NO. 45195-6

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

EARL BURNS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Jerry Costello

No. 12-1-03109-8

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Should defendant's claim the trial court erroneously refused to strike Juror 22[1] for cause be rejected when it is not properly before the Court because defendant accepted of the jury without exhausting his peremptory challenges and meritless because disqualifying actual bias was never proved?

2. Has defendant failed to prove prosecutorial misconduct in summation since the challenged remarks properly advanced reasonable inferences from evidence adduced at trial?

B. STATEMENT OF THE CASE.

1. Procedure

Appellant, Earl Burns ("defendant") was charged with second degree domestic violence ("DV") assault in Pierce County Cause No. 12-1-03109-8 for inflicting substantial bodily harm on the mother of his children when he viciously attacked her in the family home. CP 1-2; RCW 9A.36.021(1)(a); RCW 10.99.020; 13RP 31-34.

[1] Venireman 22 was seated as Juror 11. He will be addressed as Juror 22 since that is how he is identified in applicable portions of the record. *See e.g.* 12RP at 123, 125.

Voir dire was conducted on the 24th and the 25th of June, 2013. 12RP 3, 107.[2] Five jurors were excused for cause without objection from the State once implacable prejudice was revealed. *See* 12RP 27-33, 54-56, 58-60, 64-67, 109-10.[3] Juror 22 equivocated about his capacity to be impartial. 12 RP 61-62, 67-68, 120-24. Defendant's motion to exclude him for cause was denied. 12RP 121-24.

The State called five witnesses: defendant's victim (Sharpley), Officer Beal, Detective Kothstein, Registered Nurse Stone, and Doctor Esterhay. 13RP 30, 59, 91; 14RP 7, 30. Defendant called his new live-in girlfriend, Megan Rose, as an alibi witness before resting. 14RP 42, 59. The jury was properly instructed on the law. CP 44-66.

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[2]The State adopts defendant's method of citing to the record: 1RP (Oct. 4, 2012); 2RP (Dec. 6, 2012); 3RP (Jan 8, 2013); 4RP (Jan.14, 2013); 5RP (Mar. 7, 2013); 6RP (Mar. 18, 2013); 7RP (Mar. 28, 2013); 8RP (May 8, 2013); 9RP (May 16, 2013); 10RP (Jun. 4/Jun. 11, 2013); 11RP (Jun.24/ Jun. 25, 2013-trial proceedings); 12RP (Jun. 24/Jun.25, 2013-voir dire); 13RP (Jun. 24/Jun.24, 2013-Vol. I); 14 RP (Jun. 26/Jun.27/Aug. 2, 2013-Vol. II).

[3] Juror 12 was excused for cause on the State's motion after stating prior jury experience in a DV murder trial resulted in bias against DV. 12RP 27-29. Juror 30 was excused for cause on the State's motion due to a disclosed inability to extend the presumption of innocence to a DV defendant. 12RP 30-32. Juror 3 was excused for cause on the State's motion based on the revelation he experienced unpredictable episodes of post traumatic stress syndrome associated with a physical assault that would cause him to miss evidence. 12RP 54-56. Juror 23 was excused for cause on defendant's motion without objection from the State upon revealing a perceived inability to be fair and impartial to both sides due to personal experience with domestic violence in the home. 12RP 58-59. Juror 26 was also excused for cause on defendant's motion without objection from the State after revealing prejudice stemming from childhood history with domestic violence. 12RP 64-66. Whereas Juror 9 was excused for cause due to expressed physical inability to serve without pain. 12RP 109-10.

In summation, the prosecutor argued the evidence that proved defendant's guilt beyond a reasonable doubt was not credibly contradicted by the alibi defense presented through Rose's unreliable testimony. *See e.g.*,14RP 82-84, 86-87, 89, 91-92, 111-14. The court overruled objections challenging the evidentiary support for the prosecutor's argument, but sustained an objection to burden shifting with a direction that the challenged remark be rephrased. 14RP 88, 90-91,92, 93-94, 111-14. An accurate statement of the State's burden of proof was then several times repeated by the court and counsel. 14RP 93, 100, 103, 105, 106.

The jury convicted defendant as charged. CP 67-68. He received a standard 20 month sentence in the Department of Corrections. 89, 91. A Notice of Appeal was timely filed. CP 100.

2. Facts

Latonia Sharpley intermittently lived with defendant during their eleven year dating relationship. 13RP 31. She woke to a text message on the morning of June 29, 2012, while sleeping with him in the bedroom of their Tacoma home. 13RP 33-34, 96-97. Defendant disbelieved her claim the text came from a female friend. 13RP 34. He pulled the phone from her hands, took it into the bathroom, and locked the door. 13RP 34-35, 73, 97.

Defendant returned threatening he "would beat [Sharpley's] ass" if she lied about contact with an ex-boyfriend. 13RP 35, 98. After discovering evidence of such contact in the phone, defendant climbed onto the bed where Sharpley was holding the five month old child defendant had in common with Megan Rose. 13RP 35-36; 14RP 50. He moved the child aside, kneeled in front of Sharpley, said: "so you want to be a little whore", then punched her right eye with a closed fist. 13RP 36-37, 73, 98.

Defendant straddled Sharpley as she struggled to cover her face. 13RP 37. He hit her right eye a second time. 13RP 37. Sharpley begged him to stop. 13RP 38. He pinned her arms to the bed, sat down on her chest in a way that prevented her from breathing, then hit her five or six more times on both sides of her now unprotected face. 13RP 38-39, 73, 98-99. She started spitting up blood. 13RP 39, 98. Defendant momentarily relented as he rose, said: "you are not worth it", and kicked her in the back 13RP 39. After washing his hands he said: "bitch, go downstairs and put some ice on your face." 13RP 39, 99. As Sharpley paused to catch her breath, he repeated himself: "[W]hat did I say? I told you to go put some ice on your face. Nothing is wrong with you." 13RP 39. Sharpley "had to feel [her] way downstairs because both ... eyes were swollen shut." 13RP 39.

