No. 43573-0-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

V.

ROBERT WOODWARD, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Toni A. Sheldon

No. 11-1-00088-5

BRIEF OF RESPONDENT

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2) *Defense counsel was not ineffective.*

3) *Because no juror who sat on Woodward's trial was biased, Woodward received a fair trial and there was no error in selecting the jury.*

4) *Counts II and III do not constitute "same criminal conduct."*

5) *Woodward had no constitutional right to have the jury decide whether counts II and III were same criminal conduct, but because the sentencing statute was amended during the range of time during which the crimes occurred, Woodward is probably entitled to the benefit of the lesser sentence.*

B. STATEMENT OF CASE

In 1999, A.G., who was then age five, and H.G., who was then age three, began residing with their grandmother and step-grandfather, Robert

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Woodward, in Mason County Washington. RP 806, 821, 863, 924, 1062. Woodward became the children's step-grandfather in 1999, when he and the children's grandmother were married. RP 806.

A couple of weeks or maybe a month after A.G. and H.G. began living with their grandparents, Woodward began sexually molesting them. RP 863. The molestation began as a game where Woodward would have the girls sit on his upraised knees while he wore only his underwear, and he would then lower his legs, causing the girls to slide over his erect penis. RP 880-881. When A.G. was five years old, Woodward touched her vagina with his fingers. RP 866. In the beginning, sometimes while H.G. was present, Woodward would rub A.G.'s vagina over her underwear. RP 866-867. Then the game stopped, after about a year. RP 885. Over time, the molesting then progressed to where Woodward would remove the girls' underwear and put his fingers into both girls' vaginas. RP 867-867. A.G. was age six or seven when the molestation progressed from over-the-underwear rubbing of the vagina to removal of the underwear or rubbing under the underwear. RP 868, 946. Woodward molested A.G. at different times of the day, depending on his work schedule and depending on when A.G.'s grandmother was in bed. RP 899, 950.

In time, Woodward began to watch pornographic movies while H.G. and A.G. were present. RP 868. While watching these movies,

Woodward would remove his clothes, exhibit an erection, and masturbate. RP 869-871, 948-949. Sometimes Woodward would have the girls touch his penis. RP 948. Woodward would often ejaculate during these episodes. RP 871, 949. On at least one occasion, Woodward had A.G. perform oral sex upon him. RP 871.

Woodward used his fingers to penetrate A.G.'s vagina on many different occasions over a period of years while A.G. was between the ages of five and 12. RP 902-903. Over the years, Woodward molested A.G. more than once a month, maybe more than once a week. RP 909, 950. The incidents were too many to count, but may have been more than 100 times. RP 903. It seemed like everyday. RP 909.

In 1999, when Woodward first began molesting A.G. and H.G, he was about 46 years old. RP 795, 1058. Neither A.G. nor H.G. were ever at any time married to Woodward. RP 881, 925.

The State charged Woodward with: one count of child molestation in the first degree, committed against H.G. between January 1, 1999, and August 30, 2008; one count of child molestation in the first degree, committed against A.G. between January 1, 1999, and January 31, 2006; and, one count of rape of a child in the first degree, committed against A.G. between January 1, 1999, and January 31, 2006. CP 21-23. The jury returned guilty verdicts on all counts. RP 1161-62.

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C. ARGUMENT

1) At trial of this matter, Woodward proposed to the jury an exculpatory theory alleging that he was medically unable, due to sexual dysfunction, to have committed the crimes with which he was accused. Woodward failed to present a doctor's testimony, medical records, or other corroborating evidence to support his defense. *Where such evidence, if it existed, would have been within Woodward's control, did the prosecutor commit misconduct by commenting on the lack of evidence to support Woodward's exculpatory theory?*

During the trial of this case, Woodward presented his own testimony and the testimony of his wife to claim as a defense that he was seriously ill and that an effect of his illness was that he had no sex drive at all and that he was unable to engage in sexual activity, unable to obtain an erection, and unable to ejaculate. RP 977-978, 1061-1062. This testimony was provided to the jury even though Woodward's wife, during the pre-trial investigation, told a detective that she and Woodward had a normal, healthy sex life. RP 1030.

