No. 92260-8

** ** ** ** ** ** ** ** ** ** ** ** **

SUPREME COURT OF WASHINGTON

** ** ** ** ** ** ** ** ** ** ** ** **

STATE OF WASHINGTON,

Respondent,

vs.

THOMAS M. GAUTHIER,

Petitioner.

** ** ** ** ** ** ** ** ** ** ** ** **

Court of Appeals No. 71631-0-I

On Appeal from King County Superior Court

No. 09-1-01751-1 SEA

** ** ** ** ** ** ** ** ** ** ** ** **

PETITION FOR REVIEW

** ** ** ** ** ** ** ** ** ** ** ** **

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Thomas M. Gauthier, petitioner, pro se, asks this court to accept review of the decision designated in Part 2.

II - DECISION

2.1 The unpublished opinion of Division One of the Court of Appeals, entered in cause no. 71631-0-I, which was filed on the 6th day of August, 2015 [a copy of which is attached to this motion as Appendix -A-].

2.2 The decision held:

(1) The prosecutor's rebuttal argument was a fair response to defense counsel's closing argument;

(2) Gauthier received effective assistance of counsel; and,

(3) The trial court properly calculated Gauthier's offender score.

III - ISSUES PRESENTED FOR REVIEW

(a) DOES DUE PROCESS PERMIT THE STATE'S PROSECUTOR TO INFLAME THE PASSIONS OF A JURY BY ATTRIBUTING SLANDEROUS INSULTS TO A DEFENDANT THAT THE PROSECUTOR KNOWS WERE NEVER MADE?

(b) WAS TRIAL COUNSEL INEFFECTIVE FOR NOT REQUESTING A MISTRIAL BASED UPON THE STATE'S IMPROPER CLOSING REMARKS?

(c) WAS GAUTHIER'S OFFENDER SCORE PROPERLY CALCULATED?

IV - STATEMENT OF THE CASE

4.1 In the early morning hours of 22 April 2001, Petitioner and Tonni Allen [the alleged victim] met along Des Moines Memorial Drive. The end result of this encounter is that Allen performed oral sex [fellatio] on Petitioner.

4.2 These are the only undisputed facts.

4.3 However, going beyond what we have described above, there are two (2) chronologies which lead up to the climactic ending:

4.4 Gauthier's Story: Gauthier first met Ms. Allen in a grocery store parking lot where he was waiting to by some crack cocaine from a dealer. However, his dealer failed to arrive.

4.5 When his dealer did not show up, Gauthier asked Allen if she could get him some drugs; she agreed. Gauthier then gave Allen $60 - but Allen never returned with either the drugs or the money.

4.6 The next time that Gauthier encountered Ms. Allen was on Des Moines Memorial Drive, between 2:30 and 3:00 A.M. At that time he asked her if she had any drugs, and she said she did not. Gauthier next asked Allen if she would perform oral sex for $20.

4.7 Initially, ALlen refused; however, when Gauthier increased the offer to $50, Allen consented. Allen then directed that she and Gauthier should step over the gaurdrail.

4.8 Gauthier then took off his coat and laid it on the ground for Allen, and she performed fellation. During this event, Gauthier recognized that Allen was the person who had previously "burned" him for $60. Gauthier then decided not to pay Allen, and he left.

4.9 Allen became infuriated because Gauthier refused to pay her. [Slip-op at 3-4].

4.10 Tonni Allen's Story: Allen was walking home from the casino along Des Moines Memorial Drive when she was suddenly pushed from behind over a guard-rail by an unknown assailant. Allen then states that she tried to dissuade her attacker from raping her by telling him that she was on her period.

4.11 Allen next asserts that her attacker forced her

to remove her pants, grabbed her neck, and demanded she perform oral sex. Allen then states that her attacker threatened to hurt her if she resisted.

4.12 Allen next states that she gave her attacker a "blow job", and after he ejaculated, he fled while she [Allen] was "spitting all over the place". [slip-op at 2].

4.13 Allen did not then call the police. Instead, Allen claims to have tried to knock on her neighbor's door. However, no one answered, and there is no other recor dof this claim.

4.14 According to Allen, she then stated that she went home, and [once again] fails to call the police. She doesn't call for medical assistance. She doesn't call a friend. Instead, she grabs a knife and sets out to pursue her attacker "intending to kill him".

4.15 While Allen was traversing the streets - armed with a knife in hopes of killing Gauthier - she received a call from Donald Brown, whom she has known since childhood.

4.16 According to Allen's own testimony, she then asked Brown to come over and, after his arrival, told him that she had been raped.

4.17 Nonetheless, neither Brown nor Allen took the time to call the police to report the crime. Instead, Brown now assisted Allen in her hunt of Gauthier, by driving her around in his car. They did not encounter him.

4.18 After failing to hunt down Gauthier - either by herself or with the assistance of Donald Brown - Allen then returned home.

4.19 It is only on the following day - according to her own testimony - that Allen calls 9-1-1 and files the complaint underlying the present charge.

4.20 At trial, both Allen and Gauthier testified in regards to the events that transpired that night.

4.21 In closing argument, the state set forth the following parameters:

4.22 > "I want to be very clear about something as I talk to you about what the evidence in this case is. Testimony is evidence. It is just as meaningful as video evidence; it is just as significant as some sort of scientific or forensic match."

