Supreme Court No. 99307-6
(COA No. 79651-8-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ARMEL LUMEMBO,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

PETITION FOR REVIEW

TRAVIS STEARNS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, WA 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court

Washington Supreme Court

Washington Court of Appeals

Decisions of Other Courts

Rules

Constitutional Provisions

A. IDENTITY OF PETITIONER

Armel Lumembo, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review under RAP 13.3 and RAP 13.4.

B. COURT OF APPEALS DECISION

Mr. Lumembo seeks review of the Court of Appeals decision dated November 9, 2020, a copy of which is attached as an appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Did the prosecutor's misconduct by using first names in her opening statement to appeal to the jury's emotions, questions to Mr. Lumembo suggesting he was attracted to vomiting women to inflame the jury, use of the phrase "we know" to vouch for witnesses, questions about prior act evidence in violation of a court order deprive Mr. Lumembo of his right to a fair trial? If these acts were insufficient in their singular, did the cumulative effect of the prosecutor's misconduct deprive Mr. Lumembo of his right to a fair trial?

2. Is reversal required for the court's error in allowing the jury to hear irrelevant prior act evidence where the evidence's prejudicial effect substantially outweighed its probative value? In allowing this evidence, was the trial court required to instruct the jury on the limited purpose of the questions, as required by ER 404(b)?

3. Did the trial court err when it did not grant a new trial, based on Mr. Lumembo's attorney's ineffective assistance, who did not call an expert on alcohol use or an essential witness?

D. STATEMENT OF THE CASE

Armel Lumembo came to Seattle from Vancouver for his son's track meet and to spend the night. RP 940.[1] He liked Seattle because of its diversity and allowed him to socialize with other people from Africa. RP 939, 943.

Mr. Lumembo rented a hotel room in Tacoma. RP 940. He then went out for the night, driving to a Belltown nightclub called Amber. *Id.*

Chareece Neal lived in Tacoma. RP 477. She and Rahab Mwaniki decided to go to Seattle the night. RP 480. They met at Ms. Mwaniki's house and shared a bottle of wine. RP 483, 619.

In Seattle, the two women went to a club where they had a tequila shot. RP 486-87, 584. They did not like the club scene and decided to go to Amber's, a club they more liked to frequent. RP 488, 585.

There was a dispute about whether Ms. Neal drank at Amber's. She stated she only drank water. RP 489. Other prosecution witnesses said she acted intoxicated and continued drinking at Amber's. RP 777.

[1] The record is largely sequential. When it is not, the date of the proceeding will be added to help identify where in the record the reference can be found.

At Amber's, Mr. Lumembo and Ms. Neal met. Mr. Lumembo spoke Swahili, as did Ms. Mwaniki. RP 956. After they talked, Mr. Lumembo spent time with Ms. Neal, who danced and flirted with him. RP 942, 44. Mr. Lumembo did not remember whether Ms. Neal drank. RP 954. She was enthusiastic and seemed to be enjoying herself. RP 954.

Mr. Lumembo and Ms. Neal left the club at closing time. RP 957. Ms. Neal felt ill and vomited at least two times. RP 958. The bouncer was present during part of this time. RP 958.

Ms. Mwaniki came out with Ms. Neal but did not remain with her. RP 601. She left to get her coat. *Id*. She also left for twenty minutes to find food. RP 606. When Ms. Mwaniki returned the second time, Ms. Neal and Mr. Lumembo had left. *Id*. Ms. Mwnaniki claimed the bouncer then drove her around the area looking for Ms. Neal. RP 609.

Mr. Lumembo stated he left with Ms. Neal shortly after Ms. Mwaniki left the second time because Ms. Neal wanted to go for a drive. RP 969. They drove around the neighborhood in a loop. RP 970.

Ms. Neal continued to flirt with Mr. Lumembo. RP 970. Eventually, they pulled the car over and moved it into a private area. RP 971. They kept touching each other, eventually engaging in sexual intercourse. RP 972.

After intercourse, they exchanged contact information, sharing phone numbers, and becoming friends on Instagram. RP 975. Ms. Neal sent Mr. Lumembo some pictures. *Id*. They fell asleep briefly before Mr. Lumembo asked Ms. Neal if she would like to go to his hotel. RP 978. She told Mr. Lumembo she would instead rest in her car. RP 979. Mr. Lumembo left her there and went to his hotel room. *Id*.

When Ms. Neal woke, she did not know where she was. RP 500. She had little memory of the night, not remembering anything from after she left the club, except for briefly recalling having sex with Mr. Lumembo while in her car. RP 498.

After calling her mother, Ms. Neal called the police. RP 504. While still with the police, Mr. Lumembo called. RP 459. Mr. Lumembo asked her if she wanted to meet him for breakfast. RP 466. She told him she did not know who he was. RP 512. The conversation then ended.

Ms. Neal was taken to Harborview Medical Center for a sexual assault examination. Tests confirmed she had been drinking on the night of the incident. RP 754. The nurse also observed a tear in Ms. Neal's vagina but did not confirm whether the tear was due to a lack of consent. RP 738, 748. The police also collected Ms. Neal's dress and underwear, which contained blood marks. RP 861.

Mr. Lumembo did not deny having had sex with Ms. Neal. RP 914. He made a voluntary statement and provided a DNA sample. RP 914-15.

The government charged Mr. Lumembo with a sex offense that was later amended to indecent liberties. CP 9.

Mr. Lumembo asked the court to preclude the parties from referring to witnesses as victims. CP 20. The trial court was clear the parties should refer to all witnesses by their last names, avoiding "victim" and "defendant," and the first names of witnesses. RP 29.

