No _____

COA #72619-6-I

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON - DIVISION ONE 926857-5

STATE OF WASHINGTON
Respondent
v.

STEVEN L. COOK
Appellant

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR SNOHOMISH COUNTY

THE HONORABLE GEORGE APPEL, Judge

PETITION FOR REVIEW

STEVEN L. COOK
Monroe Correction Center
WSR Unit
P.O. BOX 777
Monroe WA 98272
C 320

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WASHINGTON CASES

A. IDENTITY OF THE PETITIONER

COME NOW Steven L. Cook, appellant, acting pro se seeking review of the opinion below.

B. OPINION BELOW

Cook seeks review of the court of appeals decision entered November 9, 2015. Opinion is attached at Appendix A. (State v Cook)

C. ISSUES PRESENTED FOR REVIEW

1) Prosecutors have a duty not to misstate the law, and the law pertaining to the burden of proof beyond a reasonable doubt is particularly important, the bedrock of our criminal justice system. The prosecutor here argued repeatedly that the standard does not mean a reason to doubt. Does this distortion of the burden of proof require reversal of appellant's conviction?

2) Effective assistance of counsel is required to ensure a fair trial. Here, counsel failed to object to prosecutorial argument that undermined the burden of proof beyond a reasonable doubt. Must appellant's conviction be reversed for ineffective assistance of Counsel?

3) Adequate investigations are required to ensure due process and a fair trial. Here, the alleged victim alleged that Cook inserted several fingers which were covered with massage oil into her vagina yet the officer who took her report failed to have swabs taken immediately to procure physical evidence. Then the state failed to test for DNA on the four swabs that were eventualy taken and failed to test the swabs for traces of massage oil. Does a failure to investigate and test physical evidence violate due process? Was the delay in collection of swabs prejudicial?

4) Effective assistance of Counsel is required to ensure a fair trial. Here, Counsel failed to have the swabs taken from Robinson's vagina tested for touch DNA and for traces of massage oil. Must appellant's conviction be reversed for ineffective assistance of Counsel?

5) Suppressing evidence from the jury violates due process. Did the failure to test the swabs for touch DNA evidence and traces of oil deny Cook access to defense evidence and was the failure to test a suppression of evidence?

D. STATEMENT OF THE CASE

Cook was charged with indecent liberties

by forcible compulsion and second-degree rape. The jury acquitted Cook of second-degree rape but found him guilty of the indecent liberties charge. The Court imposed 68 months to life in confinement and a lifetime of community custody.

Cook is 64 years old and has no criminal record. He became a massage therapist to help people who had physical ailments. He worked at several clinics and was building his practice.

Cook massaged Robinson four times with no incident. He again massaged Robinson July 6, 2014. Robinson repeatedly dropped the sheet and exposed her breasts and frequently lied on Cook's massage table fully nude. Cook proceeded with the massage according to the client's comfort level.

During the massage, Cook did notice that Robinson flinched but she said nothing so he simply proceeded with the massage. At the end of the massage he waited for her in the lobby just like on prior occassions. He admitts to be friendly with Robinson. He asked her to grab a bite sometime and discussed scheduling their next appointment. Robinson said she was going on vacation the following week and could not stay to schedule an appointment.

Cook called Robinson several times attempting to schedule another massage session. Days later, Cook was approached by Lynnwood police detectives.

Two days after the July 6 massage on July 8, 2014, Robinson alleged Cook held her down using pressure on her lower back while he inserted several fingers into her vagina clear up to the knuckle. Robinson said Cook used fair amounts of massage oil and stated his fingers slipped right into her vagina. No rape kit was performed on July 6, 2014.

On July 10, 2014, Lynnwood detective Arnett followed up with Robinson and described a sexual assault examination as "intrusive" and she left it up to Robinson to get the examination or not. The exam was done that day by a forensic nurse.

The forensic nurse testified that the exam was taken four days after the alleged assault but that they routenely would do exams as much as seven days after an assault. And stated that DNA could be found even after four days delay in conducting the examination. She also explained in court how the swabs contained only evidence of exactly what the swab tip touched and she explained moving the swabs around inside Robinson's vagina. No swabs were used on the vagina lips or outside the vagina.