4.23 > "Testimony is evidence. . . ."
> [RP at 555-56, ln 22-25, 1-4].

4.24 The prosecutor then went on to state at lines 15-16: "When Tonni Allen gets up on that stand and tells you about how this man raped her, that is evidence . . . . "

Then went on and further stated at lines 21 - 22: ". . . If you believe her, he is guilty."

4.25 In response to the state's presentation of what the jury was to consider as "evidence", defense counsel's closing argument centered on reiterating the testimony of Gauthier:

4.26 "Well, do you date for $20?" She said, "No". And his counter offer, "How about $50?" [RP at 576, ln 20-21].

4.27 "Mr Gauthier took off his jacket, his jean jacket with white fur on the side, and laid it down on the ground, got down on his knees.

4.28 "Tonni Allen stood there while he did that, and without any force, without any threat or any violence whatsoever, Tonni Allen got down on her knees and gave him a blow job." [RP at 576-77; ln 25, 1-6].

4.29 Gauthier "told her that he would pay her $50, or agreed to a $50 price for a blow job, and he never paid for it. Now, where and when he got the idea not to pay for it is really immaterial to all of this because he was never going to pay her. But you will see in the instructions that no where does it say that lying to somebody is rape in the second degree." [RP at 577; ln 13-15].

4.30 The state went to great lengths in the opening portion of its closing arguments to establish that

"testimony is evidence". Defense counsel's closing argument simply and eloquently reiterated very closely what Gauthier's testimony actually said - while pointing out several glaring inconsistencies in the testimony of Tonni Allen.

4.31 Nonetheless, in rebuttal, the state began an impassioned oration designed with the singular objective of inciting the passionate emotion and prejudices of the jury.

4.32 However, the State began with what could have been [if left to these beginnings] a permissible rebuttal:

> "There is not one iota, one piece, one shred of evidence, besides the testimony of this man, that Tonni Allen worked as a prostitute on April 22nd, or any other day in her life."

[RP at 605-06, 24-25, 1 - 3].

4.33 However, the State did not stop there. Instead, the State went on a slanderous crusade. A crusade that utilized vile epithets which were specifically designed to anger and enrage the jury. Language that was deliberately attributed to the defendant - but which had never, in fact, been uttered by either him or his counsel. Not during testimony. Not during closing argument.

4.34 The State's soap-box oration began as follows:

> "The defense is almost like a cliche': she is a slut, she is a prostitute, she was out there, you know what, she had it coming. That is what this man is saying. She looked like a prostitute.

> Why? What about the way that she dressed in jeans, and white tennis shoes, and big puffy jacket makes her look like she is out there working the streets? And you can tell it frombehind? Three blocks away, in the back. She looked like a drug dealer. She looked like a prostitute? That is laughable."

[RP at 607-08; see also slip-op at 5].

4.35 No where in the record of the evidence and testimony being presented by the defense did he or counsel ever state:

> "She is a slut, she is a prostitute, she was out there, you know what, she had it coming."

4.36 Offender Score: This offense is alleged to have occurred in April of 2001. At that time, Gauthier had only one (1) prior conviciton. Because this offense pre-dates most of the offenses used by the state to calculate his offender score, these offenses should be excluded from the offender score. Nonetheless, because the period between the last TMVWOP conviction [13 April 2007] and the date of the conviction for the current offense [26 November 2013] constitutes a period in excess of six and one-half years, all of the prior offenses should be excluded from the offender score as a matter of law.

(a) DOES DUE PROCESS PERMIT THE STATE'S PROSECUTOR TO INFLAME THE PASSIONS OF A JURY BY ATTRIBUTING SLANDEROUS INSULTS TO A DEFENDANT THAT THE PROSECUTOR KNOWS WERE NEVER MADE?

4.37 Prosecutors are generally granted "wide latitude" in closing argument to draw "reasonable" inferences from the evidence and to express such inferences to the jury. State v. Vassar, 188 Wn App 251, 352 P3d 856, ¶ 11 (2015, Div-3). Nonetheless, a prosecutor "cannot use his or her position of power and prestige to sway the jury." Vassar, 188 Wn App at ¶ 17; citing In re Glassman, 175 Wn 2d 696, 706, 286 P3d 673 (2012).

4.38 It is misconduct for a prosecutor to submit extrinsic evidence to a jury. State v. Pete, 152 WN 2d 546, 552, 98 P3d 803 (2004) "[E]xtrinsic evidence is defined as information that is outside all of the evidence admitted at trial." Id., at 552-53. (my emphasis).

4.39 The rule is "consideration of any material by a jury not properly admitted as evidence vitiates a verdict when there is a reasonable ground to believe that the defendant may have been prejudiced". Vassar, 188 Wn App at ¶ 17, citing State v. Rinkes, 70 Wn 2d 854, 862-63, 425 P2d 658 (1967).

4.40 Under the facts of the present case, it should be clear that the prosecutor cast Gauthier as the "villain in the ongoing battle against sexism." [slip-op at 6, citing Br. of Appellant at 8-9] and encouraged the jury to convict him based upon an emotional response rather than the evidence. Id.