Sharpley fled out a bathroom window fearing the attack would resume. 13RP 40, 73-74, 99. She found rèfuge among landscapers at a nearby residence. 13RP 40. A neighbor took her inside to call 911. 13RP 40. Defendant left before police arrived. 13RP 42, 74.

Officer Beals contacted Sharpley at the neighbor's house within minutes of receiving the call for help. 13RP 41, 61-62. He noticed "very substantial injury" to her face, which included an eye that was "blackened, swollen, and cut." 13RP 63. Blood flowed from Sharpley's mouth where a tooth was visibly damaged or missing. *Id.* There was blood on her hands as well as in the area around her eye. 13RP 84-85. She looked like someone punched her face. 13RP 85-86; 14RP 20, 39. Beals had an independent recollection of Sharpley's injured eye at trial because he "had[n't] seen a black eye like that in a very, very long time." 13RP 87-89. He was a twenty one year police veteran who had observed the result of numerous assaults.13RP 59, 85. Sharpley was transported to the hospital by ambulance. 13RP 43, 64.

Sharpley described the attack to Beals at the hospital. 13RP 42, 45, 64, 72-74. She was visibly frightened. 13RP 65. Extreme pain and swelling made it difficult for her to reduce a detailed statement to writing. 13RP 46. Photographs of her injuries were taken as evidence; however, the forensics team responsible for generating them did not arrive until the

swelling had subsided in response to treatment. 13RP 47, 66-68 (Ex. 4-6); 14RP 16. Sharpley consistently described the attack to Detective Kothstein in a follow-up interview July 5, 2012. 13RP 97-100. Pain from her injuries persisted. 13RP 100.

Sharpley received emergency care from Registered Nurse Stone. 14RP 15. At that time the vision in Sharpley's right eye was completely obstructed by substantial swelling. 13RP 42-44;14RP 16-17. She cried while describing the attack. 14RP 18. Dr. Esterhay diagnosed Sharpley's condition. 14RP 34. He initially observed a subconjunctival hemorrhage of the left eye (or bleeding in the white part of the eye), a fractured left lower tooth as well as facial swelling. 14RP 35-36. A CAT scan revealed subtle right retrobulbar hemorrhage (or orbital bleeding behind the right eye), which could present as blurred or lost vision. 14RP 36-37. Sharpley received a shot of intramuscular morphine and a Vicodin prescription for pain. 14RP 38. The vision in both her eyes periodically blurred for months. 13RP 43-44. Sharpley did not have the financial means to repair her broken tooth. 13RP 44.

Megan Rose was defendant's alibi witness. 14RP 42. She described herself as his girlfriend and mother of his child. 14RP 42. Their relationship overlapped with defendant's relationship with Sharpley. 14RP 43-44. Before the assault, Rose lived with defendant's mother while he

mostly stayed with Sharpley; after the assault, he moved into an apartment with Rose.14RP 44, 50. Rose admitted defendant gave her the information that led her to believe he was with her when the assault occurred. 14RP 44-46, 53. She never alerted law enforcement to defendant's alibi. 14RP 53-54. And she testified to engaging in behavior at the time of the incident that was inconsistent with her version of events. 14RP 46, 50; *see also* 13RP 35-36; 55-56.

C. ARGUMENT.

1. DEFENDANT'S CLAIM THE TRIAL COURT ERRONEOUSLY REFUSED TO STRIKE JUROR 22 FOR CAUSE IS NOT PROPERLY BEFORE THE COURT BECAUSE HE ACCEPTED THE JURY WITHOUT EXHAUSTING HIS PEREMPTORY CHALLENGES AND MERITLESS BECAUSE DISQUALIFYING ACTUAL BIAS WAS NEVER PROVED.

A defendant is guaranteed the right to a fair and impartial jury under the Sixth Amendment to the United States Constitution and Article I, Section 22 (amend.10) of the Washington Sate Constitution. ***State v. Roberts***, 142 Wn.2d 471, 517, 14 P.3d 713 (2000)(*citing* ***State v. Brett***, 126 Wn.2d 136, 157, 892, P.2d 20 (1995); ***State v. Rupe***, 108 Wn.2d 734, 748, 743 P.2d 210 (1987)). Trial courts safeguard those rights by excusing jurors with proven bias for cause. ***State v. Grenning***, 142 Wn. App. 518, 540, 174 P.3d 706 (2008)(*citing* ***State v. Gosser***, 33 Wn. App. 428, 433,

656 P.2d 514 (1982); RCW 4.44.170). Actual bias is:

> ...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...."

Gosser, 33 Wn. App. at 517-18 (quoting RCW 4.44.170).

A trial court's decision on actual bias is reviewed for an abuse of discretion. ***Ottis v. Stevenson-Carson School Dist. No 303***, 61 Wn. App. 747, 755-57, 812 P.2d 133 (1991) (*citing* ***State v. Noltie***, 116 Wn.2d 831, 840, 809 P.2d 190 (1991); ***Rupe***, 108 Wn.2d at 749; ***Gosser***, 33 Wn.App. at 434)). "[E]vidence [is considered] in the light most favorable to the prevailing party ... which ... means ... the appellate court must accept the trial judge's decision regarding the credibility of the prospective juror ... as well as the trial judge's choice of reasonable inferences." *Id.* A trial court's decision will not be reversed unless it is manifestly unreasonable or based on untenable grounds for untenable reasons. ***State v. Lormor***, 172 Wn.2d 85, 93, 95, 257 P.3d 624 (2011); ***In re Marriage of Littlefield***, 133 Wn.2d 39, 46-7, 940 P.2d 1362(1997); *see also* RCW 2.28.010.

a. <u>This issue is improperly raised for defendant accepted the jury without exhausting his peremptory challenges</u>.