The nurse found ne bruising or trauma, which was consistent both with Robinson's account and with nothing at all having happened.

The four swabs taken from the inside of Ms. Robinson's vagina were never tested for DNA or massage oil according to the State. The State contended that even if DNA was found on the swabs it would be consistent with Cook having accidentaly touched Robinson's vagina as Arnett claimed Cook had said during an interview days after the alleged assault. There is absolutely no physical evidence to corroborate Robinson's allegations against Cook. The State's only evidence is Robinson's testimony at trial against Cook.

During closing argument, defense counsel argued there were many reasons to doubt the State's case such as the failure to test the vaginal swabs for DNA or even massage oil and inconsistencies in Robinson's statements.

In rebuttal, the prosecutors theme was that the burden of proof beyond a reasonable doubt does not mean a reason to doubt:

> "of course, there are many standards of proof, but there's one thing that I take issue with and the instructions do. Beyond a reasonable doubt is not a reason to doubt. The instructions define it a little differently. It's not a reason to doubt. It says what beyond a reasonable doubt is also: an abiding belief in the truth of the charges. That's your standard"...

... "So it's not a reason to doubt. Gee, I guess there was a small chance that the DNA could have been recovered on the swab that was also used to test whether she had any sexually transmitted diseases. It's not a doubt to an element of the offense. It's not a reasonable doubt. It may be for you, but that's for your determination."

The jury found Cook not guilty of the rape charge but found him guilty of the indecent liberties. Cook appealed. The Court of Appeals affirmed by way of an unpublished opinion on November 9, 2015. See App. A. Cook motioned to reconsider but the Court denied the reconsideration. App. B. Cook now seeks review by the Washington Supreme Court.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. THE PROSECUTORS ARGUMENT MINIMIZING THE BURDEN OF PROOF DENIED COOK A FAIR TRIAL

The presumption of innocence and the corresponding burden of proof beyond a reasonable doubt forms the berock of our criminal justice system. State v Bennett, 161 Wn 2d 303, 315, 165 P 3d 1241 (2007). When a prosecutor misstates the law pertaining to the burden of proof, there is a grave risk that the jury will be misled and the accused thereby deprived of his

or her constitutional due process right to a fair trial. State v Warren, 165 Wn 2d 17, 27-28, 195 P 3d 940 (2008); State v Davenport, 100 Wn 2d 757, 763, 675 P 2d 1213 (1984); State v Fleming, 83 Wn. App. 209, 213-14, 921 P. 2d 1076 (1996).

A prosecutor's misconduct is reversible error when the argument was improper and, under the circumstances, prejudice resulted. In re Pers. Restraint of Glasmann, 175 Wn 2d 696, 704, 286 P. 3d 673 (2012). The mere failure to object is not waiver when no instruction could have cured the prejudice and the prejudice had a substantial likelihood of affecting the verdict. State v Pinson, 183 Wn. App. 411, 416, 333 P. 3d 528 (2014) (citing State v Emery, 174 Wn. 2d 741, 760-61, 278 P 3d 653 (2012).

Here, the prosecutor committed prejudicial misconduct when he argued, "Beyond a reasonable doubt is not a reason to doubt." To compound the problem, he also suggested the reasonable doubt standard was something different from the "abiding belief" also required under the pattern instruction: He stated "It's not a reason to doubt. It says what beyond a reasonable doubt is also: an abiding belief in the truth of the charges. That's your standard." Four times, the prosecutor told the jury reasonable doubt is not a reason to doubt. See Brief of Appellant p 9 for transcript citations.

This argument distorted and minimized the burden of proof and requires reversal of Cook's conviction.