4.41 The prosecutor is entitled to make a fair response to the arguments of defense counsel. State v. Brown, 132 Wn 2d 529,

566, 940 P2d 546 (1997). However, the prosecutor is not permitted to fabricate evidence or testimony.

4.42 The Due PRocess Clause of the Fourteenth Amendment requires that the State's prosecution of Gauthier "comport[s] with prevailing notions of fundamental fairness." See State v. Lord, 117 Wn 2d 829, 867, 822 P2d 177 (1991). That is a requirement that cannot be deemed satisfied "by mere notice and hearing if a state has contrived a conviction through the pretense of a trail which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by presentation of testimony known to be perjured." U.S. v. Agurs, 427 U.S. 97, fn. (7) (1976).

4.43 Division One's determination that "[a] fair reading of the arguments indicate that none of the prosecutor's remarks were calculated or intended to inflame the passions or prejudices of the jury," [slip-op at 7], and that they were "properly responsive to counsel's summation that TA was a prostitute, drug user, liar and a thief," is in diametrical opposition to the record before it. [My emphasis].

4.44 The state did not argue that defense counsel called TA a "prostitute, drug user, liar and a thief". No, instead the State shouted the word "Slut!" A word never uttered by the defense. THe State told the jury that Gauthier called her a a slut, with the specific intent to shock the jury, and to incite their passion and anger.

4.45 The argument that TA is a slut. That she had it coming, or got what she deserved, was never advanced by the defendant - or his attorney. These statements were neither provoked by counsel, nor a pertinent reply to his acts or statements. (see State v. Russell, 125 Wn 2d 85, 86, 882 P2d 747 (1994). More than that, the flagrant and ill-intentioned nature of the comments went so far that no form of curative instruction could have obviated their harm. You simply cannot unring that bell.

(b) WAS TRIAL COUNSEL INEFFECTIVE FOR NOT REQUESTING A MISTRIAL BASED UPON THE STATE'S IMPROPER CLOSING REMARKS?

4.46 Article 1, § 22 of the Washington Constitution, as well as the Sixth and Fourteenth Amendments to the U.S. Constitution, guarantee a criminal defendant the right to be represented by counsel.

4.47 For more than thirty years, our courts have held that the Constitutional right to be represented by counsel requires the representation to be effective. See Strickland v. Washington, 466 U.S. 668, 685, 104 S. ct. 2052 (1984).

4.48 Defense counsel is constitutionally ineffective where (1) the attorney's performance was unreasonably deficient; and (2) the deficiency prejudiced the defendant. State v. Thomas, 109 WN 2d 222, 225-26, 743 P2d 816 (1987).

4.49 Throughout the present matter, the Court of Appeals analysis of the prosecutorial misconduct claim emphasized that "defense counsel fail[ed] to object at trial." [slip-op at 6].

4.50 That decision made clear that "[i]ndeed, the absence of an objection strongly suggests that the argument did not appear critically prejudicial to the appellant in the context of the trial." Id., citing State v. McKenzie, 157 Wn 2d 44, 53, n.2, 134 P3d 221 (2006).

4.51 The court repeated this mantra at page 7, stating "defense counsel's decision not to object or request a curative instruction 'strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.'" (citing State v. Swan, 114 Wn 2d 613, 661, 790 P2d 610 (1990).

4.52 The court continually uses the fact that defense counsel failed to object to the flagrant and inflammatory comments to minimize the import of those words to the jury. THe court, like the prosecution itself, sweeps broad strokes with its brush as it paints a picture of who said what:

4.53 "The defense theme in closing argument was that this was a case drugs [sic], prostitution, theft, revenge and angry retribution". [Response at 17].

4.54 "COunsel told the jury the case boiled down to witness credibility and TA was a liar, this was not a violent rape, but a consensual sexual encounter with a prostitute that happened to turn bad because of the defendant's act of revenge and TA's angry retribution?"[sic]. [Id.]

4.55 However, as the verbatim report clearly demonstrates, it was the State who put the issue of witness credibility on the table,

and drove home to the jury that "[t]estimony is evidence." [RP 556, ln 1-4].

4.56 The decision of the Court of Appeals ignores the egregious nature of the statements: "She is a slut!"; "She was out there, you know, she had it coming."

4.57 The court then ignores the apparent fact that defense counsel failed to recognize that neither he himself, nor Gauthier, had made any such comments; nor did he recognize the plainly apparent fact that these remarks were not a fair response to the arguments that were made to the jury.

4.58 The first prong of the Strickland test requires that a defendant show that counsel's performance fell below an "objective standard of reasonableness". [466 U.S. at 688].

4.59 It cannot be deemed "objectively reasonable" for a defense attorney to permit the state to utter inflammatory epithets to a jury [which are attributed to the defendant] that have no factual basis anywhere in the record.

4.60 No reasonable attorney would allow such blatant misconduct to go unchallenged or uncorrected.

4.61 The second prong of the Strickland inquiry requires a "but for" analysis. That is, but for counsel's deficient performance there is a reasonable probability that the result would have been different. Id.

4.62 In the present case, the Court of Appeals asserts that "[i]t is far from certain that the trial court would have sustained

an objection". [slip-op at 7]. However, this reasoning can only be upheld if one continues with the fallacy that "[t]hey were properly responsive to defense counsel's summation that TA was a prostitute, drug user, liar and a thief." [slip-op at 7, supra].

