No. 90062-1
COA No. 43573-0-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROBERT LUCAS WOODWARD,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR MASON COUNTY
Cause No. 11-1-00088-5

The Honorable Judge Toni A. Sheldon

PETITION FOR REVIEW / RAP 13.4

ROBERT LUCAS WOODWARD DOC357466
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A. IDENTITY OF PETITIONER

Robert Lucas Woodward asks this Court to accept review of the Court of Appeals decision designated in part B of this petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), petitioner seeks review of the unpublished Court of Appeals decision in State v. Robert Lucas Woodward, No. 43573-0-II (February 11, 2014). A copy of the decision is attached in Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. It is misconduct for a prosecutor to shift the burden of proof during closing argument. In this case, the state's attorney improperly equated the lack of medical evidence presented by the defense with the failure of a prosecutor to prove an offense. Did the prosecutor commit misconduct that infringed Mr. Woodward's Fourteenth Amendment right to due process?

2. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel. Here, counsel failed to object to prejudicial misconduct during the prosecuting attorney's closing. Was Mr. Woodward denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

3. A new trial is required whenever the erroneous denial of a challenge for cause results in a jury that includes a biased juror. In this case, the trial judge erroneously refused to excuse for cause Juror 27, who sat on the jury that convicted Mr. Woodward. Did the convictions violate Mr. Woodward's Sixth and Fourteenth Amendment rights to due process and to an impartial jury?

4. The state constitutional right to a jury trial is violated when an accused person is forced to exhaust peremptory challenges to remove a biased juror, after

the trial judge erroneously denies a challenge for cause. In this case, the trial judge incorrectly denied three challenges for cause, and Mr. Woodward was forced to exhaust his peremptory challenges removing two of the three biased jurors; the third remained on the jury. Did the trial judge violate Mr. Woodward's state constitutional right to a fair and impartial jury trial?

5. Multiple current offenses comprise the same criminal conduct for purposes of calculating the offender score if they occurred at the same time and place and if they were committed for the same overall criminal purpose against the same victim. In this case, Mr. Woodward was convicted of raping and molesting A.G., but the prosecution did not allege or prove that the offenses occurred on different occasions. Did the trial judge abuse his discretion by scoring counts two and three separately?

6. An accused person has a right to have the jury determine every fact which increases the penalty for a crime. In this case, the jury did not find that counts two and three occurred at separate times and places. Did the sentencing court violate Mr. Woodward's state and federal rights to a jury trial and to due process by scoring counts two and three as separate criminal conduct?

D. STATEMENT OF THE CASE

Mr. Woodward suffers several severe health problems, including arthritis, a stoke, blood disease and hepatitis C, the last of which required two separate and very difficult treatment periods. RP 901, 976, 996-1002, 1057-1060. His illnesses and treatment affected his ability to hold jobs, to use his hands, to perform sexually, and to participate in family activities. RP 976-977, 988, 996-1002, 1030, 1057-1061, 1071.

Mr. Woodward and his wife Amanda Woodward effectively raised her grandchildren, A.G. and H.G. (born in 1994 and 1996,

respectfully). RP 805-806, 817, 835-837, 882, 896, 926-927, 966, 1054. As A.G. got older, she wanted more independence. Mr. Woodward build her a bedroom in an outbuilding near the house. RP 807, 839. A.G. was allowed to have friends stay with her there. RP 845-846, 893-894, 985, 1070. When she was sixteen, she wanted her boyfriend to stay with her. The Woodwards said no, which angered A.G. RP 879, 1015, 1051-1052. She moved to her aunt's house, where her boyfriend joined her. RP 779, 804, 809, 819, 917.

When Mrs. Woodward asked here to come home, A.G. said she would not because Mr. Woodward had molested her. RP 858-860, 1023. A police report was made in which A.G. alleged that Mr. Woodward molested H.G. as well, and H.G. eventually supported the story. RP 767-781, 877-879.

The state charged Mr. Woodward with two counts of Child Molestation in the First Degree and one count of Rape of a Child in the First Degree. CP 21-23.

The case went to trial, and the jury was unable to reach a verdict. RP 40, 564-568. The court declared a mistrial and the state tried Mr. Woodward again. RP 567, 570-1163.

During jury selection for the retrial, the court conducted individual questioning for several jurors, including Jurors 3, 26, and 27. Juror 3 and his wife and her younger sister had both been "forcibly raped" by their mother's boyfriend years earlier.

RP 601. He said that they had made a report and pursued prosecution, but that the offender "got off." Because of this, Juror 3 said that he might have difficulty being fair. He said that even though his wife is 51 now, she still has problems stemming from the offense. RP 601.

Juror 27, was a teacher; he knew the alleged victims as well as several other people on the witness list. RP 679-681. He told the court that he was the IEP manager for one of the witnesses, and that serving as a juror would be "awkward." RP 679-682. The prosecuting attorney noted that he and his brother had grown up with the children of this particular teacher. RP 681. The teacher claimed that he could be fair. RP 680-681.

Juror 26 said that she might be too sympathetic to be an appropriate juror, and that she was not sure that she could check her sympathy at the door. RP 707. Upon further questioning, she said she did not believe that she could put her sympathy aside. RP 707-708. She continued to equivocate when questioned by the prosecutor. RP 709-710. In the end, after repeatedly expressing how uncertain she was, she said only "I think I can do that" when asked if she could decide the case based on the evidence and the law. RP 710.

The defense moved to excuse all three of these jurors for cause, but the court denied the motions. RP 607-608, 682-683, 711. Mr. Woodward used his peremptory challenges to remove Jurors

3 and 26, and exhausted his challenges without removing Juror 27. RP 742-745, Jury Roll Call, Supp. CP; Jury Panel, Supp. CP.