"Statements made by the prosecutor or defense to the jury must be confined to the law as set forth in the instructions given by the court." Davenport, 100 Wn 2d at 760; State v Estill, 80 Wn. 2d 196, 199, 492 P 2d 1037 (1972). Specifically, a prosecutor may not attempt to shift or diminish the burden of proof beyond a reasonable doubt in closing argument. Warren, 165 Wn 2d at 26-27; State v Cleveland, 58 Wn App 634, 647, 794 P 2d 546 (1990). The prosecutor's repeated arguments that reasonable doubt does not mean a reason to doubt were an incorrect statement of law that undermined the burden of proof beyond a reasonable doubt.

"[A] 'reasonable doubt, at a minimum, is one based upon reason.'" Bennett, 161 Wn 2d at 311 (quoting Victor v Nebraska, 511 U.S. 1, 17, 114 S. Ct. 1239, 127 L Ed 2d 583 (1994). Washington's pattern jury instruction explains, "a reasonable doubt is one for which a reason exists." Washington Practice, Pattern Jury Instructions - Criminal WPIC 4.01 (3d Ed). Under this instruction, reasonable doubt means a reason that causes a person to doubt, a "reason to doubt."

The prosecutor's argument in this case makes reasonable doubt sound illusive and illusory. The argument undermines the presumption of innocence by making reasonable doubt appear meaningless.

While the jury need not be able to point to a reason for doubt in order to acquit, if the jury

identifies such a reason, it has a duty to acquit. The prosecutor's argument in this case was improper because it essentially invited the jury to set aside valid reasons to doubt. The prosecutor encouraged the jury to ignore reasonable doubt and focus only on an "abiding belief in the truth of the charges."

Misstatements of law pertaining to the burden of proof cannot be easily dismissed. Fleming, 83 Wn App at 213-14. A prosecutor's disregard of a well-established rule of law, such as the burden of proof is flagrant and ill-intentioned misconduct. Fleming, 83 Wn App at 214.

The court of appeals decision found no error. Slip op. at p. 6. The court suggests that the jury was read the instruction and that the prosecutor merely emphasized that "a abiding belief in the truth of the charges" was part of the pattern instruction.

The court of appeals decision can not be squared with Cook's constitutional right to a fair trial. See 6, 14 amend. U.S. Constitution; Art. I §§ 3 and 22 Wash. Constitution.

Reading the jury instruction did not cure the misstatement of the law. The prosecutor read the instruction but planted a misinterpretation of that instruction into the minds of the jury. The prosecutor told the jury what they should understand the instruction to say and told them not to think of reasonable doubt as "reasons to doubt."

The Court should accept review of this claim because the opinion is in conflict with decisions of the Supreme Court and in conflict with other Court of Appeals decision. RAP 13.4 (b) (1), (2).

2. COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT WHEN THE PROSECUTOR UNDERMINED THE BURDEN OF PROOF DURING REBUTTAL CLOSING ARGUMENT.

The Sixth amendment as well as Article I section 22 of the Washington Constitution guarantees the right to effective assistance of counsel for the defense of an accused person.

The purpose of Counsel is to ensure the trial is fair. It was deficient performance to fail to object to the prosecutors argument undermining the burden of proof and the prejudice is obvious. Had counsel objected, a curative instruction would have been given. Both prongs of the Strickland test have been satisfied in this case. Strickland v Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed 2d 674 (1984).

Here, reasonably competent counsel would have objected to the blatant misstatement of the burden of proof during the prosecutor's rebuttal closing argument. Counsel failed to preserve error and failed to obtain curative instruction.

This Court should accept review of this claim under R.A.P. 13.4 (b) (1), (2).

3. THE STATE FAILED TO CONDUCT AN ADEQUATE INVESTIGATION INTO THE ALLEGATIONS TO VERIFY THE COMPLAINT BY THE ALLEGED VICTIM.

Due process and fair trial are not just mere words. Cook is in prison now convicted of a crime based soley on the word of Robinson.

Robinson reported a sexual assault on July 8, 2014 and the police officer, who is not trained in forensic science decided not to suggest a rape kit for Robinson. Two days later, Arnett does a follow up and does suggest a rape kit but tells Robinson the test is "intrusive" and leaves it up to her to have the intrusive examination done.

