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IN THE SUPREME COURT OF THE STATE
OF WASHINGTON.

Washington State
Supreme Court

94749-0

STATE OF WASHINGTON,

Respondent,

v.

JOSE CASTRO-LINO,

Petitioner.

MOTION FOR DISCRETIONARY REVIEW.

From The Court Of Appeals,

No; 47850-1-II

34966-7-III

JOSE CASTRO-LINO,

Pro se.

STAFFORD CREEK CORRECTIONAL CTR.

191 constantine way,

ABERDEEN WA, 98520.

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I. IDENTITY OF PETITIONER.

Petitioner JOSE CASTRO_LINO, HEREBY PROCEEDING
Pro se, moves this Honorable court to review the Court
Of Appeals, unpublished opinion, filed on JUNE, 13
2017. (SEE APPENDIX, A).

II. ISSUES PRESENTED FOR REVIEW.

A. Trial counsel here provided ineffective assistance of counsel, when he failed to object to the Prosecutor's inflammatory statements/ prejudicial remarks, and statements of his own personal belief as to how credible the state's witness were.

B. The trial counsel provided ineffective assistance when he failed to furnish an objection, when the state shifted the burden of proof to Mr. Castro-lino, to explain why the victim would falsely accuse him.

C. Trial counsel was also ineffective for his failure to object to the Prosecutor's mis-stating the State's burden of proof, beyond a reasonable doubt prong.

III. STATEMENT OF THE CASE.

The state charged Castro-lino with second degree rape.

On January 30th, 2015, following an investigation that lasted a year, Castro-lino was arrested. The investigation was conducted by a detective from the vancouver police department.

Detective Carol Boswell, contacted Castro-lino regarding the allegation against him. During the recorded statement, Castro-lino denied the allegations and stated that he had little recollection of the events of the day in question due to being highly intoxicated. RP; 189, Exhibit, 4).

Prior to trial, the court conducted pre-trial motions. Petitioner's defense attorney stated to the court that he would be calling an expert (DR. REISBERG), to testify about " the effects of alcohol on one's memory". RP; 76-77.

The defense counsel clarified that " Dr. Reisberg, is a memory expert. He'll be able to help the jury understand what.....intoxication will cause someone to have a blackout, that's the issue here. Mr. castro-lino had told detective Boswell that didn't remember what happened because he had been drinking, so that's

the issue". RP; 77.

The defense counsel emphasized that, "other potential issue is if Mr. Casro-lino testifies, there are other details that weren't disclosed to detective Boswell at the time of the interview in 2014, that were subsequent recall, so Dr. Reisberg would be able to testify as to being able to recall memories that were previously not being able to be remembered". RP; 77. That expert was never called to testify in the trial.

At trial Ms. Marissa Lattiak identified Castro Lino and stated that she knew him as the boyfriend of her friend's mother. That her friend's name was Chris. That on January 4, 2014, Ms. Lattiak went to Chris' and Castro-lino's home after she finished her work shift at 2 a.m.

(RP; 93).

She had arrived around 3 a.m., (RP (96)

That she had drank a "couple of beers". RP 96-97. She may have also smoked marijuana. RP; 97.

During the evening ms. Lattiak went to sleep in chri's downstairs bedroom on the bed alongside another house guest, nicknamed 'Moody'. RP; 100-101, 103.

After falling asleep on her stomach, ms. lattiak alleged that she, " felt penetration" and "just not

Thinking anything of it,.....rolled over onto [her] back". RP 104. Ms. Lattiak was unable to determine whether it was vaginal or anal penetration . RP; 106.

Ms. lattiak was also unable to recall how many times she was penetrated or with what she had been penetrated. Id. Ms lattiak alleged that she had opened her eyes and saw Castro-lino on top of her. RP; 107.

On cross examination, ms lattiak identified at least 16 people that she had discussed with, about her allegations. RP; 117-118. She testified that she had "no injuries" and remembered " a little bit of pain from the penetration, but that's about it". RP; 120-121.

