No. 91401-0

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

RAYMOND REYNOLDSON

Petitioner

APPEAL FROM DIVISION II
OF THE COURT OF APPEALS
#44710-0-II

PETITION FOR REVIEW

BRETT A. PURTZER
WSB #17283

HESTER LAW GROUP, INC., P.S.
Attorneys for Appellant
1008 South Yakima Avenue, Suite 302
Tacoma, Washington 98405
(253) 272-2157

Table of Contents

TABLE OF AUTHORITIES

Cases

Rules

Constitutional Provisions

I. IDENTITY OF PETITIONER

Raymond Reynoldson, petitioner, respectfully requests that this court accept review of the Court of Appeals decision in case number 44710-0-II terminating review designated in Part II of this petition.

II. COURT OF APPEALS DECISION

Mr. Reynoldson respectfully requests that this Court review the Court of Appeals' decision, affirming his conviction and denying his relief premised on prosecutorial misconduct, ineffective assistance of counsel, a public trial right violation and juror misconduct.

A copy of the decision from the Court of Appeals, Division II, terminating review which was filed on February 10, 2015 is attached as Exhibit "A".

III. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals err in affirming the court's decision that multiple instances of prosecutorial misconduct did not warrant a new trial?

2. Did the Court of Appeals err when it determined that Mr. Reynoldson received effective assistance of counsel?

3. Did the Court of Appeals err when it affirmed the court's decision that a side-bar conference without any subsequent explanation of what was discussed during the side-bar did not result in a public trial right violation?

4. Did juror misconduct occur when the jurors were permitted to rely on extraneous information to convict Mr. Reynoldson?

IV. STATEMENT OF THE CASE

On March 15, 2006, Mr. Reynoldson, Appellant herein, was charged by way of information with one count of kidnapping in the first degree, one count of attempted rape in the first degree, and one count of assault in the second degree. CP 1-2. Trial commenced and Mr. Reynoldson was found guilty as charged on October 1, 2010. 10/1/10 RP 4-5, CP 75-82. The jury also found that counts I and II were committed with sexual motivation. 10/1/10 RP 5, CP 83-84.

At trial, the state contended Mr. Reynoldson picked up a prostitute, D.M., and, after paying her $50.00 for oral and vaginal sex, kidnapped, raped and assaulted her. RP (9/29/10) 1043-1092. During trial, D.M. admitted she began smoking crack and taking heroin in 1995. RP (9/22/10) 721–722. She also began prostituting herself to pay for the drugs. Id. at 723. According to D.M. she completed substance abuse treatment in 1999 and has "been clean ever since." Id. at 722. Despite that sworn statement, at Mr. Reynoldson's trial, D.M. testified that on March 17, 2000 she was working as a prostitute, had a crack pipe in her pocket, and was high on heroin when she was picked up by Mr. Reynoldson by the McDonald's on 6th Ave in Tacoma. RP 727 –737. She later admitted during cross-examination that she was still using drugs after treatment in 1999. RP 795.

As it related to the incident with Mr. Reynoldson, D.M. admitted her memory was "cloudy." Id. at 737-738. She admitted smoking crack makes a person paranoid, but denied she was smoking crack – despite the fact that she was carrying a crack pipe. Id. at 795-796. She told police she was "hitchhiking" on the corner of 6th and Tacoma when she was picked up. Id. at 796. She told police that after being picked up, Mr. Reynoldson asked her if she would mind if they stopped at his house to pick something up. Id. at 798. At trial, she admitted that statement was untruthful. Id. Following the alleged incident she made a hand-written statement to police. Within the statement she stated that she entered Mr. Reynoldson's house through the back door. Id. At trial she denied making the statement until confronted with it. Id. As it related to her written statement, D.M. stated, "I will be honest this was fabricated...," and "Okay, but it is not true. Everything was all garbled." Id. at 800; 801. She also told police that as soon as she entered the house, Mr. Reynoldson walked her to the bedroom and threw her down on to the bed. Id at 801. She admitted at trial that statement was untruthful. She told police that she worked for Multicare, but that statement was untruthful as well. Id. at 801. D.M. testified extensively about her nipples being twisted but, just an hour later, when examined by a sexual assault nurse, she never mentioned her nipples being twisted. Id. at 756, 757, 758, 759.

During cross-examination, D.M. was asked if she went into any other rooms in the house. Id. at 803. She said no. Id. Then the following exchange took place:

Question:	Isn't it true that you used the bathroom that night?
Answer:	Oh, yeah. I got a washcloth.
Question:	You actually asked Mr. Reynoldson where the bathroom was; isn't that correct?
Answer:	Yes. I forgot about that. That's true.
Question:	You also asked him for a washcloth; isn't that correct?
Answer:	Yes.

Id. at 804.

Despite all of D.M's untruthful statements, 10 years later, at Mr. Reynoldson's trial, a jury convicted Mr. Reynoldson of kidnapping, rape and assault.

Because of the following errors that occurred at trial, Mr. Reynoldson respectfully urges this Court to accept review.

A. Prosecutorial Misconduct/Ineffective Assistance of Counsel

During closing and rebuttal argument, the prosecutor made multiple inappropriate remarks (that were not objected to) including:

- "I would like to go back through at least we are all on the same page on what it is that *the State believes* that the information that was elicited from these witnesses." RP (9/29/10) 1044.

- "He tries to pull her back into the house. And *thank God* for the neighbor Deborah Tarnecki." RP (9/29/10) 1056.

- "She [the alleged victim] *told the truth*." RP (9/29/10) 1063.

- "She [the alleged victim] *told the truth* as she told you the events that took place on that day while she was seated in that box for you to be able to witness and see how her demeanor as she described those events to you." RP (9/29/10) 1064.

- "So the defendant is guilty – *we believe* that we have proven each of these elements beyond a reasonable doubt." RP (9/29/10) 1084.

- "At a minimum the rape in the – the Attempted Rape in the Third Degree, but *we believe* that we have proven the Attempted Rape in the First Degree." Id.

- "Once you do, *we believe* that you should be or should have an abiding belief in the truth of the charge." RP (9/29/10) 1088.

- "What I would submit to you is that when [the alleged victim] testified to you, *she was honest*." RP (9/29/10) 1089.

- "She [police officer] got up there and *looked honest*." RP (9/29/10) 1090.

- "These [the state's witnesses] are *credible people*." RP (9/29/10) 1091.

- "[The alleged victim] *can be believed*." RP (9/29/10) 1123.

- "She [the alleged victim] didn't come in here with any false pretenses. *She told you like it was*."

RP (9/29/10) 1125.

B. Public Trial Violation

During the state's closing argument, the prosecutor stopped her argument and asked, "Your Honor, can I address the court for just a moment?" The judge responded, "at sidebar?" to which the prosecutor said "yes." The record reflects a sidebar conference occurred at that point; what was discussed was never revealed. RP (9/29/10) 1053; see also RP (9/29/10) 1128.