In closing argument, the State commented on the lack of any medical evidence to support or corroborate Woodward's assertion that he was incapable of committing the crimes with he was charged because he

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had no sex drive, was impotent, and was unable to ejaculate. RP 1134. Woodward did not object to the prosecutor's arguments. RP 1134-1135.

On appeal, Woodward claims that the prosecutor's comments shifted the burden of proof and, therefore, denied him a fair trial. Appellant's Opening Brief, pp. 11-12.

Where a defendant fails to object to a prosecutor's closing argument at trial, on appeal the defendant must show that the prosecutor's argument was misconduct and that the misconduct "was so flagrant and ill-intentioned that it caused an 'enduring and resulting prejudice' incurable by a jury instruction." *State v. Sakellis*, 164 Wn. App. 170, 184-185, 269 P.3d 1029 (2011), *review denied*, ___ Wn.2d ___, ___ P.3d ___ (Jan. 9, 2013, No. 86695-3), citing *State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006) (quoting *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997)). In the instant case, Woodward has not made this showing. To make this showing, Woodward must show that: "(1) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict,' and (2) no curative instruction would have obviated the prejudicial effect on the jury." *Sakellis* at 184, quoting *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011). The State urges that the prosecutor's comments were not misconduct, but that even if misconduct had occurred on these facts, given the great strength of the

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evidence, there was little likelihood that these comments affected the jury verdict and that in any event a curative instruction would have obviated the effect.

The prosecutor's comments in this context were not error, because it is not error for the prosecutor to comment on Woodward's lack of evidence to support his exculpatory theory. *State v. Pierce*, 169 Wn. App. 533, 551-552, 280 P.3d 1158 (2012), citing *State v. Anderson*, 153 Wn. App. 417, 428, 220 P.3d 1273 (2009).

A prosecutor may commit misconduct if he or she comments or argues that a defendant has failed to present any evidence or has failed to rebut the State's allegations of guilt. See, e.g., *State v. Fleming*, 83 Wn. App. 209, 921 P.2d 1076 (1996). Likewise, a prosecutor may commit misconduct by arguing that a defendant is guilty "based simply on the defendant's failure to present evidence to support his defense theory." *State v. Sells*, 166 Wn. App. 918, 930, 271 P.3d 952 (2012). However, "[a] prosecutor is entitled to point out a lack of evidentiary support for the defendant's theory of the case." *Id.* at 930.

The court has, however, found that the State commits misconduct when it argues during closing that the defendant has a duty to present corroborating evidence to support its exculpatory theory. See, e.g., *State*

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v. Toth, 152 Wn. App. 610, 217 P.3d 377 (2009). As distinguished from the facts of *Toth*, however, in the instant case, the prosecutor argued that:

> [W]hen the claim is made that the defendant has some sort of medical issue that prevents him from even being capable of committing the crime that he's accused to have committed, and when any reasonable person with a medical claim that would have prevented them from some medical condition having the ability to commit the crimes with which he was committed would come forward with some sort of medical evidence that here's -- here's the evidence, here's the doctor -- here's the --the doctor, the nurse, here's the medical records, something that documents that I have this condition and that it -- it has resulted in these effects of erectile dysfunction, or the lack of any sexual desire, or the lack of an ability to achieve an erection, or the lack of the ability to ejaculate. Those things would be presented to you by a reasonable person. And -- and you don't have any evidence along those lines in this case.

RP 1134. The prosecutor did not argue or assert that Woodward had a *duty* to present evidence. *Id.*

In the instant case, the prosecutor merely pointed out that corroborating evidence in the form of medical evidence was within Woodward's control and that a reasonable person who asserted a medical condition as an absolute defense would have presented medical evidence to corroborate the defense. *Id.* The corroborating medical evidence, if it existed, was properly part of the case, was in Woodward's interest to present, and was within Woodward's control; thus, the prosecutor's comments regarding Woodward's failure to present that evidence were

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not improper. See, e.g., *State v. Hartzell*, 153 Wn. App. 137, 162, 221 P.3d 928 (2009), citing *State v. Blair,* 117 Wash.2d 479, 485–91, 816 P.2d 718 (1991); see also, *State v. Barrow*, 60 Wn. App. 869, 872, 809 P.2d 209, *review denied*, 118 Wn.2d 1007 (1991) (If a defendant presents an exculpatory theory that could have been supported by the testimony of an uncalled witness, the prosecutor may properly question a defendant's failure to provide corroborating evidence).