At trial, Mr. and Mr. Woodward both testified about his medical conditions, the treatments he had undergone, and the effects on his life. RP 963-1095.

During closing argument, the prosecutor made the following argument to the jury -- See Appendix B (RP 1133-1134). This time, the jury convicted Mr. Woodward of all three charges. CP 6.

The court's instructions did not require the jury to find that counts two and three (related to A.G.) occurred at separate times or different places. Court's Instructions, Supp. CP. Nor did they return special verdicts on this issue. Verdict Forms, Supp. CP.

At sentencing, the parties agreed that Mr. Woodward had no criminal history. RP 1169. Without argument or comment, the court found that counts two and three were not the same course of conduct, and scored the two offenses separately. CP 6-7. The court determined that Mr. Woodward had an offender score of six, and sentenced him to life in prison, with a minimum term of 130 months (counts one and two) and 216 months (count three). CP 8.

Mr. Woodward appealed, and the Court of Appeals affirmed his convictions, but vacated his sentence and remanded for resentencing under the sentencing scheme in effect prior to

September 1, 2001. Id. Appendix A.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. THE PROSECUTOR COMMITTED MISCONDUCT THAT WAS FLAGRANT AND ILL-INTENTIONED.

A. Standard of Review

Prosecutorial misconduct requires reversal if there is a substantial likelihood that it affected the verdict. In re Glasmann, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). Even absent an objection, error may be reviewed if it is "so flagrant and ill intentioned that an instruction would not have cured the prejudice." Id. at 704.

Furthermore, prosecutorial misconduct may be argued for the first time on appeal if it is a manifest error that affects constitutional right. Where prosecutorial misconduct infringes a constitutional right, prejudice is presumed. State v. Toth, 152 Wn.App. 610, 615, 217 P.3d 377 (2009). The burden is on the state to show harmlessness beyond a reasonable doubt. State v. Irby, 170 Wn.2d 874, 886, 246 P.3d 796 (2011).

B. The prosecutor improperly shifted and misstated the burden of proof in closing argument.

The state and federal constitutions secure for an accused person the right to a fair trial. Glasmann, at 704; U.S. Const. Amend. 6 & 14; Wash. Const. Article 1, Section 22. Prosecutorial misconduct can deprive an accused person of these rights.

Glasmann, at 704.

A prosecuting attorney commits misconduct by making a closing argument that shifts or misstates the burden of proof. State v. Dixon, 150 Wn.App. 46, 55, 207 P.3d 459 (2009); United States v. Perlaza, 439 F.3d 1149, 1171 (9th Cir. 2006). It is improper even to imply that the defense has a duty to present evidence relating to an element of the charged crime. Toth, at 615. Similarly, "misstating the basis on which a jury can acquit insidiously shifts the requirement that the State prove the defendant's guilt beyond a reasonable doubt." Glasmann, at 704.

In this case, the prosecutor misstated the burden of proof when he told jurors the "instructions tell you both sides ... are entitled to the benefit of the evidence .... I would submit to you that that extends implicitly, if not explicitly in the instructions, to the lack of evidence." RP 1134.

This argument falsely equated a prosecutor's failure to produce evidence with an accused person's failure to produce evidence. This is burden shifting. When the prosecution fails to produce evidence on an element, the result is acquittal; however, when the defense fails to produce evidence, the lack of such evidence does not require conviction.

By linking the improper argument to the lack of medical testimony (regarding the impact of Mr. Woodward's medical conditions and the side effects of his treatment), the prosecutor

suggested that Mr. Woodward was obligated to produce such evidence, and that his failure to do so required conviction in the same way that a failure of the state's proof would require acquittal. These argument improperly shifted and misstated the burden of proof. They are flagrant and ill intentioned, and are presumed prejudicial. Glasmann, at 704; Toth, at 615.

Mr. Woodward's defense rested in part on medical impossibility. By equating the absence of medical evidence of this defense with a failure of proof by the prosecution, the prosecutor violated Mr. Woodward's right to a fair trial. Glasmann, at 704. Accordingly, the convictions must be reversed and the case remanded for a new trial. Id.

2. MR. WOODWARD WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring de novo review. State v. A.N.J., 168 Wn.2d 91, 109, 225 P.3d 956 (2010).

B. An accused person is constitutionally entitled to the effective assistance of counsel.

The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense." U.S. Const. Amend. 6. Likewise, Article I, Section 22 of the Washington Constitution

provides, "In all criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel...."

An appellant claiming ineffective assistance must show (1) that defense counsel's conduct was deficient, falling below an objective standard of reasonableness, and (2) that the deficient performance resulted in prejudice -- "a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed." State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2000)(citing Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

The presumption that defense counsel performed adequately is overcome when there is no conceivable legitimate tactic explaining counsel's performance. Reichenbach, at 130. Further, there must be some indication in the record that counsel was actually pursuing the alleged strategy. See, e.g., State v. Hendrickson, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996)(the state's argument that counsel "made a tactical decision by not objecting to the introduction of evidence of ... prior convictions has no support in the record.").

C. Mr. Woodward was denied the effective assistance of counsel by his attorney's failure to object to repeated instances of prosecutorial misconduct that were flagrant and ill intentioned.

Failure to object to improper closing arguments is objectively unreasonable under most circumstances. Hodge v. Hurley, 426 F.3d

368, 386 (6th Cir. 2005).

Here, defense counsel should have objected to the prosecutor's flagrant and ill-ententioned misconduct. The prohibition against misstating or shifting the burden of proof is well established. By failing to object, counsel's performance thus fell below an objective standard of reasonableness. At a minimum, Mr. Woodward's lawyer should have either requested a sidebar or lodged an objection when the jury left the courtroom. Id.