"Under well-settled case law," a defendant may not properly challenge a trial court's refusal to strike a juror for cause when the defendant accepts the jury without exhausting peremptory challenges since

prejudice predicated on the jury's composition cannot be shown. ***State v. Clark***, 143 Wn.2d 731, 762, 24 P.3d 1006 (2001)(*citing* ***State v. Tharp***, 42 Wn.2d 494, 500, 256 P.2d 482 (1952); ***State v. Collins***, 50 Wn.2d 740, 744, 314 P.2d 660 (1957); ***State v. Robinson***, 75 Wn.2d 230, 231-32, 450 P.2d 180 (1969); ***State v. Gentry***, 125 Wn.2d 570, 616, 888 P.2d 1105 (1995); ***State v. Elmore***, 139 Wn.2d 250, 277, 985 P.2d 289 (1999)).

Defendant accepted the jury without exercising his sixth peremptory challenge as to the first twelve jurors or the peremptory challenge reserved for the alternate juror. CP 113; 12RP 124-26. Those tactical decisions were memorialized by his entry of the word "Pass" on the lines designated for peremptory challenges six and seven. CP 113. Since defendant accepted the seated panel with peremptory challenges to spare he cannot make the requisite showing of prejudice.

The well-settled waiver doctrine barring this improperly raised claim was not overruled in ***State v. Fire,*** 145 Wn.2d 152, 34 P.3d 1218 (2001)). ***Fire*** held that:

> "[i]f a defendant through the use of a peremptory challenge elects to cure a trial court's error in not excusing a juror for cause, exhausts his peremptory challenges before the completion of jury selection, and is subsequently convicted by a jury on which no bias juror sat, he has not demonstrated prejudice, and reversal of his conviction is not warranted."

145 Wn.2d at 165. ***Fire*** did not decide the factual scenario before this Court, *i.e.*, a defendant who allowed a juror unsuccessfully challenged for

cause to be empanelled despite the availability of a peremptory challenge that was never used. *See Id.* at 156. Defendant maintains ***Fire*** nevertheless reached beyond its facts to decide issue preservation through the following passage:

> "As the Court indicated, if a defendant believes that a juror should have been excused for cause and the trial court refused his for-cause challenge, he may elect not to use a peremptory challenge and allow the juror to be seated. After conviction, he can win reversal on appeal if he can show that the trial court abused its discretion in denying for-cause challenge."

145 Wn.2d 158 (*citing* ***Martinez-Salazar***, 528 U.S. 304, 315, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000); *but see*, ***Clark***, 143 Wn.2d at 762; ***Tharp***, 42 Wn.2d at 500; ***Collins***, 50 Wn.2d at 744; ***Robinson***, 75 Wn.2d 230, 231-32; ***Gentry***, 125 Wn.2d at 616; ***Elmore***, 139 Wn.2d at 277;

Fire should not be read as impliedly overruling five decades of Washington precedent in *orbiter dictum* that briefly mentioned, without analyzing, a rule-based remedy extended to dissimilarly situated federal defendants given Washington's expressed commitment to *stare decisis*. *See Id.*, *see e.g.*, ***State v. Deer***, 175 Wn.2d 725, 746, 287 P.3d 539 (2012)(*citing* ***Keene v. Edie***, 131 Wn.2d 822, 831, 935 P.2d 588 (1997)(honoring the principal of *stare decisis* "promotes the evenhanded, predictable, and consistent development of legal principals, fosters reliance on judicial decisions, and contributes to the actual and perceived

integrity of the judicial process")(*quoting* ***Payne v. Tennessee***, 501 U.S. 808, 827, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991)).

Fire cursorily referenced issue preservation in the context of challenges for cause as described in ***Martinez-Salazar*** without explaining why a remedy federal courts extend to federal defendants under Federal Rule of Criminal Procedure 24 could, or should, govern the options available to Washington defendants that allow purportedly problematic jurors to be seated without exhausting the peremptory challenges they receive under Washington CrR 6.4(e) to assist in empanelling an impartial jury. *See e.g.*, 145 Wn.2d 159; ***Martinez-Salazar***, 528 U.S. at 312, 315. Since ***Martinez-Salazar's*** cited ruling on issue preservation was not grounded in the federal constitution, it cannot be interpreted as superseding the waiver rule reaffirmed in ***Clark***. *See* 143 Wn.2d at 762. Defendant apparently cites to ***State v. Gonzales***, 111 Wn. App. 276, 280, 45 P.3d 205 (2002) to support the contention that Division I adopted ***Fire's*** *dictum* as a new rule, yet that reading is untenable since ***Gonzales*** never addressed the preclusive effect of a defendant's failure to exhaust peremptory challenges, presumably because that issue was not raised on appeal. *See* ***Schatz v. DSHS***, 178 Wn. App. 16, 40, 314 P.3d 406 (2013)(*citing* ***Cont'l Mut.Sav. Bank v. Elliot***, 166 Wash. 283, 300, 6 P.2d 638 (1932)("An opinion is not authority for what is not mentioned therein ....").

Reading ***Fire*** as overruling precedent controlling issue preservation in Washington is also fundamentally at odds with our judiciary's considered reluctance to allow a *sub silentio* development of state law: "[w]here [the Court] ha[s] expressed a clear rule of law...[it] will not–and should not–over rule it *sub silentio*." ***Lundsford v. Saberhagen Holdings, Inc.,*** 166 Wn.2d 264, 280 P.3d 1092 (2009)("[t]he doctrine of *stare decisis* applies regardless of whether we overrule a prior decision explicitly or implicitly. Therefore, we continue to require 'a clear showing that an established rule is incorrect and harmful.'") *accord* ***State v. Studd***, 137 Wn.2d 533, 548, 973 P.2d 1049 (1999); *see also* ***Agostini v. Felton***, 521 U.S. 203, 237, 117 S.Ct. 1997, 138 L. Ed. 2d 391(1989)("[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Courts of Appeal should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

Although a later holding may impliedly overrule a prior holding if it directly contradicts[4] an earlier rule of law, ***Fire*** fails to meet that criteria with respect to ***Clark*** because ***Fire***, and ***Martinez-Salazar***, decided cases where defendants exhausted their peremptory challenges.[5] ***Fire***, 145 Wn.2d at 156; ***Martinez-Salazar***, 528 U.S. at 309. Whereas ***Clark***, and the

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[4] ***Lundsford***, 166 Wn.2d at 280.

