NO. 72829-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JAMES DELONG,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JOHN CHUN

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether the trial court properly excluded evidence of the victim's sexual history at the defendant's trial for rape and promoting prostitution.

2. Whether the deputy prosecutor committed misconduct during closing argument by referring to the child-like intellect of the developmentally disabled victim.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The appellant, James DeLong, was charged by amended information with the crimes of second-degree rape and first-degree promotion of prostitution involving P.W., and second-degree promotion of promotion involving P.B. CP 9-10.[1] The elevated degree of the sex offenses involving P.W. was due to the allegation that she could not consent to sexual intercourse or prostitution due to mental incapacity or developmental disability. CP 9-10.

By jury verdict rendered on November 18, 2014, DeLong was found guilty as charged on all counts. CP 67-68, 70.

[1] DeLong was also charged with, and convicted by jury verdict of, second-degree theft from P.W. CP 10, 69. DeLong is not challenging his conviction for theft in this appeal, and the State will thus not recite the facts relating to that conviction in its brief.

2. SUBSTANTIVE FACTS

On the evening of February 18, 2014, Federal Way Police Department (FWPD) officer Brian Bassage responded to his station to take a report from P.W. and her friend, Christina Stark. 8RP 76, 78-79.[2] Bassage attempted to talk to P.W., but found her impossible to communicate with, and mentally disabled. 8RP 80. After speaking with Stark, Bassage requested the assistance of detectives, and FWPD detectives Richard Kim and Adrienne Purcella took over for him. 8RP 80-81.

Like Bassage, Kim and Purcella found P.W. to be unintelligible and inarticulate. 8RP 54; 9RP 30. P.W., who was 51 years of age, appeared unable to function normally, and was unable to tell the detectives her birthdate or recite the alphabet. 8RP 56, 59; 9RP 30.

Stark explained to the jury that she had been living with P.W. and DeLong at a home in Federal Way for at least a year. 11RP 107-08, 110. She had initially been hired by DeLong to care for the property, though DeLong only rented it from its owner. 11RP 80,

[2] The verbatim report of proceedings consists of 18 volumes, referred to in this brief as follows: 1RP (10/22/2014); 2RP (10/23/2014); 3RP (10/27/2014); 4RP (10/28/2014); 5RP (10/29/2014); 6RP (10/30/2014); 7RP (11/3/2014); 8RP (11/4/2014); 9RP (11/5/2014); 10RP 11/6/2014); 11RP (11/10/2014); 12RP (11/12/2014); 13RP (also 11/12/2014); 14RP (11/13/2014); 15RP (11/17/2014); 16RP (11/18/2014); 17RP (12/9/2014); 18RP (12/12/2014).

111. Stark tried to teach P.W., who has been collecting social security disability benefits since 1991, her ABCs and basic reading, and told the jury that P.W. liked to watch cartoons and play with toys and stuffed animals. 10RP 88; 12RP 3-7, 54. According to Stark, DeLong spent a lot of time with P.W., and was "like a dad to her." 12RP 10.

In early 2014, Stark noticed that P.W. would not spend as much time at their Federal Way residence as she had before. 12RP 15. After speaking to P.W. about this change, Stark confronted DeLong and accused him of being a pedophile. 12RP 15-16. When DeLong asked Stark if she meant that he was having sex with children, Stark told him that P.W. was, for all intents and purposes, like a child. 12RP 16. DeLong told Stark that he did not "mess with children" and that what he did with P.W. was none of Stark's business. 12RP 16. Within the next few days, Stark decided to take P.W. to the police station in Federal Way. 12RP 21.

After speaking to P.W. and Stark, FWPD Detectives Kim and Purcella drove to DeLong's residence and spoke to him. 8RP 61-62. DeLong agreed to go back with the detectives to their station, where he submitted to a recorded interview with them. 8RP 63.

During his interview,[3] DeLong said that he had known P.W. for three years. State's Ex. 14. He described P.W. as having a "learning disability" and that she's "developmentally incapable" of providing for herself. State's Ex. 14. Although he initially denied having sex with P.W., he ultimately admitted that he engaged in digital and genital penetration with her. State's Ex. 14.

DeLong also told the detectives that he had, on a number of occasions, driven P.W. to the Gig Harbor home of an acquaintance of his, Marvin Douglass. State's Ex. 14. DeLong admitted that P.W. would engage in sex acts with Douglass and that Douglass would pay him, but asserted that his payment was simply for bringing P.W. to Douglass's apartment, and not for facilitating sex. State's Ex. 14.