Furthermore, Mr. Woodward was prejudiced by the error. The prosecutor's improper comments substantially increased the likelihood that jurors would vote guilty based on improper factors. See Glasmann, at 704. The failure to object deprived Mr. Woodward of his 6th & 14th Amendment to the effective assistance of counsel, and contrary to the Court of Appeals decision, Toth is controlling because the State shifted the burden of proof related to facts disproving an element -- and they were not "merely comments on the lack of evidence." Toth, at 615; Hurley, at 386. Accordingly, the convictions must be reversed and the case remanded for a new trial. Id.

3. THE TRIAL JUDGE VIOLATED MR. WOODWARD'S RIGHT TO DUE PROCESS AND HIS RIGHT TO AN IMPARTIAL JURY BY ERRONEOUSLY DENYING THREE CHALLENGES FOR CAUSE.

A. Standard of Review

Constitutional violations are review de novo. Bellevue School Dist. v. E.S., 171 Wn.2d 695, 257 P.3d 570 (2011). A ruling on

a challenge for cause is review for abuse of discretion. State v. Gonzales, 111 Wn.App. 276, 278, 45 P.3d 205 (2002).

B. Mr. Woodward was convicted by a jury that included a biased juror when the trial judge refused to excuse Juror 27 for cause.

A potential juror should be excused for actual bias whenever the juror cannot "try the case impartially and without prejudice to the substantial rights of the party challenging that juror." RCW 4.44.170(2); City of Cheney v. Grunewald, 55 Wn.App. 807, 780 P.2d 1332 (1989). Any doubts regarding bias must be resolved against the juror. United States v. Gonzalez, 214 F.3d 1109, 1114 (9th Cir. 2000); State v. Cho, 108 Wn.App. 315, 329-330, 30 P.3d 496 (2001). Erroneous denial of a challenge for cause requires reversal whenever the biased juror participates in the decision to convict the accused person. U.S. Const. Amend. 6 & 14; State v. Fire, 145 Wn.2d 152, 165, 34 P.3d 1218 (2001).

In this case, Juror 27 knew A.G. because he had her in class. He was the IEP manager for one of the witnesses. In addition, his children had grown up with the prosecutor (and his brother). RP 679-683. Even though Juror 27 did not wish to admit to bias -- he spoke, instead, of "awkwardness" -- these circumstances establish that he should have been excused for cause.

Despite this, the judge refused to excuse Juror 27 for cause. RP 683. Mr. Woodward exhausted his peremptory challenges removing other jurors, and Juror 27 sat on the jury that voted to convict.

This clearly deprived Mr. Woodward of his constitutional right to a fair trial by an impartial jury. Accordingly, his conviction must be reversed and the case remanded for a new trial.

C. The trial judge violated Mr. Woodward's state constitutional right to a jury trial by forcing him to exhaust peremptory challenges to remove biased jurors who should have been excused for cause.

1. Gunwall analysis suggests that the state constitutional right to a jury trial is broader that the corresponding federal right.

As with many other constitutional provisions, the right to a jury trial under the Washington state constitution is broader than the federal right. See, e.g., City of Pasco v. Mace, 98 Wn.2d 87, 97, 653 P.2d 618 (1982); Wash. Const. Article I, Section 21 & 22; State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

Five of the six nonexclusive Gunwall factors favor independent application of Article I, Section 21 and 22 in this case. Other than factor 3 (common law and state constitutional history), the Gunwall factors establish that our state constitution provides greater protections to criminal defendants than does the federal constitution. The substance of the state constitutional protection can be inferred from the long line of case requiring reversal of a conviction whenever an accused person is erroneously forced to exhaust peremptory challenges removing a biased juror. See e.g., State v. Moody, 7 Wash. 395, 35 P. 132 (1893); State v. Rutten, 13 Wash. 203, 43 P. 30 (1895); State v. Stentz, 30 Wash.

134, 70 P. 241 (1902); State v. Muller, 114 Wash. 660, 195 P. 1047 (1921); McMahon v. Carlisle-Pennell Lumber Co., 135 Wash. 27, 236 P. 797 (1925); State v. Patterson, 183 Wash. 239, 48 P.2d 193 (1935); State v. Parnell, 77 Wn.2d 503, 508, 463 P.2d 134 (1969). Applying the reasoning and values set forth in these decisions, a conviction must be reversed whenever the erroneous denial of a challenge for cause forces an accused to exhaust peremptory challenges. Thus, pre-existing state law favors the interpretation urged by Mr. Woodward. Applying the Gunwall factors to this issue, an independent application of the state constitution requires reversal of Mr. Woodward's convictions.

2. The refusal to excuse Jurors 3, 26, and 27 forced Mr. Woodward to exhaust his peremptory challenges.

Here, the trial court should have excused Juror 27 for cause, as previously argued. In addition, the court should have excused Jurors 3 and 26. Juror 3 (whose wife and sister-in-law had been forcibly raped by their mother's boyfriend) was hesitant about saying he could be fair and expressed concern that the charged crimes would be "the more disgusting thing" for him. RP 602. He said that he had "a shiver go up his spine" when he heard the charges, and that he didn't know if he could "stop that or not from happening" during the trial. RP 604. He said he "would try" to be fair, and "that's about as good as you're going to get." RP 604. In light of the similarity between the charged

offenses and the crimes committed against Juror 3's wife and sister-in-law, the trial judge should have excused Juror 3 for cause. This is especially true because Juror 3 expressed an inability to be fair, because the prosecution against his wife's assailant had failed, and in the end Juror 3 was not fully rehabilitated.

Similarly, Juror 26 repeatedly said that she might be unable to set her sympathy aside. RP 707-710. In light of this, the court should have excused her for cause when she (like Juror 3) was able to give only a tepid reassurance. RP 710.