C. Juror Misconduct

The jury was polled after the verdict and all jurors confirmed the verdict. RP 10/1/2010 at 6. But, minutes later, juror Linda Ortiz called the judge's judicial assistant and complained that she believed the verdict was erroneous; that she felt browbeat and coerced by the other jurors to return the guilty verdict. CP at 346. Importantly, within Ms. Ortiz's affidavit, she explained statements made by jurors surrounding Mr. Reynoldson's prior crimes and the need for him to be "locked up." Specifically, in her declaration, Ms. Ortiz stated:

> There was discussion between several jurors who opined about how many other times Mr. Reynoldson may have done this and gotten away with it. There also was reference to the necessity of his being locked up.

CP at 342.

No evidence of Mr. Reynoldson's "prior crimes" was introduced as evidence in his trial. See RP's generally.

On November 10, 2010, the trial court ordered a new trial pursuant to CrR 7.5, finding that the juror committed misconduct when she lied

during the verdict poll. CP at 360. The state appealed this finding on November 10, 2010. CP at 362. In a published opinion filed May 30, 2012, the Court of Appeals found that the trial court erred when it considered the juror's affidavit. CP at 373 – 381. The Court stated that:

> Therefore, the sole question before us is whether we may consider the juror's statements in her affidavit that she lied when she was polled.

CP at 376.

The Court of Appeals reversed the trial court's grant of a new trial and remanded for reinstatement of the verdict. CP at 381. Mr. Reynoldson was thereafter sentenced to life in prison as a persistent offender pursuant to RCW 9.94A.570. See Judgment and Sentence; CP at 398-411.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. Why review should be accepted.

Petitioner respectfully requests that this Court accept review of this case as it concerns significant questions of law under the Constitution of the State of Washington and the United States Constitution, and because it involves an issue of substantial public interest that should be determined by the Supreme Court pursuant to RAP 13.4(b)(3), (4). In particular, the Court of Appeals' decision ignores the prosecutor's misconduct, holding in this Court's recent decision in State v. Walker, No 89830-8 (Jan 22, 2015) as well as the public trial right mandate enunciated in State v. Wise, Wn. 2d. _____, 288 P.3d 1113 (2012) and subsequent decisions.

B. Argument

1. Mr. Reynoldson was denied a fair trial because the prosecutor committed misconduct on twelve separate occasions.

The cumulative effect of errors occurring at trial may support the grant of a new trial, even if none of the errors standing alone would justify a new trial. State v. Mark, 71 Wn.2d 295, 301, 427 P.2d 1008 (1967). Prosecutorial misconduct denies a defendant the right to a fair trial and necessitates a new trial if there is a substantial likelihood that the comments affected the verdict. State v. Echevarria, 71 Wn. App. 595, 597, 860 P.2d 420 (1993). If the misconduct implicates the constitutional rights of the defendant, however, reversal is required unless the error is harmless beyond a reasonable doubt. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). Even in the absence of an objection by the defense, reversal is still required if the remarks were so flagrant or ill-intentioned that no curative instruction could have obviated the prejudice. Echevarria, 71 Wn. App. at 597. A defendant claiming prosecutorial misconduct must establish the impropriety of the state's comments and their prejudicial effect. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006).

It is well established that "the prosecutor has a special obligation to avoid 'improper suggestions, insinuations, and especially assertions of personal knowledge.'" United States v. Roberts, 618 F.2d 530, 533 (9th Cir. 1980)(*quoting* Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629 (1935)). See also, State v. Walker, No. 89830-8 (Jan. 22, 2015). It is improper for a prosecutor to personally vouch for or against a witness's

credibility for truthfulness. State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). Indeed numerous Washington cases have found misconduct where the prosecutor improperly vouched for a witness or made an explicit statement of personal opinion as to a witness's credibility. See, e.g., State v. Allen, 161 Wn.App. 727, 746, 255 P.3d 784, *review granted*, 172 Wn.2d 1014 (2011); State v. Horton, 116 Wn.App. 909, 921, 68 P.3d 1145 (2003).

Further, where a prosecutor explicitly or implicitly communicates his or her personal knowledge about the underlying facts of a case, he or she will be deemed to have vouched for or against the credibility of a witness. United States v. Edwards, 154 F.3d 915, 921 (9th Cir. 1998). Assertions of personal knowledge run afoul of the advocate – witness rule, which prohibits attorneys from testifying in cases they are litigating. Id.; see also, RPC 3.7 cmt. 1 (recognizing that "[c]ombining the roles of advocate and witness can prejudice the tribunal and the opposing party"). Lawyers are not permitted to impart to the jury personal knowledge about an issue in the case under the guise of either direct or cross examination – or during argument – when such information is not otherwise admissible in evidence. State v. Denton, 58 Wn.App. 251, 257, 792 P.2d 537 (1990)(*citing* State v. Yoakum, 37 Wn.2d 137, 222 P.2d 181 (1950)).

Here, during closing argument and rebuttal, the prosecutor made several inappropriate remarks such as:

- "I would like to go back through at least we are all on the same page on what it is that *the State believes* that the information that was elicited from these witnesses." RP (9/29/10) 1044.

- "He tries to pull her back into the house. And *thank God* for the neighbor Deborah Tarnecki." RP (9/29/10) 1056.

- "She [the alleged victim] *told the truth.*" RP (9/29/10) 1063.

- "She [the alleged victim] *told the truth* as she told you the events that took place on that day while she was seated in that box for you to be able to witness and see how her demeanor as she described those events to you." RP (9/29/10) 1064.

- "So the defendant is guilty – *we believe* that we have proven each of these elements beyond a reasonable doubt." RP (9/29/10) 1084.

- "At a minimum the rape in the – the Attempted Rape in the Third Degree, but *we believe* that we have proven the Attempted Rape in the First Degree." Id.

- "Once you do, *we believe* that you should be or should have an abiding belief in the truth of the charge." RP (9/29/10) 1088.

- "What I would submit to you is that when Donna [the alleged victim] testified to you, *she was honest.*" RP (9/29/10) 1089.

- "She [police officer] got up there and *looked honest.*" RP (9/29/10) 1090.

- "These [the state's witnesses] are *credible people.*" RP (9/29/10) 1091.

- "Donna [the alleged victim] *can be believed.*" RP (9/29/10) 1123.

- "She [the alleged victim] didn't come in here with any false pretenses. *She told you like it was.*"

RP (9/29/10) 1125.

The State's numerous claims about what it "believes" – especially relating to the credibility of the alleged victim and the ultimate issue – were improper. It is well-established that a prosecutor simply cannot vouch for or against a witness's credibility. When this happened here, on no less than twelve occasions between closing and rebuttal closing, it is impossible to conclude that the prosecutor's conduct did not influence the jury. This is especially true where the entirety of the state's case hinged on the credibility of the alleged victim, D.M. By vouching for D.M.'s credibility, the prosecutor represented herself as a witness. Such conduct is improper.