The prosecutor agreed but then used Ms. Neal's first name 48 times in her opening. RP 389-396. She used the first names of her other witnesses 29 times. *Id*. In contrast, she used Mr. Lumembo's first name once. *Id*. When admonished for her violation, the prosecutor admitted to disregarding the order in an attempt to personalize her witnesses. RP 443.

The prosecutor sought to introduce evidence of blood marks on Ms. Neal's dress and underwear in its case. Mr. Lumembo objected, asking the court to find the evidence was not relevant and that its probative value outweighed its prejudicial effect. RP 861. No expert could state there was any evidence that could be used to demonstrate a lack of consent. RP 688. The Court denied the request. RP 863. Although the objection was sustained, in closing arguments the prosecutor tried to use this evidence to suggest someone drugged Ms. Neal. RP 1082.

Mr. Lumembo testified. He did not believe Ms. Neal was incapable of consent, as they spent the evening dancing and flirting with each other. RP 954. He was with her when she became sick but did not think she could not consent when they initiated sexual contact. RP 970.

Over objection, the prosecutor's first question on cross-examination was whether Mr. Lumembo was attracted to vomiting women. RP 991. The court overruled Mr. Lumembo's objection. *Id*. The prosecutor then repeated the question. *Id*.

Before trial, Mr. Lumembo moved to preclude the government from using prior act evidence. CP 4. The court granted the motion. RP 13. During her questioning of Mr. Lumembo, the prosecutor asked him whether he had sex with women in cars on other occasions. RP 1029; RP 1030. Defense counsel objected. *Id*. The court determined the prejudicial effect of these questions did not outweigh their probative value. RP 1063.

In closing arguments, the prosecutor consistently used the phrase "we know" when referring to evidence, at least 22 times. RP 1066-1102. The phrase appeared in her PowerPoint, with a slide titled: "How do we know what happened here?" CP 54.

The jury found Mr. Lumembo guilty. CP 80.

New counsel was appointed before sentencing and asked for a new trial. 11/8/18 RP 15, CP 97. Counsel alleged trial counsel was ineffective

assistance by not using an expert on the effects of alcohol on memory and not interviewing or calling the bouncer, a key witness to Ms. Neal's interactions with Mr. Lumembo. *Id*. The court denied the motion. CP 125.

E. ARGUMENT

1. Review should be granted to determine whether misconduct deprived Mr. Lumembo of his right to a fair trial.

Mr. Lumembo asks this Court to review whether the prosecutor's misconduct deprived him of his right to a fair trial. Review should be granted because this issue is a significant question of state and federal constitutional law and involves an issue of substantial public interest that should be determined by this Court. RAP 13.4(b).

a. Improper use of first names in disregard of the trial court's order.

Before trial, the trial court instructed the parties to use last names when referring to witnesses and Mr. Lumembo. RP 29.[2] Despite this order, the prosecutor referred consistently to her witnesses by their first names, using Ms. Neal's first name 48 times and other witnesses' first names 29 times. RP 389-96. In contrast, she referred to Mr. Lumembo by his first name one time.

[2] The Court of Appeals notes that this order was issued two weeks before opening statements, suggesting that violating it was not intentional. App 5, fn. 1. The timing of the order should have no consequence on the fact that it was violated.

Witness	First Name Used	Last Name Used
Chareece Neal	48 times	Once
Other Witnesses	29 times	3 times
Armel Lumembo	Once	39 times

The Court of Appeals found the prosecutor's use of first names was not flagrant and ill-intentioned. App 6. It also concluded the prosecutor's misconduct was not intentional and did not cause enduring prejudice that could not have been cured by a proper jury instruction. App. 7.

This Court should accept review of this holding. When the court admonished the prosecutor, she made clear her use of first names was to appeal to the jury's emotions. RP 443. She stated:

> Your Honor, my reason is I want to personalize her. I try to use first names to personalize people.

RP 443.

A prosecutor may not appeal to the jury's emotions. *In Re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). This rule is especially true in opening statements, where appeals to the jury's passion and prejudice are particularly improper. *State v. Claflin*, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984). "Argument and inflammatory remarks have no place in the opening statement." *State v. Kroll*, 87 Wn.2d 829, 835, 558 P.2d 173 (1976).

Creating sympathy for a witness in opening statements should not be tolerated. Even if the trial court intended for last names to be used as a sign of respect, it was clear from the prosecutor's statement she used first names to create sympathy for her witnesses and make a clear distinction between them and Mr. Lumembo. RP 433. This behavior was intentional and improper. *State v. Ish*, 170 Wn.2d 189, 199, 241 P.3d 389 (2010).

This misconduct is especially concerning because of the experience of the prosecutor. *State v. Monday*, 171 Wn.2d 667, 678, 257 P.3d 551 (2011) ("It is deeply troubling that an experienced prosecutor who, by his own account, had been a prosecutor for 18 years would resort to such tactics.") Trained and experienced prosecutors "do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case." *State v. Fleming*, 83 Wn. App. 209, 215, 921 P.2d 1075 (1996). Where the prosecutor stated she used first names for an improper purpose, this Court should not assume this action was a mistake, as did the Court of Appeals. App 6.

Even if the prosecutor had not disregarded an order when it committed this misconduct, it should still be grounds for reversal. The right to a fair trial is a fundamental liberty guaranteed by the state and federal constitutions. U.S. Const. amends. VI, XIV; Const. art. I, § 3, § 22;

Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976). Trial proceedings must not only be fair but also "appear fair to all who observe them." *Wheat v. United States*, 486 U.S. 153, 160, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988). Beginning the trial with a clear appeal to the jury's emotions fails to meet this standard. Review should be granted on this issue.

b. Questioning Mr. Lumembo about his attraction to vomiting women improperly inflamed the jury.

