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SUPREME COURT NO. 96685-1

NO. 76962-6-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY BAUS,

Petitioner.

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

The Honorable Ellen Fair, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Jeffrey Baus asks this Court to grant review of the court of appeals' unpublished decision in State v. Baus, No. 76962-6-I, filed November 5, 2018 (Appendix A). The court of appeals denied the State's motion to publish on November 28, 2018 (Appendix B).

B. ISSUES PRESENTED FOR REVIEW

1. Is this Court's review warranted under RAP 13.4(b)(2), (3) and (4) to determine whether a prosecutor improperly undermines the presumption of innocence by arguing, "why are we here if the presumption of innocence means he's innocent?"

2. Is this Court's review warranted under RAP 13.4(b)(1), (3) and (4) to determine whether a prosecutor impermissibly shifts the burden of proof by arguing reasonable doubt must be "based on something?"

3. Is this Court's review warranted under RAP 13.4(b)(3) and (4), where the cumulative effect of prosecutorial misconduct in closing and rebuttal arguments deprived Baus of a fair trial?

C. STATEMENT OF THE CASE

Baus was convicted by a jury of second degree rape and second degree assault of R.M. CP 66-67; 5RP 492. Baus has no prior criminal history. CP 14, 47. Before sentencing, over 25 of Baus's friends and family members sent letters to the trial court expressing their support for Baus. CP

13-44. Baus was also honorably discharged from the Army after eight and a half years of service. 5RP 498. The trial court imposed 14 months for the assault conviction, to run concurrently with a minimum term of 100 months and a maximum term of life for the rape conviction. 5RP 503; CP 49.

R.M. is a homeless heroin addict, with six prior theft convictions. 3RP 43-46, 113-14. She frequents casinos because they are open 24 hours. 3RP 46-47. R.M. testified that on Friday, April 22, 2016, she went to the Quilceda Creek Casino in Marysville around 7:00 or 8:00 p.m. 3RP 46-47, 119-20. R.M. explained she was irritated because she was wearing uncomfortable shoes and her friend left her at the casino. 3RP 48.

R.M. said she noticed a man, who later introduced himself as Baus, making eye contact with her as she walked around the casino. 3RP 49-50. Baus eventually approached R.M., asked if she was alright, and offered for her to come to his house in Granite Falls to relax. 3RP 51-52. R.M. testified she and Baus talked and flirted a bit, and she eventually agreed to go home with him sometime around 11:00 p.m. or 12:00 a.m. 3RP 53-56, 61. The police never obtained surveillance video from the casino. 4RP 388-89.

On the ride home, R.M. and Baus started talking about sex. 3RP 58-59. When they arrived at Baus's house, Baus showed R.M. around, and R.M. made herself a tuna fish sandwich and smoked some heroin. 3RP 62-70. R.M. eventually asked Baus if she could take a shower, so he showed

her to the bathroom in the master bedroom. 3RP 70-74. The pocket door to the bathroom would not lock. 3RP 74.

R.M. testified that, after a few minutes in the shower, Baus got in the shower with her, but she yelled at him to get out. 3RP 72-74. R.M. said she quickly rinsed off, ran to the other bathroom in a towel, and locked the door. 3RP 75-77. R.M. eventually returned to the master bathroom and began cleaning her ears with a Q-Tip. 3RP 77.

R.M. claimed Baus then "body-bumped" her, ripped off her towel, and threw her on the bed. 3RP 79-80. R.M. said Baus straddled her as he tied her hands and one leg to the bedposts with rope. 3RP 80-82. R.M. testified Baus "backhanded" her when she screamed and thrashed, causing a black eye. 3RP 82-84. R.M. said Baus eventually "shoved his penis in [her] mouth," but did not ejaculate. 3RP 85-87. R.M. testified she did not consent to this activity. 3RP 101-02.