Robinson has the exam done and Arnett, who is not trained in forensic science decides not to test the swabs. The prosecutor, who is not trained in forensic science decides not to test the swabs also.

The state has physical evidence in their possession which can prove that no sexual assault ever happened. Cook's hands were covered in oil. The forensic nurse stated in trial that the swab tips would only contain evidence collected at the exact spot the swab tip touched. She only took swabs, four in total, of the inside of Ms. Robinson's vagina.

Due process requires Cook be given a fair chance to defend against the charges. See

5, 14 amend. U.S. Const. Art. 1 sec 3, Wash. Const. And Cook is entitled to a fair trial. 6th amend. U.S. Const. Art 1 sec. 22 Wash Const.

The State has an obligation to seek justice. The trial is a search for the truth. Testimony is only one component of a trial. The State of Washington is becoming so used to obtaining convictions without physical evidence that even when they have physical evidence, they don't even bother to test it.

Cook was 64 years old and worked for Homeland security at one point. He never even had a single arrest. No criminal history.... ever. The State tried to explain their failure to test the swabs away by saying oh it would just be consistent with a statement made by Cook even if DNA was found and said the delay IN collecting the swabs made them feel that the likelihood of evidence being there was slim to none.

But Cook maintains he never made any statement that he accidentaly touched Robinson's vagina so to find DNA on the swabs would have impeached him. And even if Cook had accidentaly touched the outside of Robinson's vagina, the swabs only contain evidence of what is INside Robinson's vagina. The tests would be evidence of whether there is touch DNA from Cook inside Robinson's

vagina or traces of oil, which should be present if Cook's fingers were jammed inside Robinson's vagina three times to the knuckle.

The State admitted in trial that they themselves are the cause for additional delay in collecting physical evidence. Then even after Robinson has the exam done, the State admits they failed to test the evidence. They didn't want to pay the lab fees.

The State knows that rape cases are emotionaly charged and that the jurors sympathize with the accuser. The State decided to save money and now Cook's conviction is based soley on testimony and no corroborating evidence.

The trial could have been stopped as soon as the forensic examiner testified that evidence of sexual assault can be taken up to a week later. The State had no incentive though. Why pay for the lab work when they can just rely on the jury to convict without a shred of evidence.

The State failed to investigate the case and the conviction should be overturned. The swabs should now be tested for touch DNA and for traces of massage oil. If neither are found, it proves Robinson lied about Cook's fingers being in her vagina and the entire case should then be dismissed. Review of this claim should be accepted pursuant to R.A.P. 13.4(b)(1), (2).

4. COUNSEL WAS INEFFECTIVE BY FAILING TO TEST THE SWABS FOR DNA AND OILS.

The right to effective assistance of counsel is the right to a fair trial. The average person is generaly absolutely ignorant of the law and stands accused faced with miles and miles of rules and legal precedent that only a trained attorney can deal with.

Counsel has a duty to investigate into all possible defenses. In this case, Robinson alleged Cook had his fingers in her vagina and said that it was up to the knuckle even. Said it was in and back out three times. She also explained that Cook used massage oils and even said he used a fair amount of oil for everything he did.

Defense counsel knew about the swabs. The forensic nurse testified that four were taken to allow samples to be given to the prosecutors and to the defense. It is true that counsel argued the State failed to test the swabs but counsel should have had the swabs tested so that Cook would have physical evidence which impeached Robinson's allegations against him.

This error of counsel is not reasonable and can not be dismissed as a legitimate trial strategy. The simple truth is; Cook was indigent and counsel didn't want to motion for public funds to test the swabs. Cook received the poor mans representation.

A failure to investigate into this defense does satisfy both prongs of the Strickland test. See Strickland v Washington, supra.

Had Counsel performed tests on the swabs collected from the inside of Ms. Robinson's vagina, there would have been impeaching evidence at trial to prove Robinson's version of the events of July 6 were fabricated. The prejudice to Cook is obvious. He was left with only the simple defense of "I didn't do it."