4.63 As the record unequivocally indicates, no where within the volumes of reported testimony can be found any justification for such vehement and offensive slurs. There is no instruction a court can devise to undo the harm inflicted by such a call to the passions and prejudices of a jury. The only person who ever called TA a "slut", or stated that "she had it coming" was the prosecutor.

4.64 Petitioner believes that it should be apparent to this Court that had defense counsel objected and moved for a mistrial - and had the proper analysis been applied - there is a reasonable probability that the result of the proceeding would have been different.

(c) WAS GAUTHIER'S OFFENDER SCORE PROPERLY CALCULATED?

4.65 "Class C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction." RCW 9.94A.525(c).

4.66 The State agrees that the wash-out period in question begins to run on 4-13-2007. This is undisputed.

4.67 The record in the present matter establishes that the current conviction did not occur until 26 November 2013. The length of time between the last conviction and the present conviction is six years, seven months, and thirteen days.

4.68 Under a plain reading of the statute, the event that is necessary to interrupt the wash-out period is the "commission of a crime that subsequently results in a conviction".

4.69 As this offense is alleged to have occurred in April of 2001, it is incontrovertible that Gauthier has not "committed any crime that subsequently results in a conviction" since his release on the 2007 offense. Therefore, the question to be considered here is not whether Gauthier was "in the community" [as asserted by both the COurt of Appeals and the State]; but rather, whether one can be considered "not in the community" when being held in custody for an offense of which he has not been convicted..

4.70 Under the reasoning of the state, one could spend four years, eleven months "in the community", and then spend six months in custody fighting an offense of which they are ultimately acquitted - and this would interrupt the wash-out period. In accord with the argument of the State - which was upheld by the Court of Appeals - all that is required to interrupt the wash-out period is to be held in custody on a felony charge.

4.71 This is not the case. The essence of the reasoning in both State v. Ervin, 169 Wn 2d 815, 239 P3d 354 (2010), and In re Nichols, 120 Wn App 425, 85 P3d 955 (2004), requires the five prior class C felonies are not included in Gauthier's offender score. Gauthier spent more than six and one-half years without committing any crime that subsequently results in a conviction. Under a plain reading of the statute, Gauthier should be within the penumbra of its protection.

4.72 As Division Two stated in State v. Morris, 150 Wn App 927, 210 P3d 1025, ¶ 9 (2009) Class C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement the offender has been crime-free for five years.

4.73 The existence of a prior conviction is a question of fact. State v. Arndt, 179 WN App 373, 320 P3d 104, ¶ 4 (2014, Div-2). The State must prove by a preponderance of evidence the existence of prior convictions used to calculate the offender score for sentencing purposes. Id.

4.74 This includes each fact necessary in order to include the prior conviction. Under a plain reading of the statute, and the facts of this case, the State cannot establish that - subsequent to his release from confinement or entry of judgment and sentence - Gauthier "committed any crime that subsequently results in a conviction."

V - ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

5.1 "The State commits misconduct by asking the jury to convict based upon their emotions, rather than the evidence." State v. Fuller, 169 Wn App 797, 821, 282 P3d 126 (2012) rev. den. 176 Wn 2d 1006 (2013).

5.2 Here, the State incited the passions and prejudices of the jury through the deliberate and vulgar use of epithets aimed at Allen, and wrongly attributed to Gauthier.

5.3 No where within the entire record can be found a single incident where either Gauthier or his counsel referred to Allen as a "slut", nor can be found a single incident where either expressed the opinion that "she had it coming".

5.4 A prosecutor is entitled to make a fair response to the arguments of defense counsel. Brown, 132 Wn 2d at 566. A prosecutor's latitutde in closing argument is limited to arguments "based on probative evidence and sound reason." Glassman, 175 Wn 2d at 704.

5.5 The finding of the COurt of Appeals that the "prosecutor's rebuttal closing remarks constitute a fair response to defense counsel's closing arguments" [slip-op at 7] are in direct opposition to the facts of this case, and the long-standing precedent of this court.

5.6 The derogatory remarks of the prosecution were deliberately and maliciously attributed to the defendant with an over-all purpose to incite the passions and prejudices of the jury. There exists no amount of etimological parsing that can alter this fundamental truth. More than this, there exists no form

of curative instruction that could have unrung this bell.

5.7 In a nutshell, the comments were neither invited, nor provoked by the defendant or his counsel; neither were they a pertinent reply to the comments that were made. The Court of Appeals decision to the contrary notwithstanding. This decision stands in in direct opposition to the principles that this court has set forth in State v. Russell, 125 Wn 2d 24, 882 P2d 747 (1994) and all of its progeny.

5.8 Where the intent is to inflame the passions and prejudices of the jury, misconduct has occurred. State v. Powell, 62 Wn App 914, 918-19, 816 P2d 86 (1991).

5.9 The decision of the COurt of Appeals that Gauthier's five (5) prior convictions do not wash-out despite more than six-and-one-half years "without committing any crime that subsequently results in conviction" ignores the plain language of the statute, as well as the reasoning established in Nichols, which this court upheld in Ervin.

5.10 The conduct of the prosecution in this case is exactly the same as that prohibited in Powell. The Court of Appeals decision to the contrary notwithstanding.