R.M. claimed Baus then got a pocketknife from his dresser and "taunted [her] with the knife for about ten minutes," which the State relied on for the second degree assault charge. 3RP 87; 5RP 459-60. R.M. said Baus laid the knife blade on various parts of her body, but did not cut her. 3RP 92-93. R.M. testified she thought she was going to die. 3RP 93. She could not recall the length of the blade, and told the police at one point it was a black knife, another time, a red knife. 3RP 91-92; 5RP 405-07. R.M. said

Baus then used the knife to cut the ropes around her wrists and leg, and told her, "I don't think this is going to work out. Some bitches like this sort of thing." 3RP 93-94.

R.M. testified Baus agreed to drop her off at Wal-Mart. 3RP 100. But, as they were driving, R.M. said Baus started talking about how it was late and he had been drinking, so he would take her to Wal-Mart in the morning. 3RP 102-03. R.M. claimed she jumped out of the car as Baus slowed through a roundabout, and Baus drove off as he said, "See you, bitch." 3RP 102-06.

R.M. testified she walked about 30 to 40 minutes to a gas station on Highway 92 outside Granite Falls, arriving around 4:00 a.m., according to the store surveillance video. 3RP 105-06; 4RP 381-83. The store clerk, Grant Jensen, testified R.M. came into the store wearing nice clothes, but her face was bleeding and bruised. 3RP 164-66, 172-76. R.M. asked Jensen, "Can I use the telephone? I've been beat up." 3RP 168.

Jensen explained R.M. did not go into specifics about what happened, but said she went to a party with friends and there was a guy who "wanted sex . . . but she said no and he turned against her." 3RP 169-70. Jensen encouraged R.M. to call the police, but "[s]he told [him] no because she had a warrant." 3RP 170. R.M. testified a "kid in a gray Ranger" gave

her a ride from the gas station to Wal-Mart, where a man named Jay picked her up. 3RP 108.

R.M. did not go to the police until Sunday morning, April 24, because of her outstanding warrants. 3RP 108-09, 179-84. R.M. provided a written statement to the police and identified Baus in a photomontage. 3RP 110, 185-91. Police noted R.M. had bruising around her left eye. 3RP 182-94, 210. A deputy who observed R.M.'s injuries believed they were consistent with being punched, rather than being "backhanded" as R.M. described. 3RP 192-95, 203.

R.M. was eventually transported to the hospital to be examined. 3RP 110, 197-98. R.M. admitted she used a significant amount of heroin on Sunday, April 24. 3RP 110-11. A detective who met with R.M. at the hospital noticed she was clearly under the influence or withdrawing from drugs. 4RP 339, 395-97. R.M. ultimately declined a sexual assault examination. 3RP 113; 5RP 416-18.

Police executed a search warrant at Baus's house. 4RP 219, 349-51. In one of the bedrooms was a significant amount of camping and fishing gear, including twine and a tackle box with a black folding knife inside. 4RP 223-27, 237-39, 261-63. More knives where found on the kitchen counter. 4RP 232-33, 357-60. None of the knives collected matched R.M.'s description of the knife. 5RP 405-07. In the garbage cans outside, police

found a tuna can, Q-Tips, and lengths of rope with knots tied in them that appeared to be cut. 4RP 229-32, 266-68. Police noted there were many kinds of rope and cordage throughout the house, consistent with the outdoor gear, and Baus had a woodworking project in the garage. 4RP 264, 270-73.

Forensic scientist Greg Frank testified DNA on one of the Q-Tips from the garbage matched R.M. 4RP 290-94. He also tested the lengths of rope found in the garbage for DNA. 4RP 301-12. One on piece, there were at least three DNA profiles, including one possible female contributor, who Frank could not identify. 4RP 308-09. Frank did not include the finding regarding the female contributor in his written report, discussing it for the first time at trial. 4RP 323-24. On another piece, two major DNA profiles were found, but R.M. was eliminated as a possible contributor. 4RP 309-10. Frank believed a minor DNA profile may have come from a female, but could not be sure. 4RP 309-11.