Blakely v Washington was decided long ago and now every criminal defendant is assigned counsel for their defense. This is an empty gesture if the Courts are going to simply allow public defenders to short shift their indigent clients.

Cook had a right to the test results of those swabs. The result of negative for massage oils especialy would have weighed heavy with the jury IN proving Robinson's allegations were fabricated.

The representation by defense Counsel was Constitutionaly deficient violating Cook's sixth amendment right contained in the United States Constitution and contained also IN Article I, §22 of the Washington State constitution.

This Court should grant review pursuant to R.A.P. 13.4(b)(1), (2), & (3). The Court of Appeals simply held that Counsel was effective because Cook was found not guilty of "some" of the charges.

Cook had a constitutional right to raise an adequate defense to all of the charges and failing to test the swabs resulted in significant evidence for the defense being suppressed from the jury.

5. THE STATE VIOLATED COOK'S DUE PROCESS RIGHTS BY SUPPRESSING THE TEST RESULTS FROM THE FOUR SWABS.

Suppression of evidence for the defense is a violation of due process. Brady v Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed 2d 215 (1963); See also Strickler v Greene, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed 2d 286 (1999)

The State claims they never tested the swabs but Cook alleges they did and then because the tests proved no massage oils were found inside the alleged victims vagina and NO touch DNA was present either, they suppressed the results.

The Court of appeals decision states that the record is incomplete to hear this claim. Slip op at p. 9. Cook respectfully argues that even a failure to conduct the tests at all is a suppression of the results and the reasonable inference to be drawn from that inaction is that the results would likely favor the defense so the tests were never taken.

Cook's due process rights were violated. See 5, 14 amendments United States Constitution;

See also Article 1 section 3 Washington Constitution.
This court should accept review of this claim pursuant to R.A.P. 13.4(b)(1),(2).

F. CLOSING ARGUMENT

No American should be convicted of a crime based soley on the testimony of an accusser without any sort of corroborating evidence at all. Especialy someone who has never been in any trouble in their whole life. Cook was 64 years old with no criminal history. Surely the State would want to verify the veracity of the allegations before puting Cook away in prison based soley on Robinson's word. Why no lab tests? Does the State of Washington care so little about its citizens that they can't even afford Cook the benefit of the doubt to dig a little into Robinson's story to make sure she's not fabricating a case so she can sue the chiropractic clinic? Cook prays that this Court will review his case.

G. CONCLUSION

This court should accept review.

Respectfully Submitted this 11th day January 2016

Steven L. Cook

STEVEN L. COOK

Appendix A

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,	)	No. 72619-6-I
	)	DIVISION ONE
v.	)	
STEVEN COOK, Appellant.	)	UNPUBLISHED OPINION
	)	FILED: November 9, 2015

SPEARMAN, C.J. — Steven Cook, a licensed massage therapist, was convicted of taking indecent liberties with a patient. He appeals, claiming that the prosecutor committed reversible error by misstating the burden of proof and that he received ineffective assistance of counsel because his attorney failed to object to the prosecutor's misstatement. In a statement of additional grounds, Cook asserts that the State conducted a faulty investigation by failing to promptly collect deoxyribonucleic acid (DNA) evidence and raises several claims related to this allegedly faulty investigation. Finding no error, we affirm.

FACTS

Cook became licensed as a massage therapist in December 2013 and shortly thereafter obtained employment at a chiropractic clinic. In June 2014, N.R. began receiving massage therapy from Cook as part of her treatment for

injuries sustained in a car accident. She received four massages from Cook without incident.

N.R. received a fifth massage from Cook on July 6, 2014. N.R. stated that during this appointment, Cook pressed on her lower back with one hand so that she could not get up. She stated that Cook massaged her genitals with his other hand, tried to kiss that area, and repeatedly inserted a finger into her vagina.

N.R. reported the incident to the police on July 8, 2014. On July 10, 2014, N.R. met with the detective assigned to the case and received a sexual assault examination from a forensic nurse examiner. As part of the exam, the nurse took swabs of N.R.'s vagina. On July 15, 2014, the investigating detective and her partner interviewed Cook. Cook stated that he accidently touched N.R.'s vagina during the massage.