Detective Boswell, without foundation and without objection, was allowed to testify that injuries in cases of anal rape " just don't show up". RP; 183. Those questions took place upon the state's redirect examination. RP: 207-208.

When the prosecutor asked detective Boswell "whether in her personal experience, if you're asleep, are you able to know exactly what's happening to you?", Defense counsel objected on relevance grounds. The trial court sustained the objection. RP: 207-208.

The court was not asked to strike that part of testimony and was not asked to instruct the jury

To disregard that part of testimony and was not asked asked to disregard that part of testimony.

The state rested and the defense began its case by calling Maribel Garza, Castro-lino's live-in fiance'. RP: 252.

Ms Garza testified that castro-lino had drunk more than half of a 24 pack of beer between 5pm and 10:30 or 11 pm, and that he was " really drunk" and that he "couldn't talk right". RP: 252-254.

The defense also called Chris garza, who testified that mr. Castro-lino had been drinking a great deal of beer at home and had drunk "almost a whole case of 24 pack" before leaving the house for the hookah lounge. RP: 302-304. Chri Garza also testified that among others, there was another individua at the house, nicknamed "moody". RP: 306. Moody and Ms. lattiak both slept on Chris' bed. RP 309.

Robert Dalton, Chris Garza's best friend, had also been at the house that night and recalled seeing an individual known as Adam at the house. RP: 336, 342. Mr. Dalton had been at the house but left at about 2:30 a.m. to go home.

Adam, whose full name is Hamed Mohammed, testified that he arrived at the house at approximately 2:30 or 3 a.m. RP:348.

Mr. Mohammed also testified that mr. Castro-lino appeared "pretty drunk".RP: 351.

Mr. Mohammed further testified that he had seen mr. Castro-lino and Ms. Lattiak flirting with one another. RP: 353-354. Upon leaving to go home, Mr. Mohammed searched for Castro-lino to say goodbye, and that's when he saw him on the bed with Ms. Lattiak engaging in what appeared to be consensual sex with Ms. lattiak, with 'Moody' sleeping on the same bed". RP:355.

Following Mr. Mohammed's testimony, the defense stated that it would not be calling Dr. Reisberg, the memory expert.RP:390. The defense also stated that it would not be presenting any further evidence. No mention of Castro-lino not testifying and no colloquy was held between the court and Castro-lino discussing his right to testify at his trial.

During closing arguments, the state began it's closing arguments by stating, " the defendant is a 'predator' who abused and violated Marissa lattiak when she was intoxicated when she was asleep, and that he violated her in the worst way we could think of". RP:414..

In addressing the sexual assault examination, the state said, "..... it doesn't sound like a very pleasant process obviously its invasive, the body's being examined, samples are being taken.....RP:419. " There's no way to put this politely from inside her anus, inside her rectum from the swab that the nurse collected". RP:421.

In regard to Ms. Lattiak's credibility, the state said, ".....If all the evidence that the state had, was simply Marissa's testimony, and if you believed her testimony, as you should, given the evidence, that alone, her testimony alone would be enough evidence for you to find him guilty". RP:418.(emphasis added).

In attacking the defendant's predicted theory of the case, the state said, "....." we know the defendant's theory, his version of what supposedly happened, which is basically a denial, 'no, i, didn't have sexual intercourse with her at all'. He is shocked by the allegations. He's shocked that she would accuse him.

The state highlighted the fact the defense theory appeared to be that Mr. Castro-lino was unable to recall any of the events that night, when he spoke to detective Boswell. Mr. Castro-lino did not testify at trial.

The state also argued that "..... Physical helplessness includes where you're unconscious, where you're asleep. Mental incapacity can be caused by intoxicating". (sic). RP:424.

On the subject of reasonable doubt, the state said, " reasonable doubt is a doubt for which reason can be given. And if after looking at all the evidence fully and carefully you have a belief, that the defendant did these things, a belief that he's guilty a belief that abides throughout your deliberation then at that point you're convinced as the law requires, and at that point it becomes your duty under the law to find the

Defendant guilty". RP: 424-425.