The first questions the prosecutor asked Mr. Lumembo on cross-examination were about whether he was attracted to vomiting women. RP 991. These questions were designed to inflame the jury against Mr. Lumembo. *State v. Thierry*, 190 Wn. App. 680, 691, 360 P.3d 940 (2015). The Court of Appeals determined the question "What exactly is attractive about a vomiting woman, Mr. Lumembo?" was an appropriate question addressing Mr. Lumembo's credibility.[3] App 8.

[3] While the Court of Appeals focuses on one question, the questioning by the prosecutor on this issue was far more extensive. The questions were as follows:

[The Prosecutor]: So what exactly is it attractive about a vomiting woman, Mr. Lumembo?
[Defense Counsel]: Objection. Argumentative.
The Court: I will allow it. You may answer.
The Witness: Can you repeat the question?
Examination By [The Prosecutor]:
Q. What exactly is attractive about a vomiting woman, Mr. Lumembo?
A. Nothing really.
Q. There is really nothing attractive about a vomiting woman?
A. Well, somebody puking. I mean, that's not --
Q. Do you think that's attractive? Does that turn you on?
[Defense Counsel]: Objection. Argumentative.

This Court should grant review of whether this inappropriate question deprived Mr. Lumembo of his right to a fair trial. The prosecutor did not ask one throwaway question but went on for two pages of the transcript on how Mr. Lumembo was attracted to vomiting women. RP 991-92. This examination was not to test Mr. Lumembo's credibility but to inflame and improperly prejudice the jury. *State v. Reed*, 102 Wn.2d 140, 147, 684 P.2d 699 (1984). This improper misconduct should be reviewed by this Court to determine whether it constitutes grounds for a new trial.

c. Improper vouching in closing arguments by using the phrase "we know" 22 times.

In her closing argument, the prosecutor used the phrase "we know" 22 times, including a PowerPoint slide. The Court of Appeals did not find error because Mr. Lumembo did not object at trial. App 7-8. This Court should now take review to address why this phrase's use in closing arguments results in improper vouching and deprived persons accused of crimes of their right to a fair trial.

The Court: Overruled. I will allow it.
The Witness: I don't know what you mean by that question.
Examination By [The Prosecutor]:
Q. Do you know what turned on means?
A. Yes.
Q. Does seeing women vomit turn you on?
A. No.
RP 991-92.

The phrase "we know" is a subtle yet insidious form of vouching. Using the phrase "we know" blurs the line between improper vouching and legitimate summary. *United States v. Younger*, 398 F.3d 1179, 1191 (9th Cir.2005). Prosecutor's opinions on what they believe to be true or "know" does not matter. Instead, the jury must decide what may be inferred from the evidence. *Id*. The use of the phrase "we know" is inappropriate as an effort to appeal to the jury's passion. *State v. Mayhorn*, 720 NW.2d 776, 790 (2006).

Here, the phrase was used repeatedly to vouch for the prosecutor's witnesses' veracity. RP 1066, 1067, 1069, 1070, 1071, 1072, 1072-73, 1073, 1075, 1076, 1078, 1079, 1082, 1083, 1101, 1102. It was also highlighted in the prosecutor's PowerPoint. CP 54.

Prosecutors carry a "special aura of legitimacy" as a representative of the government. *United States v. Bess*, 593 F.2d 749, 755 (6th Cir. 2000). Thus, "the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own." *United States v. Young*, 470 U.S. 1, 18-19, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985).

Here, the phrase "we know" was not used only to draw inferences from the evidence but to vouch for the witnesses improperly. *Younger*, 398 F.3d at 1191. Because Mr. Lumembo's case involved the witnesses'

credibility, this Court should recognize the phrase's use was not harmless. The phrase was designed to show the jury the prosecutor believed her witnesses. By vouching for the witnesses, the prosecutor committed incurable misconduct.[4] This Court should grant review to determine whether the use of this phrase deprived Mr. Lumembo of his right to a fair trial.

d. The cumulative effect of the prosecutor's misconduct.

"[T]here comes a time ... when the cumulative effect of repetitive prejudicial error becomes so flagrant that no instruction or series of instructions can erase it and cure the error." *State v. Case*, 49 Wn.2d 66, 73, 298 P.2d 500 (1956). When there is a substantial likelihood the prosecution's improper arguments affected the trial's outcome, reversal is required. *State v. Lindsay*, 180 Wn.2d 423, 440, 326 P.3d 125 (2014).

Even if this Court were not to grant review for a single instance of misconduct, it should examine whether the cumulative effect of the misconduct deprived Mr. Lumembo of his right to a fair trial. This case involved credibility, and all of the prosecutor's misconduct ingratiated her witnesses to the jury. By creating sympathy for them in opening

[4] It is inconsequential that Mr. Lumembo's lawyer used this phrase in his closing argument. Defense attorneys are not quasi-judicial officials who owe a duty to act impartially in the interest "only of justice." *State v. Warren*, 165 Wn.2d 17, 27, 195 P.3d 940 (2008).

statements, denigrating Mr. Lumembo in cross-examination, and then vouching in closing arguments, the prosecutor committed incurable misconduct. *Lindsay*, 180 Wn.2d at 444. This Court should grant review to examine whether this misconduct affected Mr. Lumembo's trial's outcome and requires reversal.