The judge should have excused all three jurors. Grunewald & Cho, supra. The failure to excuse Jurors 3, 26, and 27 forced Mr. Woodward to exhaust his peremptory challenges to remove two of the three jurors. He was therefore unable to use his final peremptory challenge on any of the twelve jurors who were seated on the jury. RP 742-750. This violated his state constitutional rights to a fair trial by an impartial jury. Accordingly, his convictions must be reversed and the case remanded for a new trial.

4. THE TRIAL COURT ABUSED ITS DISCRETION BY SCORING COUNTS TWO AND THREE SEPARATELY INSTEAD OF FINDING THAT THEY COMPRISED THE SAME CRIMINAL CONDUCT.

A. Standard of Review

A sentencing court's "same criminal conduct" determinations will be reversed based on a clear abuse of discretion or misapplication of the law. State v. Hannock, 141 Wn.2d 103, 110,

3 P.3d 733 (2000).

B. Multiple offenses comprise the same criminal conduct if committed at the same time and place, against the same victim, and with the same criminal purpose.

A sentencing court must determine the defendant's offender score pursuant to RCW 9.94A.525. When calculating the offender score, a court must determine how multiple current offenses are to be scored. RCW 9.94A.589(1)(a). The burden is on the state to establish that multiple convictions do not stem from the same criminal conduct. State v. Dolen, 83 Wn.App. 361, 365, 921 P.2d 590 (1996); State v. Jones, 110 Wn.2d 74, 750 P.2d 620 (1988).

Charges of child molestation and child rape against a single victim comprise the same criminal conduct if they are committed during a single incident, where the offender does not take the time to pause and reflect between the one offense and the next. State v. Tili, 139 Wn.2d 107, 119-125, 985 P.2d 365 (1999); see also Dolen, at 364-365, State v. Walden, 69 Wn.App. 183, 188, 847 P.2d 956 (1993); State v. Palmer, 95 Wn.App. 187, 975 P.2d 1038 (1999).

In this case, the prosecutor alleged that Mr. Woodward molested and raped A.G.. CP 21. During trial A.G. was not asked to separate occasions on which she was molested from occasions on which she was raped, and the jury was never instructed to find that counts two and three were "separate and distinct" from each other. RP 835-911. Court's Instructions, Supp. CP. Nor did

the prosecution attempt to prove at sentencing that the two charges stemmed from different incident, or that Mr. Woodward took time to pause and reflect between offenses -- and had the State tried, any finding of separate conduct would have been subject to a challenge under Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). RP 1166-1187.

Accordingly, the evidence was insufficient to establish that the two offenses scored separately under RCW 9.94A.589. The court should have found counts two and three to be the same criminal conduct and scored them as a single offense. RCW 9.94A.589(1)(a). Had the court done so, it would have sentenced Mr. Woodward with an offender score of three, rather than six. Accordingly, his sentence must be vacated and the case remanded for resentencing with an offender score of three.

5. MR. WOODWARD'S SENTENCE WAS IMPOSED IN VIOLATION OF HIS CONSTITUTIONAL RIGHT TO HAVE THE JURY DETERMINE EVERY FACT THAT INCREASED THE PENALTY FOR EACH OFFFENSE.

A. Standard of Review

Constitutional violations are reviewed de novo. E.S., 171 Wn.2d at 702.

B. The trial court imposed a sentence above the statutory maximum without a jury determination beyond a reasonable doubt of the facts used to increase the penalty.

The state and federal constitutions guarantee an accused person the right to due process and the right to a trial by jury. U.S. Const. Amend. 6 & 14; Wash. Const. Article I, Sections 3,

21 & 22. Any fact which increases the penalty for a crime must be found by a jury by proof beyond a reasonable doubt. Blakely v. Washington, supra. In Washington, failure to submit such facts to the jury is not subject to harmless error analysis. State v. Recuenco, 163 Wn.2d 428, 440, 180 P.3d 1276 (2008).

1. The trial court should have scored counts two and three as the same criminal conduct, absent a jury finding that the two offenses were separate and distinct.

Where the state proves that multiple current offenses are separate and distinct from each other, they score separately, resulting in a higher offender score and longer standard range sentence. RCW 9.94A.589.

In this case, the prosecution offered evidence of multiple incidents of child molestation and rape to prove counts two and three. CP 21-23; RP 758-962, 1119-1135, 1148-1154. The jury was not required to find that each count involved separate and distinct conduct. Accordingly, the jury was permitted to convict based on a single incident that involved both molestation and rape. Court's Instructions, Supp. CP. In the absence of some showing that the jury convicted based on two separate incidents (such as a special verdict indicating that the two offenses involved different incidents), the jury's verdict did not authorize the court to impose the higher sentence that goes with scoring the offenses separately. Blakely, supra.

The enhanced sentence violated Mr. Woodward's right to a jury trial and to proof beyond a reasonable doubt, under both the state and federal constitutions. Blakely & Recuenco, supra.

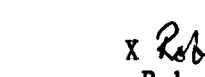
The Court of Appeals opinion that "the same criminal conduct rule ... operates only to decrease the offender score ..." and therefore does not violate Blakely, is misplaced. Its the trial court's "fact finding" that violates Blakely. Whether the penalty is increased or decreased, the trial court is not authorized to increase Mr. Woodward's sentence by finding that the two offenses did not comprise the "same criminal conduct." Without the finding the trial court could not legally increase Mr. Woodward's sentence, and thus a jury determination on the issue was required. This is a very important issue that this Court should decide, because its not the "decrease" in the sentence that violates Blakely, rather its the "factual finding that increases" the sentence. Accordingly, it is Mr. Woodward's position that his sentence must be vacated, and the case remanded for resentencing with an offender score of three, instead of six.