The defense did not object to any of the state's closing argument.

The defense argued that Castro-lino had been intoxicated. RP:427.

"The problem is that he was drunk that evening on January 4th, so he was so drunk that he couldn't remember very much from that evening. so there wasn't that much to be said". RP:436.

The defendant is not required to testify. Castro-lino already explained his side of the story to Detective Boswell and there's not much to add. He's blackout drunk, he doesn't remember".

RP:438.

On rebuttal, the state said; " you will not find any evidence of why she would falsely accuse him. you may have heard some speculation, but there's no evidence of why she would falsely accuse him". RP:441.

The jury returned a guilty verdict, finding Mr. Castro-lino guilty as charged. RP:454-455.

Castro-lino appealed his conviction. The court of Appeals Division II, transferred his case to the court of appeals Division III.

That court issued an unpublished opinion, on June 13, 2017, affirming the conviction.

Castro-lino seeks Review.

IV. ARGUMENT.

A. Court of Appeals erred in finding that Trial counsel did not Provide Ineffective assistance, for his Failure to object to the prosecutor's inflammatory statements.

The prosecuting attorney's hold a special role in regard to the public and jurors in a jury trial.

'Prosecutors are "presumed to act impartially in the interest only of justice'.

If one lays aside the impartialty that should characterize his official action to become a heated partisan.....he ceases to properly represent the public interest, which demands no victim, and asks no conviction through the aid of passion, sympathy or resentment". State v. Reed, 102 Wn. 2d 140, 684 P.2d 699(1984).

The state may not use prejudicial, or inflammatory language to characterize the alleged acts of the defendant, either in its questioning of witnesses, argument to the court in the presence of the jury, or in opening statements, and closing arguments". State v. Pirtle, 127 Wn. 2d 904 (1995); State v. Guizzotti, Wn.App.289.

It is also improper for a prosecutor to express his/her own personal beliefs or make inflammatory remarks in regards to witnesses or evidence. which is a clear violation of the Rules of Professional Conduct.

Where the prosecutor's comment's "so infected the trial with 'unfairness', it constitutes a 'denial of due process' Darden v. Wainwright, 477 u.s. 168,(1986). see also Tak Sun-Tan v. Runnels, 413 f.3d 1101 (9th cir. 2005).

Under Darden, the first issue "is whether the prosecutor's remarks were so improper, and if so, whether they infected the trial with unfairness". Id. Here, the state's inflammatory remarks, of calling a defendant, a 'predator' and focusing the jury's attention upon the sexual assault examination of how it involved placing of a swab inside Ms. Lattiak's rectum were prejudicial and unbecoming the prosecutorial office. This type of comment's were intended to inflame the jury's passion and designed to deprive the defendant of a fair trial. They were statements that any trial counsel would/ and should have found to be objectionable.

Defense counsel's failure, here, to object to such statements constituted ineffective assistance of counsel. In determining whether prosecutorial comments have denied the defendant a fair trial, a reviewing court must first decide whether the comments are improper and, if so, whether there is a substantial likelihood that the comment's affected the verdict. State v. Reed, 102 wn. 2d 140,145, 684 P.2d 699 (1984).

Here, the court of appeals clearly erred in determining that the prosecutor's comments were not improper. (court of Appeals Opinion at 6.).

The prosecutor's comment's here were not just a prosecutor

Drawing reasonable inferences from the evidence admitted at trial. The prosecutor here clearly wanted to illicit sympathy and thus inflame the jury's passion in the case. This is evident in the fact that the prosecutor followed such comments by infusing his own personal belief in the strength of the evidence by addressing the testimony of Ms. Lattiak, saying "if you believed her testimony, as you should", that the jury would have to find Mr. Castro-Lino guilty of the accused crime.

Such a statement implying a personal belief as to the credibility of a witness' statement, whose testimony is the sole evidence of guilt, is impermissible and had a likely impact upon the jury deliberations.

