Supreme Court No. 99679-2
COA No. 36359-7-III

IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff/Respondent

v.

GORDON ENNIS,
Defendant/Petitioner.

ANSWER TO DEFENDANT'S PETITION FOR REVIEW

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INDEX

TABLE OF AUTHORITIES

Federal Cases

State Cases

Constitutional Provisions

Statutes

Rules

I. IDENTITY OF PARTY

Respondent, State of Washington, was the plaintiff in the trial court and the respondent in the Court of Appeals.

II. INTRODUCTION

This Court has stated numerous times that, in general, it will not review any claim of error that was not raised in the trial court. "[T]here is great potential for abuse when a party does not object because '[a] party so situated could simply lie back, not allowing the trial court to avoid the potential prejudice, gamble on the verdict and then seek a new trial on appeal.'" *State v. Strine*, 176 Wn.2d 742, 293 P.3d 1177 (2013) (internal citations omitted). The same is generally true of claimed prosecutorial misconduct. *State v. Emery*, 174 Wn.2d 741, 761-62, 278 P.3d 653 (2012) (citing cases including *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990) ("[c]ounsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal")).

Yet, Gordon Ennis invites this Court to set those rules aside and accept review of numerous alleged errors that, with little exception, were not raised until after a jury found him guilty of the second-degree rape of a

fellow police officer who was highly intoxicated. This Court should decline the defendant's invitation. The errors Mr. Ennis alleges are not manifest, nor was any alleged prosecutorial misconduct incurable. With regard to his conflict of interest claim, Ennis idly sat through three pretrial hearings, during which his counsel repeatedly assured the court the defense would not use the "evidence" Ennis now claims provided a plausible alternative theory – and yet the defendant did nothing – including failing to seek new counsel. The defendant presents no preserved issue meriting review under RAP 13.4.

III. ISSUES PRESENTED

1. Should this Court accept review of the defendant's claims of instructional error where the defendant did not raise the errors, which are not manifest constitutional errors, until after trial?

2. Should this Court accept review of the defendant's many claims of prosecutorial misconduct where only one of those instances was objected to during trial, and where all could have been cured?

3. Should this Court accept review of the defendant's conflict of interest claim where he fails to present admissible evidence in support of his contention the alleged conflict resulted in counsel's failure to pursue a plausible alternative strategy and where the record is clear that he was satisfied with his lawyer's strategy until after he was found guilty?

4. Whether any of the issues presented merit review under RAP 13.4?

IV. STATEMENT OF THE CASE

Gordon Ennis was charged on December 2, 2015, in the Spokane County Superior Court, with one count of second degree rape against K.S., who was alleged to be incapable of consent by reason of being physically helpless or mentally incapacitated. CP 1. The defendant was alleged to have penetrated K.S.'s vagina with his finger(s) while she was highly intoxicated, if not unconscious. Although the defendant's fingernails were later clipped so short as to prevent evidence collection, the victim's DNA was found on the driver's seatbelt of Ennis' car; it was undisputed that K.S. had never been in Ennis's vehicle. A jury found him guilty as charged. CP 328.

1. Substantive facts.

K.S. was hired by the Spokane Police Department ("SPD") as a police officer in May 2014. RP 814. Doug Strosahl mentored K.S. RP 815-17. Ennis, a firearms instructor, taught K.S. RP 827. Shortly after K.S. began work for SPD, Ennis promoted to sergeant. *Id*. At times, the two would interact in their professional capacities; K.S. viewed Ennis as a mentor. RP 831, 833. In October 2015, K.S. dated Officer Spenser Rassier, with whom she had been friends for years. RP 837-38.

On October 24, 2015, Doug and Heather Strosahl[1] hosted a party. RP 568. Ms. Strosahl's friends attended the party, as well as her sister, Gina Watkins. RP 569, 572-73. Mr. Strosahl invited K.S. and Ennis. RP 569, 1318. K.S. and her roommate, Callie Roseland, arrived at 7:32 p.m. RP 820, 1221. K.S. hugged Mr. Strosahl and met Ms. Strosahl and her friends. RP 822-23. Ennis arrived nearly two hours later. RP 748-50, 826, 1222. K.S. hugged him too, excited to see a friend.[2] RP 750, 834.

During the party, K.S. estimated she consumed three or four hard ciders, each mixed with a shot of Fireball, and an additional shot of alcohol. RP 602, 628, 836, 907-08, 910. Roseland did not drink any alcohol. RP 700, 1046. When Ennis arrived, he observed K.S. was "slightly intoxicated," as was Mr. Strosahl. RP 1324, 1389. The partygoers listened to music and K.S. and Ms. Strosahl danced near Ennis. RP 574, 649, 651, 726. K.S. had no recollection of dancing. RP 844. After dancing, K.S. gave Ennis a hug. Ex. 33; RP 1393. Then, K.S. leaned on Ennis, with her arms on his legs. RP

[1] At the time of trial, the Strosahls were married, although Ms. Strosahl used the surname "Lickfold" at the time of the incident.

[2] At the party, K.S. only knew Mr. Strosahl, Ennis, and Roseland. RP 836.

1356, 1395. This "made him feel good" that a "25-year-old girl…was showing [him (a 45-year-old man)] a lot of attention." RP 1395.

Around 11:00 p.m., the group entered the hot tub. RP 575-76, 760, 1223. K.S. still exhibited signs of alcohol impairment. RP 728. Melissa Beaver, one of Ms. Strosahl's friends, sat on Ennis' lap and they kissed.[3] RP 76, 804, 1055. Ms. Strosahl and K.S. left the hot tub to mix more drinks. RP 577, 847. K.S. returned; Ms. Strosahl did not. RP 577. Ms. Strosahl and Megan Weese[4] helped Beaver, who was intoxicated and ill, into bed.[5] RP 578, 581, 766.