2. Review should be granted to decide whether the use of other act evidence tainted Mr. Lumembo's right to a fair trial.

Mr. Lumembo also asks this Court to review whether the use of other act evidence to ensure his conviction without a limiting instruction deprived him of a fair trial. Review should be granted because this issue is a significant question of state and federal constitutional law and involves an issue of substantial public interest that should be determined by this Court. RAP 13.4(b). The Court of Appeals decision also conflicts with this Court's opinions. *See State v. Gresham*, 173 Wn.2d 405, 269 P.3d 207 (2012); *State v. Saltarelli*, 98 Wn.2d 358, 655 P.2d 697 (1982); *State v. Arredondo*, 188 Wn.2d 244, 394 P.3d 348 (2017).

The Court of Appeals found the use of Mr. Lumembo's prior sexual history did not violate ER 404(b). App 9. This Court has previously rejected this analysis, holding that the admission of evidence proves a person's character and shows that the person acted in conformity with that character. *Gresham*, 173 Wn.2d at 420. When presented with prior act

evidence, a court should presume the prior act is inadmissible and resolve any doubts on whether to admit the evidence in the defendant's favor. *State v. Nelson*, 131 Wn. App. 108, 115, 125 P.3d 1008 (2006). This rule is especially critical in sexual assault cases because the "prejudice potential of prior acts is at its highest." *Saltarelli*, 98 Wn.2d at 363.

Before trial, Mr. Lumembo asked that prior acts be precluded from his trial. CP 4. The order was granted with no objection. RP 1029. At trial, however, the prosecutor asked Mr. Lumembo whether having sex in the back seat of his car happened to him "often." RP 1029. Defense counsel immediately objected but was overruled. *Id*. The prosecutor asked Mr. Lumembo the question again. *Id*.

The Court of Appeals determined Mr. Lumembo's prior sexual acts were not prior act evidence, holding that prior sexual acts or not past acts that prove conformity with current acts. App 10. This analysis should be addressed by this Court and rejected. Asking Mr. Lumembo if he had previously committed a sexual act like the act he was accused of is what ER 404(b) is intended to preclude. *Saltarelli*, 98 Wn.2d at 363.

Instead, this Court should grant review to recognize how allowing the jury to hear of Mr. Lumembo's prior sexual conduct deprived him of a fair trial. Const. art. I, § 21. Allowing the jury to hear propensity evidence created an impossible hurdle for Mr. Lumembo to overcome. *Saltarelli, 98*

Wn.2d at 363. Instead of defending solely against the charges, Mr. Lumembo was forced to defend against his past acts. *State v. Johnson*, 152 Wn. App. 924, 934, 219 P.3d 958 (2009). And even if the jurors did not completely believe the allegations here, they may "feel that the defendant should be punished somehow, for a broad swath of general criminal wrongdoing." *United States v. Bradley*, 5 F.3d 1317, 1320 (9th Cir. 1993). It is for this reason the prior act evidence should have been excluded.

Mr. Lumembo asks this Court to accept review of whether the court's decision to allow the prosecutor to introduce prior act evidence deprived him of his right to a fair trial. In addition, Mr. Lumembo asks this Court to accept review of whether, at a minimum, an instruction was required limiting the use of the prior act evidence, as this Court has recognized is critical in *Arredondo*. 188 Wn.2d 358-59.

3. Review should be granted to determine whether ineffective assistance requires a new trial.

After trial, Mr. Lumembo's new counsel demonstrated his trial counsel did not interview or call critical witnesses, including an expert on alcohol's effect on memory and a potential eyewitness. CP 102. The Court of Appeals found counsel's performance did not fall below an objective standard of reasonableness and denied relief. Mr. Lumembo asks this Court to accept review, as this is an issue is a significant question of state and federal constitutional law and involves an issue of substantial public interest should be determined by this Court. RAP 13.4(b).

First, Mr. Lumembo was entitled to a new trial because the defense counsel did not call an expert on alcohol and memory. CP 102. Had an expert like this been called, they could have educated the jury on how alcohol affects a person's ability to perceive and recall their surroundings. CP 102-03. This testimony was critical because the central issue, in this case, was Ms. Neal's ability to consent. CP 103.

Had an expert been called, they would have supported Mr. Lumembo's defense theory and undermined the government's witnesses' credibility. CP 103. An expert could have explained to the jury that intoxication does not mean a person can consent. *See, e.g., State v. Lozano,* 189 Wn. App. 117, 121, 356 P.3d 219 (2015). Without an expert,

Mr. Lumembo could not explain to the jury why Ms. Neal's perception conflicted with how she acted on the night of the allegations.

Next, Mr. Lumembo demonstrated a critical fact witness should also have been interviewed and called. CP 103. The bouncer who was at the club after it closed for the night should have been interviewed. CP 103. The bouncer was there when Mr. Lumembo was with Ms. Neal. RP 958. After Ms. Neal and Mr. Lumembo left, the bouncer remained with Ms. Mwanki. RP 610. He stayed with her most of the night. *Id*. In the morning, she used his phone to text Ms. Neal. RP 613.

Despite knowing about the bouncer from the start, defense counsel did not interview him. CP 104. This failure to investigate allowed the untested implication Ms. Neal was too incapacitated to answer her phone, along with the assertion Ms. Mwanki spent most of the night driving around Seattle looking for her friend. *Id*. Had the bouncer been contacted, he could have provided an independent version of the incident.