[5] CrR 6.4(e) In prosecution for offenses punishable by imprisonment in the state Department of corrections the defense and the state may challenge peremptorily "6 jurors each[.]"

cases it cites, addressed defendants, like Burns, who accepted jurors that could have been, but were not, excused through unused peremptory challenges. ***Clark*** therefore controls, and requires the appeal from the challenged ruling to be rejected without consideration on the merits.

b. Defendant failed to prove the trial court abused its discretion in deciding actual bias had not been proven.

"Case law, the juror bias statute, our Superior Court Criminal Rules and scholarly comment all emphasize that the trial court is in the best position to determine a juror's ability to be fair and impartial. It is the trial court that can observe the demeanor of the juror and evaluate and interpret responses." ***State v. Noltie***, 116 Wn.2d 831, 839, 809 P.2d 190 (1991)(*citing e.g.,* ***Gosser***, 33 Wn. App. at 434, 656 P.2d 514 (1982); ***Rupe***, 108 Wn.2d at 749; RCW 4.44.170(2), .190; CrR 6.4(c)(1)).

"[T]he trial court has, and must have, a large measure of discretion" "[f]or the very reason that reasonable minds can well differ" on the significance of a potential juror's responses in the context of her full array of observable attributes. ***Noltie,*** 116 Wn.2d at 839-40. "This discretion includes the power to weigh the credibility of the prospective juror ... and to choose among reasonable but competing inferences...[I]t must be exercised on the basis of probabilities, not possibilities ... which is equivalent to saying that the challenging party has the burden of proving the facts necessary to the challenge by a preponderance of the evidence."

Ottis, 61 Wn. App. at 753-54 (*citing* ***Noltie***, 116 Wn.2d at 831); *see* ***Bourjaily v. United States***, 483 U.S. 171, 176, 107 S. Ct. 2775, 2779, 97 L. Ed. 2d 144, 152 (1987).

A party challenging the trial court's denial of a challenge for cause on appeal "must show more than a mere possibility... the juror was prejudiced." ***Noltie***, 116 Wn.2d at 840 (*citing* L.Orlando & K. Tegland, § 202, at 331). The Supreme Court has "recently and repeatedly held that equivocal answers alone do not require a juror to be removed when challenged for cause, rather the question is whether a juror with preconceived ideas can set them aside." *Id.* at 839 (*citing* ***Rupe***, 108 Wn.2d at 749; ***State v. Mak***, 105 Wn.2d 692, 707, 718 P.2d 407, 418, *cert. denied,* 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986); ***State v. Latham***, 100 Wn.2d 59, 64, 667 P.2d 56 (1983); ***State v. White***, 60 Wn.2d 551, 569, 374 P.2d 942 (1962), *cert. denied*, 375 U.S. 883, 84 S. Ct. 154, 11 L. Ed. 2d 113 (1963); *see also* RCW 4.44.190).

i. Defendant has not proven by a preponderance of the evidence that Juror 22's familiarity with several law enforcement officers resulted in actual bias.

Gosser held the trial court did not abuse its discretion in denying a challenge for cause based on a claim the juror would unduly favor state witnesses due to his twenty six year career as a State Trooper. 33 Wn. App. at 433-34. The Court of Appeals deferred to the trial court's personal observation of the juror's demeanor in explaining his ability to evaluate

credibility based on factors other than a witness's professional status. *Id.*

Juror 22 was far less likely to unduly favor police testimony than the twenty six year police veteran deemed capable of overcoming that propensity in ***Gosser***. Juror 22 was a retired proprietor of a 7-Eleven store, a limousine service, a landscaping service, and a beauty salon who acknowledged "know[ing]" three people identified as law enforcement. 12 RP 15, 43, 50. When asked whether those relationships would adversely impact his ability to be fair, Juror 22 initially stated: "Well, I'm not really sure." *Id.* Once the question was clarified he confirmed his ability to impartially decide the evidence. *Id.* at 44. He also dispelled the notion he perceived police to be categorically credible by stating he had "known a lot of officers. Sometimes you can believe them; sometimes you can't." 12RP 94.[6]

Defendant unfairly compares Juror 22 to the juror determined to be biased in ***Gonzales***, 111 Wn. App. at 281-282. That juror "unequivocally admitted a bias .... in favor of police witnesses ... and indicated that the bias would likely affect her deliberations." *Id.* The juror "also candidly admitted she did not know if she could presume Gonzales innocent in the face of officer testimony." *Id.* No rehabilitation was accomplished, or attempted. *Id.* Based on those *combined* factors, actual bias was found. *Id.* A similar bias stemming from Juror 22's police contacts was not shown.

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[6] Juror 22 went on to say doctors and nurses who carefully document their work would have good credibility by virtue of their profession.

ii. Defendant has not proven by a preponderance of the evidence Juror 22's experience with robbery and rape committed by strangers resulted in an actual bias applicable to defendant's act of domestic violence.

"A defendant must prove actual bias." ***Grenning***, 142 Wn. App. at 540 (*citing* ***Noltie***, 116 Wn.2d at 838). He "must show more than a mere possibility ... the juror was prejudiced...." *Id.* (*citing* ***Noltie*** at 840). "A juror's equivocal answers alone do not justify removal for cause." *Id.* (*citing* ***Noltie*** at 839).