Douglass, a legally blind retiree, told the jury that he had known DeLong for many years, and that DeLong knew he was lonely. 11RP 7, 20-24. DeLong offered to bring women to Douglass's home, and Douglass agreed. 11RP 23-24. Douglass said that he would typically give DeLong $100 per visit, and

[3] The recording of the interview was admitted as State's Ex. 13 and was played for the jury. 9RP 88. The jury was provided with a transcript of the interview as well, which was offered into evidence as State's Ex. 14 and has been transmitted by DeLong to this Court.

explained that DeLong would drop off P.W. or other women, whom Douglass would have sex with. 11RP 25-26, 32-33.

Douglass identified P.B. as one of the other women with whom he would engage in intercourse. 11RP 26, 33. Stark identified P.B. to the jury as a heroin addict who briefly lived at DeLong's home in late 2013 and early 2014. 12RP 12-14. In his interview with the FWPD detectives, DeLong acknowledged that Douglass paid him to bring P.B. to his apartment, and that Douglass and P.B. would engage in sex during her visits. State's Ex. 14.

Carolyn Webster, a child interview specialist for the King County Prosecutor's Office, testified that along with interviewing children, she was tasked with talking to adults with developmental delays, because many of the same issues – such as limited vocabulary and ability to understand concepts – are involved with both types of interviewees. 12RP 64-65, 67. Webster conducted an interview with P.W. and found that P.W. had a great deal of difficulty understanding basic things, and displayed very child-like behavior. 12RP 80.

The State called P.W. in its case-in-chief, and her testimony was very reflective of her intellectual limitations. She could not

state her address or her correct age. 13RP 148-49, 150-51. She stated that she enjoyed riding bikes, watching cartoons, and playing with toys. 13RP 152-53, 154-55, 156-57. She told the jury that she referred to Stark as "Mom," and that she considers the cartoon character Scooby Doo to be her boyfriend. 13RP 155; 14RP 25.

P.W. was very uncomfortable while being asked to describe sexual matters, but told the jury that she had genital intercourse and manual copulation with DeLong at both their current home in Federal Way and an earlier residence in Fife. 13RP 177-79. She stated that she did not enjoy this activity. 13RP 180.

P.W. also identified Douglass as DeLong's friend, and said that DeLong would take her to Douglass's home and tell her to have sex with him so that they would have money to pay their bills. 13RP 182. P.W. explained that she did not enjoy this activity, either. 13RP 182; 14RP 34.

DeLong did not testify in his case-in-chief. He called only two witnesses: his attorney's investigator, who testified regarding the cost of cab fare between Federal Way and Gig Harbor; and a former neighbor of DeLong's in Fife, who told the jury that he knew P.W. well, but had a hard time understanding her, and that he often

heard P.W. and DeLong engaging in sex when he would arrive at DeLong's home. 14RP 52, 54, 57.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY EXCLUDED IRRELEVANT EVIDENCE OF P.W.'S SEXUAL HISTORY

DeLong asserts that he was deprived of his constitutional right to present a defense when the trial court refused to allow him to offer evidence of P.W.'s purportedly sexual relationship with a similarly developmentally disabled boyfriend.[4] DeLong contended at trial that evidence of P.W.'s sexual activity with her boyfriend, which allegedly occurred near to and during the period of time during which DeLong engaged in sexual intercourse with P.W., was probative of P.W.'s ability to consent. The trial court disagreed, and held that the fact of other possible intercourse was unconnected logically to the question of whether P.W. was biologically incapable, due to mental defect, of understanding the nature or consequences of sexual intercourse, such that P.W. was unable to grant consent.

[4] In his trial memorandum, DeLong presented, as an offer of proof, an affidavit from his attorney that stated, in full: "[D]efense represents that [P.W.] has had and continues to engage in sexual activities with her 'boyfriend' [T.B.]" CP 16. Defense counsel provided no oral elaboration to the trial court as to the nature of the alleged "sexual activities." 2RP 97. The State, in responding to DeLong's assertion, noted that P.W.'s boyfriend was also developmentally disabled. 4RP 12-13.