Baus did not dispute he spent time with R.M. at his house, but disputed that they ever engaged in nonconsensual sexual activity. 5RP 461-77. R.M. admitted she reciprocated Baus's sexual advances and never told him she did not want to have sex. 3RP 128-29; 5RP 466-67. R.M. also testified at trial to several details she did not to include in her written statement, even though the police told her to write "as much as she could possibly remember." 3RP 189. For instance, R.M. did not tell the police

that Baus got in the shower with her or that Baus said "[s]ome bitches like this kind of thing." 3RP 132, 142; 5RP 468. R.M. also told the police Baus stopped the car and let her out, inconsistent with her trial testimony that she jumped from his moving vehicle. 3RP 144-45.

On appeal, Baus challenged several instances of prosecutorial misconduct in closing and rebuttal arguments. Br. of Appellant, 8-28. The court of appeals rejected Baus's arguments and affirmed his convictions. Opinion, 7-13. The State thereafter moved to publish the court of appeals' decision, contending "[t]he court's opinion regarding allegations of improper argument in closing clarifies issues which arise frequently in trial and are of general public interest." Motion to Publish, 2. The court of appeals denied the motion to publish. Appendix B.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

THIS COURT'S REVIEW IS WARRANTED TO DETERMINE WHETHER SEVERAL ARGUMENTS MADE BY THE STATE IN CLOSING AND REBUTTAL, AND SANCTIONED BY THE COURT OF APPEALS, CONSTITUTE PROSECUTORIAL MISCONDUCT.

1. This Court's review is warranted to determine whether a prosecutor undermines the presumption of innocence by arguing, "why are we here if the presumption of innocence means he's innocent?"

In rebuttal, the State began by addressing defense counsel's argument regarding the presumption of innocence. The State contended:

> It doesn't mean a plea of not guilty means end of story and you just dismiss what anyone else has to say to the contrary. That's not what it means. You evaluate the evidence and you determine whether or not -- I mean, why are we here if the presumption of innocence means he's innocent?

5RP 477-48 (emphasis added). At the close of rebuttal, the State argued, "An abiding belief is something that you believe yesterday, today, tomorrow." 4RP 485 (emphasis added). Defense counsel did not object to either remark. Baus asserted on appeal that both arguments constituted flagrant and ill-intentioned misconduct because they undermined the presumption of innocence. Br. of Appellant, 13-18.

"The presumption of innocence is the bedrock upon which the criminal justice system stands." State v. Bennett, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007). "The presumption of innocence can be diluted and even washed away if reasonable doubt is defined so as to be illusive or too difficult to achieve." Id. at 316. Washington courts are therefore "vigilant to protect the presumption of innocence." Id. Baus's jury was properly instructed the presumption of innocence "continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt." CP 75; 11 WASH. PRACTICE, WASH. PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01 (4th ed. 2016).

A prosecutor's argument that misstates or undermines the presumption of innocence constitutes flagrant and ill-intentioned

misconduct. State v. Warren, 165 Wn.2d 17, 27, 195 P.3d 940 (2008). In State v. Venegas, 155 Wn. App. 507, 524, 228 P.3d 813 (2010), for instance, the prosecutor argued in rebuttal the presumption of innocence erodes every time the jury hears evidence of the defendant's guilt. The court of appeals held this "was a clear misstatement of the law," because "[t]he presumption of innocence continues 'throughout the entire trial' and may only be overcome, if at all, during the jury's deliberations." Id.

Similarly, in State v. Evans, the prosecutor argued in closing that the presumption of innocence "kind of stops once you start deliberating right? At that point, you start evaluating evidence and decide if that has been overcome or not." 163 Wn. App. 635, 641, 260 P.3d 934 (2011). Like Venegas, the court of appeals held the prosecutor's comment improperly "invited the jury to disregard the presumption once it began deliberating, a concept that seriously dilutes the State's burden of proof." Id. at 643-44.

Here, the prosecutor's comments undermined the presumption of innocence, similar to the remarks in Venegas and Evans. Br. of Appellant, 13-18. Most seriously, the prosecutor stated, "I mean, why are we here if the presumption of innocence means he's innocent?" 5RP 478. But that is precisely what the presumption of innocence means: the accused is innocent unless and until the jury, during deliberations, unanimously agrees the State has proved all the elements of the charged offense beyond a reasonable

doubt. Until that point, the accused is innocent. If the jury cannot reach such an agreement during deliberations, the accused remains innocent.