Woodward presented his wife's testimony and testified himself that he had a medical condition that made it impossible to commit the crimes with which he was accused. RP 977-978, 1061-1062. The prosecutor responded by pointing out in closing argument that when asserting a medical defense which, if true, would make it impossible for the defendant to have committed the crimes with which he was accused, a reasonable person would have presented a doctor's testimony or medical records to corroborate the defense. RP 1134. The prosecutor did not argue or imply that Woodward was guilty merely because he did not corroborate his defense; nor did the prosecutor suggest that Woodward had a duty to present evidence. *Id.* Instead, the prosecutor merely pointed out that although corroborating evidence should be available to Woodward, there was nevertheless a lack of evidence to corroborate

Woodward's assertion that it was medically impossible for him to have committed the crimes with which he was charged. *Id.*

On the facts of the instant case, the prosecutor did not err by commenting on the lack of evidence to support Woodward's exculpatory theory. See, e.g., *State v. Pierce*, 169 Wn. App. 533, 551-552, 280 P.3d 1158 (2012), citing *State v. Anderson*, 153 Wn. App. 417, 428, 220 P.3d 1273 (2009).

2) *Defense counsel was not ineffective.*

Ineffective assistance of counsel is a two-pronged test that requires the reviewing court to consider whether trial counsel's performance was deficient and, if so, whether counsel's errors were so serious as to deprive the defendant of a fair trial for which the result is unreliable. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 246 P.3d 1260, 1268 -1269 (2011).

Additionally, to establish ineffective assistance of counsel, Woodward must show that his counsel's performance fell below an objective standard of reasonableness. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Woodward claims that his trial counsel's performance was ineffective because counsel did not object

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when the prosecutor pointed out to the jury that, because Woodward did not present a doctor's testimony or present medical records to corroborate his assertion that he was medically incapable of committing the crimes of child molestation and rape of a child, there was a lack of evidence (other than the testimony of Woodward and his wife) to support Woodward's exculpatory assertion. Appellant's Opening Brief at pp. 11-12, 14-15. The State asserts that because the prosecutor's argument was not improper, defense counsel's failure to object was not below an objective standard of reasonableness.

Finally, to demonstrate prejudice Woodward must show that, but for the deficient performance, there is a reasonable probability that the outcome would have been different. *Strickland*, 466 U.S. at 697; *State v. Foster,* 140 Wn. App. 266, 273, 166 P.3d 726 (2007). Woodward has not made this showing.

3) *Because no juror who sat on Woodward's trial was biased, Woodward received a fair trial and there was no error in selecting the jury.*

Woodward claims two separate and distinct errors related to jury selection in this case.

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The first error Woodward alleges is that he did not receive a fair trial because, he alleges, Juror No. 27 was biased but nevertheless served as a juror at his trial. Appellant's Opening Brief at pp. 16-17. Woodward alleges that the trial court judge erroneously denied Woodward's motion to strike Juror No. 27 for cause. *Id.*

As the second jury selection error, Woodward alleges that jurors 3 and 26 were also biased and that the trial court erroneously denied his motion to remove these two jurors for cause, thus forcing Woodward to expend peremptory strikes to excuse jurors 3 and 26 from the jury. Appellant's Opening Brief at pp. 17-23. Premised upon his assertion that jurors 3 and 26 were biased, Woodward asserts that forcing him to exercise peremptory strikes to excuse those jurors violated his state constitutional right to a jury trial. *Id.* at 17.

Because both of Woodward's assignments of error regarding jury selection are premised upon his assertions that certain jurors were biased, the State's response will begin with an examination of whether these jurors were biased. The State's response will then separately examine Woodward's two assignments of error.

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a) Summary of Facts Regarding Juror No. 27

Juror No. 27 told the court and parties that he had been a teacher for 40 years and had been a coach for 41 years and that he, therefore, knew a lot of kids. RP 679. Upon reflection, he remembered that he knew the "potential victim" in the case, because, he said, "I've had her in class." RP 679. He remembered and knew her name because he had her in class "as a substitute one year." RP 680.