On appeal, DeLong contends that the trial court erred in multiple regards. He maintains that the trial court's reliance on RCW 9A.44.020, commonly known as Washington's "rape shield" law, was misplaced, insofar as the statute pertains only to a victim's prior sexual activity, as opposed to her sexual relations with others that are separate from, but contemporaneous with, the charged conduct. DeLong further asserts that regardless of whether the "rape shield" law applies, his proposed evidence was highly probative as to the issue of consent, and that the trial court's prohibition on introduction of that evidence was patently wrong. DeLong also appears to question the validity of any statutes that would inhibit the ability of the mentally disabled to engage in sexual activity. Finally, DeLong argues that the trial court's exclusion of this evidence cannot withstand review for constitutional harmlessness, and that reversal is required. His claims should be rejected.

The standard of review for a trial court's rulings pursuant to RCW 9A.44.020 is somewhat confusing. For many years, the rule expressed in State v. Hudlow, 99 Wn.2d 1, 659 P.2d 514 (1983), was considered a matter of well-settled law. As the Hudlow court explained, the admissibility of "past sexual behavior evidence is

within the sound discretion of the trial court...and the exercise of discretion in balancing the danger of prejudice against [its probative value] is also a matter within the trial court's discretion, and should be overturned only if no reasonable person could take the view adopted by the trial court." Hudlow, 99 Wn.2d at 17-18. This "abuse of discretion" standard, which typically applies to the evidentiary rulings of trial courts, was put in some question in 2010 by the state supreme court in its decision in State v. Jones, 168 Wn.2d 713, 230 P.3d 576 (2010). In Jones, the supreme court held that although a defendant has no constitutional right to present irrelevant evidence, his Sixth Amendment right to present a defense entitles him to prevail over the bar erected by RCW 9A.44.020 if his evidence of the victim's sexual history has "high probative value." Jones, 168 Wn.2d at 720-21. The Jones court then analyzed whether the evidence offered in that case was sufficiently valuable as a matter of *de novo* review. Id. at 719.

The Jones court did not profess to overrule Hudlow, however, citing its earlier decision repeatedly with approval. Jones, 168 Wn.2d at 720-21. Perhaps the most reasonable way to reconcile the two cases is to conclude that a trial court's ruling as to the relevance of a victim's sexual history is, as it has long been,

reviewed for abuse of discretion, whereas if the trial court deems the evidence minimally relevant, its determination as to whether it is of sufficient probative value to overcome the proscription set forth by the "rape shield" statute is considered *de novo* by this Court.

In any event, regardless of the standard of review applied by this court, the trial court's decision should be affirmed. Evidence that P.W., a severely mentally disabled woman, engaged in other sexual activity lacked probative value when it came to the question of whether she was capable, due to her physiological defects, from ever consenting at all. This simple fact was expressly recognized by the trial court, and controls the outcome here, whether the trial court's decision is reviewed for abuse of discretion or *de novo*, and whether RCW 9A.44.020, or ordinary evidentiary rules such as ER 401 and ER 403, apply.

a. Applicability of RCW 9A.44.020 to the instant case.

As noted *supra*, DeLong's offer of proof as to P.W.'s sexual relationship with her developmentally disabled boyfriend was that the two had and were currently engaged in "sexual activities." CP 16. Presumably, DeLong was attempting to convey that these "activities" were contemporaneous with the charging period during which, the State alleged, DeLong was raping P.W. CP 9. DeLong

asserts that RCW 9A.44.020 is inapplicable to his circumstance, on the ground that the statute applies only to that segment of a victim's sexual history that antedates the charged event(s).

DeLong relies on Jones for this proposition. In that decision, the state supreme court observed that the plain language of RCW 9A.44.020[5] compelled the conclusion that only evidence of "prior sexual activity" was subject to potential exclusion via the "rape shield." Jones, 168 Wn.2d at 722-23. Based on this conclusion in Jones, DeLong asserts that the trial court erred by even subjecting his proposed evidence to the review required by RCW 9A.44.020, because it was purportedly contemporaneous with, rather than prior to, his sexual intercourse with P.W.

In Jones, the defendant asked for permission to present evidence that purportedly would have shown that the victim had engaged in an "alcohol- and cocaine-fueled sex party" with the defendant and two other men, and that her sexual activity with all three men was a consensual event during this party; in other words, Jones's sexual intercourse with the victim at the party was not rape,

[5] RCW 9A.44.020(2) provides that "[e]vidence of the victim's past sexual behavior including but not limited to the victim's marital history, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards is inadmissible on the issue of credibility and is inadmissible to prove the victim's consent" except under certain conditions.

for which he had been charged. Jones, 168 Wn.2d at 717, 721. The trial court held that evidence of the victim's sex acts with the other men was prohibited by RCW 9A.44.020. Id. at 721.

