 Wn.2d at 759 (when raising prosecutorial misconduct, the appellant "must first show that the prosecutor's statements are improper.").

If the defendant fails to properly object to the misconduct, "a defendant cannot raise the issue of prosecutorial misconduct on appeal unless the misconduct was so flagrant and ill intentioned that no curative instruction would

have obviated the prejudice it engendered." *State v. O'Donnell*, 142 Wn. App. 314, 328, 174 P.3d 1205 (2007) (internal quotation marks omitted) (*quoting State v. Munguia*, 107 Wn. App. 328, 336, 26 P.3d 1017 (2001)). "Under this heightened standard, the defendant must show that (1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.'" *Emery*, 174 Wn.2d at 761 (quoting *Thorgerson*, 172 Wn.2d at 455). "Reviewing courts should focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured." *Id*. at 762.

In closing argument, the State is allowed to draw reasonable inferences from the evidence. *Stenson*, 132 Wn.2d at 727. "However, a prosecutor may not make statements that are unsupported by the evidence and prejudice the defendant." *Boehning*, 127 Wn. App. at 519.

It is improper for a prosecutor to personally vouch for the credibility of a witness. *Thorgerson*, 172 Wn.2d at 443. Improper vouching occurs when the prosecutor expresses a personal belief in the veracity of a witness or indicates that evidence not presented at trial supports the testimony of a witness. *Id*.

Here, in its closing argument, the State argued as follows, regarding plastic surgery:

> What wouldn't a person do, to get out of a crime? When you know what you're being accused of, you've read the reports against you, and you know that these witnesses have told you - - have told police, He has this mark, on his penis. *So where is - - what's a person going to do? I'm going to get rid of the mark.* When you're charged with a

> crime - - a serious crime - - like what Mr. Hart's charged with, I think you'd do just about anything.

(RP 510-511) (emphasis added).

Defense counsel did not object. (RP 510-511).

In its rebuttal closing argument, the State again addressed plastic surgery:

> Mr. Hart is a very smart man. I will give him credit for that. Because the day of the last day of trial, he presents us with pictures of his penis, where he says that there's no mole here anymore. Mr. Hart has had 13 months to produce something like that. But today is the day that we get those photos. That is a problem. And that should ring question into your ear, about, if you determine that there's no mole on his penis, why is there no more mole? And why are we just finding out about it, today? Why are we just getting pictures of that today? *There are some amazing advances in plastic surgery these days. Where if someone gets a nose job - - you can't tell.*

(RP 533-534) (emphasis added).

At this point in the argument, defense counsel objected. (RP 534). The trial court sustained the objection, but did not strike the argument or give a curative instruction. (RP 534). The State continued its argument:

> *He had ample opportunity to remove a mole, from his penis; 13 months' worth.* He knew what the allegations were, he knew what the testimony was going to be against him, so what are you going to do? And when am I going to tell them about it? The day of trial.

(RP 534) (emphasis added).

Defense counsel did not object. (RP 534).

The State committed misconduct in its closing arguments by making statements regarding Mr. Hart obtaining plastic surgery to remove the mark from his penis. In ruling that Mr. Hart had not proven prosecutorial misconduct occurred during the State's closing arguments, the Court of Appeals found the statements were reasonable inferences from the evidence:

> The relevance of the mole was clear, although the inference to be drawn was not. Three witnesses testified that one was present in the past, which one witness testified that no mole currently existed. While the jurors could infer that one or more witnesses were incorrect in their testimony, it was equally likely that all were correctly reporting information that they had experienced at different times over the preceding decades. *It was not improper for the prosecutor to suggest that there had been a recent change, possibly effectuated by plastic surgery, that explained the conflict in the testimony.* The phrasing of the remarks was objectionable because there was no evidence about any advances in plastic surgery. *The possibility of plastic surgery as an explanation for the differences was not necessarily improper.*

See Appendix A, pg. 9-10 (emphasis added).