The prosecutor's argument instead suggested Baus should be presumed guilty because the State charged him and the parties proceeded to trial. Put another way, the State invited the jury to infer guilt simply because it charged Baus with the crimes. But, as established, the presumption of innocence meant Baus was innocent until the deliberating jury found him guilty beyond a reasonable doubt. Baus was an innocent man at the time of the prosecutor's improper argument. A jury trial means the innocent, accused person is holding the State to its burden of proof; it does not mean that person is guilty by virtue of the State's charges.

The prosecutor also undermined the presumption of innocence by claiming "[a]n abiding belief is something that you believe in yesterday, today, tomorrow." 4RP 485. But the jury could not have an abiding belief in the truth of the charge "yesterday," because it had not yet heard all the evidence. Nor could the jury have an abiding belief in the truth of the charge "yesterday" because it had not yet begun deliberating and had not yet reached a unanimous agreement that Baus was guilty beyond a reasonable doubt. The prosecutor's argument again suggested to the jury that it should presume Baus guilty—before presentation of all the evidence and before deliberations.

The court of appeals rejected Baus's first challenge. Opinion, 8-9. The court believed the prosecutor's argument "was consistent with the jury's instructions" and did not suggest the presumption of innocence ends before the jury's deliberations. Opinion, 9. The court reasoned, unlike Venegas, the prosecutor did not "imply that Baus was guilty merely because the State filed charges against him. Rather, the prosecutor emphasized that the presumption of innocence may ultimately be overcome by evidence that meets the State's burden of proof." Opinion, 9. The court of appeals likewise rejected Baus's second challenge, holding, "to the extent that the prosecutor's explanation of the meaning of abiding belief was inartful in that it included 'yesterday,' it was not flagrant misconduct." Opinion, 9.

The court of appeals' sanctioning of the argument "why are we here if the presumption of innocence means he's innocent?" is particularly troubling. The State clearly considered the court's decision to be significant—moving to publish on the grounds that it "clarifies issues which arise frequently in trial and are of general public interest." Motion to Publish, 2. Though the court of appeals denied the State's motion, the motion raises a red flag and demonstrates the need for this Court's definitive guidance. Specifically, does the prosecutor undermine the presumption of innocence in making such arguments, or are they consistent with the jury instructions and the law?

This Court's review is therefore warranted under RAP 13.4(b)(2), because the court's decision is inconsistent with Venegas and Evans; RAP 13.4(b)(3), as a significant question of constitutional law; as well as RAP 13.4(b)(4), as an issue of substantial public interest, which the State has acknowledged in its motion to publish.

2. This Court's review is warranted to determine whether a prosecutor impermissibly shifts the burden of proof by arguing reasonable doubt must be "based on something."

Along with discussing the presumption of innocence in rebuttal, the prosecutor commented on the concept of reasonable doubt:

> Now, the reasonable doubt instruction talks about reasonable doubt being based on evidence or lack of evidence, but it talks about evidence based -- I mean reasonable doubt that's based on something; right? So you can't just come here and throw out here's a man's name, here's a man's name. Maybe it's him or maybe she met the defendant three days earlier. Well, where's that come from? Is that, is that the way it works? You can just throw out a possibility over here and a possibility over here and come up with a hypothetical and that's enough reasonable doubt even though it's based on nothing? No. No. The law contemplates that it's based on something. The doubt is based on something, not on the fact there is a possibility that this potential hypothetical might happen and there's other men who she had contact with that week.
>
> [DEFENSE COUNSEL]: Objection; burden shifting.
>
> THE COURT: Again, it's argument. The law has been given and is clear.
>
> [DEFENSE COUNSEL]: Thank you.

> [PROSECUTOR]: There is nothing to support that she met the defendant days earlier. She said she met the defendant that night. There is no reason to doubt that.

5RP 479-80 (emphasis added). Baus contended these remarks misstated the reasonable doubt standard and shifted the burden of proof to Baus to provide a basis for doubt. Br. of Appellant, 18-23.