To be effective, trial counsel must conduct an investigation. *State v. Jones*, 183 Wn.2d 327, 339, 352 P.3d 776 (2015). "While [trial] counsel is not required to interview every possible witness, the failure to interview witnesses who may provide corroborating testimony may constitute deficient performance." *State v. Weber*, 137 Wn. App. 852, 858, 155 P.3d 947 (2007).

An attorney renders constitutionally inadequate assistance when there is no legitimate strategic or tactical reason for conduct that prejudices the accused. *State v. Grier*, 171 Wn.2d 17, 33-34, 246 P.3d 1260 (2011); U.S. Const. amend. VI; Const. art. I, § 22. Even if defense counsel has a strategic or tactical reason for certain actions, the "relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000); *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Mr. Lumembo had a constitutional right to effective assistance of counsel. U.S. Const. amend. VI; Const. art. I, § 22; *Strickland*, 466 U.S. at 688; *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). By failing to investigate this case properly by not engaging an expert witness or interviewing a fact witness, Mr. Lumembo's attorneys failed to provide effective assistance of counsel. The court should have granted Mr. Lumembo's request for a new trial.

This Court should now grant review of whether the trial court should have granted a new trial to remedy the ineffective assistance error. With the help of an expert, the jury would have understood why Ms. Neal had memory issues. By investigating Mr. Lumembo's case, the defense counsel could have discovered a neutral witness who would have been

able to explain Ms. Neal's behavior. It was manifestly unreasonable for the court not to order a new trial based on Mr. Lumembo's original counsel's failure to provide effective assistance of counsel. CrR 7.5(a)(8). This Court should grant review to correct this error, which impacts Mr. Lumembo's state and federal constitutional rights to a fair trial and is an issue of substantial public interest that should be determined by this Court. RAP 13.4(b).

F. CONCLUSION

Based on the preceding, Mr. Lumembo respectfully requests that review be granted pursuant to RAP 13.4(b).

DATED this 9th day of December 2020.

Respectfully submitted,

TRAVIS STEARNS (WSBA 29335)
Washington Appellate Project (91052)
Attorneys for Appellant

APPENDIX

Table of Contents

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ARMEL MANZUMBA LUMEMBO, Appellant.	DIVISION ONE No. 79651-8-I UNPUBLISHED OPINION

DWYER, J. — Armel Manzumba Lumembo appeals from the judgment entered on a jury's verdict finding him guilty of indecent liberties. He contends that prosecutorial misconduct deprived him of a fair trial, that the trial court erroneously admitted evidence, and that the trial court erred in denying his motion for a new trial based on a claim of ineffective assistance of counsel. Finding no error, we affirm.

I

Armel Manzumba Lumembo met C.N. at Amber, a Seattle nightclub. C.N. and her friend Rahab Mwaniki had traveled from Tacoma for a night out. C.N. had a young son who she was still breastfeeding and had not had the opportunity to go out drinking in almost two years. C.N. had one or two glasses of wine at Mwaniki's home before driving herself and Mwaniki to Seattle. C.N. also drank a shot of tequila at a different club before the two women went to Amber. By the time C.N. and Mwaniki arrived at Amber, C.N. was not feeling well and had

stopped drinking alcohol. Mwaniki testified that while at Amber, C.N. seemed very intoxicated and was "dancing with everyone recklessly." During this period, Lumembo and C.N. met and danced together. According to Lumembo, he and C.N. began kissing on the dance floor.

At some point, C.N. stepped outside to get some fresh air. A friend of Mwaniki's informed her that C.N. was outside. Mwaniki went outside to check on C.N. and found her vomiting and leaning on Lumembo for support. Mwaniki asked her friend Stephen Whitmore to hold C.N.'s purse and stay with C.N. while she went to get some water. Whitmore testified that C.N. appeared too intoxicated to be aware of her surroundings and that Lumembo was touching her waist and buttocks.

Mwaniki returned with water and found Whitmore and C.N. at C.N.'s car. Once Mwaniki had returned, Whitmore departed. At this time, C.N. was sitting in the driver's seat and dry heaving. She was not able to talk. Lumembo was also present, standing nearby. Mwaniki determined that C.N. needed "something in [her] stomach," and went to a nearby hot dog stand to "get something for her to eat." When Mwaniki returned, C.N. and her car, which contained Mwaniki's keys and cell phone, were gone. Mwaniki spent the next several hours searching for C.N., enlisting the help of a bouncer employed by Amber before eventually getting a hotel room in Seattle.

At this point, Lumembo's testimony and C.N.'s testimony diverge dramatically. According to Lumembo, C.N. asked him to drive her car away and began touching him sexually while he drove. He testified that they had

consensual sex in the backseat of the parked car in two locations. He testified that, thereafter, the two talked for a while and exchanged contact information. At about 5:00 a.m., Lumembo drove the car back to where his car was parked and left C.N. to sleep in her car.

C.N. testified that after Mwaniki left, someone moved her into the back seat of her car and drove away. She drifted in and out of consciousness. C.N. awakened and felt a man on top of her having sex with her. C.N. attempted to push the man away and felt herself vomiting before passing out once again.

Later that morning, C.N. woke up alone in the backseat of her car. Her dress was up and her underwear was on the floor. She felt throbbing pain in her vagina and anus. There was vomit in the car. C.N.'s mother called her, and C.N. told her that she believed she had been raped. C.N.'s mother instructed her to call the police, which she did. Police officers subsequently arrived. While C.N. was speaking to an officer, Lumembo called her. C.N. ended the call after Lumembo invited her to have breakfast at his hotel.