However, contrary to the Court of Appeals conclusion, the State's arguments were not reasonable inferences from the evidence, because there was no evidence presented at trial that Mr. Hart had obtained plastic surgery. (RP 234-487). The only evidence presented at trial regarding plastic surgery was Mr. Miranda's testimony that he was not aware of any surgical procedure that Mr. Hart underwent. (RP 487). The prosecutor's statements were unsupported by the evidence presented at trial. *See Boehning*, 127 Wn. App. at 519. Further, without any testimony regarding plastic surgery, such as expert testimony, knowledge of plastic surgery is beyond the general purview of the jurors.

The prosecutor's statements regarding Mr. Hart obtaining plastic surgery were also not reasonable inferences from the evidence because neither set of photographs, those taken prior to the charges in the case and those taken during trial, showed a mark on Mr. Hart's penis. (RP 358-359, 407-409, 413, 473, 479, 482-487; Exs. 5, 6).

In addition, the prosecutor's statements regarding Mr. Hart obtaining plastic surgery constituted improper vouching for the credibility of witnesses A.S.C., Ms. Stewart, and Detective Evitt, who testified to a mark on Mr. Hart's penis. *See Thorgerson*, 172 Wn.2d at 443. Improper vouching occurred here, when the prosecutor indicates that evidence not presented at trial (i.e., the insinuation that Mr. Hart had plastic surgery to remove a mark from his penis) supported the testimony of a A.S.C., Ms. Stewart, and Detective Evitt. *See Thorgerson*, 172 Wn.2d at 443.

The State's argument prejudiced Mr. Hart. *See Emery*, 174 Wn.2d at 761 (quoting *Thorgerson*, 172 Wn.2d at 455). This case turned on the credibility of A.S.C., whether to believe her testimony that Mr. Hart had sexually abused her. There was evidence throughout the record to doubt her credibility. Although A.S.C. initially alleged Mr. Hart sexually abused her at the address on 2nd Street and at the address on Miller Street, A.S.C. later testified at trial that she does not remember any contact at the 2nd Street address, resulting in an amendment to the charges against Mr. Hart. (CP 2-9, 15-18, 120-122; RP 246-249, 457-470, 482). Both Ms. Stewart and Ms. Anderson did not believe A.S.C. when she disclosed the alleged abuse. (RP 261-268, 281-283, 311-312, 333-334, 337-338, 430, 433-434). A.S.C. wrote a declaration stating she never accused Mr. Hart. (RP 264-268, 283-284; Ex. 3). Neither set of photographs taken of Mr. Hart's penis showed a mark. (RP 358-359, 407-409, 413, 473, 479, 482-487; Exs. 5, 6).

Given the evidence in the record to doubt her credibility, the prosecutor's argument that Mr. Hart obtained plastic surgery to remove a mark

from his penis had a substantial likelihood of affecting the jury verdict, by vouching for A.S.C. that Mr. Hart had previously had a mark on his penis, and therefore improperly vouching for and bolstering her trial testimony. The prosecutor's argument also vouched for the credibility of Ms. Stewart, which was also important testimony for the State. The State's evidence was not overwhelming, and the prosecutor's comments had a substantial likelihood of affecting the jury verdict.

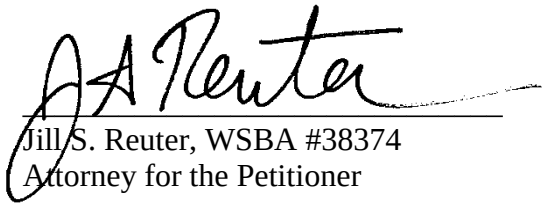
The State's misconduct "'was so flagrant and ill intentioned that no curative instruction would have obviated the prejudice it engendered.'" *O'Donnell*, 142 Wn. App. at 328 (*quoting Munguia*, 107 Wn. App. at 336); *see also Emery*, 174 Wn.2d at 761 (quoting *Thorgerson*, 172 Wn.2d at 455). No curative instruction would have alleviated the belief in the jurors' minds that Mr. Hart had plastic surgery to remove the mark from his penis, a fact outside of the evidence submitted for their consideration. The error was incurable, given the fact that the case hinged upon the credibility of A.S.C., there was evidence throughout the record to doubt her credibility, and the evidence of Mr. Hart's guilty was not overwhelming.