The remaining guests exited the hot tub. RP 584. Mr. Strosahl felt nauseous from the alcohol he drank and went to bed. RP 584, 1328. Ennis felt more intoxicated than he expected. RP 1412. Roseland observed K.S. wander naked into the living room; wanting to cover her up, Roseland took her to the bathroom. RP 1058. Roseland asked Ms. Strosahl to help care for K.S. as she vomited. RP 585-86, 1064-65. Shortly after the incident, Ms.

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[3] Ennis told Roseland, "What are you going to do when it's right in front of you and she's on top of you?" RP 1444.

[4] Another of Ms. Strosahl's friends.

[5] Beaver described herself as "fairly intoxicated" and lost her recollection of the evening's events while she was in the hot tub. RP 805.

Strosahl described K.S. as "pretty intoxicated." RP 586. Roseland described K.S. as "stumbling, mumbling, [and] disoriented" with glassy eyes; she was incoherent and passed out in the bathroom. RP 1062.

While being walked to a bedroom, K.S. asked for Ennis, and held his hand; Ennis observed she was "very intoxicated." RP 771, 1409. Ms. Strosahl and Weese flanked K.S., and "hoisted her" onto the bed. RP 593. Ms. Strosahl provided K.S. a bucket to use if she vomited. RP 594. K.S. later stumbled into Watkins' bedroom, unable to walk in a straight line. RP 595, 653, 707, 1070. She vomited or dry-heaved, stating "I drank too much and I don't feel very well." RP 708-09, 715, 1072. Watkins suggested Roseland should take K.S. home, but K.S. said that she was drunk, and did not want to be sick in the car. RP 596, 654, 730. Ms. Strosahl and Roseland walked K.S. back to her room. RP 595, 685, 1086. Ennis was present when K.S. again fell asleep. RP 1415. On cross-examination, Ennis admitted that he knew K.S. had vomited from the alcohol, and was intoxicated. RP 1447.

Roseland left the residence. RP 1087. Ms. Strosahl cleaned the kitchen while Ennis ate to sober up; Mr. Strosahl reappeared, still intoxicated, but no longer nauseous. RP 598, 1330, 1418. Mr. Strosahl wanted to poke fun at K.S. because she had vomited. RP 598, 1331.

Sometime between 2:15 and 2:30 a.m., the three entered K.S.'s room and teased her for "not being able to hold her liquor." RP 600, 1329. In her original 2015 interview, Ms. Strosahl said K.S. moaned, reached out, and said "Sarge, Sarge," to which Ennis said, "You're all right, go back to sleep "you're just drunk." RP 601, 677.

The Strosahls and Ennis returned to the kitchen; they claimed K.S. entered the kitchen moments later, wrapped her arms around Ennis' neck and rested her head on his chest. RP 601-02, 662, 1423-24. Mr. Strosahl said K.S. did not stumble as she walked. RP 1332. Ms. Strosahl asked Ennis to ensure K.S. returned to her room; Ms. Strosahl and Mr. Strosahl went to bed;[6] and Ennis and K.S. went down the hallway in the opposite direction.[7] RP 602. During Ms. Strosahl's pretrial police interview, she indicated K.S. and Ennis did not appear romantic; at trial, she indicated the opposite. RP 605-07. Ms. Strosahl testified K.S. did not seem "highly intoxicated." RP 667.

[6] Ms. Strosahl testified that it was 2:38 a.m. when she went to bed. RP 608.

[7] Ennis, on the other hand, testified that Mr. Strosahl wanted to go back to sleep, so he left the kitchen. Ms. Strosahl, however, stayed in the kitchen as Ennis and K.S. walked down the hall. RP 1425.

While in the hallway, Ennis claimed K.S. grabbed him and embraced him. RP 1426. He claimed they went into the bedroom, K.S. laid down, and Ennis sat next to her; K.S. cuddled around him, stroking his leg. RP 1427. Ennis then stroked her thigh and rubbed her vagina outside of her pants. RP 1428. Ennis asserted that K.S. pushed down her pants, grabbed and placed his hand between her legs and penetrated her vagina with his finger. RP 1429. Ennis declared that he then "had a reality check" this was moving "towards sex, full sex" which could have personal and professional implications. RP 1430. He told K.S. that he needed to leave. RP 1430-31. Ennis admitted they both were under the influence of alcohol, and although K.S. was not "incoherent," she was more intoxicated than he. RP 1433-34. Ennis readily agreed there had been no flirting or sexual interaction between them before the party and there had been no physical, sexual contact before K.S.'s hug in the kitchen at the end of the night. RP 1457-58, 1461.

K.S. recalled nothing of the evening after she left the hot tub until she awoke to find Ennis' fingers in her vagina. RP 848. K.S. recognized Ennis by his voice and the hat he had worn earlier. RP 849-50, 853. He touched her aggressively and "almost painfully." RP 849. She started crying and moved away. RP 850. Ennis said, "Ah, I - I got - I got to go" and then

quickly left. RP 853. K.S. locked herself in the bathroom. RP 854. At 3:07 a.m., she called Rassier and told him of the assault. RP 861; Ex. 7. Rassier believed K.S. was intoxicated, as her speech was slurred and slow. RP 965.

K.S. fell asleep and awoke at approximately 7:15 a.m.; she asked Roseland for a ride, who arrived at 8:15 a.m. RP 868, 871, 1228. They agreed K.S. should speak to Mr. Strosahl for guidance. RP 871. K.S. was a probationary employee and was concerned that she could face trouble because of these events. RP 872-74.

In Roseland's presence, K.S. spoke with Mr. Strosahl. RP 876, 1091. K.S. told him that Ennis assaulted her; Mr. Strosahl downplayed her complaint, asked if she wanted water, and left the room. RP 877. He did not return, and K.S. and Roseland left the residence. RP 877, 1092. K.S. contacted her former field training officer, Kyle Huett, who advised her to report the assault. RP 892-93, 1157. Huett and K.S. each contacted K.S.'s supervisor. RP 893, 1158. K.S. submitted to a rape kit and provided a statement to detectives. RP 894. After reporting the assault, K.S.'s professional life suffered, she lost friends, and she was the subject of rumors and media attention. RP 935.