F. CONCLUSION

Based on the foregoing reasons, Mr. Woodward asks this Court to grant review and reverse his convictions and the remaining portion of his sentence related to his offender score and the trial court's erroneous same criminal conduct finding.

DATED this 24th day of February, 2014.

Respectfully Submitted,



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A P P E N D X - A

Court of Appeals Decision
Cause No. 43573-0-II / Filed 2-11-2014

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ROBERT LUCAS WOODWARD, Appellant.	No. 43573-0-II UNPUBLISHED OPINION

PENOYAR, J. — Robert Woodward appeals his convictions and sentence for first degree child molestation and first degree child rape. Woodward argues (1) prosecutorial misconduct denied him a fair trial, (2) he received ineffective assistance of counsel when his trial counsel failed to object to the prosecutor's closing statements, (3) he was convicted by a biased jury, (4) the trial court violated his right to a jury trial by not requiring the jury to make a finding on same criminal conduct, and (5) the trial court should have sentenced him under the sentencing scheme in effect prior to September 1, 2001. We affirm Woodward's convictions, but vacate his sentence and remand for the trial court to sentence him under the sentencing scheme in effect prior to September 1, 2001.

FACTS

A.G. and H.G. began living with their grandmother, Amanda Woodward, and step-grandfather, Woodward, in 1999. A.G. was five years old and H.G. was three years old when they moved in with their grandparents.

In early 2011, A.G. reported to her friend and grandmother that Woodward had molested her and H.G. The State charged Woodward with first degree child molestation of H.G. between January 1, 1999 and August 30, 2008 (count I); first degree child molestation of A.G. between

January 1, 1999 and January 31, 2006 (count II); and first degree rape of a child of A.G. between January 1, 1999 and January 31, 2006 (count III). The jury was unable to reach a verdict in the first trial and the trial court declared a mistrial.

The State retried Woodward in April 2012. During jury selection for the retrial, the trial court denied Woodward's motions to excuse jurors 3, 26, and 27 for cause. Woodward used two of his seven peremptory challenges to excuse jurors 3 and 26, and exhausted his challenges without removing juror 27.

During individual questioning, juror 3 said that when his wife was 12 years old, she and her younger sister were forcibly raped by their mother's boyfriend. He said the boyfriend was not convicted due to issues with evidence, but that his wife still had problems secondary to the incident. When he heard what the charged crime was, juror 3 said a "shiver [went] up [his] spine." IV Report of Proceedings (RP) at 604. He said that "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." IV RP at 602. Despite his wife's experience, juror 3 stated he believed he could "probably" make a fair determination in the case. IV RP at 602. Juror 3 said he would base his decision on the evidence and "[f]rom whatever you give—whatever information you give me . . . and I guess, the Judge would tell me what the law is." IV RP at 606-07.

During group questioning, juror 26 raised her hand when defense counsel asked if anyone thought they were too sympathetic or empathetic. Juror 26 stated she is pretty sympathetic to other people's issues and that she was not sure if she could put her sympathy aside during deliberations. When questioned further by the State, juror 26 said she thought she could base her decision on the evidence and the law, and not let sympathy overcome the evidence or the law.

During individual questioning, juror 27, who had been a teacher for 40 years, said he had A.G. in class one year when he was a substitute teacher. Juror 27 also stated that he knew several of the children on the witness list, and that he was the IEP manager at high school for one of the witnesses. The State's attorney also noted that he grew up with juror 27's children. Other than stating it may be awkward being a juror because he knew some of the witnesses, juror 27 said that having had A.G. in class, knowing some of the witnesses, and his children growing up with the State's counsel would not affect his ability to be fair and impartial.

At trial, both Woodward and his wife testified that Woodward suffered from several medical conditions and had undergone treatment that resulted in Woodward not having any sexual interest and being unable to engage in sexual activity. During the pretrial investigation, however, Woodward's wife told a detective that she and Woodward had a normal, healthy sex life.

During closing argument, the State commented on the lack of medical evidence to support Woodward's and his wife's testimony that Woodward suffered from illnesses that made him incapable of committing the charged crimes. The State said:

> [S]omehow those treatments or illnesses starting in 1999 prevented him from having either the opportunity or the sexual interest to have committed the crimes that he's alleged to have committed.
>
> And yet both parties are entitled to the—you know, your verdict is to be based upon the evidence and lack of evidence. . . . And your instructions tell you that both sides have—are entitled to the benefit of the evidence, regardless of who introduced evidence. I would submit to you that that extends implicitly, if not explicitly in the instructions, to the lack of evidence.
>
> And when 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 . . . the nurse, here's the medical records, something that documents that I have this condition and that it—it has resulted in these effects. . . . 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.

VI RP at 1133-34. Woodward did not object to the State's arguments in closing.

The jury returned guilty verdicts on all three counts. The trial court sentenced Woodward to indeterminate sentencing pursuant to RCW 9.94A.507. The trial court determined Woodward had an offender score of 6 and sentenced him to life in prison, with a minimum term of 130 months on counts I and II and 216 months on count III. Woodward timely appeals.

ANALYSIS

I. PROSECUTORIAL MISCONDUCT

Woodward argues that prosecutorial misconduct denied him a fair trial. Specifically, he argues the State improperly shifted the burden of proof in closing argument by commenting on the lack of medical evidence to support Woodward's defense that he was incapable of committing the charged crimes due to his medical conditions. Woodward also argues his trial counsel was ineffective for failing to object to the prosecutor's statements. Because the prosecutor's statements were not improper, the prosecutor did not commit misconduct and Woodward was not denied effective assistance of counsel.