C.N. was transported to Harborview hospital. She was examined by a sexual assault nurse examiner (SANE), who noted that she had blood pooled in her vagina. The SANE and C.N. decided not to examine the potential injury further because the examination itself can cause additional physical trauma. The SANE also collected C.N.'s underwear, her dress, and a forensic urine sample.

Lumembo was charged with indecent liberties. A jury found him guilty as charged. Lumembo then sent several letters to the court alleging ineffective assistance of counsel. The trial court appointed new counsel to represent him

and investigate his claim. Lumembo's new counsel moved for a new trial based on ineffective assistance of counsel. The motion was denied.

Lumembo appeals.

II

Lumembo contends that statements made by the prosecutor during her opening statement, her cross-examination of Lumembo, and closing argument constituted prosecutorial misconduct requiring reversal. We disagree.

Prosecuting attorneys are quasi-judicial officers who have a duty to ensure that defendants receive a fair trial. State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). Prosecutorial misconduct violates this duty and can require reversal. Boehning, 127 Wn. App. at 518. The propriety of a prosecutor's conduct is "reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given." State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994).

A defendant alleging improper argument by the State bears the burden of proving that the prosecutor's conduct was both improper and prejudicial. State v. Emery, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). Once a defendant establishes that a prosecutor's statements were improper, we determine whether the defendant is entitled to relief by applying one of two standards of review. Emery, 174 Wn.2d at 760. The first standard, which applies if the defendant timely objected at trial and the objection was overruled, requires that the defendant show that the prosecutor's misconduct led to prejudice that had a substantial likelihood of affecting the jury's verdict. Emery, 174 Wn.2d at 760.

The second standard applies if the defendant did not object at trial. In that event, the defendant is deemed to have waived the claim of error unless the defendant can show that the misconduct was "'so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice'" that could not have been cured by a jury instruction. State v. Fisher, 165 Wn.2d 727, 746, 202 P.3d 937 (2009) (internal quotation marks omitted) (quoting State v. Gregory, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006)).

A

Lumembo's first claim of misconduct is that the prosecutor referred to the victim and other witnesses by their first names during the State's opening statement. Lumembo argues that, although he did not object at trial, this was flagrant and ill-intentioned conduct designed to create improper sympathy for the victim. This view is not supported by the record.

Prior to trial, Lumembo requested that the trial court order witnesses to refer to participants in the trial by name, rather than words such as "victim" or "perpetrator." The trial court granted the motion and additionally ordered that counsel use surnames when referencing witnesses or parties. The trial court explained that the purpose of this additional order was to maintain respect and professionalism in the courtroom.

Nearly two weeks later,[1] the prosecutor delivered her opening statement and referred to C.N. and other witnesses by their first names. Lumembo did not

[1] The court's ruling occurred at a pretrial hearing on Monday, September 17, 2018. The court was not in session September 24 through September 28. The remainder of the week of September 17 was used for other preliminary matters and voir dire. Opening statements were delivered on Monday, October 1.

object. The following day, the trial judge addressed the issue sua sponte. When asked why she had used C.N.'s first name, the prosecutor stated that she wanted to "personalize" C.N. The following exchange then took place:

> THE COURT: And I totally understand that. And defense often likes to do that with their client as well. But I think it's a more important value in showing respect to people. So that's the reason for my rule of addressing people by their surnames, and using their surnames in reference to them. Unless there is really a good reason not to.
>
> [Prosecutor]: Okay. My apologies for being disrespectful.
>
> THE COURT: Oh, no. I know it was unintentional. I was just giving you the reason for the rule that I follow.

Because Lumembo did not object, he must show that the prosecutor's use of C.N.'s and other witnesses' first names constituted misconduct so flagrant and ill-intentioned that it resulted in an enduring prejudice that could not have been cured by a jury instruction. See Fisher, 165 Wn.2d at 747.

Here, there is no evidence that Lumembo was prejudiced by the prosecutor's use of first names in her opening statement. The purpose of the trial court's order to use surnames was to show respect for the individuals referenced, not to prevent unfair sympathy. That Lumembo did not object "strongly suggests" that the use of first names did not seem critically prejudicial in the context of the trial. See State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

More significantly, the trial court found that the violation of its order was unintentional. Because it was not intentional, it cannot logically be deemed "flagrant and ill-intentioned." Given that the trial court had ruled nearly two weeks

earlier, and the remedy it ordered was greater than and different from the relief requested by Lumembo (and to advance a different purpose), the trial judge's finding that there was no intentional violation of its ruling is quite understandable.

Finally, there is no evidence that any unfair prejudice would not have been cured by a proper jury instruction. Moreover, Lumembo's timely objection could have prevented several of the instances of the prosecutor's use of C.N.'s and other witnesses' first names.

The violation of the order was not intentional, did not cause enduring prejudice, and any unfair prejudice could have been cured by a proper jury instruction. Lumembo fails to show an entitlement to appellate relief.

B

Lumembo next asserts that the prosecutor's use of the phrase "we know" while listing evidence in closing argument constituted impermissible vouching for the State's witnesses.

During closing argument, the prosecutor used the phrase "we know" numerous times in reference to evidence presented to the jury and in arguing reasonable inferences that could be drawn from that evidence. The prosecutor also displayed a PowerPoint slide with the heading "How do we know that happened here?" Lumembo did not object to the use of the phrase, and his counsel also used the phrase "we know" in reference to admitted evidence during the defense closing argument.

Because Lumembo's counsel also used the phrase "we know" in closing argument, his failure to object to the phrase when used by the prosecutor is

properly deemed to have been tactical. Lumembo, therefore, waived this claim of error.[2] We will not "sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial." State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988).