On October 26, 2015, Ennis met with investigators at his attorney's office. RP 1172, 1238, 1263. He was cooperative. RP 1037. A forensic technician intended to collect fingernail clippings from him; however, no attempt was made because Ennis' nails were so short that an attempt to clip them would injure him. RP 1035, 1172, 1239. The defendant's left ring finger, middle finger, and pinky finger were noticeably shorter in length than the other nails. RP 1245; Ex. 26. At trial, Ennis claimed that he had cut his nails "a couple days" before, and not in preparation for the meeting. RP 1433. Ennis also asserted that he offered to cut his nails for the forensic technician, but the offer was refused. RP 1467. Neither the forensic technician, nor Detective Armstrong recalled that offer, and Detective Armstrong documented in his report that Ennis was silent during the meeting. RP 1037, 1472. Defense investigator, Shirley Vanning, testified that Ennis had offered to cut his nails, but the offer was refused. RP 1474.

On October 28, 2015, Armstrong procured a warrant to collect evidence from Ennis' vehicle, and executed it the next day. RP 1266. A forensic scientist examined swabs taken from Ennis' driver's side seatbelt.

RP 1014. She detected DNA belonging to Ennis, his wife, and K.S.[8] RP 1014-15. K.S. had never been inside Ennis' vehicle. RP 888. The scientist tested K.S.'s vaginal swabs, finding a low level of male DNA consistent with digital penetration;[9] however, the sample contained insufficient DNA to match it to a specific person. RP 997-98, 1022.

2. Conversation between Ennis' and Strosahl's attorneys.

The matter was originally set before Judge James Triplet. During pretrial motions, defense counsel, Rob Cossey, told the court that the parties had difficulty interviewing Mr. Strosahl. 5/19/17 RP 10. The State voiced concern that Mr. Strosahl might assert his Fifth Amendment privilege or that Ennis might claim Mr. Strosahl could be an alternate suspect. 5/19/17 RP 11-12; 5/25/17 RP 4. During this pretrial hearing, Cossey told the court that he had spoken with Mr. Bugbee, Mr. Strosahl's attorney, but had given "his word [to Bugbee that he]…would not disclose" the substance of that conversation. 5/19/17 RP 15. Ennis was present. 5/19/17 RP 3.

[8] The third partial profile matched K.S. with an estimated probability of selecting an unrelated individual in the United States population with the same profile of 1 in 1.4 million. RP 1015.

[9] No seminal fluid was present in this sample of male DNA. RP 1030.

The following week, Mr. Strosahl had hired a different attorney, Mr. Sullivan. 5/25/17 RP 2. Both Sullivan and Cossey told the court Mr. Strosahl intended to testify only to the information attributed to him in the police reports; Cossey *again* indicated he had no intention of introducing any information received from Bugbee during trial, including during rebuttal. 5/25/17 RP 5-7, 9-10. Ennis was present. 5/25/17 RP 2.

A week and a half later, the parties and the court again discussed the conversation Cossey had with Bugbee. 6/7/17 RP at *passim*. Cossey reiterated, "I'm not at all heading down the path of the alternative suspect…period…The information that was provided…by…Bugbee, true or not…is not going to be used by me in any shape or form in this trial." 6/7/17 RP 80. Cossey agreed that if the defense tactic changed, he would seek an in-camera review before offering the information at trial. 6/7/17 RP 82. Ennis was present. 6/7/17 RP 2.

Ennis' trial was set for June 9, 2017, but the court declared a mistrial during voir dire. CP 272, 277. The matter again proceeded to trial on February 20, 2018. CP 332. At its conclusion, the court instructed the jury on the elements of second degree rape, CP 320-23; at Ennis' request, the court instructed that "it is a defense to a charge of rape in the second degree

that at the time of the act the defendant reasonably believed that [K.S.] was not mentally incapacitated or physically helpless" and that the defendant bore the burden of proving this defense by a preponderance of the evidence, CP 325; and, at the State's request and without defense objection, RP 1478, the court instructed that "in order to convict a person of second degree rape, it shall not be necessary that the testimony of the alleged victim be corroborated," CP 324. The court instructed the jury with other routinely-used instructions, including that the jury was the sole judge of witness credibility, and the weight to be given to testimony, and lawyer's remarks are not evidence. CP 312-27.

The jury found the defendant guilty of second degree rape. CP 328. Before sentencing, Ennis retained new counsel who moved for a new trial. CP 340, 410 *et seq*. In his post-verdict motion, Ennis raised several alleged errors for the first time: (1) the State committed misconduct by commenting on his pretrial silence; (2) his attorney had a conflict of interest that adversely affected his representation; and (3) the court erred in instructing the jury with the reasonable belief instruction and the non-corroboration instruction. CP 410-29. The court permitted Cossey to be interviewed regarding his conversation with Bugbee, and its effect on his trial strategy;

the substance of that interview was disclosed to the court and it denied the motion for a new trial. CP 1300-01; RP 1769-82.

The defendant timely appealed, claiming numerous errors, many of which were alleged for the first time on appeal. In a lengthy opinion, Division Three unanimously rejected the defendant's many contentions, holding that, while a non-corroboration instruction may be problematic in some cases, it was not problematic in Ennis' trial; Ennis failed to object to the instances of claimed prosecutorial misconduct, thereby waiving the claims; and Ennis failed to establish a conflict of interest that adversely affected his attorney's representation. *State v. Ennis*, No. 36359-7 (March 18, 2021).

V. ARGUMENT

A. REVIEW SHOULD NOT BE GRANTED BECAUSE THE DEFENDANT'S COMPLAINTS REGARDING THE NON-CORROBORATION INSTRUCTION WERE NOT PRESERVED; THE PETITION DOES NOT SATISFY RAP 13.4.