5.11 Because the decision of the Court of Appeals relieves the State of its burden to prove that Gauthier "committed any crime that subsequently results in a conviction" in order to interrupt the wash-out period, this court should grant review of the decision in order to provide guidance in the very unique facts of this case.

VI - CONCLUSIONS

Based upon the foregoing facts and arguments, and the record and file to date, Petitioner asks this court to grant Review of the Decision of the COurt of Appeals which denied relief in this matter.

Date: 11-3-15

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ATTACHMENT ONE

Court of Appeals Decision

State v. Thomas M. Gauthier

No 71631-0-I

Division One

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. THOMAS M. GAUTHIER, Appellant.	)	No. 71631-0-I DIVISION ONE PUBLISHED OPINION FILED: June 22, 2015

LAU, J. — Thomas Gauthier appeals his conviction for rape in the second degree. He argues (1) the prosecutor committed misconduct in closing argument, (2) he received ineffective assistance of counsel, and (3) prior convictions included in his offender score "washed out" under RCW 9.94A.525(2)(c). In a pro se statement of additional grounds, Gauthier alleges five other grounds for review. We conclude the prosecutor's rebuttal closing argument was a fair response to defense counsel's closing argument, Gauthier received effective assistance of counsel, and the trial court properly calculated Gauthier's offender score. And because Gauthier's statement of additional grounds presents no independent basis for reversal, we affirm the judgment and sentence.

FACTS

Evidence at trial shows the following facts: In 2001, TA worked two jobs as a medical assistant and a waitress at Rascal's Casino in South Seattle. TA did not own a car, so she walked the few blocks from her apartment to work at the casino.

On April 22, 2001, at about 3:00 a.m., TA was walking home from the casino along Des Moines Memorial Drive. TA said she was suddenly pushed from behind over a guardrail by an unknown assailant. She tried to dissuade the attacker from raping her by telling him she was having her period, and removed her tampon to prove it. She testified that he forced her to remove her pants, grabbed her neck, and demanded she perform oral sex. He threatened to hurt her if she resisted. He ejaculated and fled as TA was "spitting all over the place." Report of Proceedings (RP) (Nov. 19, 2013) at 406-07.

TA knocked on her neighbors' doors for help but no one answered. She got a knife from her apartment and went outside to look for her attacker, intending to kill him.

TA received a call from her sister's boyfriend, Donald Brown, whom she knew from childhood. Crying, she asked Brown to come over. When he arrived, she told him she had been raped. Brown saw a scratch mark on TA's neck. They both drove around the area in Brown's car looking for the attacker. TA called 911 the next day.

Police collected TA's clothing and examined the scene where the attack occurred. They noticed an area where the foliage was matted down. Detectives also found a tampon lying on the ground. Detectives observed grass stains on TA's right leg, upper right pocket, back pocket, and dirt stains on her lower leg. They also saw bruising on her upper arms and hip.

TA worked with a sketch artist to create an image of her attacker. Relying on this sketch, police stopped Thomas Gauthier on June 28, 2001. Gauthier told the detectives about his recent release from jail and gave them his address. At the time, he had no further contact with police.

In August 2001, the crime lab tested a semen sample from the jacket TA wore on the night of the attack. Police were unable to match the sample to a known DNA profile. TA met with detectives and identified one person in a photo montage, but the suspect's DNA did not match the profile from TA's jacket.

In 2008, the Combined DNA Index System (CODIS) returned a match between the DNA sample found on TA's jacket and Gauthier's DNA. Police located Gauthier in Arizona and returned him to Washington for trial on the second degree rape charge.

At trial, Gauthier admitted that in 2001 he was addicted to crack cocaine, struggled to keep a job or driver's license, and often sought sex from prostitutes. When he was contacted by detectives in 2008, Gauthier said he was surprised and amused that he was suspected of rape.

Gauthier initially denied recognizing TA's photograph. Later on, he claimed to remember more details about his interactions with TA. Gauthier testified that he first met TA in a grocery store parking lot where he was waiting to buy crack cocaine from a dealer. When his dealer failed to arrive, he asked TA if she could get him the drugs and she agreed. Gauthier said he gave TA $60, but she never returned with either the drugs or money.

Gauthier said the next time he saw TA was on Des Moines Memorial Drive between 2:30 or 3:00 a.m. He asked her whether she had crack, and she said she did

not. She refused when he asked her if she would perform oral sex for $20. TA consented when Gauthier offered her $50. They both stepped over the guardrail and TA performed oral sex. Gauthier testified that he eventually recognized her from their prior encounter and decided not to pay her. Gauthier denied raping TA.

A jury convicted Gauthier of second degree rape and we reversed the conviction. State v. Gauthier, 174 Wn. App. 257, 298 P.3d 126 (2013). On retrial, he was convicted as charged. He appeals.

ANALYSIS

Prosecutorial Misconduct in Rebuttal Closing Argument

Gauthier alleges that the prosecutor committed misconduct by appealing to the passions and prejudices of the jury during closing argument.