It was with this in mind that the state supreme court analyzed the language of the rape shield law, and held that the language of the statute would not operate to require exclusion of Jones's evidence. As the supreme court explained:

> The language of the statute states unequivocally that evidence of the victim's "past sexual behavior" is "inadmissible to prove the victim's consent".... The statute was not designed to prevent defendants from testifying as to their version of events....
>
> Jones's evidence refers not to past sexual conduct but to conduct on the night of the alleged rape. He wanted to testify that K.D. was not raped, but that she had...consented to sex with three men during an all-night sex party. If we bar this evidence because of the rape shield statute, we are effectively reading the word "past" out of the statute. There is no indication that this is what the legislature intended.

Jones, 168 Wn.2d at 722-23.

The State recognizes that this Court is bound to adhere to the rulings of the supreme court. State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984). However, the State respectfully suggests that the supreme court's holding in Jones should be interpreted with an eye toward the specific facts of that case, which

led the supreme court to find that the trial judge had wrongly applied the "rape shield" law to sexual activity that was occurring *in the same setting, at the same time, and in the defendant's active presence* as the conduct by the defendant that was being prosecuted. See Jones, 168 Wn.2d at 724 (holding that had the trial court allowed the defendant to present his evidence, "a reasonable jury that heard of a consensual sex party may have been inclined to see the sexual encounter in a different light. The jury would have heard a completely different account of the events of that night, so it is possible [that it could have reached a different result].")

There is no such confluence of events in the instant matter. DeLong has never asserted that he had engaged in consensual group sex with P.W. and her boyfriend, such that there could be significant similarity between P.W.'s conduct with her boyfriend and her sexual intercourse with DeLong. As the Jones court itself noted, RCW 9A.44.020 was based on the observation that evidence of sexual activity with others is "usually of little or no probative value in predicting the victim's consent to sexual conduct on the occasion in question." Id. at 723, citing Hudlow, 99 Wn.2d at 9.

Indeed, this observation by the Jones and Hudlow courts is especially fitting when the issue before the trier of fact concerns whether the victim even had the fundamental, organic ability to consent, as opposed to the question of whether, on a particular occasion, she exercised an ability she undoubtedly possessed. The trial court reasonably observed that even if P.W. had verbally agreed to have sex with her boyfriend (or DeLong), it would not provide insight into the question of whether she had the ability to understand the act or consequences of intercourse, which was the central determination that the jury would be required to make. 3RP 42.

Accordingly, the State respectfully asks this Court to see the holding in Jones – that RCW 9A.44.020 applies only to sexual history that antedates the charged events – as dependent on, and limited to, the facts of that and like cases, where exclusion of evidence of the victim's other sexual activity effectively silences the defendant and disables him from presenting his account of the charged event.

b. Evidence of P.W.'s relationship with her boyfriend was irrelevant and would have been unhelpful to the jury.

In any event, whether the trial court's consideration of RCW 9A.44.020 was appropriate or misplaced, its conclusion that DeLong's proposed evidence should be excluded can be affirmed on simple grounds of relevance and avoidance of confusion.[6] Indeed, it becomes clear when one reads the history of the "rape shield" law that it does not do much more than, for historically necessary reasons, separately encapsulate pre-existing principles regarding relevance and other generalized evidentiary considerations.

In its 1983 decision in Hudlow, the supreme court observed that the "presumption of inadmissibility of prior sexual conduct evidence on the issue of consent is a recent trend" that reversed years of the opposite rule, which was based on the inexplicable notion that a woman's consent to have sex with one or more men made her somehow more likely to consent to other men. Hudlow, 99 Wn.2d at 9-10 (noting that the mere fact of prior consensual sexual activity, by itself, would not meet the bare relevancy test of ER 401). The Hudlow court went on to explain that even where

[6] The judgment of a trial court should not be reversed when it can be sustained on any basis supported by the record, although different from that indicated by the trial judge. State v. Nordlin, 134 Wn.2d 570, 582, 951 P.2d 1131 (1998).

there might be some small relevance between a woman's prior sexual activity and the charged event,[7] the evidence of this other sexual conduct would still be so slight in comparison to its prejudicial effect to warrant exclusion under ER 403. Id. at 11.