Ennis alleges that the use of the non-corroboration instruction was (1) a judicial comment on the evidence in violation of our State Constitution and (2) deprived him of his constitutional right to present a defense. The Court of Appeals analyzed the merits of the first allegation, ostensibly finding that issue to be of constitutional magnitude despite the lack of

objection below. Slip Op. at 18. Regarding the second allegation, the Court of Appeals found no violation of the defendant's right to present a defense because the defendant failed to demonstrate the non-corroboration instruction prevented him from eliciting particular evidence. Slip Op. at 22. Indeed, the non-corroboration instruction was not read or offered to the jury until after all of the evidence from the State and defense had been presented.

At no time prior to the defendant's motion for a new trial did Ennis object to the trial court's use of the non-corroboration instruction. RP 1473. Generally, the failure to timely and properly object to a jury instruction waives the claimed error. *State v. Schaler,* 169 Wn.2d 274, 282, 236 P.3d 858 (2010); *State v. Scott,* 110 Wn.2d 682, 685–86, 757 P.2d 492 (1988); CrR 6.15. Under RAP 2.5(a), a party may not raise an error on appeal that was not first raised at trial unless the claim involves a manifest constitutional error. This "exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can 'identify a constitutional issue not litigated below.'" *Scott,* 110 Wn.2d at 687. To meet RAP 2.5(a), an appellant must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension. *State v. Kirkman,* 159 Wn.2d 918, 926, 155 P.3d 125 (2007).

> In order to ensure the actual prejudice and harmless error analyses are separate, the focus of the actual prejudice must be on whether the error is *so obvious on the record* that the error warrants appellate review… It is not the role of an appellate court on direct appeal to address claims where the trial court could not have foreseen the potential error or where… trial counsel could have been justified in their actions or failure to object. Thus, to determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.

State v. O'Hara, 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009) (footnote and internal citation omitted) (emphasis added). A defendant's motion for a new trial does not remedy the failure to object at trial. *State v. Jones*, 185 Wn.2d 412, 426-27, 372 P.3d 755 (2016) ("A motion for a new trial is not a substitute for raising a timely objection that could have completely cured the error…[T]he failure to raise a timely objection strongly indicates that the party did not perceive any prejudicial error until after receiving an unfavorable verdict").

1. Comment on the evidence.

Ennis' first allegation – that the non-corroboration instruction is a judicial comment on the evidence – is not "manifest" within the meaning of the rule such that, without a defense objection, the trial court should have sua sponte denied the State's request for the instruction. This Court, and other Washington courts have repeatedly held that the non-corroboration

instruction is not a judicial comment on the evidence. *See State v. Clayton*, 32 Wn.2d 571, 573-74, 202 P.2d 922 (1949); *State v. Galbreath*, 69 Wn.2d 664, 419 P.2d 800 (1966); *State v. Chenoweth*, 188 Wn. App. 521, 537, 354 P.3d 13 (2015); *State v. Zimmerman*, 130 Wn. App. 170, 182, 121 P.3d 1216 (2005); *State v. Malone*, 20 Wn. App. 712, 714-15, 582 P.2d 883 (1978). This Court's Committee on Jury Instructions may have "misgivings" about instruction, but those misgivings do not overrule established precedent.

The defendant reminds this Court that it recently granted review of the propriety of a non-corroboration instruction in *State v. Svaleson*, 195 Wn.2d 1008, 458 P.3d 790 (2020), but review was terminated when the defendant died. Pet. for Rev. at 5. Defendant fails to alert this Court that the critical distinguishing feature between *Svaleson* and *Ennis* is that Svaleson lodged a timely objection to the instruction. *State v. Svaleson*, 2018 WL 2437289 at *3, 3 Wn. App. 1065 (2018).[10] Here, the trial court was presented with no opportunity to entertain Ennis' arguments why the instruction was inappropriate in *his* case, especially in light of significant precedent which permits the instruction.

[10] Pursuant to GR 14.1, this opinion has no precedential value and is cited for its procedural history only.

Similarly, in the unpublished decision in *State v. Steenhard*, 2019 WL 3302416 at *5, 9 Wn. App. 1072 (2019), Division Three reviewed the propriety of an *objected-to* non-corroboration instruction, *also finding no error* in the use of the instruction alone. *Id*. at *7. Division Three reversed the convictions not because of instructional error, but because the improper vouching from two separate witnesses combined with the non-corroboration instruction (when the imaginative child victims' allegations occurred at times when there *should have been* corroborative evidence), causing a risk of prejudice to the defendant. *Id*. at 11. Such is not the case here. Even Ennis corroborated that the sexual act with K.S. occurred. Because both sides agreed that the sexual act occurred, the giving of non-corroboration instruction was harmless in any event. Further, some witnesses corroborated that K.S. was highly intoxicated and some corroborated Ennis' perception of her lessened intoxication level. As noted by Judge Siddoway:

> Ennis argues that he should have been as free as K.S. to argue that his testimony did not need to be corroborated. We agree. It might have been a strange argument to make…because as the trial court pointed out in denying his new trial motion, this was a case in which both sides presented quite a bit of corroborative-type evidence on …K.S.'s capacity…It is unimaginable, if defense counsel had argued that Ennis's testimony did not have to be corroborated, that the State would have objected….it is inconceivable [if the State objected] that the trial court would not have overruled the State's objection…[I]f both the unimaginable and inconceivable happened,

> which led the jury to believe that the defense, but not the State, must present corroborating evidence, we would reverse…and order a new trial.

Slip Op. at 20.

Ennis' case is readily distinguishable from the cases he cites in support of review and does not conflict with this Court's established precedent, militating against review under RAP 13.4. Further, the lack of objection should preclude review as well.

2. Right to present a defense.

Not only did the defendant fail to specifically object to the non-corroboration instruction during trial, he also failed to object to the combined use of the non-corroboration instruction and the reasonable belief instruction. As with the claimed error above, the defendant deprived the trial court of the opportunity to consider the effect the non-corroboration instruction might have on the jury's understanding of the reasonable belief instruction, and did not claim error until after he had been convicted. Further, defendant has cited no authority that should have alerted the trial court that the combined use of these instructions could deprive him of his right to present a defense. Even assuming this error implicates a constitutional right, it is not manifest or obvious as required for review.