Juror 22 volunteered his ex-wife had been raped, and he had been assaulted in a robbery, perpetrated by strangers in a 7-Eleven store he previously owned. 12RP 49-50. He expressed uncertainty about whether those experiences would interfere with his ability to decide defendant's case impartially, stating: "It depends on what kind of case it is. I'm not really sure what abuse we are talking about here." 12RP 50. Juror 22 responded to the revelation that both cases involved physical assault by representing: "I could try to be impartial." *Id.* at 51. He also stated he "would try" to set his personal experience aside. *Id.*

When defense counsel followed up on those responses, Juror 22 reaffirmed he "could try to be impartial", adding that he "could be as fair as [he] can." *Id.* at 61-62. He responded to counsel's expressed confusion by stating "Well, I could be fair." *Id.* At counsel's prompting he reiterated "You know, I could be as fair as I can." *Id.* He then acknowledged there

was a greater possibility of him being fair in a case that did not involve assault. *Id.* He nevertheless discounted the effect pictures of physical violence would having on him, noting his experience "see[ing] some pretty gruesome pictures." 12 RP 63.

Juror 22 distinguished his prior experience to another venireman's DV experience by stating:

> "What we were just talking about, that lady there, it was family domestic. The person that I was with, did to me, was somebody I did not know. And I don't know this gentleman either. So for me being impartial to him, I can't really say. I'm sorry."

12RP 67-68.

Juror 22 amended his answers the next day:

> "For me logically to say I can give you a positive answer on his outcome, I cannot ...I thought about this all last night, and I want to be fair to this gentleman here. And I really can't be."

12RP 119-21. Defense counsel moved to excuse him for cause. *Id.* When the prosecutor inquired into Juror 22's reasoning he described the injuries he sustained in the unrelated robbery, concluding:

> "I can't -- I don't know you ... I can't say I am going to be able to really give a good outcome for him."

Id. at 121. The prosecutor clarified the parties were not asking about an outcome, then inquired into Juror 22's ability to set his experience aside:

> **Prosecutor**: So you can separate out the fact that you had these past experiences that have nothing to do with the defendant?

> **Juror 22**: Correct
> **Prosecutor**: So the question is: Given that you have had those experiences, not related to the defendant, if we seat you on this panel, could you decide the case based on the evidence you heard and the testimony your heard?
> **Juror 22**: I possibly could, yes.
> **Prosecutor**: That's what we are asking, if you could do that knowing it's not related to your other experiences. Could you put those aside and decide this case solely based on what you heard through testimony and exhibits in this courtroom?
> **Juror 22**: If it's two different people, yeah ....
> **Prosecutor**: So that's what we are talking about. Can you do that?
> **Juror 22**: Yeah.

12RP 122-23. The prosecutor objected to defendant's motion. *Id.*

Juror 22 explained his continued equivocation:

> "Well, I want to be impartial. I want to be a juror that can be impartial, okay. I don't know if I can separate myself from what happened to me or what he did or is accused of doing. Sorry."

12RP 123-24. Juror 22 added *he did not know* if he could separate the two incidents, *rejecting counsel's proposed alternative of thinking he could not. Id.* at 124. Defendant's motion was denied. *Id.*

The ***Noltie*** court was also presented with a conscientiously equivocal juror who predicted potential difficulty being impartial based on prior experiences unrelated to the case while recognizing she might be. 116 Wn.2d at 836. She shared Juror 22's earnest desire to ensure the defendant received a fair trial. *Id.* Neither the ***Noltie*** juror nor Juror 22 concluded impartiality was improbable; rather they expressed abstract

doubts about how undisclosed evidence might affect them once revealed. Despite the ***Noltie*** juror's misgivings, and the attending possibility of prejudice, the Court did not perceive a manifest abuse of discretion in the trial court's denial of defendant's motion to excuse her for cause. The same result is warranted here.

Neither the convenience store robbery Juror 22 endured, nor the exceedingly tragic stranger rape that befell his ex-wife, bore any resemblance to defendant's bedroom attack on the mother of his children other than the generic common denominator of physical assault. Whereas the patent dissimilarities among the crimes make Juror 22 highly distinguishable from the juror in ***Grunewald*** who was improperly seated in a DUI trial despite the prejudicial *combination* of being a member of Mothers Against Drunk Driving whose niece had been killed by a drunk driver that opined "he did not think the [DUI] defendant would get a fair trial from jurors with his frame of mind." *See* ***Noltie***, 116 Wn.2d at 838 (*citing* ***Cheney v. Grunewald***, 55 Wn. App. 807, 780 P.2d 1332 (1989)).

Defendant's decision not to exercise a spare peremptory challenge to strike Juror 22 suggests he changed his mind about the juror's capacity for fairness. Review of the record could lead one to conclude defendant decided to keep Juror 22 believing the defense would be well served by a juror so committed to ensuring defendant received a fair trial that he spent a night reflecting on his capacity for impartiality. 12RP 120-21, 123-24.

Whatever defendant's reason for keeping Juror 22, reversal is

unwarranted since the record does not prove actual bias by a preponderance of the evidence. Juror 22 twice said he could be fair (12RP 61-62, 122-23), once stated he could not (12RP 120-21), once stated he wanted to be impartial (12RP 123-24) at least four times indicated he could try to be impartial (12RP 61-62, 122-23), and three times said he did not know if he could (12 RP 67-68, 123-24) while rejecting the notion that he thought he could not. 12RP 123-24. Only a possibility of prejudice is manifest in Juror 22's aggregated equivocation. As in ***Noltie***, "[t]he trial court was in the best position to judge whether the juror's answers merely reflected honest caution based on h[is] ... experience or ... manifested a likelihood of actual bias." ***Noltie***, 116 Wn.2d at 839-40. And in this case the trial court that watched *voir dire* unfold over two days reasonably concluded Juror 22 was fit to serve. That decision was not manifestly unreasonable.

2. DEFENDANT FAILED TO PROVE PROSECUTORIAL MISCONDUCT IN SUMMATION SINCE THE CHALLENGED REMARKS PROPERLY ADVANCED REASONABLE INFERENCES FROM THE EVIDENCE ADDUCED AT TRIAL.