Cook was arrested and charged with second degree rape and indecent liberties. At trial, the detective testified that she did not test the swabs from N.R.'s sexual assault examination for DNA evidence. She stated that she decided not to test the swabs based on the low probability of obtaining DNA evidence. Additionally, the presence of Cook's DNA, if obtained, would be consistent with his statement that he had accidentally touched N.R.'s vagina.

The forensic nurse testified regarding the sexual assault examination. She stated that it is standard practice to take swabs during a sexual assault examination if the exam occurs within seven days of the alleged assault. The swabs are used to test for sexually transmitted diseases and may be used to obtain DNA evidence. The nurse described finding DNA evidence from digital

penetration as "not highly likely, but it is likely." 3VRP (Sept. 23, 2014) at 210. In N.R.'s case, when the exam took place four days after the alleged assault, she described it as "possible" that there could be DNA evidence. Id. at 210. She later described finding DNA evidence on N.R.'s swabs as a "slim possibility." Id. 218-219.

During closing arguments, defense counsel emphasized the State's burden of proof. She argued that the State had the duty to present evidence and that it had failed in that duty by not testing the swabs. On rebuttal, the prosecutor took issue with defense counsel's characterization of the burden of proof and read the pattern jury instruction aloud.

The jury acquitted Cook of the rape charge but convicted him of indecent liberties. He appeals, claiming that the prosecutor distorted and diminished the burden of proof in closing argument and that his counsel was ineffective in failing to object to the prosecutor's misstatement.

DISCUSSION

To prevail on a claim of prosecutorial misconduct, the defendant must establish that the prosecutor's conduct was "'both improper and prejudicial in the context of the entire record and the circumstances at trial.'" State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011) (quoting State v. Magers, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)). A prosecutor is "entitled to make a fair response to the arguments of defense counsel" during rebuttal. State v. Brown, 132 Wn.2d 529, 566, 940 P.2d 546 (1997). A prosecutor's comments are generally only prejudicial if there is a "'substantial likelihood the misconduct affected the jury's

verdict.'" State v. Monday, 171 Wn.2d 667, 675, 257 P.3d 551 (2011) (quoting State v. Yates, 161 Wn.2d 714, 774, 168 P.3d 359 (2007)). If the defendant did not object to alleged misconduct at trial, the issue of prosecutorial misconduct is waived unless the misconduct was flagrant, ill intentioned, and could not have been cured by an admonition to the jury. State v. Weber, 159 Wn.2d 252, 270, 149 P.3d 646 (2006) (citing State v. Stenson, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997)).

Cook asserts that the prosecutor misstated the burden of proof. He argues that the prosecutor's discussion of "a reason to doubt" minimized the State's burden. Brief of Appellant at 9. He further argues that the prosecutor suggested that the reasonable doubt standard was something different from "abiding belief." Id. The State argues that, in the context of the entire closing argument, the prosecutor's statement was not error. Alternatively, if it was error, it was waived because any prejudicial effect could have been cured by a timely objection.

The "reason to doubt" language that Cook objects to first appeared in defense counsel's closing argument. Defense counsel emphasized the State's burden, stating:

> I want to take a moment and talk about this burden that the State has because it's incredibly important. It's the crux of what you're dealing with. Because when the State charges a person with a crime, ...[t]hey have to bring all their resources, their money, their power, everything they have at their disposal and put it out here as evidence for you to hear. . . .

4VRP (Sept. 24, 2014) at 30-31. After describing lower burdens of proof, she stated:

> The State's burden here is higher than that. And it's higher than that for a reason, and it's a bit of an intelligent twist because you may think he's guilty by clear, cogent, and convincing evidence. **But if you have reason to doubt the State hasn't proven to you beyond a reasonable doubt that he's guilty**, you have to acquit him.

Id. at 32 (emphasis added). She then reminded the jury that the State had not provided any corroborating evidence:

> I want to talk a little bit about [N.R.'s] stories and the problems with the stories. I can't emphasize enough to go back to the fact there is not one additional piece of evidence to corroborate what she has said. The State's evidence is based entirely on that . . . . .