The defendant has consistently failed to explain what evidence the non-corroboration instruction precluded at trial. Slip Op. at 22. No witnesses were excluded nor was his cross-examination limited by the use of the instruction. This Court should decline review of this issue.

B. THIS COURT SHOULD DECLINE REVIEW OF THE PROSECUTORIAL MISCONDUCT CLAIMS.

1. Several of defendant's claims of prosecutorial misconduct were not preserved.

As with the alleged errors above, the defendant failed to object during trial to most of the claimed prosecutorial misconduct until after the jury found him guilty. In *Emery,* 174 Wn.2d 741, this Court set forth specific guidance for the review of prosecutorial misconduct claims where no objection was made below. A defendant must first show that the prosecutor's statement was improper. *Id*. at 759. When no objection is raised at trial, the misconduct must be "so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." *Id.* at 760-61. Objections during trial are critical to the inquiry. *Id*. at 762 ("Objections are required not only to prevent counsel from making additional improper remarks, but also to prevent potential abuse of the appellate process"). "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.*

In *Matter of Phelps*, 190 Wn.2d 155, 165, 410 P.3d 1142 (2018), this Court observed it has found prosecutorial misconduct that was flagrant and ill-intentioned only "in a narrow set of cases where [it was] concerned about the jury drawing improper inferences from the evidence, such as those comments alluding to race or a defendant's membership in a particular group, or where the prosecutor otherwise comments on the evidence in an inflammatory manner." *Id.* at 170. The instances of alleged, yet unobjected-to misconduct occurring during Ennis' trial fail to meet the *Emery* or *Phelps* criteria. As with the alleged instructional error above, the defendant apparently perceived no prejudice from the prosecutors' conduct at trial, gambled on the verdict without presenting the court or the prosecutor an opportunity to cure any potential error, and only belatedly asserted misconduct after having been convicted. The defendant's failure to object precludes review.

a. Alleged comment on right to silence

The defendant did not raise the general allegation that the State improperly commented on his right to silence until he filed his motion for a

new trial. On direct appeal, the defendant claimed as improper: (1) the State's question to Detective Armstrong whether the defendant remained silent during the DNA collection, RP 1472; (2) and, during closing argument, five references to the credibility of Ennis' testimony, listed separately below. While the instances of alleged misconduct during closing argument were raised in the motion for new trial, the alleged impropriety of Detective Armstrong's questioning was not. CP 412-13.

Under both the state and federal constitutions, the State may not comment on a defendant's exercise of the Fifth Amendment right to remain silent, including prearrest silence. *See State v. Easter*, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996); *State v. Lewis*, 130 Wn.2d 700, 705, 927 P.2d 235 (1996). "[W]hen the defendant's silence is raised, [an appellate court] must consider whether the prosecutor manifestly intended the remarks to be a comment on that right." *State v. Burke*, 163 Wn.2d 204, 216, 181 P.3d 1 (2008). A comment on an accused's silence occurs when the State uses the evidence to suggest the defendant is guilty. *State v. Keene*, 86 Wn. App. 589, 594, 938 P.2d 839 (1997). A prosecutor's statements will not be considered a comment on the right to silence if, "standing alone, [it] was so subtle and so brief that [it] did not naturally and necessarily emphasize

defendant's testimonial silence." *Burke*, 163 Wn.2d at 216 (internal quotations and citations omitted). A remark that does not amount to a comment is considered "a mere reference" to silence, and is not reversible error absent a showing of prejudice. *Id*. And in *Burke*, Justice Madsen would not have reviewed a "mere reference" to silence, absent a proper objection, even when raised in a motion for a new trial. *Id*. at 210, 223 (Madsen J., dissenting).

i. Detective Armstrong's testimony

During his *redirect examination*, Ennis testified that he offered to clip his nails for investigators, but the offer was rejected. RP 1467. In response to Ennis's testimony, Detective Armstrong stated he did not remember Ennis offering to cut his own nails for investigators. RP 1472. The State then asked, without objection, "*Did you indicate in your report* that he *remained silent* during the contact and conversations?" and Armstrong replied, "I indeed did." RP 1472 (emphasis added).

Any impropriety in the question to Armstrong was not preserved. Further, as the Court of Appeals properly found, the question was directed at whether, in addition to the Detective's own independent recollection, he made a report indicating Ennis was silent during the interview. Ennis and

his investigator, RP 1474, claimed he verbally offered to clip his nails for investigators, and the officer's contemporaneous record of the interview was offered to rebut that assertion – an event the State's witnesses did not recall. RP 1037, 1472. The defendant opened the door to this testimony. *State v. Gefeller*, 76 Wn.2d 449, 458 P.2d 17 (1969). The State was entitled to respond, and did not use or intend to use the defendant's silence during the interview to demonstrate his guilt.

ii. Closing argument

The defendant did not object to the State's allegedly improper closing arguments.[11] RP 1496-97, 1499-1500, 1510. In the motion for a new trial, the trial court was asked to analyze only three of the statements,[12] and found they lacked any specific comment on the defendant's silence, were ambiguous, and directly reflected the defendant's own testimony at trial. RP 1781-82.

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[11] *See also* Slip Op. at 22-25 (reproducing State's arguments verbatim and noting only one allegation was raised in the defendant's motion for a new trial).

[12] The trial court analyzed: (1) "We heard the defendant's statement for the first time yesterday when he took the stand"; (2) "You can look at the timing and accuracy of a statement, how someone testifies and what motive or bias they may have"; and (3) "The defendant spoke to you the other day after having two years and four months to access reports and being seated in the courtroom throughout this, and he gave you a version of events you must analyze."

These statements were directed at the defendant's credibility while testifying, not at his silence to law enforcement. The first statement, "we heard the defendant's statement for the first time yesterday," implies nothing about guilt from any earlier silence. It simply indicates that the jury heard the defendant present his version of events for the first time the preceding day (the defense waived its opening statement); it merely regarded the order of evidence presented and the defendant's credibility.