Here, defense counsel's failure to object to such inflammable statements cannot, and should not be considered as legitimate trial strategy. It is not a legitimate trial strategy or tactic by a trial attorney to allow the state to express their own personal opinion regarding the credibility of the state's primary and only percipient witness, under, Strickland v. Washington, 466 U.S. 668, 689-91, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984).

This court should grant review on this issue also. Such conduct and failure to object is therefore ineffective assistance.

A. The Court Of Appeals Erred In Finding that The Trial Counsel Did Not Provide Ineffective Assistance, When He Failed To Object When The Prosecuting Attorney Committed Prosecutorial Misconduct By Shifting The Burden of Proof /That The Defendant Bore Responsibility Of Establishing Why Ms. Lattiak Would Falsely Accuse Him.

To prevail on a claim of prosecutorial misconduct, a defendant must show that the prosecutor's argument was improper and prejudicial. State v. Warren, 165 Wn. 2d 17,26, 195 P.3d 940 (2008).

"It is inappropriate for a prosecutor to suggest that the defendant bears any burden of proof". State v. Fiallo-Lopez, 78 Wn. App. 717, 728-29, 899 P.2d 1294 (1995).

The court of Appeals erred by reasoning that Castro-Lino did not "directly attack the prosecutor's statements but only does so by invoking a ineffective assistance of trial counsel claim". (SEE OPINION, at 8).

That is the contrary. Castro-lino, in his opening brief did argue prosecutorial misconduct and substantially argued that the prosecutor's misconduct was improper and egregious. (see Appellant's Opening Brief at. 23).

The court of Appeals correctly reasoned that 'if the prosecutor significantly erred in, argument, the error is directly reviewable'. see Belgrade, 110 wn. 2d at 507; Here, the Court of Appeals declined to decide whether the prosecutor's statements were inflammatory and whether they were of prejudicial language. (see opinion at. 9....." is not a question we need decide here".

The prosecutor, in closing arguments went on this elaborate explanation of how the defense bore the responsibility of establishing why Ms. lattiak would falsely accuse him of rape. " a criminal defendant has no duty to present evidence and it is error for the prosecutor to suggest otherwise". State v. Cheatham, 150 wn. 2d 626,652, 81 P.3d 830 (2003). An argument that shifts the burden to prove guilt beyond a reasonable doubt constitutes misconduct. State v. Thorgerson, 172 wn. 2d 438,453, 258 P.3d 43 (2011). see also, State v. Osman, 192 wn. App. 355 (wash..App. Div I, 2016).

Where prosecutor's comments "so shifts the burden of proof is a denial of due process" under the federal Constitution. Darden v. Wainwright, 477 u.s. 168 (1986). In this case, the defense correctly argued on closing argument that petitioner was not required to provide a reason of why ms. lattiak would falsely accuse him. The state countered by saying on rebuttal, " if you want to plausibly argue that, you better have a reason. You better have something that makes sense"

In doing this, the state clearly shifted the burden of proof and actually created a burden of proof for Castro-lino to explain, why Ms. lattiak falsely accused him. Castro-lino had no such burden and for the state to imply so was error and clear misconduct that warrants a reversal of his conviction, for a new trial.

Defense counsel's failure to object also constitutes ineffective assistance of counsel and thus deprived Castro-lino of a fair trial. (In re Winship, u.s.).

This court should accept review on this issue also.

C. The Court Appeals Clearly Erred,
When It Summarized That Trial Counsel
Did Not Provide Ineffective Assistance
When He Failed To Object To The
Prosecutorial Misconduct Of Mis-Stating
The Law And Reducing The State's Burden
Of Proof To Establish Proof Beyond A
Reasonable Doubt.