The State committed misconduct in its closing arguments that was prejudicial and incurable, by making statements regarding Mr. Hart obtaining plastic surgery to remove the mark from his penis. This Court should reverse his convictions and remand for a new trial.

F. CONCLUSION

For the reasons stated herein, Mr. Hart respectfully requests that this Court grant review pursuant to 13.4(b).

Respectfully submitted this 31st day of October, 2018.



Jill S. Reuter, WSBA #38374
Attorney for the Petitioner

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

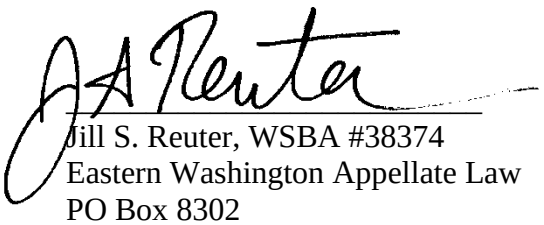
STATE OF WASHINGTON	)	
Plaintiff/Respondent	)	COA No. 35381-8-III
vs.	)	
	)	
EDWARD LANE HART	)	PROOF OF SERVICE
	)	
Defendant/Appellant	)	
	)	

I, Jill S. Reuter, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on October 31, 2018, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the attached Petition for Review to:

Edward Lane Hart, DOC #399600
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

Having obtained prior permission from the Chelan County Prosecutor's Office, I also served the Respondent State of Washington at prosecuting.attorney@co.chelan.wa.us using the Washington State Appellate Courts' Portal.

Dated this 31st day of October, 2018.



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APPENDIX A

FILED
OCTOBER 2, 2018
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. EDWARD LANE HART, Appellant.	)	No. 35381-8-III UNPUBLISHED OPINION

KORSMO, J. — Edward Hart appeals from convictions for second degree child rape and second degree child molestation, primarily arguing that the trial court erred in disqualifying his retained attorney. The court did not err by disqualifying an attorney who was a factual witness to the victim's report of the crimes. We affirm the convictions and remand to modify the judgment and sentence.

FACTS

Mr. Hart was convicted of sexually abusing his wife's daughter, A.C. At age 14, A.C. reported to her mother that Mr. Hart had abused her over the previous nine years. Her mother did not believe the accusation, a fact that seriously strained the mother-

daughter relationship. A.C. then reported the abuse to Mr. Hart's family and to his attorney and personal friend, Julie Anderson. Ms. Anderson did not believe the accusation and discussed it with A.C.'s mother. Since neither woman believed A.C., neither one reported to the police.

At age 16, A.C. performed occasional office work for attorney Anderson. That fall, she hand wrote a recantation on a declaration form used by the Anderson Law Office. Ex. 3. A.C. would later testify that her mother sent her to Ms. Anderson, who then had her write the note. In their testimony, both Anderson and the mother denied involvement.

When A.C. was 25, her mother's marriage to Mr. Hart was dissolved. After the dissolution was final, A.C. and her mother reported the abuse to law enforcement. Both women described a birthmark on Mr. Hart's penis. The investigating detective obtained a search warrant authorizing him to photograph the birthmark. The detective reported seeing a mark, but it was indistinct in the detective's photos.

Eventually, the prosecutor filed two counts of first degree child rape and two counts of second degree child rape against Mr. Hart. Ms. Anderson appeared as retained counsel for Mr. Hart. She moved to dismiss the charges on statute of limitations grounds. The trial court denied the motion.