The remaining comments, also related to the defendant's credibility while testifying, and did nothing more than (1) explain to the jury that the court's instructions, relating to credibility determinations, also applied to the defendant's own testimony and (2) argue how, based on the testimony, the jury should find Ennis' trial testimony not credible. *See* CP 314. The comments emphasized the defendant's actions prior to trial – i.e., clipping his fingernails and contacting witnesses in violation of a court order as evidence that he was attempting to "get rid of potential evidence," and how those actions bore on his credibility as a witness. RP 1500, 1511. Ennis testified that he had spent "two years and four months" thinking about the case and, therefore, could remember minute details, despite his level of intoxication during the party. RP 1437-38. The defendant's ability to recall

the events and details from the night of the party was a proper subject for both cross-examination and closing argument. A defendant who testifies at trial may have his credibility questioned by the prosecution, just as any other witness, with some constitutional limitations. *See e.g., Brown v. United States*, 356 U.S. 148, 154, 78 S.Ct. 622, 2 L.Ed.2d 589 (1958) ("If [a defendant]…testifies in his own defense his credibility may be impeached and his testimony assailed like that of any other witness"). None of these statements was a comment on the defendant's right to silence, or inferred guilt therefrom; the record reflects the State only intended its remarks as an attack on the defendant's credibility at trial. Indeed, the trial court found that it did not "believe that that was even a subtle comment on silence." RP at 1781; Slip Op. at 32.

b. Vouching

The defendant next claims that the prosecutor vouched for K.S.'s credibility during closing argument, citing five comments made by the prosecutor, again, without objection.[13] RP 1513-14, 1543-44. Prosecutors have "wide latitude to draw and express reasonable inferences from the evidence" in their closing arguments. *State v. Robinson*, 189 Wn. App. 877,

[13] *See also* Slip Op. at 35-36.

893, 359 P.3d 874 (2015). "The prejudicial effect of a prosecutor's improper comments is not determined by looking at the comments in isolation but by placing the remarks 'in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.'" *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)).

A prosecutor may not vouch for a State witness's credibility. *State v. Coleman*, 155 Wn. App. 951, 957, 231 P.3d 212 (2010). The trier of fact has sole authority to assess witness credibility. *State v. Ish*, 170 Wn.2d 189, 196, 241 P.3d 389 (2010). Vouching occurs when the prosecutor either (1) places the prestige of the government behind the witness, or (2) indicates that information that was not presented to the jury supports the witness's testimony. *Robinson*, 189 Wn. App. at 892-93. There is a difference between a prosecuting attorney's individual opinion presented as an independent fact, and "'an opinion based upon or deduced from the testimony in the case.'" *McKenzie*, 157 Wn.2d at 53 (quoting *State v. Armstrong*, 37 Wash. 51, 54-55, 79 P. 490 (1905)) (emphasis omitted). Prejudicial error will not be found unless it is "clear and unmistakable" that

counsel is expressing a personal opinion. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995).

Even the use of the word "truth" during closing argument is not necessarily improper. In *State v. Warren*, for example, the prosecutor argued that details about which the complaining witness testified were a "'badge of truth'" and had the "'ring of truth,'" and that specific parts of the witness's testimony "'rang out clearly with truth in it.'" 165 Wn.2d 17, 30, 195 P.3d 940 (2008).

Here, it is not clear and unmistakable that counsel expressed a personal opinion of K.S.'s veracity during closing argument. The State's argument regarding K.S.'s credibility did not place the prestige of the government behind the witness. Nor did it suggest or convey the existence of evidence not heard by the jury that supported K.S.'s testimony. Rather, the prosecutor's argument that K.S. was truthful was tied to the evidence that was elicited at trial, and the instructions given to the jury: (1) she did not attempt to stop her Field Training Officer from reporting the allegations she made to him; (2) despite K.S.'s significant professional and personal difficulties that resulted from reporting the assault, she adhered to the statements she had given to law enforcement and others for two and a half

years;[14] (3) the evidence did not reflect a sexually aggressive woman with a vendetta (as suggested by defendant both in his testimony and during his closing argument); and (4) based on the facts of the case, the jury could find that K.S. was truthful and credible. The prosecutor also repeatedly reminded the jury that *it* was to judge the credibility of the witnesses in light of the evidence and testimony presented. RP 1496-97, 1543. The prosecutor asked the jury to look at the bias and motive of *both* K.S. and Ennis and to hold them to the same standard. RP 1544. The statements of the prosecutor, when considered as a whole and in context, are not vouching – and even if improper, could have been cured by a timely objection.

c. Impugning defense counsel

Melissa Beaver told investigators that K.S. was "a little wasted" at the party. RP 1360-61. During defense counsel's questioning, she retracted that statement, claiming she was walking and talking "just fine." RP 1354. When impeached with her prior statement, Beaver sought to clarify, to which the prosecutor responded, "No, that's fine. Mr. Cossey can clean that up, and you can explain why you're changing it now." RP 1361.

[14] It was *the defendant* who told the jury that he had thought of the events occurring during the party every day for two years and four months. RP 1437.

It is improper for a prosecutor to disparagingly comment on defense counsel's role or impugn the defense lawyer's integrity. *State v. Thorgerson*, 172 Wn.2d 438, 258 P.3d 43 (2011). Here, the prosecutor's comment makes no suggestion that defense counsel was engaging in "sleight of hand," or subversive tactics. The statement only indicated that defense counsel would provide Beaver an opportunity to explain why her testimony differed from her earlier statement. Even assuming the comment disparaged defense counsel, the comment was not so egregious as to be incurable. *See Warren*, 165 Wn.2d at 29 (argument that defense counsel's "mischaracterizations" were an example of "what people go through in a criminal justice system when they deal with defense attorneys" and that defense counsel's mischaracterizations were in the hope that the jury "was not smart enough to [it] figure out," impugned defense counsel but were not so flagrant and ill-intentioned that no instruction could have cured them). Here, defense counsel objected; that objection was sustained. There is no evidence that, had counsel desired a curative instruction, it would not have sufficed to cure any potential prejudice during a protracted and intensive trial.

d. Expressing an opinion of guilt during K.S.'s testimony

Next, Ennis claims the State engaged in misconduct by expressing a personal opinion about Ennis' guilt. At issue is the State's use of the word "assault" in nine of its questions addressed to K.S., all asked after the victim had fully described awaking to find Ennis' fingers in her vagina.[15] RP 848-50, 857, 862. Only the last instance to which the defendant assigns error was objected to by trial counsel, which resulted in the court directing the prosecutor to rephrase. RP 933-34. In his petition, Ennis highlights that no curative instruction was given. Pet. for Rev. at 31. Ennis does not disclose that counsel did not request the court strike the prosecutor's statement or provide a curative instruction. RP 934.