" Prosecutorial misconduct has many heads". U.s.
v. Williams, 504 u.s. 36, 112 s.ct. 1735, 118 L.Ed. 2d 352,
60 U.S.SL.W. 4348 (1992). A prosecutor's improper comments
during closing arguments may 'so infect the trial with unfairness
as to make the resulting conviction a denial of due process".
Donnelly v. DeChristoforo, 416 u.s. 637, 94 S.ct. 1868, 40
L.Ed. 2d 431 (1974).

See also U.s. v. Crockett, 49 f.3d 1362 (8th cir. 1995), " we will necessarily be more inclined to reverse in a case if the testimony has been unfairly summarized or the summary comes wrap in improper argument".

" Reversible error is committed when counsel's closing argument to the jury introduces extraneous matter which has a reasonable probability of influencing the verdict".

A prosecutor can prosecute a case with earnestness and vigor. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction.

Improper suggestions, insinuations and especially assertions of personal knowledge are apt to carry much weight against the accused, when they should properly carry none. Berger v. United States, 295 U.s. 78, 55 S.ct. 429, 79 L.Ed. 1314 (1935).

Here, the prosecutor in his closing argument, implied that if the jury thought Castro-lino was guilty when they started their deliberations and continued to think he was guilty through-out deliberations, then they have met the legal standard and had the duty to find him guilty. However nowhere did the 'to convict instruction say it was their duty to find Castro-lino guilty at all, let alone following a belief which lasts for only less than four hours.

The prosecutor's argument mis-characterized 'abiding'

As associated with the timing of the deliberations rather than abiding as a steadfast, continuing, somewhat permanent belief. It was an improper and prejudicial, and incorrect statement of law; which may have led to Castro-lino not receiving a fair trial.

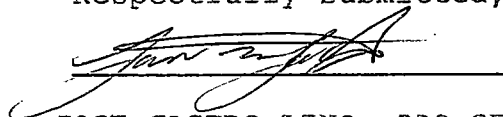
This court should grant review on this issue also.

V. CONCLUSION.

For all the foregoing reasons, Petitioner asks this Honorable court to grant review.

DATED this 7/11/17 day of July, 2017.

Respectfully submitted;



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APPENDIX

A

FILED
JUNE 13, 2017
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,)	
)	No. 34966-7-III
Respondent,)	
)	
v.)	
)	
JOSE RAFAEL CASTRO-LINO,)	UNPUBLISHED OPINION
)	
Appellant.)	

KORSMO, J. — Jose Castro-Lino appeals his conviction for second degree rape, arguing that his trial counsel was ineffective because he (1) prevented Mr. Castro-Lino from taking the stand in his own defense and (2) failed to challenge alleged prosecutorial misconduct. Finding no prejudicial error, we affirm.

FACTS

The charge arose after a night of heavy drinking by Mr. Castro-Lino, his fiancée's son, and a group of the son's friends. While the son and several of his friends—including the victim—were under the age of 21, the defendant was nearly 30. The party wound

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down at Mr. Castro-Lino's residence, with many of the younger partygoers ultimately sleeping there.

The victim, M.L., went to sleep on her stomach on a bed in the basement beside one her friends. While asleep, she was slightly awakened by what she described as "penetration." Drowsy, she thought nothing of it and rolled over onto her back and returned to sleep. She soon again felt penetration and woke up due to pain. She opened her eyes and saw Mr. Castro-Lino on top of her. Upon seeing her open eyes, he stood up and left the basement. Anal swabs subsequently revealed sperm belonging to Mr. Castro-Lino.

The defense called Hamed Mohamud to describe his observations of the evening's events. He testified that in the early morning he saw Castro-Lino and M.L. holding each other on the basement bed. This angered him because the defendant was engaged. The defendant did not testify, but his statement to police that he was too drunk to remember the night's events was entered at trial. After a recess for consultation, the defense rested after Mohamud's testimony without the defendant taking the stand. The defense also declined to call its expert to testify concerning memory and intoxication.

The prosecutor began his closing argument by calling the defendant "a predator who abused and violated" M.L. while she was intoxicated. In closing, defense counsel stated that his client was not a predator, but had made two mistakes by getting very drunk

and cheating on his fiancé. He stressed how vague the victim's testimony had been and the fact that she, too, was intoxicated.