Juror No. 27 also disclosed that he was then currently mentoring a boy whose last name was the same as the defendant's. RP 680. In response, the court inquired of Juror No. 27, as follows: "And then I don't know what connection your person that you're mentoring has to the defendant in this case. But if there was some familial connection, would that make it difficult to be fair?" RP 681. The juror answered, "Probably not. It might be real awkward -- at school, yeah." RP 681. Juror No. 27 said that he also knew "numerous kids" who were on the witness list. RP 682. Again, he said that knowing the potential witnesses would not make it difficult for him to be fair, but that it would be "just awkward again because one of those other students that were on the list there, I'm his IEP manager at the high school. So I'm in contact with him all the time. So -- [.]" RP 682.

During the voir dire, the prosecutor brought up that he and his brother had grown up with Juror No. 27's kids, to which Juror No. 27 responded affirmatively. RP 681. No citation to the record was located where there is any indication that there was a connection between the defendant and the child the juror was mentoring.

Woodward moved to have Juror No. 27 removed for cause. RP 683. The court denied the motion. RP 683. Juror No. 27 returned to the panel. RP 683.

After Juror No. 27 rejoined the full panel, he volunteered an answer to a question posed to the entire panel by the prosecutor. RP 695. He said that he had been on a prior jury and that the foreperson of that jury initially did not follow the instructions of the court. RP 695-696. Juror No. 27 explained that, "you have to follow what the judge says." RP 696.

Later still during voir dire of the entire panel, Juror No. 27 responded to Woodward's questioning of the panel and said that as a teacher, he tries to avoid being alone with a student, especially female students. RP 719-20. Juror No. 27 explained, "... I've had friends of mine that have been in the teacher profession that have had falsely -- false accusations put on them because they put themselves, or allowed themselves, in those situations." RP 720.

No citation to the record was located where Woodward renewed his motion to strike Juror No. 27 for cause or where he moved to exercise a peremptory challenge to strike Juror No. 27.

b) Summary of facts regarding Juror No. 3

Juror #3 said that when his wife was 12 years old, she and her younger sister were forcibly raped by her mother's boyfriend. RP 601. Juror #3 said the perpetrator "got off" because "they didn't have the right evidence...." RP 601.

Juror #3 said, "My wife now is 51 years and she still has problems along those lines. So she would be definitely not the person you'd want to be sitting in this chair...." RP 601.

The court inquired of Juror No. 3 as follows: "And what we are really trying to get at is can you wall off those life experiences so that they don't affect your ability to hear the evidence and make a fair determination, fair to both sides?" RP 602.

Juror No. 3 answered, "I believe I probably could, but, you know, that's where I'm at on that. Of all the different things that could -- this would be the more disgusting thing for me. So in all the possibilities of people doing whatever they do, this is not -- this is not really good at all. So, I mean I -- I --[.]" RP 602.

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The prosecutor asked Juror No. 3 whether the he could set aside his wife's experience and decide the facts of the case based upon the evidence presented in court, to which the juror answered: "What I can tell you is I would try. That's about as good as you're going to get. I would weigh everything I would hear. When -- when I came in here and they said what the -- what the crime was, I have a -- all I can tell you is I have a shiver go up my spine...[.]" RP 604. When asked whether he might be influenced in his verdict by how his wife might react if he acquitted the defendant, Juror No. 3 said: "As... far as my wife goes, I wouldn't even tell her about it. And you know, that wouldn't make any difference to me. 'Cause either I feel the person did it or they didn't do it. From whatever you give -- whatever information you give me will tell me that." RP 606. The prosecutor asked Juror No. 3 whether he could base his verdict on the evidence and the law, to which the juror responded: "Well, it would be the evidence and I guess, the Judge would tell me what the law is." RP 607.

Woodward moved to excuse the juror for cause. RP 607. The court denied the challenge. RP 608.

Woodward exercised a peremptory challenge and struck Juror No. 3 from the jury panel. RP 744.

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c) Summary of facts regarding Juror No. 26

During voir dire of the entire panel, Juror No. 26 indicated that he might be too sympathetic. RP 706. He explained as follows: "There is a possibility. I'm pretty sympathetic to other people's issues." RP 707. In regard to empathy or sympathy, Woodward asked Juror No. 26 whether he'd be able to "check those at the door[,]" to which the juror answered, "I -- I'm not sure." RP 707.