2. *Mr. Reynoldson's counsel was ineffective for failing to object to the numerous instances of prosecutorial misconduct.*

To show ineffective assistance of counsel, a defendant must show that (1) his or her lawyer's representation was deficient and (2) the deficient performance prejudiced him/her. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Representation is deficient if it falls below an objective standard of reasonableness based on consideration of all the circumstances. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Prejudice occurs when but for counsel's deficient performance, the proceeding's result would have been different. McFarland, 127 Wn.2d at 335. If a party fails to satisfy one prong, this Court need not consider the other. State v. Foster, 140 Wn. App. 266, 273, 166 P.3d 726, *review denied*, 162 Wn.2d 1007 (2007).

Courts are highly deferential to counsel's performance, that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. Strickland, 466 U.S. at 689. Tactical decisions cannot form the basis for a claim of ineffective assistance of counsel. McFarland, 127 Wn.2d at 336.

Here, as noted above, the prosecutor made numerous statements vouching for the credibility of the alleged victim and other witnesses. Defense counsel never objected to a single remark. In a trial where credibility of the witnesses was paramount, to allow the state to effectively testify that the alleged victim was a credible witness was to allow the jury to be swayed in favor of believing her. Such inaction by defense counsel is not a trial tactic.

The second prong of the Strickland test requires the defendant to show prejudice – i.e. that the result of the trial would have been different but for the ineffective representation. In this case the credibility of the witnesses was the determinative factor. No physical evidence or eyewitness testimony existed except for the alleged victim to support the charges and her testimony was replete with inconsistencies. Therefore, without independent evidence of guilt, the verdict would have been different had counsel objected to the multiple acts of misconduct.

3. Mr. Reynoldson's public trial right was violated when a conference occurred at sidebar without any follow-up record discussing what occurred during that instance of courtroom closure.

Both Article I § 22 of the Washington State Constitution and the Sixth Amendment to the United States Constitution guarantee a criminal defendant a "public trial by an impartial jury." Additionally, Article I § 10 of the Washington Constitution provides that "[j]ustice in all cases shall be administered openly," thereby protecting the defendant and the public's interest in open, accessible proceedings. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982). "The public trial right is not absolute but may be overcome to serve an overriding interest based on findings that closure is essential and narrowly tailored to preserve higher values. Waller v. Georgia, 467 U.S. 39, 45, 104 S.Ct. 2210 (1984).

Accordingly, the public trial right can only be overcome if courtroom closure is necessary to serve "an overriding interest based on findings that closure is essential and narrowly tailored to preserve higher values." State v. Lormor, No.84319-8, 2011 WL 2899578, at 4 (Wash. July 21, 2011). Specifically, when seeking to conduct a portion of a trial outside the presence of the public, the Court is required to consider the following factors on the record:

1. The proponent of closure must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a 'serious and imminent threat' to that right;

2. Anyone present when the closure motion is made must be given an opportunity to object to the closure;

3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests;

4. The court must weigh the competing interests of the proponent of closure and the public; and

5. The order must be no broader in its application or duration than necessary to serve its purpose.

State v. Bone-Club, 128 Wn.2d 254, 257, 906 P.2d 325 (1995).

Because courtroom closures affect the very integrity of a proceeding, in instances where Article I § 10 is violated, the only remedy is a new, open trial – regardless of whether the complaining party can show prejudice. In re Det. Of D.F.F., 172 Wn.2d 37, 42, 256 P.3d 357 (2011). This is because "a courtroom closure bears the hallmarks of structural error. Id (*citing* State v. Momah, 167 Wn.2d 140, 148, 217 P.3d 321 (2009)

In In re Det. of D.F.F., 172 Wn.2d 37, 256 P.3d 357 (2011), this Court held that the defendant's involuntary commitment proceedings were unconstitutional because the judge closed the proceedings to the public. Id. The Court reversed the finding that the defendant should be committed and held that she was entitled to a new set of proceedings. Id. In reaching the decision, the Court cited the five "Bone-Club factors" and stated:

> This is not the first case where this court has granted a new trial when a trial court closed proceedings without considering the five requirements to permit an exception to the open administration of justice right under article I, section 10 or the right to a public trial under article I, section 22. *See* Easterling, 157 Wn.2d at 171 ("We conclude that the trial court committed an error of constitutional magnitude when it directed that the courtroom be fully closed to Easterling and to the public during the joint trial without first

> satisfying the requirements set forth in [*Bone-Club*, 129 Wn.2d at 258-59]. The trial court's failure to engage in the required case-by-case weighing of the competing interests prior to directing the courtroom be closed rendered unfair all subsequent trial proceedings."); *State v. Brightman*, 155 Wn.2d 506, 509, 122 P.3d 150 (2005) ("[T]he trial court erred when it directed that the courtroom would be closed to spectators during jury selection, without fulfilling the requirements set forth in [Bone-Club]. This error entitles Brightman to a new trial."). This result should be of little surprise. The open administration of justice is fundamental to the operation and legitimacy of the courts and to the protections of all other rights and liberties. *See Easterling*, 157 Wn.2d at 187 (Chambers, J., concurring) (The open administration of justice "is a constitutional obligation of the courts. It is integral to our system of government."). The jurisdiction of the courts may be set forth on paper, but the authority of the courts—like every other branch of government—is derived from the people. The ability to imprison or involuntarily confine a citizen is an awesome power and, as such, is always at risk to be abused—with devastating results. It is a historic trend that continues in many parts of the world today, that individuals who disagree with the powers-that-be are labeled mentally ill and their voices are silenced through involuntarily confinement. But the ratifiers of our constitution guaranteed better. The guaranty of open administration of justice is at the very heart of the fairness and legitimacy of judicial proceedings. The public bears witness and scrutinizes the proceedings, assuring they are fair and proper, that any deprivation of liberty is justified. Through this, citizens are guaranteed the strongest protection against unfair or unlawful confinement by the government—the protection afforded because the public is watching. D.F.F. is entitled to that protection. D.F.F. is entitled to new commitment proceedings.

Id.

Here, the trial court never considered the Bone-Club factors when

addressing the side bar issue. No considerations were made when the sidebar occurred and no explanation or record was made after its conclusion. The trial court was required to make findings if it was going to allow the sidebar, and consider reasonable alternatives to its occurrence. As such, there can be little doubt that the trial court's actions during Mr. Reynoldson's trial were clearly contrary to In re Det. Of D.F.F. - as well as to the long established body of law requiring trials to be public, and grounds for limited closure to be addressed on the record. See State v. Wise, supra. Because no such record exists here, the remedy is a new trial.