The jury found the defendant guilty of second degree rape. Defendant retained new counsel and moved for a new trial, arguing that his original counsel had prevented him from testifying. Trial counsel also testified at the hearing and explained that although Mr. Castro-Lino originally had been planning to testify, plans changed after Mr. Mohamud testified. Counsel and his client consulted before resting and decided that the testimony of both the defendant and the expert were now unnecessary. Mr. Castro-Lino testified that he had wanted to testify, but accepted his attorney's advice not to do so based on their belief the defense would win. Report of Proceedings (RP) (May 29, 2015) at 57-58.

The trial court rejected the motion, noting both that the defendant was not denied the opportunity to testify by counsel and that the defendant had never indicated the subject matter of his proposed testimony. *Id.* at 68-69. Mr. Castro-Lino then timely appealed.

ANALYSIS

On appeal, Mr. Castro-Lino challenges both the substance of the court's ruling on the CrR 7.5 motion and his new counsel's handling of the motion, and also challenges his counsel's failure to object to portions of the prosecutor's closing arguments. We address first the new trial motion and then the prosecutor's argument.

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CrR 7.5 Motion

Mr. Castro-Lino attacks both the trial court's ruling on the motion and his new counsel's failure to elicit testimony concerning what he might have been able to testify about at trial. These challenges are easily resolved by the fact that his motion failed due to his own testimony.

The principles governing the three areas of law implicated by these claims are quite well settled. First, we note that a trial court's decision to grant a new trial is reviewed for abuse of discretion. *State v. Marks*, 71 Wn.2d 295, 302, 427 P.2d 1008 (1967). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Discretion also is abused when a court uses an incorrect legal standard in making a discretionary decision. *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995). "The question is not whether this court would have decided otherwise in the first instance, but whether the trial judge was justified in reaching his conclusion." *State v. Taylor*, 60 Wn.2d 32, 42, 371 P.2d 617 (1962).

Equally well settled is the law governing claims that counsel prevented his client from testifying. Criminal defendants have a federal and state constitutional right to testify on their own behalf. *State v. Robinson*, 138 Wn.2d 753, 757-758, 982 P.2d 590 (1999). It is the defendant, not trial counsel, who makes the ultimate decision about whether to testify. *State v. Thomas*, 128 Wn.2d 553, 558, 910 P.2d 475 (1996).

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Following trial, a silent defendant may present a claim that counsel prevented him from testifying. *Id.* at 561. A silent defendant must show that his attorney prevented him from testifying despite “unequivocal demands” from the defendant to do so. *Robinson*, 138 Wn.2d at 764. If defense counsel advises a defendant not to testify, and the defendant accepts that advice, the silent defendant cannot subsequently claim his right to testify was violated because he followed counsel’s advice. *Id.* at 763; *State v. Hardy*, 37 Wn. App. 463, 466-467, 681 P.2d 852 (1984); *State v. King*, 24 Wn. App. 495, 499, 601 P.2d 982 (1979).

Finally, long settled standards govern ineffective assistance of counsel claims. An attorney’s failure to perform consistent with the standards of the profession will require a new trial when the client has been prejudiced by counsel’s failure. *State v. McFarland*, 127 Wn.2d 322, 334-335, 899 P.2d 1251 (1995). In evaluating ineffectiveness claims, courts must be highly deferential to counsel’s decisions. A strategic or tactical decision is not a basis for finding error. *Strickland v. Washington*, 466 U.S. 668, 689-691, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Under *Strickland*, courts evaluate counsel’s performance using a two-prong test that requires determination whether or not (1) counsel’s performance failed to meet a standard of reasonableness and (2) actual prejudice resulted from counsel’s failures. *Id.* at 690-692. When a claim can be disposed of on one ground, a reviewing court need not consider both *Strickland* prongs. *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726, review denied, 162 Wn.2d 1007 (2007).