A defendant bears the burden of establishing both the impropriety of the prosecutor's argument and its prejudicial effect. ***State v. Brett***, 126 Wn.2d 136, 175, 892 P.2d 29 (1995) (*citing* ***State v. Furman***, 122 Wn.2d 440, 455, 858 P.2d 1092 (1993)); *see also* ***State v. Hoffman***, 116 Wn.2d 51, 93-95, 804 P.2d 577 (1991). Challenged "arguments should be

reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given." ***State v. Russell***, 125 Wn.2d 24, 86, 882 P.2d 747 (1994) (*citing* ***State v. Graham***, 59 Wn. App. 418, 428, 798 P.2d 314 (1990); ***State v. Green***, 46 Wn. App. 92, 96, 730 P.2d 1350 (1986); *see also* ***State v. Warren***, 165 Wn.2d 17, 26-28, 195 P.3d 940 (2008)).

a. The prosecutor properly argued the evidence.

Prosecutors are afforded wide latitude to draw, and express, reasonable inferences and deductions from the evidence during closing argument, including inferences as to the credibility of witnesses. ***State v. Gregory***, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006); ***State v. Militate***, 80 Wn. App. 237, 250, 908 P.2d 374 (1995) (*citing* ***State v. Hoffman***, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991); ***State v. Munguia***, 107 Wn. App. 328, 337, 26 P.3d 1017 (2001)(*citing* ***State v. Knapp***, 14 Wn. App. 101, 111, 540 P.2d 898 (1975)). "Prosecutors may argue ... inferences as to why the jury would want to believe one witness over another." *Id.* at 290 (*citing* ***State v. Brett***, 126 Wn.2d 136, 175, 892 P.2d 29 (1995)). But prosecutors may not advance speculations about facts that were not admitted at trial. *See* ***Boehing***, 127 Wn. App. at 519.

Defendant challenges two remarks the prosecutor made in closing, and one remark made in rebuttal as arguing facts not in evidence. The first

remark recalled the jury to Rose's alibi testimony in the context of explaining why it should not be trusted:

> "And then I ask her, well, what you are telling me is that you are giving him an alibi. Right? That's what she is doing. You are saying he wasn't there. He was with you."

App.Br. 23, 28 (*citing* 14RP 88). The first flaw in defendant's misconduct claim is that it is predicated on a mischaracterization of a question the prosecutor purportedly failed to pose during cross-examination as testimony. *See* App.Br. 28 ("The prosecutor ... misrepresented the testimony, suggesting that he had specifically asked Rose about whether she was giving Burns an alibi."). Testimony is evidence. *See* CP 46 (Instruction No. 1); WPIC 1.02. "The lawyers' statements are not evidence...." *Id.* So a prosecutor cannot "misrepresen[t] the testimony" by recalling the jury to a question he allegedly failed to ask.

Defendant also inaccurately claims the prosecutor failed to inquire into Rose's status as an alibi witness during cross-examination. Alibi is "the fact or state of having been elsewhere at the time." Webster's Third International Dictionary 53 (2002). The prosecutor cross-examined Rose's claim defendant was with her the morning Sharpley was assaulted. *See e.g.*. 14RP 54 (Q: "Your testimony today is that [defendant] was with you at the time?"). It is immaterial the prosecutor efficiently referred to the import of that question by its commonly understood handle. The testimony

elicited by that question was faithfully communicated by the challenged remark as Rose acknowledged the prosecutor accurately summarized her testimony. *See e.g.*, 14RP 54 (A: "Correct."); 14RP 88. Even defendant's trial counsel agreed with the prosecutor's characterization of Rose's testimony. *See* 14RP 101 ("As expected ... the State, asked you to question the credibility of Ms. Rose, who is Mr. Burns' alibi witness.").

The second challenged remark properly recalled the jury to its role in evaluating the evidence of Rose's motive to lie:

> **"Now, let's look at another thing you have to look at is bia[s] or motive. Does a witness have a bias or motive to give the story they are giving? Well, let's talk about Ms. Rose's relationship with the defendant**. What you heard is that the relationship is, quote, unofficial in her own words for a period of two years. That includes up to the point of this incident. At the time of this incident, they were having a, quote, unofficial[7] relationship, but Ms. Rose knows about Ms. Sharpley. And at the time, the defendant is spending time at both houses, back and forth, as you heard. But their relationship is unofficial. Incident comes out, the defendant is charged, now it's official. Now they have an official relationship, her words, her testimony. The relationship status has changed because of this case. It ... now becomes official. He is down to a one woman man."

[7] It is curious defendant feels comfortable criticizing the prosecutor for referring to defendant's relationship with Rose in terms of its "unofficial" and "official" status as that is how Rose and defense counsel first described the relationship's evolution during direct examination. 14RP 42-43 (When defense counsel asked Rose how long she had been in a relationship with defendant, Rose responded: "Officially for about ten months.")(Defense counsel then asked how long they had been "unofficially" together.); 14RP 101 (In closing counsel argued: "She is in fact his girlfriend. Apparently now it's official.").

14RP 91-92 (emphasis added). After defendant's objection was overruled the prosecutor argued inferences from that evidence:

> "**The relationship with Ms. Sharpley has ended ... Ms. Rose doesn't want to see the defendant get in trouble**. After this incident, he's staying at the house with her, they eventually move out, they have their own place now. He's with her. She has a new relationship status with him. She has a new place to live with him. She doesn't want to see that end. **She doesn't want to see that altered like this case would do. Is that biased? You decide that. You, as the jury decide that**...."

14RP 92 (emphasis added).

The challenged rebuttal answered counsel's response that defendant's increased post-assault commitment to Rose was irrelevant:

> Rose stated "**[t]he information she had about the dates is from the defendant. She's not independently recalling these events**. What she is saying is we talked about the date, and now I saying he was there. And it has to be that date because that's the date he is charged with. All of th[ese] [are] holes in her story. **It goes to the credibility, if any, that you should give to what she was saying on the stand**. I pointed out that soon after he was charged, their relationship status changed from unofficial to official. That provides her motive, a bias. **She doesn't want to see him get in trouble. She's advanced in her relationship with him because of this. The other woman, Ms. Sharpley, is out of the picture. Now it's just her. She's got to keep that like it is**."