4. Where the jurors relied on extraneous information, this Court should reverse Mr. Reynoldson's conviction.

Jury use of extraneous evidence is misconduct entitling a defendant to a new trial if the defendant has been prejudiced. State v. Briggs, 55 Wn.App. 44, 776 P.2d 1347 (1989). The court's inquiry is an objective one. The question is whether the extrinsic evidence could have affected the jury's determination. State v. Caliguri, 99 Wn.2d 501, 664 P.2d 466 (1983) (1983). The court need not delve into the actual affect of the evidence. State v. Jackman, 113 Wn.2d 772, 783 P.2d 580 (1989).

A similar issue presented itself in Jeffries v. Blodgett, 5 F.3d 1180 (9th Cir. 1992). In that case, Jeffries had been convicted of two counts of aggravated first degree murder and sentenced to death. After exhausting Washington State court remedies, Jeffries sought federal habeas relief. One of the issues raised by Jeffries related to the jury's consideration of

extrinsic evidence, specifically relating to his criminal history. The District Court considered the allegation of extrinsic evidence through presentation of affidavits by the defendant, but it did not hold an evidentiary hearing. In Jeffries, the Court concluded that the extrinsic information of the nature alleged to have been communicated, if true, would have had a substantial and injurious affect or influence and remanded the matter to the trial court to conduct an evidentiary hearing to determine the truth of the allegations. On remand, the trial court found jury misconduct. The trial court's findings were appealed and affirmed. See Jeffries v. Wood, 114 F.3d 1484 (9th Cir. 1997).

Here, following trial, Juror Ortiz stated that other jury members were fixated on Mr. Reynoldson's prior crimes. She stated specifically:

> There was discussion between several jurors who opined about how many other times Mr. Reynoldson may have done this and gotten away with it. There also was reference to the necessity of his being locked up.

CP at 342.

She also stated, "[s]ome of the other jurors were so assertive and aggressive that I felt as if I was sitting with a blood-thirsty lynch mob." Id. at 343.

Respectfully, as this Court is aware, Mr. Reynoldson was sentenced to life in prison following these convictions. Such a sentence is only available if the defendant has prior convictions. It appears the jurors became aware of these convictions and relied on them even though juror

Ortiz felt there was reasonable doubt. In accordance with the cases cited above, reversal of Mr. Reynoldson's conviction is appropriate and a new trial should be granted.

VI. CONCLUSION

Based on the arguments, records and files contained herein, Mr. Reynoldson respectfully requests that this court accept review of this matter.

Respectfully submitted this 12th day of March, 2015.

HESTER LAW GROUP, INC., P.S.
Attorneys for Petitioner

By: _____
BRETT A. PURTZER
WSB #17283

CERTIFICATE OF SERVICE

Lee Ann Mathews, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of the petition for review to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

Melody Crick
Deputy Prosecuting Attorney
930 Tacoma Avenue South, #946
Tacoma, WA 98402

Raymond Reynoldson
DOC #981414
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

Signed at Tacoma, Washington, this 12th day of March, 2015.

Lee Ann Mathews

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. RAYMOND SAMUEL REYNOLDSON, Appellant.	No. 44710-0-II UNPUBLISHED OPINION

WORSWICK, J. — Following the State's successful appeal of an order granting a new trial, the trial court sentenced Raymond Reynoldson on his convictions for first degree kidnapping with sexual motivation,[1] first degree attempted rape,[2] and second degree assault with sexual motivation.[3] Reynoldson now appeals, arguing that (1) the trial court violated his public trial rights by holding a sidebar during the State's closing argument, (2) the prosecutor committed misconduct by vouching, (3) trial counsel provided ineffective assistance by failing to object to that vouching, and (4) jurors committed misconduct by considering extraneous information of Reynoldson's prior convictions. We hold that Reynoldson has failed to establish a public trial right violation, has waived his vouching claim, and has failed to meet his burden to show either ineffective assistance of counsel or juror misconduct. Accordingly, we affirm.

---

[1] Former RCW 9A.40.020 (1975); former RCW 9.94A.030(37) (1999).

[2] RCW 9A.44.045; former RCW 9A.28.020 (1994).

[3] RCW 9A.36.021(1)(f); former RCW 9.94A.030(37).

FACTS

A. *The Facts Established by Testimony*

1. *DGM's Testimony of the Night of the Crime*

DGM[4] testified that in 2000, Raymond Reynoldson approached her at a restaurant and solicited oral sex and vaginal intercourse from her in exchange for money. DGM agreed, and Reynoldson and DGM went to Reynoldson's house in his vehicle.

Reynoldson parked the vehicle behind the house. DGM and Reynoldson walked around the house, entered through the house's front door, and went to Reynoldson's bedroom. Inside the bedroom, Reynoldson unsuccessfully attempted to perform vaginal intercourse with DGM. Then, Reynoldson, against DGM's will, forcefully flipped her over on her stomach, ripped off her shirt and bra, bound her hands behind her back with her bra, tied her feet up with her socks, gagged her mouth with a bandana secured by a sock tied around her head, and twisted her nipples. Reynoldson again attempted to penetrate her, but failed.

Reynoldson then left the bed and walked out of the room. While Reynoldson was walking around the house, DGM managed to untie her feet. Still naked, and with her arms and mouth bound, DGM jumped out of a closed window by breaking the glass with the force of her body. DGM testified she felt she had to jump out of the closed window because she was afraid of being killed or tortured.

[4] This opinion uses initials to protect the victim's privacy.

Reynoldson, who was also naked, jumped out of the window and began punching DGM and attempting to drag her back to the house. A nearby neighbor, Deborah Tarnecki, ran over to help DGM. This act caused Reynoldson to flee around the house. DGM testified: "Thank God the neighbors across the street were having a party. They heard the crash, the window crash." Verbatim Report of Proceedings (VRP) at 764; *see also* VRP at 765 (DGM testifying: "[T]hank God the neighbors were having a party.").

2. *Tarnecki's Testimony of the Night of the Crime*

Tarnecki testified she was in her home when she heard glass break, and exited her home to investigate. Tarnecki saw DGM outside of the window, naked, in a fetal position, with her mouth gagged and hands tied. She saw Reynoldson on top of DGM, attempting to drag her back into the house. While Reynoldson was attempting to drag DGM back to the house, she was clinging to the grass and making muffled screams through the gag.[5]

When Tarnecki ran over to DGM, Reynoldson ran into the house. Tarnecki took DGM back to her nearby home. DGM was terrified, and in a state of such extreme shock that she could not walk without assistance. DGM related to Tarnecki that

> [Reynoldson] was going to get a knife and finish her off. She said, he was torturing me, twisting my nipples. She said, I was in so much pain. She said that she heard the knives jingling in the kitchen, so she knew that she was going to die. She knew that she had to jump out that window for her life. She kept saying over and over, he was going to kill me. He is going to kill me. She thought that he was still going to come after her because she was so scared. He had been torture raping her.

VRP at 920. Tarnecki called 911.