The new trial ruling is resolved by the defendant's own testimony. He agreed with trial counsel's advice not to testify, and, thus was not prevented from testifying. He cannot now challenge that decision. *Robinson*, 138 Wn.2d at 764-765; *Hardy*, 37 Wn. App. at 466-467; *King*, 24 Wn. App. at 499.

The trial court had a very tenable basis for denying the motion—the defendant was never prevented from testifying. He merely acceded to his counsel's advice. For that reason, we also need not consider whether counsel erred in failing to elicit a summary of the defendant's proposed testimony. If that was error in the presentation of the argument, it was clearly not prejudicial error since the motion failed due to the fact that the defendant agreed he was not prevented from testifying at trial.

The court did not abuse its discretion in rejecting the CrR 7.5 motion.

Prosecutor's Argument

Appellant next argues that his trial counsel provided ineffective assistance by failing to object to several of the prosecutor's statements made during closing arguments. He fails to establish prejudicial error.

The standards for reviewing this type of alleged error in closing argument are also well settled. Mr. Castro-Lino's arguments implicate several types of claims that have been discussed over the years. The general rule is that a prosecutor can properly draw reasonable inferences from the evidence admitted at trial and argue those inferences to the jury. *State v. Hoffman*, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991); *State v. Hale*, 26

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Wn. App. 211, 216, 611 P.2d 1370 (1980), *review denied*, 95 Wn.2d 1030 (1981). The prosecutor can also argue that the evidence does not support the defendant's theory of the case. *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994). "Mere appeals to jury passion and prejudice, as well as prejudicial allusions to matters outside the evidence, are inappropriate." *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988) (quoting *State v. Belgarde*, 46 Wn. App. 441, 448, 730 P.2d 746 (1986)). However, the defendant must object to the prosecutor's allegedly improper argument to preserve a claim of error unless the argument was so "flagrant and ill intentioned that no curative instructions could have obviated the prejudice." *Id.* When improper argument is alleged, the defense bears the burden of establishing the impropriety of the prosecuting attorney's comments as well as their prejudicial effect. *Hoffman*, 116 Wn.2d at 93.

In determining whether prosecutorial comments have denied the defendant a fair trial, a reviewing court must decide whether the comments are improper and, if so, whether there is a substantial likelihood that the comments affected the verdict. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). "Allegedly improper arguments should be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given." *State v. Graham*, 59 Wn. App. 418, 428, 798 P.2d 314 (1990). A failure to object to an improper remark constitutes a waiver unless the comment is flagrant and ill intentioned and the resulting prejudice so

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enduring that jury admonitions could not neutralize its effect. *State v. Charlton*, 90 Wn.2d 657, 661, 585 P.2d 142 (1978).

It also is inappropriate for a prosecutor to suggest that the defendant bears any burden of proof. *State v. Fiallo-Lopez*, 78 Wn. App. 717, 728-729, 899 P.2d 1294 (1995). However, once a defendant presents evidence, a prosecutor can fairly comment on what was not produced. *State v. Barrow*, 60 Wn. App. 869, 871-873, 809 P.2d 209 (1991); *State v. Guizzotti*, 60 Wn. App. 289, 298, 803 P.2d 808 (1991); *State v. Contreras*, 57 Wn. App. 471, 788 P.2d 1114 (1990).

Appellant does not directly attack the prosecutor's statements, but indirectly does so through an allegation that trial counsel provided ineffective assistance. There was no need to take that approach. If the prosecutor significantly erred in argument, the error is directly reviewable. *E.g., Belgarde*, 110 Wn.2d at 507; *Charlton*, 90 Wn.2d at 661. If the prosecutor did not significantly err in argument, presenting a derivative claim of ineffective assistance will be of no avail since *Strickland* requires proof of actual prejudice.¹ Accordingly, we will turn to the arguments without viewing them through the obscuring veil of an ineffective assistance analysis.