During defense interviews of A.C. and her mother, the prosecution learned of Ms. Anderson's relationship to the case, including the fact that A.C. had disclosed the abuse

to Ms. Anderson years earlier. The State then moved to disqualify Ms. Anderson on the basis that she was a potential witness in the case. The defense opposed the motion, arguing that there was no attorney-client relationship between Anderson and A.C., and that the only issues she would testify about were uncontested matters.

The trial court granted the motion, stating:

> I am going to grant the State's motion to disqualify you, Ms. Anderson, from this case, and my concern is very much . . . . this could be a real situation of a he said/she said swearing match where credibility is going to be of the utmost importance for the jury to evaluate because this long after the allegations, there's not going to be any other kind of physical evidence.
>
> Your declaration indicates that you had conversations with Mr. Hart, with Ms. Stewart, the mother, and with the alleged victim back at this time period when this was first brought to light. Further, I don't know if—I guess I wouldn't rule out the possibility that the State could end up calling you as a witness, depending on what the nature of the defense is, as a rebuttal witness, but I think that Mr. Hart would be deprived potentially of a witness that might be favorable for him in terms of you and your knowledge of the event back many years ago if you are acting as his attorney in this case.
>
> If Mr. Hart is unable to hire another private attorney, he can ask the Court to appoint one for him. Your implication of your statement is that many people feel that getting a public defender isn't as good as getting a private attorney. I just don't think that that's really true here, at least in Chelan County, where, you know, we have, from the Court's viewpoint, a consistently high level of representation and good outcomes at trial, just had one last week on a high profile case where the defense—although the gentleman was convicted of a gross misdemeanor, it was far less than the original charge. So I understand Mr. Hart's desire to have you continue in this case, but it seems to the Court that you are potentially a witness in this case and so I'm going to grant the motion to disqualify you.

Supplemental Report of Proceedings at 10-11.

Because Mr. Hart was unable to retain a new attorney, the court appointed counsel for him. The State called Ms. Anderson in its case-in-chief. She testified to her long-term relationship with Mr. Hart, A.C., and A.C.'s mother. Anderson denied involvement in the recantation note and did not know why it was on her law firm's form. She also told the jury that A.C. had reported the abuse to her, but that, like the child's mother, she did not believe the allegation.

The State amended charges during trial to one count of second degree child rape and one count of second degree child molestation prior to resting. The amended charges were alleged to have occurred between January 1, 2002, and December 31, 2004. The only witness called by the defense was an investigator for the public defender's office. He had taken pictures that morning of the defendant's penis and presented the photos to the jury over the State's objection about untimely discovery. When cross-examining the investigator, the prosecutor stated: "It's amazing, the advances in plastic surgery these days, isn't it?" Report of Proceedings (RP) at 485. The court sustained the defense objection and struck the comment from the record.

During closing argument, the defense argued that A.C. was not credible and cited the photographic proof that there was no mark on his penis. In rebuttal, the prosecutor pointed out that Mr. Hart had 13 months to have the mark removed and only that very day had he taken pictures to show that there was no mole. She then argued that there had been "amazing advances in plastic surgery these days." The trial court sustained an

objection to the argument. She then simply noted for the jury, without objection, that Mr. Hart had 13 months to remove the mark. RP at 533-534.

The jury convicted Mr. Hart as charged. After a timely appeal to this court, a panel heard argument on the case.

ANALYSIS

This appeal raises arguments concerning the removal of Ms. Anderson and the prosecutor's plastic surgery remarks. It also raises three arguments concerning aspects of the judgment and sentence. We address first the removal of counsel argument before turning to the prosecutor's comments. We will then jointly consider the challenges to the judgment and sentence.

Removal of Counsel

Mr. Hart initially argues that the trial court denied him his counsel of choice when Ms. Anderson was removed in light of her role as a witness. The trial court did not err in entering the removal order.