[5] Tarnecki identified the man that she saw attempting to drag DGM back into the house as Reynoldson. But Tarnecki also testified that "[Reynoldson] does not look the same at all [as] what he looked [like around the time of the crime], but I can see the resemblance." VRP at 903.

3. *Detective Kimberly Sheskey's Testimony of Her Investigation*

Detective Kimberly Sheskey responded to the 911 call and met DGM at Tarnecki's home. Detective Sheskey testified that DGM was visibly upset and had a sock tied around her neck. Detective Sheskey went with DGM to the hospital, where medical professionals examined DGM and forensics technicians took photographs of her injuries. Detective Sheskey was present for this, and stated in her police report that DGM had "cuts, scratches, [and] bruises on her face, legs, arms, and back." VRP at 831.

At the hospital on the night of the crime, DGM made statements to Detective Sheskey that were inconsistent with her trial testimony, including statements that DGM met Reynoldson while hitchhiking for a ride to the Tacoma Dome, that Reynoldson took an unexpected detour to the house, that Reynoldson twisted her arm behind her back immediately upon exiting Reynoldson's vehicle, that they entered the house through the back door, and that Reynoldson threw DGM down on the bed. At trial, DGM testified that these inconsistent statements were lies that she told Detective Sheskey because she was afraid of being arrested for prostitution.

After DGM's exam, Sheskey searched Reynoldson's house and found a condom in the bedroom. At trial, the parties stipulated that Reynoldson's DNA (deoxyribonucleic acid) was on the condom's interior and that DGM's DNA was on the condom's exterior.

4. *Tonya Bloomstine's Testimony of Her Medical Examination*

Nurse Tonya Bloomstine was one of the medical professionals who examined DGM on the night of the crime. Bloomstine testified that a physical exam confirmed that DGM had multiple abrasions and contusions to her lower back, mid-back, and extremities. DGM was

tearful and crying during the exam. DGM told Bloomstine that her arms, legs, and mouth had been bound and that she had been sexually assaulted.

5. *DGM's Testimony as to Her Injuries*

DGM provided further testimony describing the injuries she suffered from the crime. DGM's testimony was supported by the forensic technicians' pictures of her injuries. The evidence showed that Reynoldson bruised DGM's eye and face by punching her, bruised her neck by choking her, scratched her by attempting to drag her back into the house after she had jumped out of the window, and bruised her wrists by binding her.

B. *Reynoldson's Extradition, Charges, and Trial*

Reynoldson left Washington State after the crime in 2000 and the State could not find him again until 2005, when the State discovered he was incarcerated in Oregon on unrelated charges. In 2006, the State charged Reynoldson with first degree kidnapping with sexual motivation, first degree attempted rape, and second degree assault with sexual motivation. But because the State was unable to extradite Reynoldson until 2009, he was not tried until 2010.

The trial court granted the State's motion to exclude witnesses from the courtroom. The State elicited the testimony discussed above. Reynoldson rested without presenting any testimony.

C. *The State's Closing Argument*

1. *Sidebar*

In the middle of the State's closing argument, the State requested and was granted a sidebar. The actual sidebar was not transcribed:

> [The State]: Your Honor, can I address the court for just a moment?
> [Trial Court]: At sidebar?
> [The State]: Yes.
> [Trial Court]: Okay.
>
> (Sidebar)
>
> [Trial Court]: Okay, Ms. Ahrens, please continue.
> [The State to the Jury]: As I'm talking, ladies and gentlemen, I want you to feel free to, just like throughout the trial, that if you feel like you may be nodding off or if you are uncomfortable, you get up and move around and stretch your legs, if you need to. I have a lot to talk about. I don't want to bore you, but there are things that I want to make sure that I want to cover. If for some reason you need to kind of jolt your bodies, please feel free to do that.

VRP at 1053.

2. *Alleged Vouching*

In its closing argument, the State made the following comments that Reynoldson alleges constituted vouching:

> [1] You were paying attention to what each of these witnesses testified to. I would like to go back through at least we are all on the same page on what it is that *the State believes* that the information that was elicited from these witnesses.
>
> . . . .
>
> [2] He tries to pull her back into the house. And *thank God* for the neighbor Deborah Tarnecki. Deborah told you that she was seated in her home. She was with her family. They heard this glass breaking.
>
> . . . .
>
> [3] When she went in, she told those detectives exactly what it is that she told you. She didn't keep along with that story that she initially told Officer Sheskey about how it was that she and the defendant made contact. *She told the truth.*
>
> . . . .
>
> [4] *She told the truth* as she told you the events that took place on that day while she was seated in that box for you to be able to witness and see how her demeanor as she described those events to you.
>
> . . . .
>
> [5] So the defendant is guilty—*we believe* that we have proven each of these elements beyond a reasonable doubt. At a minimum the rape in the—the Attempted

> Rape in the Third Degree, but *we believe* that we have proven the Attempted Rape in the First Degree.
>
> . . . .
>
> [6] You take that information and decide whether or not you think these people are credible. Are they believable people? Does this make sense? Does it fit the elements of the crimes that are charged. Once you do, *we believe* that you should be or should have an abiding belief in the truth of the charge. You should be satisfied beyond a reasonable doubt as to the offenses charged against the defendant.
>
> . . . .
>
> [7] What I would submit to you is that *when Donna testified to you, she was honest.* She told you about her lifestyle then. She told you about her life now, how that has changed. She told you that she initially lied and why she lied. She told you what she had agreed upon with the defendant even though it is, clearly, embarrassing for her to tell you that.
>
> . . . .
>
> [8] You heard from Officer Sheskey. Officer Sheskey told you, look, I don't recall everything that happened in this case. She needed her report to refresh her recollection about a lot of things that happened. *She didn't get up there and try to make up things. She got up there and looked honest.* She tried to look through her report to answer any questions that were asked of her about the evidence that was found there.
>
> . . . .
>
> [9] You heard from Tonya Bloomstine, who treated [DGM]; from Brett Reynoldson, who was a bit reluctant to tell you that his father was actually staying in the home, but did; former Detective Ed Baker came in to talk to you; and you also heard from Detective Miller about his actions. Each one of these people provided you with the information that they had so that you can make a decision. *These are credible people.* The testimony that they gave is in line with the evidence that you have—has been submitted to you.

VRP at 1044, 1056, 1063, 1064, 1084, 1088-91 (emphasis added). In its rebuttal to Reynoldson's closing, the State stated the following:

> [10] [DGM] *can be believed.* She told you that she lied. She came in here and told you that. She told you the reasons why. She told you that she was ashamed. She told you to the best of her ability her memory, what it was that took place.
>
> . . . .
>
> [11] She told you what she did and what she didn't do that day. She just left it up to you to decide what happened. She didn't come in here with any false pretenses. *She told you like it was.*

VRP at 1123-25 (emphasis added). Of these eleven comments, trial counsel objected to only comment [3], objecting that the prosecutor was commenting on matters not in evidence, rather than vouching. The trial court overruled trial counsel's objection, stating:

> Well, the jury has been instructed that the lawyers' remarks, statements, and arguments are not the evidence and not the law. They are the deciders of that. I will let them make that decision.