¹ Indeed, since appellant would also have to show that his trial counsel erred by not objecting, it is more burdensome for an appellant to try to establish ineffective assistance than to establish misconduct by the prosecutor.

Here, Mr. Castro-Lino alleges the prosecutor committed misconduct when he: (1) used inflammatory and prejudicial language by referring to Mr. Castro-Lino as a predator and recounting details of M.L.'s sexual assault examination, (2) vouched for M.L.'s credibility by telling the jury they should believe her testimony, (3) shifted the burden of proof by faulting Mr. Castro-Lino for not providing evidence M.L. was lying, and (4) misstated the State's burden of proof when he erroneously defined what constitutes proof beyond a reasonable doubt. We discuss each allegation in turn.

Whether the prosecutor actually used inflammatory and prejudicial language is not a question we need decide here since the remarks were not prejudicial. Defense counsel embraced the term "predator" and turned it around, emphasizing that his client made a mistake by cheating on his fiancé with the victim. It played directly to the defense theme of the case—a voluntary sexual encounter fueled by alcohol consumption rather than a rape by an older man of an incapacitated female. Similarly, the prosecutor quite understandably cited to the examination results to prove that sexual intercourse occurred and merely recited the nurse's unchallenged testimony. It was not improper to cite to the testimony.

Appellant next contends that the prosecutor vouched for M.L. He did not. The argument made by the prosecutor shows the context:

So in this case if all the evidence that the State had was simply [M.L.'s] testimony, *and if you believed her testimony, as you should, given the*

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evidence, that alone, her testimony alone would be enough evidence for you to find him guilty.

Now, obviously in this case we have more evidence than that, but I point that out because *if you find her credible, if you believe what she has related to you*, which has been consistent throughout, which links up with the other evidence, that alone is sufficient for you to find the Defendant guilty. But obviously there's more evidence in this case.

RP (April 9, 2015) at 418-419 (emphasis added). The prosecutor clearly pointed out that the evidence supported the victim's testimony and that it, alone, was enough to prove the case. He did not vouch for M.L., but tied her credibility to the evidence before the jury.

Appellant also contends that the prosecutor impermissibly shifted the burden to the defense when he argued that there was no evidence presented showing M.L. had a motive to lie about Mr. Castro-Lino. This argument was a proper rebuttal to the defense argument that M.L. was lying about the incident. *Guizzotti*, 60 Wn. App. at 298. It is not burden-shifting to point out that evidence does not support a defense argument.

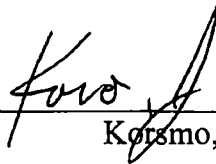
Finally, Mr. Castro-Lino argues that the prosecutor misstated the burden of proof when he concluded his initial argument by reciting portions of the burden of proof instruction to the jury and telling them they had a "duty" to convict the defendant if they had an abiding belief in his guilt after considering the evidence. There was no error. The prosecutor properly recited portions of jury instruction 3 defining reasonable doubt, and then referenced (without citing) the concluding line of jury instruction 8, which told jurors that if all of the elements were proven beyond a reasonable doubt, it was their "duty" to convict. Clerk's Papers at 175, 180; RP 424-425.

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Again, there was no error. Mr. Castro-Lino does not directly attack the jury instructions and we can conceive of no situation where a prosecutor accurately reciting the instructions somehow engages in misconduct. This contention is without merit.

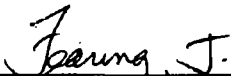
Mr. Castro-Lino has not established that the remarks that he now challenges constituted prejudicial error. Accordingly, the conviction is affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

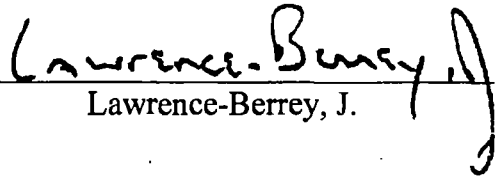


Kotsmo, J.

WE CONCUR:



Fearing, C.J.



Lawrence-Berrey, J.