Inquiring further, Woodward asked addressed Juror No. 26 as follows: "Do you think that it would get in the way or your being able to deliberate in an honest -- bad choice of word, honest. Do you think you'll be able to deliberate in -- in a way that you would want a juror to deliberate if you were sitting in this chair?" RP 708. Juror No. 26 answered, "I'm -- I -- I can't really answer that. I -- I don't know." RP 708. Woodward clarified, asking Juror No. 26 whether he'd be able to set his sympathy aside, to which Juror No. 26 answered, "No, I don't think so." RP 708.

Woodward asked that Juror No. 26 be excused for cause. RP 708. Before ruling, the court passed Juror No. 26 to the prosecutor for questioning. RP 708.

The prosecutor addressed Juror No. 26, and asked: "Would you be able to base your decision based upon the facts in -- that are proved by

evidence in court and the law, and not let whatever feelings of sympathy you have affect your decision?" RP 710. Juror No. 26 answered, "I honestly can't say. I don't know. I've never been in this situation before so -- I would hope so, but -- [.]" RP 710. The prosecutor pressed on, rephrasing his question, apparently seeking a more definite answer, and ultimately posed the following question to Juror No. 26: "So can you base your decision based on the evidence and the law, and not let sympathy overcome the evidence or the law?" RP 710. Juror No. 26 answered, "Yeah, I think I could do that." RP 710.

The prosecutor had no further questions. RP 710. Woodward declined to ask further questions. RP 711. The court then ruled on Woodward's motion to strike Juror No. 26 for cause, and denied the motion. RP 711.

Woodward exercised a peremptory challenge and struck Juror No. 26 from the jury panel. RP 744.

d) *The facts do not support Woodward's assertion that and juror. was biased; therefore, the facts do not support a finding of manifest abuse of discretion by the trial judge for denying Woodward's motion to strike Jurors 3, 26, and 27 for cause.*

Bias that requires removal of a juror for cause may be either implied bias or actual bias. RCW 4.44.170. Implied bias occurs when

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facts exist which disqualify the juror as a matter of law. RCW 4.44.170(1). Actual bias occurs when the trial judge is satisfied that a juror has a state of mind which prevents the juror from deciding the case on the merits. RCW 4.44.170(2); *State v. Noltie*, 116 Wn.2d 831, 839-40, 809 P.2d 190 (1991).

Implied bias is defined by statute and is limited by statute to the following four specified circumstances:

> (1) Consanguinity or affinity within the fourth degree to either party.
>
> (2) Standing in the relation of guardian and ward, attorney and client, master and servant or landlord and tenant, to a party; or being a member of the family of, or a partner in business with, or in the employment for wages, of a party, or being surety or bail in the action called for trial, or otherwise, for a party.
>
> (3) Having served as a juror on a previous trial in the same action, or in another action between the same parties for the same cause of action, or in a criminal action by the state against either party, upon substantially the same facts or transaction.
>
> (4) Interest on the part of the juror in the event of the action, or the principal question involved therein, excepting always, the interest of the juror as a member or citizen of the county or municipal corporation.

RCW 4.44.180; see also, *State v. Perez*, 166 Wn. App. 55, 66-69, 269 P.3d 372 (2012). There are no citations to the record to support a finding that

any of jurors 3, 26, or 27 should have been excused by the trial court for implied bias.

Because the statutory elements for implied bias are not satisfied in regard to any of the disputed jurors, each juror will now be examined individually for evidence of actual bias. A challenge for cause due to actual bias should be granted only when a juror shows a probability, not a mere possibility, of actual bias. *State v. Noltie,* 116 Wn.2d 831, 838-39, 809 P.2d 190 (1991). Actual bias occurs when a juror cannot decide a case on the merits due to an inability to put aside extraneous opinions or beliefs. *Id.* at 839-40; RCW 4.44.190.

A trial court's denial of a motion to strike a juror for cause is reviewed for a *manifest* abuse of discretion. *Noltie* at 838. Because the trial court can observe the demeanor of a juror and can evaluate and interpret the juror's responses during voir dire, the trial court is in the best position to determine a juror's ability to be fair and impartial. *Id.* at 839. On review of a trial court's decision regarding a challenge for cause, the reviewing court defers to the trial court's decision and considers the evidence in the light most favorable to the prevailing party. *Ottis v. Stevenson-Carson Sch. Dist. No. 303*, 61 Wn. App. 747, 755, 812 P.2d 133 (1991).