As with the above issues, there was no objection to, no motion in limine regarding, or court order prohibiting the prosecutor's use of the word

[15] (1) "Why didn't you tell him who had *assaulted* you?," RP 862; (2) "Had you at that point told him who *assaulted you*?," RP 866; (3) "So I want to take you to the point where you wake up *after you had been assaulted* and it's in the morning," RP 867; (4) "Did you tell Callie [Roseland] at that point who had *assaulted* you?," RP 869; (5) "And did you tell him how you were being *assaulted*?," RP 876; (6) "And were those the clothes that you were wearing when you woke up being *sexually assaulted*?," RP 877; (7) "And can you tell me a little bit—at this point you've been *sexually assaulted* that—why would you shower?," RP 879-80; (8) "And so it was a couple of minutes almost immediately after that you report that *you were assaulted* to [Rassier]?," RP 933; (9) "[Y]ou'd suffered a *sexual assault,* been up until midnight," RP 933.

"assault" or "sexual assault" during its questioning – except for the final time the State used the word. Even assuming that the use of the term, in a sexual assault trial, is misconduct, the defendant must demonstrate that the use of the term was flagrant and ill-intentioned such that the use of the term could not have been cured – especially by a timely objection *after the first instance of its use* – which likely would have resolved the use of the term thereafter. After all, the prosecutor ceased using the term after the defendant objected and the court directed the prosecutor to rephrase, demonstrating the prosecutor's prompt compliance with the court's order.

The defendant further claims the Court of Appeals erred in finding the following statement, immediately following the defendant's objection to the State's use of the term, "sexual assault," lacked flagrance or ill-intent and was atypical of the prosecutor's conduct at trial. Br. at 33.

> [STATE]. Okay. You'd been up – you'd suffered a sexual assault, been up until midnight --
> MR. COSSEY: Judge, I'm going to object on that. She's doing it constantly. It's not appropriate. She's constantly making that statement. It's not appropriate.
> [STATE]: *Your Honor, I'm stating the fact that there was an assault where fingers were placed inside this woman's vagina. That's why we're here.*
> MR. COSSEY: It's an allegation, and she's making it as a fact that she's -- when she's asking questions.

RP 933-34 (emphasis added).

Defense counsel did not object to this statement, nor did he ask the court for a curative instruction. Arguably he tactically seized an opportunity to respond to the State's comment, by reminding the court (and jury) that the assault was only an allegation. The jury was properly instructed that the lawyer's comments were not evidence, and that it was the sole judge of the credibility and significance of the evidence. As with the above claimed misconduct, the defendant fails to demonstrate that if a curative instruction had been requested, it would not have neutralized any conceivable prejudice resulting from the State's errant comment. None of the alleged misconduct, most of which was unobjected-to, merits review under RAP 13.4.[16]

C. THE DEFENDANT FAILS TO OFFER ANY THEORY UPON WHICH THE ALLEGED "OTHER SUSPECT" HEARSAY EVIDENCE WOULD HAVE BEEN ADMISSIBLE AT TRIAL.

In his motion for a new trial,[17] Ennis presented the trial court with affidavits from his wife and himself claiming they believed Cossey would use the substance of his discussion with Bugbee regarding Mr. Strosahl's potential sexual involvement with K.S. to Ennis' advantage during trial. The

[16] While repetitive misconduct may have a cumulative effect, here, there is little clear misconduct. Slip Op. at 60; *see also In Re Glasmann*, 175 Wn.2d 696, 711, 286 P.3d 673 (2012). Any misconduct could easily have been remedied by curative instruction.

[17] A motion for a new trial is one form of collateral attack. RCW 10.73.090.

report of proceedings firmly contradicts those assertions. Ennis sat through three hearings during which that conversation was discussed between the State, Cossey, and the court. 5/25/17 RP 2; 5/19/17 RP 3; 6/7/17 RP 2. Ennis did not object to his counsel's repeated assurances, on the record, that the evidence *would not* be used at trial.[18] Knowing Cossey did not intend to present the evidence, Ennis did not obtain a new attorney, who, theoretically, could have sought the admission of that information at trial.

1. Standard of review.

This Court reviews whether circumstances demonstrate a conflict of interest de novo. *State v. Regan,* 143 Wn. App. 419, 428, 177 P.3d 783 (2008). Where, as here, the defendant does not make a timely objection in the trial court, a conviction will stand unless the defendant can show his lawyer had an actual conflict that adversely affected the lawyer's performance. *Cuyler v. Sullivan,* 446 U.S. 335, 350, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). "Actual conflict" is a term of art, requiring a "'conflict that affected counsel's performance – as opposed to a mere theoretical

[18] Furthermore, in ruling on the motion for a new trial, the trial court found that when interviewed post-trial, Cossey indicated that Ennis "stated unequivocally that he didn't want to implicate Mr. Strosahl in any of this; that his defense was consent." Slip Op. at 48-49. As with Ennis' other claims, it was not until *after* his conviction that he averred his belief that the information would be used at trial.

division of loyalties.'" *Regan,* 143 Wn. App. at 427-28 (quoting *Mickens v. Taylor,* 535 U.S. 162, 171, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002)). Until a defendant shows his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance. *State v. Dhaliwal,* 150 Wn.2d 559, 573, 79 P.3d 432 (2003).