A. STANDARD OF REVIEW

A defendant who alleges prosecutorial misconduct bears the burden of proving that, in the context of the record and circumstances of the trial, the prosecutor's conduct was both improper and prejudicial. *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). A defendant can establish prejudice by showing a substantial likelihood that the misconduct affected the jury verdict. *Glasmann*, 175 Wn.2d at 704. Where the defendant fails

to object to the prosecutor's improper statements at trial, such failure constitutes a waiver of claims of prosecutorial misconduct unless the prosecutor's statements are so flagrant and ill-intentioned that an instruction would not have cured the prejudice. *Glasmann*, 175 Wn.2d at 704. The focus of this inquiry is more on whether the resulting prejudice could have been cured, rather than the flagrant or ill-intentioned nature of the remarks. *State v. Emery*, 174 Wn.2d 741, 762, 278 P.3d 653 (2012).

In determining whether the misconduct warrants reversal, we consider its prejudicial nature and cumulative effect. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). We review a prosecutor's remarks during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).[1]

B. IMPROPER STATEMENTS

We first consider whether the prosecutor's statements were improper. *Glasmann*, 175 Wn.2d at 704. Here, the State commented on the lack of medical evidence to support Woodward's defense and argued that a reasonable person would have presented such medical evidence. Woodward did not object to these closing statements.

[1] Woodward improperly states that we should apply the constitutional harmless error standard. Our Supreme Court declined to adopt the constitutional harmless error standard in a prosecutorial misconduct case where the appellants contended that it was the appropriate standard because the prosecutor's remarks violated their right to the presumption of innocence and shifted the burden of proof. *Emery*, 174 Wn.2d at 756-58. Here, Woodward argues only that the prosecutor's closing arguments shifted the burden of proof. Accordingly, as the Supreme Court did in *Emery*, we decline to adopt the constitutional harmless error standard here.

A prosecutor has wide latitude to argue reasonable inferences from the evidence; but it is improper for the prosecutor to argue that the burden of proof rests with the defendant. *State v. Thorgerson*, 172 Wn.2d 438, 453, 258 P.3d 43 (2011). A prosecutor may commit misconduct if he mentions in closing argument that the defense failed to present witnesses or if he states that the jury should find the defendant 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) (citing *State v. Jackson*, 150 Wn. App. 877, 885, 209 P.3d 553 (2009)), *review denied*, 176 Wn.2d 1001 (2013). However, "'[t]he mere mention that defense evidence is lacking does not constitute prosecutorial misconduct or shift the burden of proof to the defense.' A prosecutor is entitled to point out a lack of evidentiary support for the defendant's theory of the case." *Sells*, 166 Wn. App. at 930 (alteration in original) (quoting *Jackson*, 150 Wn. App. at 885-86).

In *Jackson*, during closing argument, the prosecutor stated "there was not a single shred of testimony in this case to corroborate [the defendant's girl friend's] story and . . . the jury should compare Jackson's evidence with the State's evidence." *Jackson*, 150 Wn. App. at 885. Because the mere mention that evidence is lacking does not constitute prosecutorial misconduct and because the prosecutor in *Jackson* clearly explained to the jury that the State had the burden of proof, this court held the prosecutor did not commit misconduct. *Jackson*, 150 Wn. App. at 885-86. Similarly, in *Sells*, the defendant was charged with second degree identity theft, and during closing argument the prosecutor commented on the lack of evidence to show that the North Beach School District superintendant's name was not on the visa card the defendant allegedly stole from the school district. *Sells*, 166 Wn. App. at 929-30. Division One of this court held the prosecutor's statement was not improper and did not constitute misconduct. *Sells*, 166 Wn. App. at 929-30.

The prosecutor in this case clearly explained to the jury that the State had the burden of proof: "I represent the prosecution. And the prosecution carries the . . . must meet the burden of proof. We have . . . the burden [of proof.]"[2] VI RP at 1135. The prosecutor did not imply that Woodward was required to present evidence or that the jury should find Woodward guilty based on his decision to present only his and his wife's testimony on his medical conditions. The prosecutor merely commented on the lack of medical evidence to support Woodward's defense theory that he was unable to commit the charged crimes due to his medical conditions and stated that a reasonable person would have presented evidence. The mere mention that defense evidence is lacking does not constitute prosecutorial misconduct or shift the burden of proof to the defense. *Jackson*, 150 Wn. App. at 885-86.

Woodward relies on *State v. Toth*, 152 Wn. App. 610, 217 P.3d 377 (2009), to argue that a prosecutor's comment on the defendant's failure to put forward evidence in support of his defense constitutes prosecutorial misconduct. The defendant in *Toth* was convicted with felony driving under the influence. *Toth*, 152 Wn. App. at 612. The prosecutor stated in closing argument that the defendant failed to present any witness or evidence to corroborate his defense that he was at his brother's house before driving where he claimed he drank only two beers and a sip of whiskey. *Toth*, 152 Wn. App. at 615. The court held the prosecutor committed misconduct because he implied the defendant "had a duty to present evidence by stating that [the defendant] did not produce corroborating evidence by calling specific witnesses to testify" and

[2] The jury instructions also clearly stated that the State had the burden of proof. VI RP at 1115 ("The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.").

that the jury could then improperly infer that the defendant had the burden to prove he was not intoxicated. *Toth*, 152 Wn. App. at 615.

In *Toth*, the prosecutor commented on the defendant's failure to produce evidence regarding a fact question—where the defendant was and how much he drank before driving—and a specific element of the crime—intoxication. Here, the prosecutor merely commented on the lack of evidence to corroborate Woodward's general defense that his medical conditions prevented him from committing the charged crimes. Because the prosecutor's comments during closing argument did not address specific fact questions or elements of the charged crimes in Woodward's case, *Toth* is not controlling and does not support Woodward's prosecutorial misconduct argument.