The decision whether or not to disqualify an attorney is reviewed for abuse of discretion. *Pub. Util. Dist. No. 1 of Klickitat County v. Int'l Ins. Co.*, 124 Wn.2d 789, 812, 881 P.2d 1020 (1994); *Am. States Ins. Co. ex rel. Kommavongsa v. Nammathao*, 153 Wn. App. 461, 466, 220 P.3d 1283 (2009). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d

12, 26, 482 P.2d 775 (1971). Discretion also is abused when it is exercised contrary to law. *State v. Tobin*, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007).

The Sixth Amendment guarantee of the right to counsel includes a criminal defendant's right to select counsel of one's choice. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 146-148, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006). However, "even for defendants with private attorneys, the right to counsel of choice is not absolute." *State v. Hampton*, 184 Wn.2d 656, 663, 361 P.3d 734 (2015). *Gonzalez-Lopez* noted that trial courts have "wide latitude" in balancing the right to counsel of choice "against the demands of its calendar." 548 U.S. at 152. *Hampton* acknowledged this balancing as a discretionary exercise for the trial court. 184 Wn.2d at 663 (quoting *State v. Aguirre*, 168 Wn.2d 350, 365, 229 P.3d 669 (2010)). Courts are reluctant to disqualify a lawyer absent compelling circumstances. *Kommavongsa*, 153 Wn. App. at 466. A trial court should enter findings concerning (1) the materiality of the testimony, (2) the necessity for the testimony, and (3) any prejudice to the client. *State v. Sanchez*, 171 Wn. App. 518, 545, 288 P.3d 351 (2012).

RPC 3.7 states the lawyer as witness rule. The section relevant to this case provides:

> **(a)** A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
> . . . .
> (3) disqualification of the lawyer would work substantial hardship on the client.

The trial court concluded that defense counsel was a possible witness for the prosecution and also could be an important witness for the defense in a case that likely would turn on witness credibility.[1] These conclusions were certainly tenable bases for determining that counsel likely would be a necessary witness and could no longer act as an advocate. RPC 3.7(a). They also satisfy the first two questions of the *Sanchez* test—the testimony was material and necessary. The remaining question is whether disqualification would work a substantial hardship on Mr. Hart. RPC 3.7(a)(3); *Sanchez*, 171 Wn. App. at 545.

The only basis for claiming hardship was that Mr. Hart could no longer afford an attorney and would need to have appointed counsel. That "hardship" was easily remedied by the trial court's appointment of experienced counsel to represent Mr. Hart at public expense. The trial court also rejected the implied argument that appointed counsel were not as capable as retained attorneys, pointing to recent successes by local public defenders. This unsupported allegation simply does not establish substantial hardship.

[1] In light of the importance at trial of the testimony concerning the recanted statement written on her firm's pleading paper and the victim's allegation that Ms. Anderson was behind it, hindsight demonstrates that the trial court's observation was correct.

The trial court had very tenable bases for removing Ms. Anderson. Her testimony was necessary for both sides. The court did not abuse its discretion by disqualifying Mr. Hart's initial counsel of choice.

Prosecutorial Misconduct

Mr. Hart next argues that the prosecutor engaged in egregious misconduct requiring a new trial. However, we conclude that the trial court properly addressed the prosecutor's statements.

The standards governing this issue are well settled. The appellant bears the burden of demonstrating prosecutorial misconduct on appeal and must establish that the conduct was both improper and prejudicial. *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). Prejudice occurs where there is a substantial likelihood that the misconduct affected the jury's verdict. *Id.* at 718-719. The allegedly improper statements should be viewed within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

Reversal is not required where the alleged error could have been obviated by a curative instruction. *State v. Gentry*, 125 Wn.2d 570, 596, 888 P.2d 1105 (1995). The failure to object constitutes a waiver unless the remark was so flagrant and ill-intentioned that it evinced an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. *Id.*; *State v. Swan*, 114 Wn.2d 613, 665, 790 P.2d 610

(1990); *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). Finally, a prosecutor has "wide latitude" in arguing inferences from the evidence presented. *Stenson*, 132 Wn.2d at 727.