During closing, defense counsel argued that the jury should doubt TA's credibility. For instance, he pointed out inconsistencies in her statements to the police. He argued the lack of damage to her nylon stockings was reason to doubt that a struggle occurred. The record shows that Gauthier's defense at trial portrayed TA as a prostitute, a drug user, a liar and thief who agreed to a sex act in exchange for money and deservedly got ripped off by Gauthier because she had previously stolen from him. Defense counsel argued in closing, TA was "really angry because she didn't get paid her money." RP (Nov. 25, 2013) at 582. "You will see nowhere, as I mentioned before, in your instructions that lying to a prostitute, agreeing to pay them money, and not paying them money, is rape." RP (Nov. 25, 2013) at 597.

In rebuttal closing, the prosecutor responded by arguing that "[t]here is not one iota, one piece, one shred of evidence, besides the testimony of this man, that [TA]

worked as a prostitute on April 22nd or any other day of her life." RP (Nov. 25, 2013) at 605-06. The prosecutor also argued:

> The defense is almost like a cliché: She is a slut, she is a prostitute, she was out there, you know what, she had it coming. That is what this man is saying. She looked like a prostitute. Why? What about the way that she dressed in jeans, and white tennis shoes, and big puffy jacket makes her look like she is out there, working the streets? And you can tell it from behind? Three blocks away, in the dark. She looked like a drug dealer, she looked like a prostitute? That is laughable.
>
> She was standing, because she was walking in the dark by herself? She must have wanted it. She had it coming. This is why people don't report, because they are called sluts, whores, and prostitutes. And counsel says she had the motivation.
>
> Twelve people sitting in the box are going to decide [are] you looking at a prostitute that night? Well, that's just an absurd belief that that is what motivated [TA] to get up on this stand and talk about the most humiliating, degrading and violent thing that ever happened to her.
>
> You saw those tears. You think that is because she is afraid that somebody thinks she is a prostitute? She wasn't even asked that question until she got in this courtroom. You know that is true because none of the investigators thought she was a prostitute.
>
> . . . .
>
> So, where is her motivation for the last twelve and-a-half years before she got on that stand, to meet with the detectives, to look at the montages, to give up her blood sample, shown montages and more montages, and coming in for the interviews? Where is her motivation to get up on that stand and lie, lie about what this man did to her, if it's not true.

RP (Nov. 25, 2013) at 607-08.

> He saw his opportunity in [TA] when she was alone, when she was isolated, when she was vulnerable on that street. And he took advantage of her. And he thinks that if he calls her a slut and a prostitute, that you are going to be distracted and think, well, maybe she did have it coming, to be out there. Maybe there is something else going on. But, there is no evidence of that.

RP (Nov. 25, 2013) at 609-10.

Defense counsel did not object to any of these remarks.

Gauthier contends that when the State asserted his defense was a "cliché" and "this is why people don't report," it introduced evidence outside the record by asking the jury to consider the problem that women's rape allegations are sometimes not believed. Br. of Appellant at 7. He argues the prosecutor cast him as the "villain in the ongoing battle against sexism," thereby encouraging the jury to convict him based on an emotional response rather than the evidence. Br. of Appellant at 8-9. We disagree.

A defendant claiming prosecutorial misconduct bears the burden of establishing both the impropriety of the comments and their prejudicial effect. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994). Even where the defendant proves improper conduct, misconduct does not constitute prejudicial error unless there is a substantial likelihood it affected the jury's verdict. State v. Stenson, 132 Wn.2d 668, 718-19, 940 P.2d 1239 (1997). Where, as here, defense counsel fails to object at trial, any error is waived except where the conduct is so "flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." Stenson, 132 Wn.2d at 719. Indeed, the absence of an objection strongly suggests that the argument did not appear critically prejudicial to the appellant in the context of trial. State v. McKenzie, 157 Wn.2d 44, 53 n.2, 134 P.3d 221 (2006).

The prosecutor is entitled to make a fair response to the arguments of defense counsel. State v. Brown, 132 Wn.2d 529, 566, 940 P.2d 546 (1997). Even where the comments are improper, the remarks by the prosecutor are not grounds for reversal "if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective." Russell, 125 Wn.2d at 86.

Viewed in the context of the evidence at trial and defense counsel's closing remarks, the prosecutor's rebuttal closing remarks constitute a fair response to defense counsel's closing arguments. A fair reading of the arguments indicate that none of the prosecutor's remarks were calculated or intended to inflame the passions or prejudices of the jury. They were properly responsive to defense counsel's summation that TA was a prostitute, drug user, liar and a thief.

As to the "cliché" and "why people don't report" remarks, these brief, isolated comments were not part of a well developed theme. Gauthier overstates the remarks' impact on the jury when viewed in context. And none of the cases he analogizes to support his misconduct claim. For example, unlike in the present case, State v. Powell, 62 Wn. App. 914, 918-19, 816 P.2d 86 (1991) involved a prosecutor's argument that acquittal would send a message that children who report sexual abuse would not be believed, "thereby declaring open season on children." That court held that the argument constituted prejudicial misconduct.