C

Lumembo additionally contends that a question that the prosecutor asked him on cross-examination constituted misconduct. Again, we disagree.

Lumembo testified that he witnessed C.N. vomiting several times prior to engaging in sexual contact with her. On cross-examination, the prosecutor asked Lumembo, "What exactly is attractive about a vomiting woman, Mr. Lumembo?" Lumembo's counsel objected and the trial court overruled the objection.

This question appropriately probed the credibility of Lumembo's testimony as to what had occurred. The jury had already heard Lumembo's testimony that he had sex with C.N. shortly after witnessing her vomit. The question did not reveal unknown prejudicial information but merely pointed to a logical weakness in the version of events that Lumembo presented. In the normal course of human behavior, most people do not find a vomiting woman particularly

[2] Lumembo's argument is also inconsistent with Washington authority. A prosecutor engages in misconduct by vouching for a witness's credibility. State v. Robinson, 189 Wn. App. 877, 892, 359 P.3d 874 (2015). Vouching occurs when either the prosecution places the prestige of the government behind the witness or indicates that information not presented to the jury supports the witness's testimony. Robinson, 189 Wn. App. at 892-93. We have determined that the use of the phrase "we know" in closing argument is not improper vouching when it is used by a prosecutor to draw reasonable inferences from the evidence rather than for an improper purpose. Robinson, 189 Wn. App. at 895. Here, there is no evidence in the record that the prosecutor used the phrase "we know" for an improper purpose.

attractive. While Lumembo may have been prejudiced by the question, he was not unfairly prejudiced.

D

Lumembo next argues that the combined effect of prosecutorial misconduct resulting from these three instances entitles him to a new trial due to the cumulative effect of the errors. He is wrong.

Cumulative error is established when, taken alone, several trial court errors do not warrant reversal of a verdict but the combined effect of those errors denied the defendant a fair trial. State v. Hodges, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003). It is the defendant's burden to prove that an accumulation of error reached a sufficient magnitude to necessitate retrial. In re Pers. Restraint of Lord, 123 Wn.2d 296, 332, 868 P.2d 835 (1994).

Because Lumembo has not established any errors, he cannot establish the several errors necessary to constitute cumulative error. Thus, his claim fails.

III

Lumembo next avers that evidence of his prior consensual sexual history was admitted in violation of ER 404(b). We disagree.

We review the trial court's evidentiary decisions for abuse of discretion. State v. Bajardi, 3 Wn. App. 2d 726, 729, 418 P.3d 164 (2018). A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds or reasons. State v. Taylor, 193 Wn.2d 691, 697, 444 P.3d 1194 (2019).

Prior to trial, Lumembo asked the court to exclude "any 404 evidence." The court agreed. On cross-examination, the prosecutor asked Lumembo several questions about whether it "happen[s] [to him] a lot" that a woman he has recently met has consensual sex with him in a car. Lumembo's counsel objected and a sidebar discussion was held.

Lumembo's counsel later put the content of the sidebar on the record, explaining that the basis for his objection was that the question was "essentially 404 evidence asking about propensity evidence." In allowing the questioning, the trial court did not conduct an ER 404(b) analysis but, rather, ruled that the questioning was relevant and that its prejudicial effect did not substantially outweigh the probative value of the evidence adduced. See ER 403.

Pursuant to ER 404(b):

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Here, the evidence admitted was not ER 404(b) evidence. The State did not seek to prove that Lumembo possessed any character trait by asking the question. Having frequent sexual intercourse in cars is not a character trait. Nor would evidence of any of Lumembo's past acts to prove actions in conformity therewith on the date in question support the State's theory of the case—if Lumembo answered the question in the affirmative, expressing that he had frequent consensual sex in cars, that evidence would tend to support Lumembo's claim that he reasonably believed that he had consensual sex in C.N.'s car on

this occasion. It would not support the State's assertion that this was unlikely. Thus, the State did not profer the questions for any purpose governed by ER 404(b). Instead, the State sought to impeach Lumembo's testimony with the question. If he answered "no," this would not support his defense. If he answered "yes," the jury might disbelieve his answer and, thus, find his other testimony less believable. Neither goal is prohibited by ER 404.

Accordingly, the trial court was not required to conduct an ER 404(b) analysis. The trial court did not abuse its discretion by allowing questioning over Lumembo's objection.

Lumembo also asserts that, although he did not request one, a limiting instruction should have been provided to the jury with regard to this evidence. A trial court is not obligated to issue a limiting instruction when none is requested. ER 105; State v. Russell, 171 Wn.2d 118, 122-23, 249 P.3d 604 (2011). Thus, this claim also fails.

IV

Lumembo next contends that the trial court erred in admitting evidence of blood found on C.N.'s dress and underwear. Because he objected to admission of this evidence in the trial court on different grounds than he now advances, appellate relief is not warranted.[3]

A party may not raise an objection not properly preserved at trial absent manifest constitutional error. RAP 2.5(a); ER 103(a). An evidentiary error is not

[3] Lumembo does not raise his original objections in his appellate briefing. Thus, we consider any such claims of error abandoned. See State v. Harris, 164 Wn. App. 377, 389 n.7, 263 P.3d 1276 (2011).

a constitutional error. State v. Powell, 166 Wn.2d 73, 84, 206 P.3d 321 (2009). "A party may only assign error in the appellate court on the specific ground of evidentiary objection made at trial." State v. Collins, 45 Wn. App. 541, 546, 726 P.2d 491 (1986) (citing State v. Guloy, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985)). An objection in the trial court on a different ground than that argued on appeal is not sufficient to preserve an alleged error. Powell, 166 Wn.2d at 83-84.