14RP 103, 110-11 (emphasis added).

Each fact offered in support of the inference that Rose was a biased witness with a motive to dishonestly protect defendant through fabricated

alibi testimony can be found in the record. *See* 14RP 44-45, 52-53 (Rose's shaky selection of an incident date that supported defendant's alibi); 14RP 52-53 (Admission that her information about the incident date came from defendant during discussions about the case) 14RP 44, 48-52 (defendant's more exclusive commitment to Rose following the assault, which included moving Rose out of his mother's house and into an apartment with him); and 14RP 47 (Rose's admission that she did not want defendant to get into trouble). In arguing the reasonable–and obvious–inference of Rose's bias from the evidence the prosecutor repeatedly invoked the court's instructions by reminding the jury it was the sole judge of Rose's credibility. 14RP 91-92, 110-11. This claim of misconduct is also without merit.

b. <u>The prosecutor properly argued the credible evidence disproved defendant's alibi defense without impermissibly shifting the burden of proof.</u>

The burden of proof does not insolate a defendant's exculpatory theory from attack; "[o]n the contrary, the evidence supporting a defendant's theory of the case is subject to the same searching examination as the State's evidence." ***State v. Contreras***, 57 Wn. App. 471, 476, 788 P.2d 1114 (1990). "A prosecutor is entitled to argue inferences from the evidence and to point out improbabilities or a lack of evidentiary support for the defense's theory of the case." ***State v.***

Killingsworth, 166 Wn. App. 290-92, 269 P.3d 1064, *rev. denied*, 174 Wn.2d 1007, 278 P.3d 1112 (2012)(*citing* ***Russell***, 125 Wn.2d at 87; ***State v. Boehning***, 127 Wn. App. 511, 519, 111 P.3d 899 (2005)). A prosecutor may fairly comment on the absence of certain evidence if persons other than the defendant could have testified regarding that evidence. ***State v. Jackson***, 150 Wn. App. 877, 885, 209 P.3d 553 (2009)(*citing* ***State v. Ashby***, 77 Wn.2d 33, 37-38, 459 P.2d 403 (1969)). It is likewise proper for a prosecutor to state certain testimony was not denied, without reference to who could have denied it. ***State v. Sells***, 166 Wn. App. 918, 930, 271 P.3d 952 (2012)(*citing* ***State v. Morris***, 150 Wn. App. 927, 931, 210 P.3d 1025 (2009)).

The challenged remark was preceded by the prosecutor's express acceptance of the State's burden of proof:

> "Now, as we have said throughout this trial, the burden is on the State, on me, to prove to you beyond a reasonable doubt that this occurred...."

14RP 82. After framing the case in terms of the State's burden, the prosecutor recalled the jury to evidence supporting each element of the charged offense. 14RP 82-84. He quoted from Instruction No. 1 to remind the jurors they were " the sole judges of credibility," adding that he "cannot tell [the jury] who's credible" as it was the "12 [of them] that will decide this case [as well as] determine who is credible. And only [them]." 14RP 84-85. The prosecutor then mentioned several factors provided in

Instruction No. 1 to assist them, which included evaluating the reasonableness of testimony in the context of other evidence. 14RP 84-85. A comparative discourse on the relative credibility of the witnesses followed. 14RP 86-93.

The prosecutor concluded with the remark defendant incorrectly claims advocated a shift in the already explicitly embraced burden:

> "**As you look at** the **stories that you have been presented and the evidence that you have been presented, the evidence supports Mrs. Sharpley's version of events. And as you are evaluating the evidence, what I want you to ask yourself is this: How did this happen? This is not an accident.** You heard her describe her pain level as a nine out of ten or an eight out of ten. Then being the worst she has ever felt in her life. She didn't hit herself. **She didn't beat herself** until her eye closed shut and then knoc[k] a tooth out. The photos are there. **And there is no other explanation....**"

14RP 93-94 (emphasis added). An objection to the argument was sustained, but sustained with a direction that it be rephrased, not abandoned. *Id.* That qualification is indicative of a conservative ruling intended to ensure the jury did not mistake the properly argued deduction that the evidence did not allow for a conclusion other than defendant's guilt as inappropriately suggesting defendant was responsible for refuting that result. 14RP 94. Responding to that guidance, the prosecutor clarified the argument in a way that avoided the implied concern while explicitly accepting–once again–that the burden of proof lied with the State:

> "**Remember the burden is always on me. But what these show support** [for] **Ms. Sharpley's testimony. These got here because the defendant punched her numerous times in the face.** It's the only way they get there is from repeated punches to the face. The evidence from the CT scan, the damage to her eye, gets there from the punches. That's how this happens. **Based on all this, based on the testimony you heard, the consistent version of what happened from Ms. Sharpley, I am asking that you find the defendant guilty....**"

14RP 94-95.

Defendant attempts to support his misconduct claim by citing to an unobjected remark in the prosecutor's rebuttal. App.Br. 27 (*citing* 14RP 116). That remark is similarly presented out of context to inaccurately suggest the prosecutor argued defendant should be convicted simply because Sharpley was injured *by someone*. Whereas the rebuttal actually submitted the physical evidence supported Sharpley's account of defendant's guilt:

> "**As jurors**, you have to look at the evidence. You have to discuss the evidence. **You have to critically analyze the evidence. So when there are holes in Ms. Rose's statement, you have to look at that and determine what, if any, credibility do I give her statement if it doesn't add up, if it doesn't make sense, if it doesn't match the facts, if it doesn't match the other evidence. You make that determination as jurors. And that's what Jury Instruction 1 tells you.** The simple fact is that Ms. Sharpley was injured. And this level of injury is an assault two. It is substantial bodily harm that she suffered. **She didn't hit herself. These injuries happened. They support her testimony. If you believe Ms. Sharpley and the consistent version of events she has given you along**

> **with the other physical evidence, then I have met my burden...."**

14RP 116-17 (emphasis added).