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In the instant case, as evidence of actual bias by Juror No. 27, Woodward alleges that Juror No. 27: "knew" one of the victims; "was the IEP manager for one of the witnesses[;]" and, had children who had "grown up with" the prosecutor and the prosecutor's brother. Appellant's Opening Brief at 17. The record on review supports these assertions of fact. RP 679-682. But Woodward does not identify how any of these assertions of fact are proof that Juror No. 27 could not fairly and impartially decide the case on the merits or how these facts would fall under the definition of actual bias as defined by RCW 4.44.190.

Actual bias occurs when a juror "has formed or expressed an opinion" based upon extraneous knowledge but is unable "to disregard such opinion and try the issue impartially." RCW 4.44.190. But there is no showing on the record of the instant case that Juror No. 27 had any opinion at all; the only showing is that he was acquainted with some of the persons involved with the case. "A juror's acquaintance with a party, by itself, is not grounds for a challenge for cause." *State v. Tingdale*, 117 Wn.2d 595, 601-02, 817 P.2d 850 (1991).

Woodward alleges actual bias in regard to Juror No. 3 because the juror's wife and his wife's sister were victims of rape when they were children. Appellant's Opening Brief at pp. 22-23; RP 601-607. As discussed above, however, actual bias occurs when a juror cannot decide a

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case on the merits due to an inability to put aside extraneous opinions or beliefs. *Id.* at 839-40; RCW 4.44.190. Woodward has not provided citations to the record or otherwise shown that Juror No. 3 had preformed opinions that would prevent him fairly trying the case.

Woodward cites *State v. Gonzalez*, 214 F.3d 1109, 1114 (9th Cir. 2000) and *State v. Cho*, 108 Wn. App. 315, 329-330, 30 P.3d 496 (2001), for the proposition that "doubts regarding bias must be resolved against the juror." Appellant's Opening Brief, p.16.

The facts of *Gonzalez*, however, are distinct from the instant facts. In *Gonzalez*, the defendant was accused of cocaine distribution and money laundering. *Gonzalez* at 1110. In *Gonzalez*, the challenged juror...

> disclosed the fact that her ex-husband, the father of her daughter, dealt and used cocaine-the same drug and conduct at issue here. Moreover, she described her former husband's drug dealing as one of the reasons for her relatively recent divorce and the break-up of her family. She admitted that the experience was painful. Asked three times whether she could put that experience aside and serve fairly and impartially, she never affirmatively stated that she could. Instead, she equivocated each time.

Id. at 1113. The *Gonzalez* court reasoned that these facts created doubt about the juror's ability to decide the case impartially based only upon evidence presented in court, and the court quoted *Burton v. Johnson*, 948 F.2d 1150, 1159 (10th Cir. 1991), for its language that "[d]oubts regarding bias must be resolved against the juror." *Gonzalez* at 1114. The *Gonzalez*

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court recognized that it is only in a rare, fact specific case that the reviewing court presumes juror bias. *Gonzalez* at 1113, citing *Burton* at 1159.

The facts of *Burton v. Johnson*, however, also are substantially distinct from the facts of the instant case. *Burton v. Johnson* involved a juror who was, during voir dire and while sitting as a juror in the trial, experiencing an abusive relationship that was similar to the relationship at issue in the trial, and there was evidence that the juror may have lied to conceal that fact during the voir dire. *Burton v. Johnson*, 948 F.2d 1150, 1154 (10th Cir. 1991).

State v. Cho, 108 Wn. App. 315, 30 P.3d 496 (2001), also is distinguishable, because it, too, involved a challenged juror who was alleged to have withheld material information during voir dire. And as did the *Burton* and *Gonzalez* courts, the *Cho* court acknowledged that only an extraordinary situation required a presumption of juror bias. *Cho* at 329. The *Cho* court reasoned that where a juror has purposefully withheld material information during voir dire so as to be seated on a jury, then notwithstanding the juror's protestations of fairness, such circumstances amounted to such an extraordinary situation where doubt must be resolved against the juror and where bias must be presumed. *Cho* at 329-330.