In other words, the legislature reasonably enacted RCW 9A.44.020 to separately address long-standing fallacies and gender biases that operated to women's detriment and wrongly made the reporting and prosecution of sex offenses unjustly dreadful. At its heart, however, the "rape shield" statute simply calls upon trial courts to exercise their discretion under ER 401 and ER 403 to admit or exclude evidence based on reasonable considerations of relevance, unfair prejudice, risk of confusion, and efficiency. Compare RCW 9A.44.020(3)(d) and ER 403. A trial court's decisions on the application of these rules of general application are reviewed for abuse of discretion, and even the Jones court noted that *de novo* scrutiny is appropriate only where evidence of "high probative value" is excluded to the defendant's detriment.

[7] The Hudlow court suggested, by way of example, that the fact that a complaining witness "frequently engages in sexual intercourse with men shortly after meeting them in bars" might meet the minimal standard set forth in ER 401 where the defendant claims that the complainant consented to intercourse with him under similar circumstances. Hudlow, 99 Wn.2d at 11. One cannot help but wonder if the court would reach the same conclusion today.

In this matter, the trial court largely referred to this Court's decision in State v. Summers, 70 Wn. App. 424, 853 P.2d 953 (1993), in concluding that evidence of P.W.'s possible sexual activity with her boyfriend was inadmissible pursuant to RCW 9A.44.020. 4RP 14-16. Whether the trial court erred in applying the "rape shield" law or not, its reliance on the reasoning in Summers is entirely justified. Summers, like the present matter, concerned the sexual abuse of a developmentally disabled woman, and; as here, the defendant in that case sought to introduce evidence of the victim's sexual history to cast doubt on the notion that she lacked the ability to consent to intercourse. Summers, 70 Wn. App. at 434. This Court affirmed the trial court's conclusion that the defendant's evidence was irrelevant, holding that "[w]here the lack of capacity is based on a permanent, organic condition, it logically follows that prior acts of intercourse cannot demonstrate that the victim understands the nature and consequences because the prior acts may have occurred due to the same lack of capacity." Id. at 435. This Court further noted that any slight probative value from the admission of such evidence was considerably outweighed by the dangers warned of in ER 403. Id.

Although the sequence of events in Summers fits more neatly into RCW 9A.44.020, in that the victim's other sexual activity predated the defendant's abuse, this Court's decision was grounded in fundamental evidentiary principles equally applicable to this case. As this Court recognized, a person who is incapable of consenting due to physiological defects is different than a person who may or may not have chosen to consent, and the probative value of the mere fact of a biologically incapacitated person's other sexual activity is negligible, at best. DeLong offered no evidence other than that P.W. purportedly engaged in sexual conduct with her developmentally disabled boyfriend. To suggest that such a showing satisfied the minimum standard required by ER 401 is to engage in the same type of reasoning discredited by the supreme court in Hudlow, when it rejected the proposition that because a woman consented to sex in the past it was more likely that she consented to the conduct engaged in by the defendant. In reality, such evidence showed only that the woman had participated in consensual sex before. Here, evidence of P.W.'s relationship with her boyfriend showed *only* that she may have engaged in sexual activity in another setting. It does not show that she was any more likely to possess the intellectual capability to understand the act or

consequences of sexual intercourse.[8] And any nominal value such evidence could contain would clearly be substantially outweighed by unnecessary embarrassment to P.W. and the risk of confusing the jury. Whether considered as an application of ER 401 and ER 403 or as an exercise under the more-targeted "rape shield" law, the trial court did not abuse its discretion, nor was the proffered evidence of such "high probative value" as to require its admission as a matter of constitutional law.[9]

DeLong further contends that evidence of P.W.'s relationship with her boyfriend was also relevant because investigators knew of P.W.'s sexual activity with her boyfriend but did not act on it. DeLong's reasoning in this regard is somewhat dubious. He appears to believe that the investigators' inactivity as to the boyfriend makes it more likely that P.W. was capable of consenting to sex with him, because they would have arrested her boyfriend

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[8] See State v. Frost, 141 N.H. 493, 501-02, 686 A.2d 1172 (N.H. 1996) (distinguishing between evidence of mere fact of other sexual activity engaged in by a developmentally disabled woman and evidence of the woman's thought processes in deciding to participate in past sexual conduct, and finding only the latter to be relevant).