Due process requires that the State bear the burden of proving every element of a criminal offense beyond a reasonable doubt. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 713, 286 P.3d 673 (2012). As such, the defense has no obligation to produce evidence and no obligation to articulate reasons to doubt the State's case. State v. Kalebaugh, 183 Wn.2d 578, 585, 355 P.3d 253 (2015); State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012).

A prosecutor commits misconduct by misstating the reasonable doubt standard or shifting the burden of proof to the accused. State v. Lindsay, 180 Wn.2d 423, 434, 326 P.3d 125 (2014) ("Arguments by the prosecution that shift or misstate the State's burden to prove the defendant's guilt beyond a reasonable doubt constitute misconduct."); Glasmann, 175 Wn.2d at 713 ("Misstating the basis on which a jury can acquit insidiously shifts the requirement that the State prove the defendant's guilt beyond a reasonable doubt.").

In Emery, this Court condemned the "fill-in-the-blank" argument because it "improperly implies that the jury must be able to articulate its reasonable doubt," thereby "subtly shift[ing] the burden to the defense." 174 Wn.2d at 760. This Court emphasized "the State bears the burden of proving its case beyond a reasonable doubt, and the defendant bears no burden." Id. Moreover, "a jury need do nothing to find a defendant not guilty." Id. at 759-60.

Similarly, in Kalebaugh, the trial court instructed the jury that reasonable doubt "is a doubt for which a reason can be given." 183 Wn.2d at 584. This Court held the instruction to be manifest constitutional error because "the law does not require that a reason be given for a juror's doubt." Id. at 585. The court denounced "any subtle suggestion that a reason must be given to doubt a defendant's guilt." Id. at 586.

Here, the State entered this forbidden territory by shifting the burden of proof to either Baus or the jury to provide a basis for doubt. The State repeatedly contended reasonable doubt must be "based on something": "I mean reasonable doubt that's based on something; right?" "The law contemplates that it's based on something." "The doubt is based on something . . . ." 4RP 479-80. Defense counsel objected to such argument as burden shifting, but the trial court overruled. 5RP 480.

The problem with the State's argument is, who provides the basis for reasonable doubt? The implication is either the jury or the accused must provide a basis for doubt. Certainly the prosecution would not purposefully do so, as the prosecution wants to win a conviction. This is apparent from the State's contention that defense counsel failed to supply reasonable doubt by merely "throw[ing] out a possibility over here and a possibility over here and com[ing] up with a hypothetical." 5RP 479. These remarks implied the defense had to create reasonable doubt, contrary to the presumption of innocence and the State's burden of proof.

The prosecutor's argument further suggested the jury must have more than just a reasonable doubt to acquit. The prosecutor contended the jury must have a basis—a justification, an explanation—for its doubt. Just like asking the jury to fill in the blank, if Baus's jury could not come up with a basis for its doubt, then it could not acquit Baus. But the jury need not articulate any basis for its doubt. Kalebaugh, 183 Wn.2d at 585; Emery, 174 Wn.2d at 759-60. The prosecutor's argument to the contrary shifted the burden of proof away from itself and onto Baus to provide a basis for doubt.

The court of appeals again rejected Baus's argument, concluding the prosecutor "did not impermissibly shift the burden of proof." Opinion, 10. The court reasoned, unlike fill-in-the-blank arguments, here "the prosecutor did not tell the jury it had to be able to articulate a specific reason for

doubting Baus's guilt before it could acquit. The prosecutor instead argued that based on the evidence before it, there was no reason to doubt his guilt." Opinion, 10.

This Court's guidance is needed: is the contention that reasonable doubt must be "based on something" a correct statement of the law, or does it impermissibly shift the burden of proof away from the State? This Court's decisions in Emery and Kalebaugh suggest the argument is improper, because it implies either the defense or the jury must supply a basis for reasonable doubt. There is no meaningful distinction between "a reason" and "a basis" for doubt—both shift the burden of proof away from the State. And, to reiterate, the State considers the court of appeals' decision to be of "general public interest." Motion to Publish, 2. Review is therefore warranted under RAP 13.4(b)(1), (3), and (4).