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In the instant case, however, Juror No. 3 was forthcoming about the facts and circumstances now at issue. RP 601-607. And it was not the juror, himself, who had had an experience similar to the facts of the current case; instead, the experience was vicarious, through his wife and her sister, and the experience was not contemporaneous with the trial but, instead, was from some point in the past, when his wife was 12 years old. RP 601. Juror No. 3 was initially pensively restrained in his answers regarding his ability to try the case fairly, but although he did not use the very words "fair and impartial," he eventually did plainly say that his wife's experience would make no difference to him and that his verdict would be based only upon the evidence and the law provided by the court. RP 606-607. Merely being the spouse of a rape victim should not establish bias. *See, United States v. Powell*, 226 F.3d 1181, 1189 (10th Cir. 2000) (juror whose daughter was a rape victim was not impliedly biased in trial for kidnapping for sexual gratification and assault); *cf. Gonzales v. Thomas*, 99 f.3d 978, 989-90 (10th Cir. 1996) (declining to hold that rape victim can never be an impartial juror in a rape trial).

Finally, Woodward asserts that Juror No. 26 should have been struck for cause because Juror No. 26 described herself as "sympathetic." Appellant's Opening Brief, p. 23. During voir dire, Juror No. 26 initially equivocated about whether he could disregard his sympathy while

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deciding the case. RP 706-708. At one point during voir dire, the juror answered, "[n]o, I don't think so[,]" when Woodward asked the juror whether he could set his sympathy aside. RP 708. Afterward, however, the prosecutor asked Juror No. 26 whether as a juror he could base his decision "on the evidence and the law, and not let sympathy overcome the evidence and the law[,]" to which the juror answered, "[y]eah, I think I could do that." RP 710.

"A juror may be excused for cause when his views '"prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."'" *State v. Clark*, 170 Wn. App. 166, 194, 283 P.3d 1116 (2012), quoting *State v. Brett,* 126 Wn.2d 136, 157–58, 892 P.2d 29 (1995) (quoting *State v. Hughes,* 106 Wn.2d 176, 181, 721 P.2d 902 (1986)). But "equivocal answers alone" do not require that a juror be excused. *State v. Noltie*, 116 Wn.2d 831, 839, 809 P.2d 190 (1991). Woodward has not shown that Juror No. 26 was unable to perform his duties as a juror merely because he was prone to feel sympathy. The trial court judge was in a position to view the juror, to observe his demeanor, and to evaluate his responses.

Because Woodward exercised peremptory challenges to remove Jurors No. 3 and 26, only Juror No. remained on the jury and participated in delivering a verdict. RP 744. Thus, in regard to Jurors No. 3 and 26,

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Woodward's claim of error fails because neither of those jurors served as jurors at his trial. *State v. Fire,* 145 Wn.2d 152, 34 P.3d 1218 (2001). As argued previously, none of the these jurors, particularly including Juror No. 27, was biased. Because Juror No. 27 was not biased, Woodward's right to a fair trial was not injured by Juror No. 27 serving on Woodward's jury.

Woodward asserts that Jurors No. 3 and 26 were biased and that he was forced to use peremptory challenges to remove these jurors, who should have been removed for cause. But the right to peremptory challenges is statutory; not constitutional. *Id.* As previously argued, Jurors No. 3 and 26 were not biased, but because neither juror sat on Woodward's trial, Woodward received a fair trial. *Id.* Thus, Woodward cannot demonstrate prejudice, and he, therefore, would not be entitled to a new trial even if Juror No. 3 or 26 were prejudiced. *Id.* at 165.

Wash. Const. art. I, § 22 and U.S. Const. Amend. VI each guarantee to criminal defendants the right to an impartial jury. The right is not violated when a defendant's motion to strike a biased juror for cause is denied but the defendant then removes the biased juror by use of a peremptory strike. *Fire* at 162-163. Woodward seeks to find a right to a set number of peremptory challenges in Wash. Const. art. I, § 21, but § 21 contains no such provision.