[9] DeLong's reliance on Anderson v. Morrow, 371 F.3d 1027 (9th Cir. 2004) is misplaced. The Anderson court did not attempt to comprehensively review the Oregon trial court's application of that jurisdiction's rape shield statute in a case involving a developmentally disabled victim. It merely affirmed one aspect of the trial court's decision, in which the lower court excluded evidence of the victim's reputation for lasciviousness, which the appellate court characterized as of a "demeaning nature that characterized [her] as a wanton and promiscuous woman." Anderson, 371 F.2d at 1030.

had they truly believed she was unable to agree to engage in intercourse. The essential error in DeLong's reasoning is that the investigators' decision may have been based on any number of considerations,[10] and their decision would only bear any relevance if they testified that they did not act because they subjectively felt that P.W. was capable of consent. Such opinion testimony by a witness, directly concerning an ultimate issue of the defendant's guilt to be decided by the jury, is generally prohibited, whether directly or by inference. See State v. Farr-Lenzini, 93 Wn. App. 453, 459-60, 970 P.2d 313 (1999); see also State v. Christopher, 114 Wn. App. 858, 863, 60 P.3d 677 (2003) (holding that this type of opinion invades the jury's independent determination of the facts).

Moreover, in seeking the trial court's permission to introduce P.W.'s relationship with her boyfriend to the jury, DeLong did not provide any evidence as to the investigators' decision-making or reasoning in this regard, and offered only speculation as to their motivation. He offered no substantive basis on which the trial court would have felt justified in disregarding the long-standing

[10] These could include the fact that P.W.'s boyfriend is intellectually challenged and thus unable to either give his own consent own or ascertain whether his partner was capable of doing so.

condemnation of witnesses' opining on key questions to be decided by the jury.

c. Even if erroneous, the trial court's exclusion of evidence of P.W.'s relationship with her developmentally disabled boyfriend was harmless.

Under most circumstances, erroneous evidentiary rulings by a trial court are reviewed under the non-constitutional harmless error standard, and do not require reversal unless the appellate court determines that within reasonable probabilities the outcome of the trial would have been different had the error not occurred. State v. Rivers, 129 Wn.2d 697, 706, 921 P.3d 495 (1996). As discussed *supra*, it is not clear whether decisions by a trial court regarding the exclusion of evidence at a rape trial of a victim's sexual history fall within a separate and distinct category and are subject to review under for constitutional harmlessness. See Jones, 168 Wn.2d at 724-25 (applying the more rigorous standard to the trial court's decision in a rape case, even after determining that the "rape shield" statute did not apply to the evidence in question). The State does not concede that the trial court erred here, whether as a matter of evidentiary or constitutional law. Assuming *arguendo*, however, that an error occurred, DeLong fails

to show, under either standard, that the jury would have reached a different result without the error.

DeLong bases his claim of harmfulness on the proposition that by excluding evidence of P.W.'s sexual activity, the trial court prevented the jury from learning of P.W.'s relative sophistication when it came to sexual conduct, which would bear on the jury's determination as to whether she had the capacity to consent. This Court has observed that the best evidence of a complainant's capacity to understand is her own testimony. Summers, 70 Wn. App. at 434. During her appearance on the witness stand, P.W. described, to the best of her capabilities, what "sex" entailed, what a "handjob" and "blowjob" are, and which body parts people use during sexual activity. 13RP 172-75, 177-78. P.W. also testified that she had a number of boyfriends in the past, and that she had been married and borne several children. 14RP 6-7.

Despite all of this testimony, the jury nevertheless concluded that P.W. lacked the ability to consent. DeLong fails to demonstrate that the jury would have acquitted him of the charges of rape and promoting prostitution involving P.W. had it also learned the mere fact that she currently had a mentally disabled boyfriend with whom she engaged in sex. The jury had ample

evidence to show that P.W. knew, in her own limited way, what sexual activity involved, but reasonably concluded that P.W.'s organic limitations rendered her incapable of providing genuine consent. As the trial court observed at sentencing, P.W.'s developmental disability was abundantly clear when she testified, and her incapacity has rendered her unable to formulate adult-level thoughts. 18RP 244-45.