But even assuming the remarks were improper, Gauthier fails to establish the statements were so flagrant or ill-intentioned that any prejudice could not have been cured by a timely objection. It is far from certain that the trial court would have sustained an objection. Even if defense counsel had objected, the court would have instructed the jury to disregard these remarks. Defense counsel's decision not to object or request a curative instruction "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

Furthermore, the trial court instructed the jury that the lawyer's arguments were not evidence:

> Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be based solely upon the evidence presented during these proceedings.
>
> . . . .
>
> The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

Clerk's Papers (CP) at 62-63. The court further instructed the jury that it was obligated to reach a decision based on the facts and the law, and not on sympathy, prejudice, or personal preference. The jury is presumed to follow the trial court's instructions. State v. Stein, 144 Wn.2d 236, 247, 27 P.3d 184 (2001).

Gauthier fails to establish that the prosecutor's comments were improper. Even assuming the comments were improper, however, he fails to show that a contemporaneous objection and timely curative instruction would not have neutralized any prejudice. His claim is therefore waived.

Ineffective Assistance of Counsel

Gauthier argues in the alternative that his attorney's failure to object or request a mistrial in response to the prosecutor's closing remarks constitutes ineffective assistance of counsel. Br. of Appellant at 14-15. We disagree.

We review claims of ineffective assistance of counsel de novo. State v. A.N.J., 168 Wn.2d 91, 109, 225 P.3d 956 (2010). To establish ineffective assistance of counsel, a defendant must prove two elements: (1) defense counsel's representation

was deficient because it fell below an objective standard of reasonableness, and if established, (2) the deficient performance prejudiced him. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Failure to establish either prong ends the inquiry. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). To prevail on an ineffective assistance of counsel claim, a defendant must overcome a strong presumption that counsel's performance was reasonable. State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011).

For the reasons discussed above, Gauthier fails to establish prejudicial deficient performance by his trial counsel.

Offender Score

Gauthier contends that the trial court improperly calculated his offender score by failing to recognize that his prior convictions "washed out" pursuant to RCW 9.94A.525(2)(c).

Under the "washout" provision, RCW 9.94A.535(2)(c),[1] class C prior felony convictions are excluded in a defendant's offender score if since the last date of release from confinement pursuant to a felony conviction or entry of the judgment and sentence, the offender spent five consecutive years "in the community" without committing any crime that subsequently results in a conviction. Gauthier has five prior class C felony convictions listed below.[2] His last release date happened in June 2007. In other words,

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[1] The parties agree that the material language of the statute, currently codified at RCW 9.94A.525(2)(c), is identical to the statute in effect in 2001. See former RCW 9.94A.360(2) (2001).

[2] The five prior class C felony convictions included in Gauthier's offender score are as follows:

(1) Possession of Cocaine (Sentencing on 12/20/1996)

(2) Taking Motor Vehicle without Permission (Sentencing on 6/15/2001)

if Gauthier had remained in the community for five years after June 2007 and remained crime free for those five years, his prior class C felony convictions would not count in his offender score after June 2012.

But he did not remain crime free for five years. He was charged with the rape of TA on March 13, 2009, and taken into custody to the King County Correctional Facility on July 23, 2010. There he remained through his first trial on May 2011 which resulted in a conviction on June 2. He was subsequently sentenced on July 8, 2011. The sentencing court calculated his offender score as a five based on his five prior class C felony convictions.

The first conviction was reversed on appeal and he was transported back to the King County Correctional Facility from prison. The jury convicted Gauthier on retrial on November 26, 2013. At sentencing on February 14, 2014, Gauthier asserted that his five prior class C felonies should not be included in his offender score because he spent 43 months in custody before he was convicted again on the present offense. He claimed that under the "washout" statute, the "in the community" phrase includes the 43 months he spent in custody on this offense, thus his offender score is zero not five. The sentencing court rejected this argument, calculated his offender score as five, and sentenced him to 120 months with credit for all time served back to July 2010, the date he was first arrested.

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(3) Taking Motor Vehicle without Permission 2 (Sentencing 3/17/2006)
(4) Taking Motor Vehicle without Permission 2 (Sentencing 3/17/2006)
(5) Taking Motor Vehicle without Permission 2 (Sentencing 4/13/2007)
CP at 84.

Gauthier relies on State v. Ervin, 169 Wn.2d 815, 239 P.3d 354 (2010). There, the parties disagreed on whether the 17 days Ervin spent in custody during a 6 year, 3 month period interrupted the 5 year washout period. The State argued the 17 days Ervin spent in jail for a misdemeanor probation violation interrupted the 5 year washout period. Our Supreme Court concluded, "we hold that time spent in jail pursuant to violation of probation stemming from a misdemeanor does not interrupt the washout." Ervin, 169 Wn.2d at 826. The court relied on In re Personal Restraint of Nichols, 120 Wn. App. 425, 85 P.3d 955 (2004). In Nichols, the court addressed whether 20 days spent in custody on a misdemeanor interrupted the washout period that began in 1989 and would have continued until 1999. The court held that the 20 days did not "interrupt" the five year washout period.

We are not persuaded by Gauthier's attempt to extend Ervin's holding to the circumstances here. We have found no case, and Gauthier cites to none, where Ervin's limited holding was applied to time spent in confinement while awaiting resolution of a felony charge. That is the precise circumstance present here. As the State correctly points out, Gauthier's interpretation creates an absurd scenario—a defendant's offender score will actually go down while he is in custody pending trial or pending sentencing. Indeed, that is an absurd result and a result we are confident the legislature did not intend.[3] GUILTY UNTIL PROVEN INNOCENT!