The court sustained defense objections both when the prosecutor questioned the defense investigator about the "amazing advances" in plastic surgery and repeated the comment in closing argument. In the first instance, the trial court also struck the comment from the record at defense request. The court also gave the standard jury instruction that the statements by the attorneys were not evidence and that only evidence that was admitted at trial could be considered. Clerk's Papers at 152-153. The first question was objectionable because no evidence about any "amazing advances" had been admitted at trial and the defense investigator was unlikely to be a competent witness on the topic. The second comment was objectionable for the reason that no evidence about the "amazing advances" had been presented. Since the two remarks were not evidence and the jury was instructed not to consider the comments of the attorneys, it is not apparent that anything more needed to be done.

Mr. Hart nonetheless argues that the two remarks were such egregious misconduct that only a new trial can remedy the situation. We disagree. The relevance of the mole was clear, although the inference to be drawn was not. Three witnesses testified that one was present in the past, while one witness testified that no mole currently existed. While the jurors could infer that one or more witnesses were incorrect in their testimony, it was

equally likely that all were correctly reporting information that they had experienced at different times over the preceding decades. It was not improper for the prosecutor to suggest that there had been a recent change, possibly effectuated by plastic surgery, that explained the conflict in the testimony. The phrasing of the remarks was objectionable because there was no evidence about any advances in plastic surgery. The possibility of plastic surgery as an explanation for the differences was not necessarily improper.

Under these circumstances, there was not a substantial likelihood that the two comments affected the jury's verdict. Accordingly, Mr. Hart has not sustained his burden of proving misconduct deprived him of a fair trial.

Judgment and Sentence

Mr. Hart presents three challenges to the judgment and sentence form. We jointly consider those contentions.

The State concedes two of the challenges and we accept one of those concessions. First, the parties correctly note that the judgment and sentence incorrectly states that Mr. Hart was subject to indeterminate sentencing under former RCW 9.94A.712, a provision that was recodified at RCW 9.94A.507 by Laws of 2008, ch. 231, § 56. The judgment and sentence should be modified to reflect the proper statute.

Although the State concedes that the prohibition on Mr. Hart possessing sexually explicit materials is improper, we question whether that concession is correct in light of *State v. Nguyen*, No. 94883-6 (Wash. Sept. 13, 2018), http://www.courts.wa.gov/opinions

/pdf/948836.pdf, a decision issued immediately after we heard argument in this case. Because the case is being remanded on other issues and the parties have not briefed *Nguyen*, we leave this issue for the trial judge on remand.

Finally, the parties do disagree about whether Mr. Hart was properly subject to the community protection zone exclusion of current RCW 9.94A.703(1)(c). That provision was originally enacted in 2005. *See* LAWS OF 2005, ch. 436, § 1. Mr. Hart was convicted for crimes committed between 2002 and 2004. The law in effect at the time the crime was committed governs sentencing in Washington. RCW 9.94A.345. The community protection zone was not enacted until a year after Mr. Hart committed these offenses. It was improper to sentence in accordance with that statute.

Nonetheless, trial judges have long held the power to impose no-contact and geographic restrictions as part of a judgment and sentence. *See generally* former RCW 9.94A.120(7) (1984); DAVID BOERNER, SENTENCING IN WASHINGTON: COMMUNITY SUPERVISION § 4.4, at 4-4 (1985). At the time of these offenses, the restrictions were found in former RCW 9.94A.700(5) (2000).

Accordingly, we reverse the two noted sentencing conditions. The trial court is free to again consider any restrictions on Mr. Hart's post-release living conditions in accordance with the law in effect at the time of these crimes. Former RCW 9.94A.700(5).

The convictions are affirmed. The noted sentence conditions are reversed and the matter remanded for further proceedings consistent with this opinion.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

WE CONCUR:

Lawrence-Berrey, C.J.

Siddoway, J.

NICHOLS AND REUTER, PLLC / EASTERN WASHINGTON APPELLATE LAW

October 31, 2018 - 1:24 PM

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