3. This Court's review is warranted to determine whether the cumulative effect of prosecutorial misconduct in closing and rebuttal arguments denied Baus a fair trial.-

The court of appeals agreed with Baus that the State impermissibly disparaged defense counsel by arguing in closing, "Then the defendant's lawyer starts asking her questions insinuating her bad choices, saying things like do you expect us to believe that? See, in ordinary polite society, we don't talk to each other like that." 5RP 433; Br. of Appellant, 9-13; Opinion, 12. However, the court did not believe reversal was warranted because the

trial court sustained defense counsel's objection to the argument. Opinion, 12. The court reasoned, "[t]o the extent there was any residual prejudice, it could have been neutralized by an instruction to disregard the argument." Opinion, 12. The court ultimately concluded "the misconduct was neither repeated nor pervasive." Opinion, 13.

This Court's review is again warranted under RAP 13.4(b)(2), (3) and (4) to determine whether there was, in fact, pervasive misconduct that denied Baus a fair trial. This Court has recognized "'the cumulative effect of repetitive prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect.'" Lindsay, 180 Wn.2d at 443 (quoting Glasmann, 175 Wn.2d at 707).

Prosecutorial misconduct can be especially harmful in a rape case, like Baus's, where the entire trial boiled down to whether the jury believed the testimony of a single witness. The outcome of Baus's trial depended entirely on whether the jury found R.M. credible and believed her story. Baus did not dispute he came into contact with R.M.; they spent time together at his house; and they possibly engaged in consensual sex. R.M. acknowledged she reciprocated Baus's sexual advances. 3RP 128-29. The question was, then, whether the sexual activity and R.M.'s physical injuries happened in the way she said they did.

The jury could have easily entertained a reasonable doubt about R.M.'s testimony, given the significant details she left out of her written statement to the police, which she testified to for the first time at trial. For instance, she did not tell the police about Baus getting in the shower with her; that he said, "[s]ome bitches like this kind of thing"; or that she had to jump from his moving vehicle. 3RP 132, 142-45; 5RP 468.

R.M. also declined a sexual assault examination, depriving the jury of highly probative evidence. 3RP 113; 5RP 416-18. Her facial injuries were more consistent with being punched than being backhanded, inconsistent with her version of events. 3RP 192-95, 203. And, the potentially female DNA on the cut ropes found in Baus's garbage could not be linked to R.M. 4RP 308-11.

Furthermore, R.M. has six prior theft convictions, which the jury could use to assess her credibility, or lack thereof. 3RP 147; CP 79. She admitted to heroin use on the night in question and the day she reported to the police, with several witnesses noting her drug-related behavior. 3RP 67, 110-11; 4RP 339, 395-97; 5RP 418. R.M. further admitted trial was continued in February of 2017 so she could enter inpatient treatment, but she never showed up for it. 3RP 153.

The prosecutor's repeated misconduct in closing and rebuttal arguments undoubtedly made it more difficult for the jury to adhere to the

presumption of innocence and not be swayed by passion or prejudice. Venegas and Evans demonstrate how the cumulative effect of such misconduct can impact the outcome of a rape case, where credibility of the complaining witness is everything.

In Venegas, the court of appeals emphasized the case "largely turned on witness credibility." 155 Wn. App. at 526. The court found prejudice where, "[r]ather than trusting the jury to reach a proper conclusion after listening to dozens of witnesses over the course of a six-week trial, the State twice made arguments that impinged on Venegas's presumption of innocence." Id. The cumulative effect of that misconduct and other errors necessitated reversal. Id. at 527.

In Evans, too, the case "turned largely on witness credibility," and the State had "serious credibility problems" with one of its key witnesses. 163 Wn. App. at 647. The court concluded: "we are unwilling to speculate that a curative instruction could have overcome the prosecutor's multi-pronged and persistent attack on the presumption of innocence, the State's burden of proof, and the jury's role." Id. at 648. The court accordingly reversed, given that the prosecutor's repeated misconduct "could not have been cured by the instructions." Id.