Id. at 33. Defense counsel argued that the swabs should have been tested for DNA, and that the State did not meet its burden by failing to test the swabs:

> The DNA, if swabs were taken --and my listening of the testimony was that it was likely or possible that there was DNA on those swabs if it had been tested.
>
> . . .
>
> So the swabs that were taken from inside of her vagina showed his DNA. That would have been evidence the State has -- did not get tested and did not put before you. That's their burden, their duty to do that. That's lacking – that's evidence that's not here.

Id. at 35-36

On rebuttal, the prosecutor took issue with defense counsel's use of the phrase "reason to doubt." He argued:

> Of course, there are many standards of proof, but there's one thing that I take issue with and the instructions do. **Beyond a reasonable doubt is not a reason to doubt**. The instructions define it a little differently. It's not a reason to doubt. It says what beyond a reasonable doubt is also: an abiding belief in the truth of the charges. That's your standard.

Id. at 44 (emphasis added). The prosecutor then read the jury instruction out loud:

> The law simply requires, "A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt" --and these are to an element of the offense – "as would exist in the mind of a reasonable person after fully, carefully -- fairly, and carefully considering all of the evidence or lack of evidence. But if you have -- if, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt."

Id. at 45. The prosecutor also rebutted the suggestion that the State's decision not to test the swabs was the basis for a reasonable doubt about Cook's guilt:

> So it's not a reason to doubt. Gee, I guess there was a small chance that the DNA could have been recovered on the swab that was also used to test whether she had any sexually transmitted diseases. It's not a doubt to an element of the offense. It's not a reasonable doubt. It may be for you, but that's for your determination.

Id.

Considering the entire context, Cook has not shown that the prosecutor undermined the State's burden of proof. Cook does not dispute that the jury received the proper written instruction. The prosecutor did not replace the instruction with his own paraphrase, but drew the jury's attention to the pattern instruction by reading it out loud. The prosecutor did not, as Cook argues, suggest that the reasonable doubt standard was different than "abiding belief," but emphasized that "an abiding belief in the truth of the charges" was part of the pattern instruction. 4VRP (Sept. 24, 2014) at 44. Considering the prosecutor's statements in context, we find no error.

Cook next argues that he received ineffective assistance of counsel because his attorney failed to object to the prosecutor's misstatement of the burden of proof. We review an ineffective assistance of counsel claim de novo. State v. White, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). To prevail on an ineffective assistance of counsel claim, a defendant must show that (1) counsel's performance "fell below an objective standard of reasonableness and (2) there was prejudice, measured as a reasonable probability that the result of the proceeding would have been different." State v. Humphries, 181 Wn.2d 708, 719-720, 336 P.3d 1121 (2014) (citing Strickland v. Washington, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

Because Cook has not shown that the prosecutor's argument was error, he has failed to show that counsel's performance was deficient in failing to object to that argument. We accordingly reject Cook's ineffective assistance of counsel claim.

Statement of Additional Grounds

In a statement of additional grounds (SAG), Cook repeatedly argues that the State conducted a faulty investigation by failing to promptly obtain DNA evidence.[1] He appears to raise three claims based on the allegedly faulty investigation: (1) that the prosecutor committed misconduct by misleading the jury about the lack of DNA evidence; (2) that he received ineffective assistance of counsel because his attorney did not have the swabs tested and did not

[1] Cook's SAG is inconsistently numbered. The gist of his arguments can be found in the statement of cases immediately following his resume.

adequately challenge the State's evidence; and (3) that the State suppressed exculpatory evidence. His claims are without merit.

First, Cook argues that the prosecutor's closing argument was improper. He objects to the manner in which the prosecutor summarized testimony and to the prosecutor's arguments concerning the lack of DNA evidence. Considering the prosecutor's statements in context, we find no error.