Finally, to the extent that DeLong may be challenging the legislature's blanket prohibition on engaging in sexual intercourse with the developmentally disabled, on the ground that individuals with disabilities "have the same needs for... sexual expression as everyone else,"[11] he has failed to preserve this issue through assignment of error and appropriate briefing. See RAP 10.3(a)(4) and RAP 10.3(a)(6); Foster v. Gilliam, 165 Wn. App. 33, 56, 268 P.3d 945 (2011).

2. THE DEPUTY PROSECUTOR DID NOT COMMIT MISCONDUCT IN HIS CLOSING ARGUMENT

Next, DeLong contends that the deputy prosecutor committed reversible misconduct during closing argument by improperly appealing to the jury's sympathies and prejudices.

[11] Brief of Appellant, at 15-16 (citations omitted).

DeLong asserts that the prosecutor asked the jury to use its role as trier of fact to "send a message" to the community and presented facts that had not been admitted in evidence. DeLong's contentions are absurd, and should be rejected.

In order to establish prosecutorial misconduct, a defendant must prove the impropriety of the prosecutor's conduct and that it prejudiced his right to a fair trial. State v. Carver, 122 Wn. App. 300, 306, 93 P.3d 947 (2004). Where, as is the case here, the defendant's trial counsel failed to object to the prosecutor's statements, reversal is required only if the misconduct was so deliberate and malicious that no instruction from the trial court could have cured the resulting prejudice. See State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988).

DeLong first challenges the fact that the deputy prosecutor referred to children when addressing DeLong's victimization of P.W. 15RP 22-24. DeLong maintains that, in doing so, the prosecutor asked the jury to decide his fate based on facts outside the record and to use its platform to communicate a broader message to the public. Brief of Appellant, at 35, 37.

A prosecutor's comments during closing argument are reviewed in the context of the total entire argument, the issues in

the case, the evidence addressed in the argument, and the jury instructions. Carver, 122 Wn. App. at 306. Here, DeLong ignores the fact that the prosecutor referred to children solely in the context of addressing P.W.'s organic defects, which rendered her intellectually juvenile notwithstanding her age and physical maturity:

> Children cannot and are not expected to understand the nature and consequences of sex. It is therefore illegal to have sex with them. And sadly, for some adults, they are mentally at the same level as children. And the law, this law, makes it illegal to have sex with them, too. There is too much danger, too much manipulation, too much power inherent in that.
>
> [P.W.] is like a sweet child. She doesn't appear to even realize that she could say no, the she could limit when and where and what in anything she would do. She doesn't quite understand that she has that power or that she should have that power. And because of that, she needs the protection of this law. She needs it. She is in many ways the epitome of who we want this law to protect.

15RP 22.

It is clear, when seen in the context of the prosecutor's entire remarks, that he was asking the jury to use its common sense rather than introducing facts (i.e., the average juror is well aware that sex with children is unlawful) and was addressing the court's instructions regarding the abuse of a mentally incapacitated adult as a means of committing rape and promotion of prostitution. CP

49-50, 52-54, . The crux of this case was, of course, whether P.W. was sufficiently mentally unequipped to consent to intercourse despite her age, and the prosecutor was entitled to explain to the jury why, based on the evidence presented, P.W. deserved the protection of the law.

In his rebuttal argument, the prosecutor did not, despite DeLong's protestations on appeal, seek to align the jury with the State by suggesting that P.W. needed "general protection from society's ills, as would a child." Brief of Appellant, at 37. He was only responding to defense counsel's attempts, in her closing remarks, at casting doubt on the likelihood that P.W. was so unsophisticated that she could not consent to sex. The prosecutor told the jury that he had called P.W. to testify so that the jurors could see her intellectual deficiencies for themselves, and so they could understand why other witnesses who testified had quickly recognized, just as DeLong had, that P.W. could be taken advantage of. 15RP 52-54. Rather than an improper appeal to passions and prejudices, the prosecutor was marshaling the evidence that was relevant to a central element of the charged sex offenses, i.e., P.W.'s incapacity.

Similarly, DeLong mischaracterizes the prosecutor's conclusion at the end of his initial closing and rebuttal arguments as a "call to arms" when he asked the jury, "What are you going to do about it?" 15RP 24, 54. It is not misconduct for a prosecutor to urge the jury to render a just verdict that is supported by the evidence. State v. Curtiss, 161 Wn. App. 673, 701, 250 P.3d 496 (2011). It is clear that this is precisely what the prosecutor was asking the jury to do here in completing his initial closing remarks:

> Consider that portion at the end of [DeLong's] interview with the detectives. Detective Kim, Detective Purcella were clearly getting frustrated with him. They were confronting him about the nature of [P.W.'s] disability and how he could possibly believe that it was okay to have sex with her. And this is what he said.
>
> (Audio recording played)
>
> He tells them she has never said no. She's a child. She shouldn't have to say no. And the Defendant took gross and disgusting advantage of that. And now the trial's over, and it's up to you. What are you going to do about it?