Here, Lumembo objected at trial on the basis that no witness could testify to the appearance of the garments at the time that they were collected and no witness had identified them as belonging to C.N. On appeal, he claims that the bloodstains were irrelevant to whether or not the intercourse was consensual. These are not the same arguments. Because the alleged error is not properly preserved, appellate relief is not warranted.

V

Lumembo avers that the trial court erred by denying his motion for a new trial based on deficiencies in his trial counsel's performance. Because Lumembo does not demonstrate that his counsel performed below an objective standard of reasonableness, his claim fails.

We review a trial court's decision to grant or deny a new trial for abuse of discretion. State v. Lopez, 190 Wn.2d 104, 117, 410 P.3d 1117 (2018). However, that deferential standard does not apply to questions of law and mixed questions of law and fact. Lopez, 190 Wn.2d at 118 (citing State v. Mohamed, 186 Wn.2d 235, 240-41, 375 P.3d 1068 (2016)). Claims of ineffective assistance of counsel present mixed questions of law and fact. Lopez, 190 Wn.2d at 116.

Accordingly, we review the trial court's legal conclusions de novo. Lopez, 190 Wn.2d at 118.

To establish ineffective assistance of counsel, a defendant must show both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Performance is not deficient if it constitutes a legitimate trial strategy or tactic. State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). A strong presumption of effective assistance exists and the defendant bears the burden of demonstrating an absence in the record of a strategic basis for the challenged conduct. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Prejudice occurs where there is a reasonable probability that the outcome of the proceeding would have been different had counsel's performance not been deficient. McFarland, 127 Wn.2d at 335. Failure to establish either prong of the test is fatal to the claim of ineffective assistance of counsel. Strickland, 466 U.S. at 687.

Here, Lumembo asserts that the trial court erred in denying his motion for a new trial based on his attorneys'[4] decisions not to call an alcohol and memory expert as a witness to attempt to impeach C.N.'s memory of events or to interview the bouncer who assisted Mwaniki in her search for C.N. However, the attorneys' tactical choice not to call an expert on memory and alcohol was logical

[4] Lumembo was represented by two attorneys at trial.

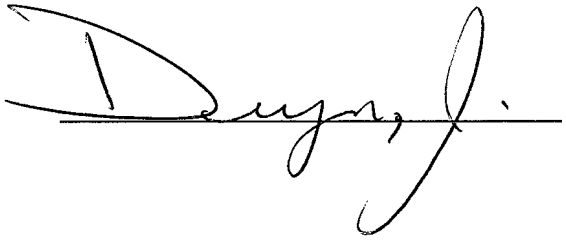
given that Lumembo's trial strategy was to argue that C.N. was not too impaired to consent to sexual intercourse.[5] Calling an expert on memory and alcohol to impeach C.N.'s memory of events on the basis that she was too intoxicated to remember correctly would directly conflict with the version of events that Lumembo testified had occurred. Instead, Lumembo's attorneys called an expert witness to attempt to impeach C.N. with records of phone calls made from her cell phone during the time period that she claimed to be unconscious.

Additionally, the decision not to interview the bouncer was not deficient given that there is no evidence in the record that the bouncer saw anything relevant. Moreover, Lumembo's attorneys sought to exploit his absence from trial, arguing that his absence was evidence of an incomplete police investigation and that Mwaniki's testimony regarding her search for C.N. was uncorroborated. This was a tactical decision.

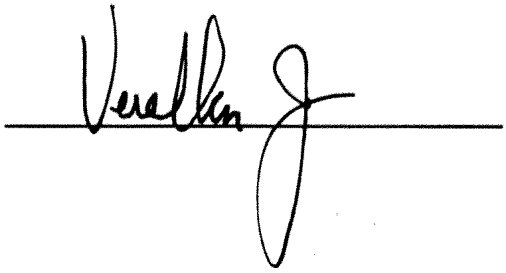
Lumembo does not show that his counsel performed deficiently. The trial court correctly denied his motion for a new trial.

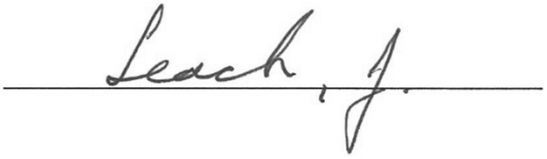
[5] Notably, Lumembo's counsel successfully moved the trial court to exclude evidence of C.N.'s urine alcohol content. This was a beneficial ruling, from the defense perspective.

Affirmed.



WE CONCUR:





DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 79651-8-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Lindsey Grieve, DPA
[lindsey.grieve@kingcounty.gov]
King County Prosecutor's Office-Appellate Unit
[PAOAppellateUnitMail@kingcounty.gov]

☐ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant Date: December 9, 2020
Washington Appellate Project

WASHINGTON APPELLATE PROJECT

December 09, 2020 - 4:21 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	79651-8
Appellate Court Case Title:	State of Washington, Respondent v. Armel M. Lumembo, Appellant

The following documents have been uploaded:

- 796518_Petition_for_Review_20201209162144D1911999_4808.pdf
  This File Contains:
  Petition for Review
  The Original File Name was washapp.120920-07.pdf

A copy of the uploaded files will be sent to:

- greg@washapp.org
- lindsey.grieve@kingcounty.gov
- paoappellateunitmail@kingcounty.gov
- wapofficemai@washapp.org

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org
Filing on Behalf of: Travis Stearns - Email: travis@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 610
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20201209162144D1911999