Further, under the missing witness doctrine, "the defendant's theory of the case is subject to the same scrutiny as the State's."[3] *State v. Montgomery*, 163 Wn.2d 577, 598, 183 P.3d 267 (2008). "The prosecutor may comment on the defendant's failure to call a witness so long as it is clear the defendant was able to produce the witness and the defendant's testimony unequivocally implies the uncalled witness's ability to corroborate his theory of the case." *State v. Contreras*, 57 Wn. App. 471, 476, 788 P.2d 1114 (1990). The defendant is able to produce a witness if "the witness is peculiarly available to the party, i.e., peculiarly within the [defendant's] power to produce." *State v. Cheatam*, 150 Wn.2d 626, 652, 81 P.3d 830 (2003).

[3] As argued by counsel at oral argument, the missing witness doctrine is not directly at issue here because it must have been "raised early enough in the [trial] proceedings to provide an opportunity for rebuttal or explanation" of why the witness was not called. *State v. Montgomery*, 163 Wn.2d 577, 599, 183 P.3d 267 (2008). But the doctrine provides a relevant and useful analogy to the prosecutor's comments here.

At trial, Woodward's wife testified that Woodward had seen a doctor regarding his medical conditions that Woodward and his wife claimed prevented Woodward from being able to commit the charged crimes. Any doctor Woodward had seen would have been peculiarly available to Woodward and within his power to produce and likely would have corroborated Woodward's defense. Accordingly, the prosecutor's statements were not improper, especially as a response to the defense Woodward raised, and the prosecutor did not commit misconduct. Because the prosecutor's statements were not improper, Woodward was not denied effective assistance of counsel when his trial counsel failed to object to the prosecutor's statements.

II. IMPARTIAL JURY

Woodward next argues the trial court violated his right to due process and his right to an impartial jury when it improperly denied his challenges to excuse jurors 3, 26, and 27 for cause. Woodward used two of his seven peremptory challenges to excuse jurors 3 and 26, but did not excuse juror 27, who ultimately sat on the jury that convicted him. Thus, Woodward contends that a partial jury convicted him. Because juror 27 was not biased and Woodward used peremptory challenges to excuse jurors 3 and 26, Woodward was not denied his right to an impartial jury.

A. RIGHT TO A FAIR AND UNBIASED JURY

The right to a jury trial includes the right to a fair and impartial jury. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22; *City of Cheney v. Grunewald*, 55 Wn. App. 807, 810, 780 P.2d 1332 (1989). The Washington Constitution provides no greater protection than the federal right to an impartial jury. *State v. Fire*, 145 Wn.2d 152, 163, 34 P.3d 1218 (2001). A prospective juror must be excused for cause if the trial court determines the juror is actually or impliedly biased. RCW 4.44.170, .180, .190. Here, Woodward alleges juror 27 was actually biased,

defined as "the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging." RCW 4.44.170(2).

We review the trial court's decision to dismiss a juror to determine if its decision is manifestly unreasonable or based on untenable grounds or reasons. *State v. Grenning*, 142 Wn. App. 518, 540, 174 P.3d 706 (2008); *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). Because the trial court is able to observe a juror, the trial court is in the best position to evaluate a juror's candor and the juror's ability to deliberate. *State v. Elmore*, 155 Wn.2d 758, 769 n.3, 123 P.3d 72 (2005). We must accept the trial court's decision regarding the credibility of the prospective juror and any other persons involved, as well as the trial court's choice of reasonable inferences. *Ottis v. Stevenson-Carson Sch. Dist. No. 303*, 61 Wn. App. 747, 756, 812 P.2d 133 (1991).

Applying these principles to the present case, we hold that the trial court did not err by denying Woodward's challenge for actual bias—in other words, we defer to the trial court's factual determination that juror 27's state of mind was such that he could fairly and impartially try the case. Juror 27's acting as A.G.'s substitute teacher one year during his 40 year teaching career, being acquainted with one of the State's witnesses, and his children having grown up with the prosecutor was sufficient to support a reasonable inference that his state of mind was such that he could not try the case fairly and impartially. On the other hand, juror 27's responses to various questions, including his testimony that he could set aside his prior associations and render a fair decision, supported a reasonable and competing inference that he could deliberate fairly and impartially. *See* RCW 4.44.190. Because the evidence supporting each inference was

such that a reasonable person could adopt either one, the choice of inferences was for the trial court, and it acted within its discretion by finding that juror 27's state of mind did not constitute actual bias. We do not disturb the trial court's decision on appeal. Because juror 27 was not biased, Woodward was not convicted by a partial jury.

B. WOODWARD'S FOR-CAUSE CHALLENGES

Woodward argues that the trial court violated his due process rights by forcing him to exhaust peremptory challenges to remove biased jurors who should have been excused for cause.

The right to peremptory challenges, however, is a statutory right, not a constitutional right. *Fire*, 145 Wn.2d at 167-68 (Alexander, J., concurring); *see also Ross v. Oklahoma*, 487 U.S. 81, 88, 108 S. Ct. 2273, 101 L. Ed. 2d 80 (1988) (Although the right to a jury trial is constitutional, peremptory challenges are statutory in nature.). If a defendant corrects a trial court's error of not excusing a juror for cause by using a peremptory challenge, and he "exhausts his peremptory challenges before the completion of jury selection, and is subsequently convicted by a jury on which no biased juror sat, he has not demonstrated prejudice, and reversal of his conviction is not warranted." *Fire*, 145 Wn.2d at 165. Accordingly, the forced use of a peremptory challenge is merely an exercise of a challenge, not its deprivation or loss. *Fire*, 145 Wn.2d at 162-63. Thus, using a peremptory challenge to create an impartial jury does not violate a defendant's due process rights. *Fire*, 145 Wn.2d at 162 (quoting *State v. Roberts*, 142 Wn.2d 471, 518, 14 P.3d 717 (2000)).