VRP at 1063-64.

D. *Conviction, Juror's Allegations of Jury Misconduct, and Order Granting a New Trial*

The jury found Reynoldson guilty of first degree kidnapping, first degree attempted rape, and second degree assault. By special verdict form, the jury found that Reynoldson committed first degree kidnapping and second degree assault with sexual motivation. The jury was polled and each juror affirmed that he or she agreed with the verdict, and that the verdict was the jury's unanimous decision.

After the verdict, one of the jurors filed an affidavit alleging many irregularities in the jury verdict process, including the following:

> There was discussion between several jurors who opined about how many other times Mr. Reynoldson may have done this and gotten away with it. There also was reference to the necessity of his being locked up.[6]
>
> . . . .
>
> When the jury was polled I lied when I affirmed my "guilty" vote because I was convinced that the judge would send us all back into that room together and I would be subjected to further verbal abuse and ridicule.

[6] Reynoldson's criminal history included four prior convictions, including two prior second degree rape (former RCW 9A.44.050 (1997)) convictions and one prior second degree kidnapping (former RCW 9A.40.030 (1975)) conviction. These offenses were not mentioned to the jury during trial.

Clerk's Papers (CP) at 342.

Based on this affidavit, Reynoldson moved for a new trial, arguing that he was deprived of his right to juror unanimity because the averring juror did not actually agree with the jury's verdict, and because the jurors committed misconduct by erroneously considering extrinsic evidence. The trial court entered an order granting a mistrial, ruling that the verdict was not unanimous because the juror committed misconduct by lying when polled by the trial court. The trial court's order did not address whether the jurors committed misconduct by considering extrinsic evidence.

E. *Appeal, Reversal of Order Granting a New Trial, Reinstatement of Verdict, and Sentencing*

The State appealed the trial court's order granting a new trial and we reversed that order in *State v. Reynoldson*, 168 Wn. App. 543, 545, 277 P.3d 700 (2012). When deciding *Reynoldson*, we first discussed the scope of our review:

> Here, the trial court found that the juror committed misconduct when she lied during the jury poll. As Reynoldson notes, the trial court did not make findings of fact on or rule on any other aspect of the juror's declaration. Therefore, the sole question before us is whether we may consider the juror's statements in her affidavit that she lied when she was polled.

Reynoldson, 168 Wn. App. at 548 (internal citations omitted). We then reversed the trial court on this narrow issue, holding courts cannot consider a juror's statements that she lied when polled because such statements go to the reasoning behind her vote to convict which "clearly inheres in the verdict and is not subject to the trial court's later review." 168 Wn. App. at 552. We did not consider whether the jury committed misconduct by considering extrinsic evidence.

The trial court reinstated the jury's verdict without considering the other issues in Reynoldson's original motion for a new trial. The trial court imposed a sentence of life imprisonment without the possibility of parole pursuant to the persistent offender accountability act.[7] Reynoldson appeals.

ANALYSIS

I. PUBLIC TRIAL RIGHT

Reynoldson argues the sidebar conference during the prosecutor's closing argument violated his public trial right. We disagree.

Whether a violation of the public trial right has occurred is a question of law we review de novo. *State v. Smith*, 181 Wn.2d. 508, 513, 334 P.3d 1049 (2014). Our state constitution and the United States Constitution guarantee both criminal defendants and the public the right to open and public trials. U.S. CONST. amend. VI; WASH. CONST. art. I, §§ 10, 22.

When analyzing whether a public trial right violation occurred, we now employ a three-step framework adopted in *Smith*, which asks:

> (1) Does the proceeding at issue implicate the public trial right? (2) If so, was the proceeding closed? And (3) If so, was the closure justified?

181 Wn.2d at 521. Where we hold the answer to the first step's question is negative, we need not reach the subsequent steps. 181 Wn.2d at 519.

In *Smith*, our Supreme Court held that under the first step, "reasonable and traditional" sidebars do not implicate the public trial right. 181 Wn.2d at 521. And the court cautioned:

[7] Former RCW 9.94A.120 (1999).

> [M]erely characterizing something as a "sidebar" does not make it so. To avoid implicating the public trial right, sidebars must be limited in content to their traditional subject areas, should be done only to avoid disrupting the flow of trial, and must either be on the record or be promptly memorialized in the record.

181 Wn.2d at 516 n.10.

Here, the conversation at sidebar, occurring in the middle of the prosecutor's closing argument, was not memorialized in the record.[8] The record reveals that the prosecutor requested a sidebar for "just a moment," the request was granted, a sidebar occurred, and the prosecutor then asked the jury to maintain their concentration during his closing argument. *See* VRP at 1053. This appears to be the State's response to a juror's inattentiveness.

The sidebar at issue here was clearly done to avoid disrupting the flow of trial, and although neither conducted nor memorialized on the record, appears to be limited to a traditional area: seeking the trial court's assistance in maintaining juror attentiveness during closing arguments. We hold that a sidebar of the type conducted here did not implicate Reynoldson's public trial right. Because the answer to the first step's question is negative, we do not consider the other two steps. 181 Wn.2d at 519.

II. PROSECUTORIAL MISCONDUCT: VOUCHING

We next consider Reynoldson's argument that the prosecutor committed misconduct by vouching. Reynoldson failed to preserve this argument for review.

[8] We note that to raise a public trial right claim for the first time on appeal, a defendant bears the burden of establishing a manifest error by providing a record showing that a closure occurred. *State v. Koss*, 181 Wn.2d 493, 502-03, 334 P.3d 1042 (2014); *see* RAP 2.5(a)(3). Because the sidebar was not memorialized, Reynoldson failed to provide a record showing that a closure occurred in this case. *See Koss*, 181 Wn.2d at 502-03.

Prosecuting attorneys are quasi-judicial officers charged with the duty of ensuring that a defendant receives a fair trial. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). Prosecutorial misconduct violates that duty and can constitute reversible error. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P .2d 1213 (1984); *see Smith v. Phillips*, 455 U.S. 209, 219, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982). A prosecutor commits misconduct by personally vouching for a witness's credibility. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). We will reverse a conviction when the defendant has met his burden of establishing (1) the State acted improperly and (2) the State's improper act prejudiced the defendant. *State v. Emery*, 174 Wn.2d 741, 756, 278 P.3d 653 (2012).

But a defendant who fails to object to the State's improper act at trial waives any error, unless the act was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011). In making that determination, we "focus less on whether the prosecutor's misconduct was flagrant or ill-intentioned and more on whether the resulting prejudice could have been cured." *Emery*, 174 Wn.2d at 762. Here, Reynoldson objected to only one of the statements, asserting the prosecutor argued facts not in evidence. He did not lodge any objection based on the rule against vouching. Because Reynoldson did not object to any vouching, and because we focus on whether the resulting prejudice could have been cured, we consider what would have happened had Reynoldson objected to vouching. *See* 174 Wn.2d at 762-63.