In *Dhaliwal,* this Court noted it had been reluctant to find counsel's performance deficient solely on the basis of questionable trial tactics:

> Salazar's failure to object to testimony is a tactical decision that, without more, does not indicate that he was acting under a conflict of interest. This is not a case where the defendant's attorney utterly failed to make any objections, to cross examine the State's witnesses, or to mount a defense.
>
> Under *Mickens* and *Sullivan,* the defendant bears the burden of proving that there was an actual conflict that adversely affected his or her lawyer's performance…Holding that the *possibility* of a conflict was not enough to warrant reversal of a conviction, the *Sullivan* Court stated: "Until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance."… Dhaliwal has demonstrated the possibility that his attorney was representing conflicting interests. However, he has failed to establish an actual conflict because he has not shown how Salazar's concurrent representation of the witnesses…and his prior representation of Grewal affected Salazar's performance at trial.

Id. at 573 (internal citations omitted). Ennis cannot show Cossey's representation was affected by whatever promises he made to Bugbee. He offers no basis upon which the "evidence" Bugbee disclosed to Cossey

would have been admissible, undermining his claim it provided a "plausible alternative strategy" not pursued due to the alleged conflict. Pet. for Rev. at 37.

2. The inadmissible "evidence" does not present a "plausible alternative strategy" that was not pursued due to the alleged conflict.

The exclusion of "other suspect" evidence is an application of the general rule that excludes evidence if its probative value is outweighed by unfair prejudice, confusion of the issues, or potential to mislead the jury. *State v. Franklin*, 180 Wn.2d 371, 378, 325 P.3d 159 (2014). Before the trial court will admit "other suspect" evidence, the defendant must present facts or circumstances that point to a nonspeculative link between the other suspect and the crime. *Id.* at 381. The inquiry "'focuse[s] upon whether the evidence offered tends to create a reasonable doubt as to the *defendant's* guilt, not whether it establishes the guilt of the *third party* beyond a reasonable doubt.'" *Id.* (alteration in original).

Here, the information provided to Cossey by Bugbee, if hypothetical, would not constitute a "nonspeculative link" between Mr. Strosahl and K.S. If the information provided to Cossey by Bugbee had been communicated as fact, the defendant cannot establish that the purported evidence tended to create a reasonable doubt as to *his own* guilt. After all,

K.S.'s DNA was found on Ennis' driver's side seatbelt, Ennis clipped his fingernails (in an apparent effort to prevent the collection of DNA evidence), K.S. recognized her assailant as Ennis by his voice and clothing, and Ennis admitted to intercourse with K.S.

Even assuming the evidence were somehow proper "other suspect evidence," Ennis offers no theory upon which he could have plausibly sought its admission. A defendant does not have a right to present inadmissible evidence. *See, e.g., State v. Starbuck*, 189 Wn. App. 740, 750, 355 P.2d 1167 (2015). Bugbee told Cossey that, if questioned about sexual contact with K.S., Mr. Strosahl would deny it. CP 1373 (Ex. 2) at ll. 278-81. If questioned about sexual contact with K.S., Mr. Strosahl would likely refuse to testify against himself. U.S. Const. amend V (No person "shall be compelled in any criminal case to be a witness against himself"); 5/25/17 RP 8. Bugbee could not testify about the conversation due to the attorney-client privilege, waivable only by Mr. Strosahl. RCW 5.60.060(2)(a). Cossey could not testify about his conversation with Bugbee - that conversation would have been inadmissible hearsay within hearsay. ER 805.

Regarding collateral attacks, including a motion for a new trial, a defendant is not entitled to relief without competent, *admissible* evidence in support of his or her claims. For example, this Court has stated:

> If the… allegations are based on matters outside the existing record, the petitioner must demonstrate that he has competent, admissible evidence to establish the facts that entitle him to relief. If the petitioner's evidence is based on knowledge in the possession of others, he…must present their affidavits or other corroborative evidence. *The affidavits, in turn, must contain matters to which the affiants may competently testify. In short, the petitioner must present evidence showing that his factual allegations are based on more than speculation, conjecture, or inadmissible hearsay.*

In re Rice, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992) (emphasis added). The affidavits provided by Mr. Ennis and his wife, attesting to Cossey's hearsay statements reporting the second and third level hearsay conveyed by Bugbee and, perhaps Mr. Strosahl, do not present the "competent admissible evidence" required for relief – only a declaration from Mr. Strosahl or another percipient witness with actual knowledge of the event would suffice. The trial court did not err in denying the request for a new trial; the Court of Appeals properly affirmed that decision, ruling that the defendant had not offered any admissible evidence demonstrating a conflict of interest actually affected Cossey's representation of Ennis. *See* Slip Op. at 49-50 (trial court); Slip Op. at 50-51 (Court of Appeals). This Court

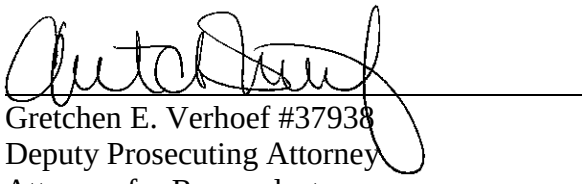
should decline review as these facts do not present any basis under RAP 13.4 for review.

VI. CONCLUSION

The State respectfully requests this Court deny review.

Respectfully submitted this 27 day of July 2021.

LAWRENCE H. HASKELL
Prosecuting Attorney



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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. GORDON ENNIS, Appellant.	NO. 99679-2 COA NO 36359-7-III CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on July 27, 2021, I e-mailed a copy of Answer to Defendant's Petition for Review in this matter, pursuant to the parties' agreement, to:

Mark Vovos
mvovos@mvovos.digitalspacemail8.net

7/27/2021 **(Date)** Spokane, WA **(Place)** **(Signature)**

SPOKANE COUNTY PROSECUTOR

July 27, 2021 - 10:45 AM

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