The trial court denied Woodward's challenges for cause to jurors 3 and 26, which resulted in Woodward using two of his seven peremptory challenges to excuse jurors 3 and 26. Even if Woodward could establish that the trial court erroneously denied his motions to excuse the two jurors, he would still be unable to establish a constitutional violation. Because

peremptory challenges are a statutory right and Woodward has failed to show he was prejudiced where no biased juror sat on his panel, the trial court did not violate Woodward's right to an impartial jury.

III. SENTENCING

A. SAME CRIMINAL CONDUCT

Woodward argues the trial court violated his constitutional right to a jury trial by not submitting the issue of same criminal conduct to the jury.[4] Because the sentencing court may properly decide the issue of same criminal conduct, the trial court did not err by not submitting the same criminal conduct issue to the jury.

Crimes constitute the "[s]ame criminal conduct" for sentencing purposes when they "require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a). A defendant has the right to have any fact that increases the penalty for a crime beyond the prescribed statutory maximum submitted to the jury and proved beyond a reasonable doubt. *Blakely v. Washington*, 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)). Because the "same criminal conduct" rule is an exception to the rule that all convictions count separately for purposes of computing the offender score, a finding of same criminal conduct can operate only to *decrease* the offender score and the otherwise applicable sentencing range. RCW 9.94A.525(5)(a); *In re Pers. Restraint of Markel*, 154 Wn.2d

[4] Woodward further argues that the trial court erred when it failed to find that counts II and III constituted the same criminal conduct. Woodward, however, did not raise this issue at the trial court and thus has waived the right to appeal it. *Jackson*, 150 Wn. App. at 892 (quoting *In re Pers. Restraint of Shale*, 160 Wn.2d 489, 496, 158 P.3d 588 (2007) ("holding that issue waived when the defendant 'failed to ask the court to make a discretionary call of any factual dispute regarding the issue of same criminal conduct and he did not contest the issue at the trial level'")).

262, 274, 111 P.3d 249 (2005). Therefore, a trial court does not violate *Blakely* when it addresses the same criminal conduct rule because that finding can only serve to decrease the defendant's possible sentence. *See Markel*, 154 Wn.2d at 274. Accordingly, the trial court did not err by not submitting the issue of same criminal conduct to the jury.

B. SENTENCING SCHEME

Woodward contends that the trial court should have sentenced him under RCW 9.94A.120, the sentencing scheme in effect prior to September 1, 2001. The State concedes this argument. We agree.

The State charged Woodward with crimes occurring between January 1, 1999 through January 31, 2006 and August 30, 2008. The legislature amended the sentencing scheme under which Woodward was sentenced on September 1, 2001.[5] The State presented evidence that Woodward committed the charged crimes throughout the charging period, including before the sentencing statute amendments in 2001. A jury convicted Woodward on all three counts without specifying whether Woodward committed the acts before or after the effective date of the sentencing statute amendments; nor was the jury required to specify when the charged crimes occurred.

When the sentence for a crime is increased during the period within which the crime was allegedly committed, and the evidence presented at trial indicates the crime was committed

[5] The legislature amended the sex offender sentencing scheme on September 1, 2001 to require the trial court to impose the statutory maximum for a sex offense and set a minimum release date within the standard range. LAWS OF 2001, 2nd sp. session, ch. 12, § 303. Under the former sex offender sentencing scheme, the trial court determined sentences within a standard range in accordance with the general sentencing scheme. Former RCW 9.94A.120(1) (2000). The trial court could also determine whether treatment and community custody were an appropriate option for the defendant. Former RCW 9.94A.120(8).

before the increase went into effect, the lesser sentence must be imposed. *State v. Parker*, 132 Wn.2d 182, 191-92, 937 P.2d 575 (1997).

We affirm Woodward's convictions, but vacate his sentence and remand for resentencing under the sentencing scheme in effect prior to September 1, 2001.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Penoyar, J.

We concur:

Maxa, J.

Lee, J.

A P P E N D X - B

Verbatim Report of Proceedings
State's Closing Argument, Pgs. 1133-1134

Somehow those treatments or illnesses starting in 1999 prevented him from having either the opportunity or the sexual interest to have committed the crimes that he's alleged to have committed. And yet both parties are entitled to the -- you know, your verdict is to be based upon the evidence and lack of evidence. If after a full and fair consideration of the case, based on the evidence and lack of evidence that you have, you have an abiding belief -- belief in the truth of the charge, then your are satisfied beyond a reasonable doubt. And your instructions tell you that both sides have -- are entitled to the benefit of the evidence, regardless of who introduced evidence. I would submit to you that that extends implicitly, if not explicitly in the instructions, to the lack of evidence.

And when 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 evidenc, here's the doctor, 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 line in this case.

RP 1133-1134.

February 24, 2014

TO: Clerk of the Court
Washington State Supreme Court
Temple of Justice
P.O. Box 40929
Olympia, WA 98504-0929

And to: David Ponzoha, Court Clerk,
Washington State Court of Appeals, Div-II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

Re: FILING PETITION FOR REVIEW
State v. Robert Lucas Woodward / COA No. 43573-0-II

Dear Clerk:

Enclosed for filing please find the following document:

1. PETITION FOR REVIEW w/Appendix A & B.

The Respondent is the Mason County Prosecuting Attorney's Office:

Tim Higgs, DPA, WSBA25919
Mason County Prosecuting Attorney's Office
521 N. Fourth Street
P.O. Box 639
Shelton, WA 98584

Thank you for your time and kind attention concerning this matter.

Sincerely,

X Robert L Woodward
Robert Lucas Woodward DOC357466
Airway Heights Corrections Center
P.O. Box 2049
Airway Heights, WA 99001-2049

cc: File