As in Venegas and Evans, the prosecutor here repeatedly engaged in misconduct rather than relying solely on the evidence before the jury. This

began by impugning the integrity of defense counsel. The misconduct continued in rebuttal, where the prosecutor resorted to attacking the presumption of innocence and shifting the burden of proof to Baus. Given the repetitive and pervasive nature of this misconduct, no instruction or series of instructions could have cured the resulting prejudice. The court of appeals' decision to the contrary should be reversed.

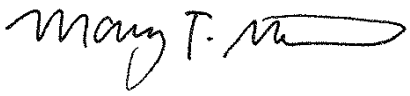
E. CONCLUSION

For the reasons discussed above, this Court's review is warranted under all the RAP 13.4(b) criteria. Baus therefore respectfully requests this Court grant review, reverse the court of appeals, and remand for a new trial.

DATED this 27th day of December, 2018.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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Appendix A

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 76962-6-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	UNPUBLISHED OPINION
	)	
JEFFREY JOSEPH BAUS,	)	
	)	
Appellant.	)	FILED: November 5, 2018

ANDRUS, J. — A jury convicted Jeffrey Joseph Baus of rape in the second degree and assault in the second degree. He contends that he was prejudiced by the prosecutor's improper remarks during closing argument. He also challenges the imposition of a condition of community custody prohibiting him from frequenting drug areas, as defined by his community corrections officer. Baus fails to establish prosecutorial misconduct warranting reversal. Because the community custody condition related to drug areas is unconstitutionally vague, we remand to strike the condition. Otherwise, we affirm the judgment and sentence.

FACTS

The State charged Jeffrey Baus, by amended information, with second degree assault and second degree rape.[1] According to the testimony at Baus's trial, R.M. spent the evening of April 22, 2016, at the Quilceda Creek Casino in Marysville. R.M., who was homeless and addicted to heroin, spent a

[1] The State initially charged Baus with rape in the third degree.

considerable amount of time at the casino. Friends were often there and it was open all night, warm, and safe.

That evening, R.M.'s plans for the night fell through and she had "nowhere to go." R.M. was distressed and she was wearing four-inch high heels that were "killing" her.

At some point, R.M. noticed Baus, who appeared to be watching her. At around 11 p.m., when R.M.'s friend walked away and she was alone, Baus approached her. Baus commented that she appeared to be having a difficult time. After R.M. explained her situation, Baus said, "today may be your lucky day." Baus told R.M. that he had a house in Granite Falls and invited her there to "hang out" and "[r]elax." Baus assured her there were "[n]o expectations."

R.M. and Baus "flirted a little bit" and talked about Alaska. R.M. grew up in Alaska and Baus said he wanted to retire there. This common interest made R.M. feel slightly more inclined to trust Baus. After an hour or so, Baus suddenly announced that he was leaving and that if R.M. wanted to come with him, it was "now or never." R.M. did not have a cell phone and wanted to find her friend first to tell him where she was going. Baus refused to wait for her.

Although R.M. felt uneasy, she left with Baus. As they drove, they passed the home of one of R.M.'s friends. R.M. asked Baus to stop so she could quickly talk to her friend. Again, he refused.

During the 30-minute drive to Baus's wooded neighborhood, the conversation turned more overtly sexual. Baus told R.M. that she was pretty and

described sex acts he wanted to engage in. R.M. "kind of blew it off" and vaguely said, "[w]ell, I'm not sure about that."

When they arrived at his home, Baus gave R.M. a tour. Baus showed her a survivalist room and told her he had everything necessary for the two of them to "disappear into the woods for a month without anybody knowing where we were." R.M. was afraid, but felt she could not leave without money, a cell phone, or shoes she could easily walk in.

R.M. ate a tuna fish sandwich and some peanut butter. And because she was nervous, she also smoked "three or four hits" of heroin, which was just enough to relax her and make her feel "normal." Meanwhile, Baus continued to drink beer and smoked marijuana. Baus offered R.M. beverages, but she declined, fearing that he might drug her.