It is clear the prosecutor properly argued the evidence corroborated Sharpley's testimony that defendant assaulted her and therefore did not logically support any conclusion other than defendant's guilt once Rose's alibi testimony was discounted as not credible. Stating evidence does not support an inference other than guilt is just another appropriate way of saying there is no reason to doubt guilt–the burden that must be met.

Killingswoth decided an analogous claim that the prosecutor impermissibly shifted the burden of proof in summation by several times arguing that there was no reasonable explanation for incriminating events other than the defendant's culpability. 166 Wn. App. at 290-91.[8] The Court of Appeals held the prosecutor did not shift the burden as he properly argued *the evidence* did not support an explanation other than defendant's guilt. *Id.* at 291-92. That permissible deduction was similarly communicated by the prosecutor at bar in a way that did not impermissibly suggest defendant bore the burden of providing exculpatory explanations for the evidence that established his guilt. *See Id.*; ***State v. Jackson,*** 150

[8] *E.g.*, In a trafficking in stolen property trial the prosecutor argued the following deduction: "The only reasonable explanation for the car being found there is that [Killingsworth] took it...somebody took ...it...This guy. There's no other reasonable explanation."

Wn. App. 877, 885, 209 P.3d 553 (2009). Prosecutorial misconduct has not been proven.

c. Defendant failed to demonstrate prejudice.

Objections to the challenged closing remarks require they be reviewed for substantial likelihood they prejudicially affected the verdict; whereas, the unobjected to rebuttal is tested for flagrant and ill-intentioned[9] misconduct that resulted in incurable prejudice. *See* 14RP 88, 91-92, 93-94, 116-17; ***State v. McChristian***, 158 Wn. App. 392, 400, 241 P.3d 468 (2010) (*citing* ***State v. Reed***, 102 Wn.2d 140, 145, 684 P.2d 699 (1984)).

There is no substantial likelihood the prosecutor's alleged mischaracterization of the testimony prejudiced the verdict. The jury was properly instructed it was to decide the case from the evidence as well as that the lawyers' remarks are not evidence and should be disregarded if not supported by the evidence. CP 46 (Instruction No. 1); WPIC 1.02. The jury then received two reminders of that instruction from the court. 14RP 90[10]-91.[11] It is presumed the jury followed those instructions. *See* ***State v.***

[9] A prosecutor commits flagrant misconduct when argument contains a flauntingly or purposely conspicuous error of law. *See* ***Warren***, 165 Wn.2d at 28; ***State v. Emery***, 174 Wn.2d 741, 761, 278 P.3d 653 (2012) (*citing* Webster's Third New International Dictionary 862-63 (2002); Webster's Third New International Dictionary 1126 (2002). Whereas argument is "ill-intentioned" when it evinces malicious disregard for a defendant's right to due process. *See generally* ***Warren***, 165 Wn.2d at 29.

[10] 14RP 90: "[O]bjection overruled. The jury will decide what the facts are."

[11] 14RP 91: "Overruled. The jury will decide what the testimony was. Counsel is

Johnson, 124 Wn.2d 57, 77, 873 P.2d 514 (1994).

The first remark was a fair summary of the cross-examination manifestly intended to establish a framework for comparing the credibility of Rose's testimony to other evidence. 14RP 88. Any deviation between the testimony adduced and the prosecutor's description of it did not rise to the level of misconduct. An attorney is not required to remain silent about pertinent aspects of admitted testimony whenever she is incapable of rendering a verbatim recitation of the record. The criminal justice system ably compensates for the universally imperfect memories of its mortal practitioners by instructing jurors to disregard remarks that are not supported by the evidence. CP 46; WPIC 1.02.

The second remark was not substantially likely to prejudice the verdict as it was plainly intended to advance the warranted inference of Rose's motive to fabricate defendant's alibi; the remark did not inaccurately indicate Rose acknowledged the same. 14RP 91-92. Any prejudice conceivably adhering to that proper argument would have been neutralized through the court's instructions and the prosecutor's several

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commenting on what he believes the testimony was. The jury has been instructed, and I will instruct the jury again that the remarks of the attorneys are not evidence ... you are to disregard remarks from either attorney that are not supported by the evidence you heard."

references to the jury's exclusive authority to decide whether Rose's alibi testimony could be trusted. *See e.g.*, 14RP 85, 93-94, 116-17; CP 46.

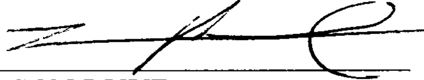
The third remark was not substantially likely to prejudice the defendant since even an isolated misstatement of the burden in this case would have been adequately corrected when the jury was repeatedly, and emphatically, reminded throughout trial that the State shouldered the entire burden of proof. 12RP 6-7 (preliminary instruction); CP 49 (Instruction 3); 14RP 82, 93 (prosecutor's closing); 14RP 97-98, 100, 103, 105 (defendant's closing); 14RP 105 (court's admonition); 14RP 106 (prosecutor's rebuttal). For the same reason the challenged rebuttal cannot be deemed so flagrant and ill-intentioned that any resulting prejudice could not have been cured by proper instruction. 14RP 116-17. Moreover, any prejudice capable of surviving the jury's repeated instruction on the law could not have produced a verdict that would not have been otherwise obtained given the persuasive evidence of defendant's guilt.

D. CONCLUSION.

The jury's verdicts should be affirmed since defendant's waived and meritless challenge to Juror 22's presence on the jury ought to be rejected along with his unproven claims of prosecutorial misconduct.

DATED: May 27, 2014.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



JASON RUYF
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The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

5-28-14

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PIERCE COUNTY PROSECUTOR

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