Second, Cook claims that he received ineffective assistance of counsel. Cook argues that his attorney's performance was deficient because she did not test the swabs for DNA evidence. But the merits of this argument depend on whether the results of such a test would be helpful to Cook's defense. Because any such evidence is outside the record before us, we decline to review the claim on appeal.

Cook also argues that he received ineffective assistance of counsel because his attorney should have challenged the State witnesses about alleged inconsistences in their testimony and should have argued to the jury that the lack of DNA evidence indicated his innocence. The record reflects that counsel did challenge State witnesses and did urge the jury to consider both the alleged inconsistences in testimony and the lack of evidence corroborating N.R.'s testimony. In addition, the jury acquitted Cook of the most serious charge, second degree rape. We accordingly hold that Cook has not shown that counsel's performance was deficient.

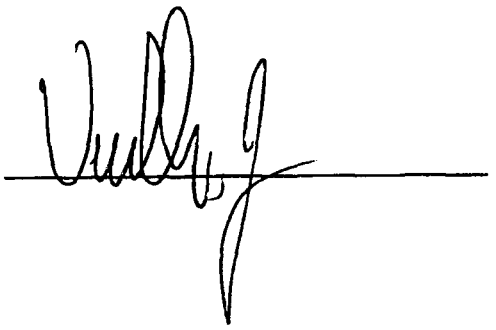
Finally, Cook appears to argue that, by failing to obtain DNA evidence, the State unlawfully suppressed evidence. Under Brady v. Maryland, 373 U.S. 83, 83

S.Ct. 1194, 10 L.Ed.2d 215 (1963), the State has a constitutional duty to disclose exculpatory evidence. To establish a Brady violation, a defendant must demonstrate that (1) the evidence at issue is favorable to the accused; (2) the evidence was willfully or inadvertently suppressed by the State; and (3) prejudice resulted. Strickler v. Greene, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). But because there is no evidence in the record of whether the swabs contained evidence favorable to Cook or that the State suppressed the evidence, we are unable to review this claim.

Affirmed.

Spearman, C.J.

WE CONCUR:



Becker, J.

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. STEVEN COOK, Appellant.	)	No. 72619-6-I ORDER DENYING MOTION TO RECONSIDER

A motion to reconsider was filed by appellant, Steven L. Cook of the opinion filed in the above matter on November 9, 2015. The State of Washington did not file a response. A majority of the panel has determined this motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion to reconsider is denied.

DATED this 5th day of January 2016.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2016 JAN -5 PM 4:48

FOR THE COURT:

Spearman C.J.
Presiding Judge

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

STEVEN L. COOK, Appellant.

NO. _____

DECLARATION OF MAILING

I, Steven L. Cook, hereby declare:

1. I am over the age of eighteen years and I am competent to testify herein.

2. On the below date, I caused to be placed in the U.S. Mail, first class postage prepaid, 2 envelope(s) addressed to the below-listed individual(s):

Washington Supreme Court
P.O. BOX 40929
Olympia WA 98504-0929

Snohomish County Prosecutors
3000 Rockefeller Ave
Everett WA 98201
MS 504

3. I am a prisoner confined in the state of Washington Department of Corrections ("DOC"), housed at the Monroe Correctional Complex ("MCC"), P.O. Box 777, Monroe, WA 98272, where I mailed the said envelope(s) in accordance with DOC and MCC Policy 450.100 and 590.500. The said mailing was witnessed by one or more correctional staff. The envelope contained a true and correct copy of the below-listed documents:

1. PETITION FOR REVIEW
2. _____
3. _____
4. _____
5. _____
6. _____

4. I invoke the "Mail Box Rule" set forth in GR-3.1—the above listed documents are considered filed on the date that I deposited them into DOC's legal mail system.

5. I hereby declare under pain and penalty of perjury, under the laws of state of Washington, that the foregoing declaration is true and accurate to the best of my ability.

DATED this 11th day of January, 2016.

Steven L Cook

(Print) STEVEN C. COOK, *Pro se.*
DOC# 377462, Unit C320
Monroe Correctional Complex
(Street address) _____
P.O. Box 777
Monroe, WA 98272