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4) *Counts II and III do not constitute "same criminal conduct."*

The charging documents in this case allege a large range of time during which the offenses occurred. CP 47-50. The jury returned guilty verdicts in regard to each range, but there was no narrowing of the offense date in regard to either count. CP 53-55. Woodward asserts that the court erred by not finding that counts II and III constituted the same criminal conduct. Count II alleged child molestation in the first degree committed against A.N.G. between January 1, 1999, and January 31, 2006. CP 54. Count III alleged rape of a child in the first degree committed against A.N.G. between January 1, 1999, and January 31, 2006. CP 54-55.

The evidence presented at trial showed an ongoing pattern of molestation and rape that continued over a course of years. The molestations began when A.G. was five years old. RP 806, 863, 866-867, 880-881, 924, 1062. At age six or seven the molestation progressed to rape. RP 867-868. Thus, the record shows separate acts of rape and molestation.

A sentencing court's determination of same criminal conduct for purposes of calculating an offender score is reviewed for an abuse of discretion. *State v. Graciano*, ___ Wn.2d ___, ___ P.3d ___ (Jan. 31,

2013, No. 86530-2); *State v. Mutch*, 171 Wn.2d 646, 653, 254 P.3d 803 (2011). Two crimes are "same criminal conduct" for sentencing purposes when they involve the same criminal intent, against the same victim, at the same time and place. RCW 9.94A.189(1)(a).

In the instant case, it is not disputed that A.G. was the same victim in both counts II and III. But the time relevant to each count was different by a period of months or years. Woodward had opportunity to pause and reflect upon his crime during the period between each offense. Thus, counts II and III do not constitute same criminal conduct. *State v. Grantham*, 84 Wn. App. 854, 932 P.2d 657 (1997). See also, *Mutch*, 171 Wn. 2d at 654-57.

The defendant bears the burden of showing that crimes constitute same criminal conduct. *State v. Graciano*, ___ Wn.2d ___, ___ P.3d ___ (Jan. 31, 2013, No. 86530-2). Woodard has failed to satisfy this burden. The record in the instant case supports a finding that counts II and III are separate criminal conduct, and where the record supports a finding of separate criminal conduct, the determination is within the discretion of the sentencing court. *Id.* at para. 14.

5) *Woodward had no constitutional right to have the jury decide whether counts II and III were same criminal conduct, but because the sentencing statute was amended during the range*

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of time during which the crimes occurred, Woodward is probably entitled to the benefit of the lesser sentence.

The jury in the instant case made findings that Woodward committed all of counts I, II, and II. CP 53-55. RCW 9.94A.525 requires that all prior and current convictions be scored when determining the sentence. When two or more offenses constitute "same criminal conduct," there is an exception to the rule. RCW 9.94A.589; *State v. Markel*, 154 Wn.2d 262, 273-275, 111 P.3d 249 (2005). Because a finding of same criminal conduct can only lower, and not raise, the sentence that Woodward might receive, a judge, and not a jury, may make the finding. *Markel*, 273-275. See also, *State v. Cubias*, 155 Wn.2d 549, 120 P.3d 929 (2005); *State v. Louis*, 155 Wn.2d 563, 120 P.3d 936 (2005).

As a separate section of his argument that a jury should have determined whether his crimes were separate criminal conduct, Woodward argues that his sentence was erroneous because the applicable sentencing statute was amended during the range of dates during which his crimes occurred and that he should have received the benefit of the lesser sentence.

The trial court sentenced Woodward to indeterminate sentencing pursuant to RCW 9.94A.507. CP 11. But RCW 9.94A.507 and its predecessor statute, RCW 9.94A.712, took effect in 2001. The offense

dates alleged against Woodward encompasses a range that begins in 1999. Although no case was located that is directly on point, *In re Restraint of Hartzell*, 108 Wn. App. 934, 33 P.3d 1096 (2001), leads to an argument that Woodward is probably entitled to be sentenced in accordance with RCW 9.94A.120, which was in effect at the beginning of the range of charging dates.

D. CONCLUSIOIN

For the reasons argued above, the State asks that Woodward's convictions be sustained, but the State also acknowledges that Woodward is probably entitled to the benefit of the sentencing range that was in effect when his crimes began in 1999 rather than the amended version of the sentence statute that was in effect when the range of his crimes ended.

DATED: March 11, 2013.

MICHAEL DORCY
Mason County
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_____

Tim Higgs
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MASON COUNTY PROSECUTOR

March 11, 2013 - 6:11 PM

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