Here, had Reynoldson objected to the prosecutor's vouching, the trial court could have cured any prejudice resulting from the prosecutor's statements by giving the jury an instruction

directing them to disregard the prosecutor's remarks as to the witnesses' credibility. *See In re Det. of McGary*, 175 Wn. App. 328, 343, 306 P.3d 1005, *review denied*, 178 Wn.2d 1020 (2013); *State v. Eastabrook*, 58 Wn. App. 805, 817, 795 P.2d 151 (1990). Thus, because the resulting prejudice could have been cured had he objected, Reynoldson waived his claim that the State violated his right to a fair trial by vouching for the witnesses. *See Thorgerson*, 172 Wn.2d at 443.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Reynoldson argues that he received ineffective assistance of counsel when trial counsel failed to object to the State's vouching. We disagree.

Whether a defendant received ineffective assistance of counsel is a mixed question of law and fact, reviewed de novo. *In re Pers. Restraint of Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001). In reviewing claims of ineffective assistance, we begin with a strong presumption of counsel's effectiveness. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

To establish ineffective assistance of counsel, a defendant must satisfy the two-pronged test announced in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). First, the defendant must show that counsel's performance was deficient, meaning that it fell below an objective standard of reasonableness under all circumstances. 109 Wn.2d at 225-26. If the defendant bases his ineffective assistance of counsel claim on trial counsel's failure to object, the defendant must show that the objection would likely have succeeded. *State v. Gerdts*, 136 Wn. App. 720, 727, 150 P.3d 627 (2007).

Second, the defendant must show the deficient performance prejudiced the defendant's case. *Thomas*, 109 Wn.2d at 225-26. Prejudice occurs if, taking all circumstances into account, there is a reasonable probability that the result of the proceeding would have been different if that deficient performance had not occurred. 109 Wn.2d at 226. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. A failure to satisfy either prong is fatal to an ineffective assistance of counsel claim. 466 U.S. at 700.

As discussed below, six of the prosecutor's statements were not vouching, and the remaining six statements caused Reynoldson no prejudice. Trial counsel was not deficient for not objecting to statements [1], [2], [5], [7], and [10] because an objection to these statements would not have succeeded, and statements [3], [4], [6], [8], [9], and [11] did not cause prejudice because, taking all circumstances into account, trial counsel's failure to object to these statements does not undermine confidence in the outcome of Reynoldson's trial.

A. *Statements [1], [2], [5], [7], and [10]: No Deficiency*

Whether a witness has testified truthfully is for the jury to determine. *State v. Ish*, 170 Wn.2d 189, 196, 241 P.3d 389 (2010) (plurality opinion) (citing *United States v. Brooks*, 508 F.3d 1205, 1210 (9th Cir. 2007)). "It is improper for a prosecutor personally to vouch for the credibility of a witness." *Brett*, 126 Wn.2d at 175. Improper vouching generally occurs if the prosecutor expresses her personal belief as to the witness's credibility or indicates that evidence not presented at trial supports the witness's testimony. *Thorgerson*, 172 Wn.2d at 443.

But the prosecutor "has wide latitude in closing argument to draw reasonable inferences from the evidence and may freely comment on witness credibility based on the evidence." *State v. Lewis*, 156 Wn. App. 230, 240, 233 P.3d 891 (2010). The prosecutor has especially wide latitude when rebutting an issue the defendant raised in closing argument. 156 Wn. App. at 240. Accordingly, closing argument does not constitute improper vouching for witness credibility unless it is clear that the prosecutor is not arguing an inference from the evidence but, instead, is expressing a personal opinion about witness credibility. *State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008). Trial counsel was not deficient for failing to object to statements [1], [2], [5], [7], and [10] because they did not constitute vouching.

> [1] You were paying attention to what each of these witnesses testified to. I would like to go back through at least we are all on the same page on what it is that *the State believes* that the information that was elicited from these witnesses.

VRP at 1044 (emphasis added). In this statement, the State informed the jury that it was about to state the information that it believed the witnesses had provided. This was not expressing a personal opinion about a witness's credibility, but rather was arguing that the jury may infer certain information from the witnesses' testimony. Thus, because the prosecutor was not expressing a personal opinion about witness credibility, statement [1] was not vouching.

> [2] He tries to pull her back into the house. And *thank God* for the neighbor Deborah Tarnecki. Deborah told you that she was seated in her home. She was with her family. They heard this glass breaking.

VRP at 1056 (emphasis added). In this statement, the prosecutor was referencing DGM's testimony, in which she thanked God that neighbors were present to assist her after she had thrown herself through a window. This was not a statement of personal opinion as to DGM's or

Tarnecki's credibility, but rather was a reference to DGM's testimony at trial. Because the prosecutor was not expressing a personal opinion about witness credibility, the statement was not vouching.

> [5] So the defendant is guilty—*we believe* that we have proven each of these elements beyond a reasonable doubt. At a minimum the rape in the—the Attempted Rape in the Third Degree, but *we believe* that we have proven the Attempted Rape in the First Degree.

VRP at 1084 (emphasis added). In this statement, the prosecutor was not expressing a personal opinion as to the credibility of a witness. Rather, the prosecutor was arguing that the jury could infer the State had met its burden to prove the crime beyond a reasonable doubt from the evidence. Thus, because the prosecutor was not expressing a personal opinion about witness credibility, statement [5] was not vouching.

> [7] What I would submit to you is that *when [DGM] testified to you, she was honest.* She told you about her lifestyle then. She told you about her life now, how that has changed. She told you that she initially lied and why she lied. She told you what she had agreed upon with the defendant even though it is, clearly, embarrassing for her to tell you that.

VRP at 1089 (emphasis added). In this statement, the prosecutor stated that she *submitted to the jury* that DGM was honest when she testified to the jury. This is not the prosecutor's personal opinion as to the witness's credibility, but rather an argument that the jury could infer DGM's credibility from DGM's testimony. Thus, because the prosecutor was not expressing a personal opinion about witness credibility, statement [7] was not vouching.

> [10] [DGM] *can be believed.* She told you that she lied. She came in here and told you that. She told you the reasons why. She told you that she was ashamed. She told you to the best of her ability her memory, what it was that took place.

VRP at 1056 (emphasis added). In this statement, the prosecutor did not state a personal opinion that DGM must be believed, but rather argued that the jury could infer DGM's believability from DGM's testimony. Thus, because the prosecutor was not expressing a personal opinion about witness credibility, statement [10] was not vouching.

Because statements [1], [2], [5], [7], and [10] did not constitute vouching, they did not constitute prosecutorial misconduct. Thus, any objection trial counsel may have made to the State's comment would not have succeeded, and trial counsel's performance was not deficient. Accordingly, Reynoldson has failed to meet his burden to show ineffective assistance of counsel regarding these statements.