15RP 24.

The prosecutor concluded his rebuttal similarly:

> And yet the Defendant saw [P.W.], and it must have been, a ha, here's a woman I can take advantage of, here's a woman I can make some money off of. And he kept doing it for years continuously.

> That's what this case is about. The Defendant told you how he did it. You have all the evidence. Now it's all up to you. You decide what's going to happen next. What are you going to do about it?
>
> The law is clear, this man is guilty of everything he is charged with. Thank you.

15RP 54. The prosecutor was not asking the jury to "send a message," and he was not otherwise appealing to the jury's prejudices. It is clear that he was concluding his review of the State's evidence by asking the jury to render a verdict supported by that evidence, and nothing more.

DeLong's attempt to equate the prosecutor's arguments here with those criticized by appellate division of the Superior Court of New Jersey in State v. Neal, 361 N.J. Super. 522, 826 A.2d 723 (N.J. Super. Ct. App. Div. 2003), is unavailing. Neal concerned the prosecution of a local school board official for perjuring himself while he testified before a grand jury that was investigating acts of embezzlement from the school board's budget. Neal, 826 A.2d at 726. In his closing remarks, at the conclusion of the perjury trial, the prosecutor asked the jury to hold the defendant accountable not only for lying to the grand jury, but for betraying his oath as a school board member and for betraying the children of the community served by that school board. Id. at 734. The appellate

court understandably agreed with Neal that such argument was improper, as it diverted the jurors' attention from the central issue at trial – i.e., whether the defendant had lied to the grand jury – and called on them to use their role at the defendant's perjury trial to punish the defendant for other uncharged acts. Id.

Nothing like that occurred here. As the excerpts of the deputy prosecutor's remarks reproduced *supra* demonstrate, the prosecutor asked only that the jury hold DeLong accountable for the crimes he had been charged with committing, and which the evidence demonstrated he was indeed guilty of committing.

Finally, DeLong asserts that his trial counsel provided ineffective assistance by failing to object to any of the prosecutor's arguments that he has challenged in his appeal. To prevail on a claim of ineffective assistance of counsel, a defendant must satisfy a two-prong test. He must show: (1) that counsel's performance was deficient, i.e., that it fell below an objective standard of reasonableness, based on consideration of all of the circumstances; and (2) that there is a reasonable probability that the result of the proceeding would have been different had counsel's performance been adequate. Strickland v. Washington, 466 U.S. 682, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State

v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). This Court need not address both prongs of the Strickland test if the defendant makes an insufficient showing on one prong. State v. Thompson, 69 Wn. App. 436, 440, 848 P.2d 1317 (1993).

Here, DeLong cannot demonstrate that his attorney's failure to object was either deficient or caused him significant harm. For the reasons described *supra,* the deputy's closing remarks were not improper. In all likelihood, DeLong's trial counsel declined to object not because she was incompetent but because she was competent, and reasonably understood that the prosecutor was not engaged in misconduct and that any objections to the prosecutor's arguments would have been overruled. Because DeLong cannot satisfy the "deficient performance" prong of the Strickland test, his claim of ineffective assistance fails.[12]

D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm DeLong's convictions.

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[12] DeLong has asked this Court to set aside not only his convictions for raping and promoting the prostitution of P.W. due to prosecutorial misconduct and ineffective assistance of trial counsel, but his conviction for promoting the prostitution of P.B. as well. Brief of Appellant, at 41, 43. DeLong provides no analysis or argument as to why the prosecutor's remarks, or his attorney's failure to object to any of them, caused him injury with regard to the allegation involving P.B. In any event, because the prosecutor did not commit misconduct and thus warranted no objection at trial, DeLong's conviction for promoting P.B.'s prostitution should stand.

DATED this 30 day of September, 2015.

RESPECTFULLY submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Jennifer Winkler, the attorney for the appellant, containing a copy of the Brief of Respondent, in STATE V. JAMES DELONG, Cause No. 72829-6-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name
Done in Seattle, Washington

09-30-15
Date