[3] Adoption of Gauthier's interpretation means that a defendant could strategically lower his offender score while in custody by delaying his trial or sentencing. We decline to adopt a rule that produces such an absurd result.

Statement of Additional Grounds

Gauthier filed a pro se statement of additional grounds (SAG) alleging five additional grounds for review.

Gauthier first asserts that the trial court violated his right to a public trial by dismissing juror 5 after defense counsel observed him sleeping during trial. RP (Nov. 19, 2013) at 393. A courtroom closure occurs only when the courtroom is "completely and purposefully closed to spectators so that no one may enter and no one may leave." State v. Lormor, 172 Wn.2d 85, 93, 257 P.3d 624 (2011). Our review shows the court dismissed juror 5 on the record. RP (Nov. 19, 2013) at 430. No closure occurred.

Gauthier argues that the trial court erred by requiring him to prove the defense of consent by a preponderance of the evidence, citing State v. W.R., Jr., 181 Wn.2d 757, 765, 336 P.3d 1134 (2014). Despite Gauthier's claim, however, the court properly instructed the jury that the State had to prove each element of rape in the second degree beyond a reasonable doubt. BUT ALLOWED NO DEFENCE

Gauthier contends that the State committed misconduct by intentionally appealing to the passion and prejudice of the jury. He makes a number of claims including the improper references to the "sexual assault unit" instead of the "special assault unit," mention of earlier "testimony," use of the word "attack," and isolated use of the word "rape" or "raped." SAG 8-9.[4] Some of his arguments involve facts, evidence, or rulings from his first trial which are not included in our record. Those claims are

[4] Some of Gauthier's arguments suggest the State violated motions in limine from Gauthier's first trial. Those are not included in our record for review.

properly raised through a personal restraint petition, not a statement of additional grounds. State v. Alvarado, 164 Wn.2d 556, 569, 192 P.3d 345 (2008).

In regards to Gauthier's other claims of prosecutorial misconduct, Gauthier must articulate how the alleged misconduct was substantially likely to affect the jury's verdict. In re Pers. Restraint of Glassman, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). Beyond the conclusory assertion that the errors appealed to the "passion and prejudice" of the jury he has not done so. SAG at 11.

Gauthier argues that his attorney's failure to object to improper statements constitutes ineffective assistance of counsel. But Gauthier fails to provide sufficient detail in his SAG to allow for review.[5] Although reference to the record and citation to authorities are not necessary or required, the appellate court will not consider an appellant's SAG if it does not inform the court of the nature and occurrence of alleged errors. RAP 10.10(c); Alvarado, 164 Wn.2d at 569.

Gauthier claims his counsel was ineffective for failing to object to the admission of old booking photos. He is mistaken. Defense counsel did object.

Finally, Gauthier argues that the trial court abused its discretion when it denied defense counsel's motion for a mistrial or, in the alternative, excusal of juror 59 for cause. Counsel's motion was based on a deputy sheriff's report that one of the jurors spoke to him during a lunch break, telling him "I can't believe how much you remember." RP (Nov. 18, 2013) at 208. The trial court interviewed juror 59, who stated that she had

[5] Gauthier claims that he can "list over 50 places in 13 RP; 14 RP; 15 RP; 16 RP that shows failure to object on central testimony and the prejudicial statements before the Jury, and no reasonable persons mind could forget such prejudicial statements, even had objections been raised properly." SAG at 15.

not formed any opinions about the case and could remain fair and impartial. Because the trial court is best situated to determine a juror's ability to serve impartially, we review the court's denial of a for-cause juror challenge for abuse of discretion. State v. Rupe, 108 Wn.2d 734, 749, 743 P.2d 210 (1987). We cannot say on this record that the trial court abused its discretion in concluding that juror 59 could remain impartial.

CONCLUSION

For the foregoing reasons, we affirm Gauthier's judgment and sentence.

Jan, J.

WE CONCUR:

Becker, J.

DECLARATION OF MAILING

GR 3.1 No. 71631-0

I, Thomas Gauthier on the below date, placed in the U.S. Mail, postage prepaid, 2 envelope(s) addressed to the below listed individual(s):

Hon. Richard Johnson
Clerk, Division One
One Union Square
600 University St.
Seattle WA 98101

Dennis J. McCurdy
King County Pros. Off.
516 3rd Ave, ste W554
Seattle WA 98104

I am a prisoner confined in the Washington Department of Corrections ("DOC"), housed at the Coyote Ridge Correctional Complex ("CRCC"), 1301 N. Ephrata Avenue, Post Office Box 769, Connell, WA 99326-0769, where I mailed said envelope(s) in accordance with DOC and CRCC Policies 450.100 and 590.500. The said mailing was witnessed by one or more staff and contained the below-listed documents.

1. PRP on for Review
2.
3.
4.
5.
6.

COURT OF APPEALS DIV
STATE OF WASHINGTON
2015 NOV -6 AM 11:27

I hereby invoke the "Mail Box Rule" set forth in General Rule ("GR") 3.1, and hereby declare under penalty of perjury under the laws of the State of Washington that the forgoing is true and correct.

DATED this 3 day of NOVEMBER, 2015, at Connell WA.

Signature Thomas Gauthier