B. *Statements [3], [4], [6], [8], [9], and [11]: No Prejudice*

We assume without deciding that trial counsel's failure to object to statements [3], [4], [6], [8], [9], and [11] constituted deficient performance. The State arguably vouched for the credibility of witnesses, as well as for the truth of the charges. In fact, statements [8] and [9] plainly were improper vouching. But taking all circumstances and evidence into account, Reynoldson cannot establish prejudice because this deficiency was not sufficient to undermine confidence in the outcome of his trial.

The parties stipulated that the condom found at the house shortly after the crime had Reynoldson's DNA on the interior and DGM's DNA on the exterior. This establishes that Reynoldson and DGM were together in the bedroom.

DGM testified that while her hands were still tied behind her back and her mouth was still gagged, she jumped through a closed window, breaking the glass. DGM testified that Reynoldson jumped out of the window after her, punched her, and attempted to drag her back into the house against her will. DGM's testimony is supported by Tarnecki's testimony. Tarnecki testified that she heard the glass break, ran outside of her home, and saw DGM outside of the window, naked, in a fetal position, with her mouth gagged and her hands tied. Tarnecki testified that she saw Reynoldson attempt to grab DGM and force her back into the house, and that DGM was outside the window, giving muffled screams through the gag and clinging to the grass to prevent Reynoldson from dragging her back into the house.

DGM described her injuries in detail, including scratches and bruises Reynoldson caused her. This testimony is supported by forensic technicians' photographs of those injuries, as well as the testimony of Detective Sheskey and Bloomstine.

DGM testified she felt she had to jump out of the closed window because she was afraid of being killed or tortured. DGM's mental state was supported by Tarnecki, Bloomstine, and Detective Sheskey, who all testified that DGM was emotionally upset after the alleged crime. Tarnecki testified to DGM's fears that Reynoldson was going to assault and rape her. Bloomstine and Tarnecki both testified that DGM claimed to have been sexually assaulted shortly after the crime.

Taking all circumstances into account, counsel's failure to object does not undermine confidence in the outcome of Reynoldson's trial. Thus, because Reynoldson has failed to

establish prejudice with these statements, he has failed to establish ineffective assistance of counsel.

IV. JUROR MISCONDUCT

Reynoldson argues that the jury committed misconduct by considering extrinsic evidence of his prior convictions. The State argues that the law of the case doctrine precludes consideration of Reynoldson's argument because we have already held that the trial court erred by granting a mistrial based on jury misconduct. The law of the case doctrine does not preclude consideration of Reynoldson's claim, but Reynoldson has failed to meet his burden of showing juror misconduct.

A. *Law of the Case Doctrine*

Under the law of the case doctrine, we generally adhere to decisions declaring the applicable law in previous appeals of the same case, and refuse to consider issues that were decided, or could have been decided if raised, in a prior appeal. RAP 2.5(c)(2); *Folsom v. County of Spokane*, 111 Wn.2d 256, 263, 759 P.2d 1196 (1988).

In *Reynoldson*, the only question before us was whether courts could consider a juror's statement in her affidavit that she lied when polled. 168 Wn. App. at 544. We held that because this juror's statement necessarily went to the juror's mental processes leading to her decision, courts could not consider it. 168 Wn. App. at 544.

Reynoldson now argues that the jury considered extrinsic evidence. Because this argument raises an issue concerning the possible introduction of extrinsic evidence, rather than

the juror's internal mental processes, it raises an issue we did not consider in *Reynoldson*, and we consider the issue here.

B. *Consideration on the Merits*

Reynoldson argues that the jury committed misconduct by considering extrinsic evidence of his prior convictions in reaching its verdict. We disagree.[9]

A jury's consideration of extrinsic evidence in its deliberations constitutes misconduct and can be grounds for a new trial. *State v. Balisok*, 123 Wn.2d 114, 118, 866 P.2d 631 (1994). Extrinsic evidence is evidence that was not subject to objection, cross-examination, explanation, or rebuttal at trial. 123 Wn.2d at 118. But "[n]either parties nor judges may inquire into the internal processes through which the jury reaches its verdict." *State v. Linton*, 156 Wn.2d 777, 787, 132 P.3d 127 (2006).

"The party alleging juror misconduct has the burden to show that misconduct occurred." *State v. Earl*, 142 Wn. App. 768, 774, 177 P.3d 132 (2008). "A strong, affirmative showing of misconduct is necessary in order to overcome the policy favoring stable and certain verdicts and the secret, frank and free discussion of the evidence by the jury." *Balisok*, 123 Wn.2d at 117-18.

Here, the juror's affidavit stated only that the jurors "opined about how many other times Mr. Reynoldson may have done this and gotten away with it." CP at 342. This presents

[9] We generally review a trial court's investigation of juror misconduct for abuse of discretion. *State v. Earl*, 142 Wn. App. 768, 774, 177 P.3d 132 (2008). But here, the trial court did not resolve this issue because it granted a new trial on a different basis. Thus, we review this issue de novo.

evidence that the jurors *speculated* that Reynoldson may have committed similar offenses in the past, but presents no evidence that jurors had knowledge of or considered Reynoldson's *actual* past offenses. No other evidence in the record suggests that the jury knew or considered Reynoldson's actual past offenses. Likewise, we should not inquire into the jury's internal thought processes. *Linton*, 156 Wn.2d at 787. Thus, we hold that Reynoldson has failed to meet his burden to show that juror misconduct by consideration of extrinsic evidence actually occurred.

We hold that Reynoldson has failed to establish a public trial right violation, has waived his vouching claim, and has failed to meet his burden to show either ineffective assistance of counsel or juror misconduct. Accordingly, we affirm.

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

Worswick, J.

We concur:

Bjorgen, A.C.J.

Bjorgen, A.C.J.

Melnick, J.

Melnick, J.

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Thursday, March 12, 2015 3:55 PM
To: 'Lee Ann'
Subject: RE: Raymond Reynoldson

Received 3/12/2015.

From: Lee Ann [mailto:LeeAnn@hesterlawgroup.com]
Sent: Thursday, March 12, 2015 3:54 PM
To: OFFICE RECEPTIONIST, CLERK
Subject: Raymond Reynoldson

Greetings, attached please find for filing the following:

Raymond Reynoldson
COA #44710-0-II
Petition for Review

Brett A. Purtzer
WSB #17283
253 272-2157
1008 S. Yakima, #302
Tacoma, WA 98405

leeann@hesterlawgroup.com

Lee Ann Mathews
Paralegal

Hester Law Group, Inc., P.S.
1008 S. Yakima Avenue, Suite 302
Tacoma, WA 98405
office (253) 272-2157
fax (253) 572-1441
email leeann@hesterlawgroup.com
web www.hesterlawgroup.com