Baus let R.M. use the bathroom, but then continually banged on the door, demanding that she come out. R.M. was increasingly worried. Partly to escape from Baus, she asked to take a shower. The pocket door in the master bathroom did not lock properly. A few minutes after R.M. got into the shower, Baus appeared, naked, and tried to enter. R.M. yelled at him to leave. Baus responded, "Oh come on. Don't you see the toys in there? Don't you want to play?" After R.M. continued to yell, he left.

R.M. believed she was truly in danger and started to panic. After her shower, she ran to the other bathroom and locked the door. For about 15 minutes, she sat on the toilet seat while Baus forcefully pounded on the door and badgered her. Finally, because she "had enough" of his yelling and thought he

might break down the door, she opened the door, grabbed her purse, and returned to the master bath. While she tried to calm herself and decide what to do, she took Q-tip cotton swabs from her purse and cleaned her ears.

Then, with a "dark" and "[g]lazed over" look on his face, Baus "body bumped" R.M. When she yelled, he snatched the towel she was wearing, picked her up, and threw her on the bed.[2] He jumped on the bed and straddled her. He tied her wrists and one leg with thin ropes that were already secured to the bedposts. R.M. screamed and tried to free herself. Baus hit her in the face. R.M. felt like her face "exploded" and fluid poured from her nose and mouth. R.M. pleaded with Baus to stop. He shoved his erect penis into her mouth three or four times. She gagged and found it difficult to breathe.

As R.M. continued to plead with him, Baus walked across the room, picked up a knife on his dresser, and "taunted" her with it for about 10 minutes. He held the blade to her skin and moved it over her naked body, touching her legs, vagina, chest, breasts, neck, and arms. R.M. believed he was going to kill her. Then suddenly, using the same knife, Baus cut the restraints. Baus said to R.M., "I don't think this thing is going to work out. Some bitches like this sort of thing."

R.M. retrieved her clothes that were scattered throughout the house. Although she was terrified, R.M. tried to pretend that she was still interested in Baus and was not really hurt. She eventually persuaded Baus to drive her to a nearby Walmart. R.M. rode with the window rolled down and her hand on the

[2] R.M. is 4 feet 11 inches tall and weighs 118 pounds, while Baus is 6 feet tall and about 100 pounds heavier.

door handle, so that she could jump out if necessary. En route, Baus changed his mind and said he was taking her back to his house and that she could leave later. As Baus slowed the car to enter a roundabout, R.M. jumped out. Baus gave her the finger and said, "See you, bitch."

R.M. walked along the highway for 30 to 40 minutes until she came to an open service station. The store clerk, Grant Jensen, immediately noticed that R.M. was injured. Her face was bruised and bleeding. R.M. was frantic and crying. She told Jensen that a man beat her up after she refused to have sex. Jensen gave R.M. ice for the swelling on her face, lent her his cell phone, and encouraged her to call 911. R.M. declined to call for assistance because there were warrants for her arrest. A customer later drove R.M. to the Walmart where a friend picked her up.

Over the next 24 hours, R.M. arranged to store her vehicle and other personal items. Then, on the morning of April 24, 2016, a friend drove R.M. back to Baus's home so she could obtain the address and then she called the police.[3] Despite the risk of going to jail, R.M. decided to report the crime because "nobody should do that to anybody."

Michael Mansur and Thomas Dalton of the Snohomish County Sheriff's Office met R.M. at the Granite Falls police station that morning. They observed her recent injuries, including black eyes, an apparently broken nose, and one eye that was nearly swollen shut. There were faint ligature marks on her wrists. R.M. was very emotional and shaken. She identified Baus in a photomontage

[3] R.M. was familiar with Baus's neighborhood because she had a friend who lived there and had worked in that neighborhood in the past.

and prepared a written statement. The police officers arranged for R.M. to go to the hospital for treatment. Both at the hospital and earlier at the police station, officers took photographs of R.M.'s injuries. At the hospital, R.M. declined to talk to the forensic nurse examiner.[4]

Items recovered in a search of Baus's home and DNA[5] testing of some of those items corroborated R.M.'s presence in Baus's home and several details of her account.

At trial, in addition to R.M., several witnesses testified on behalf of the State, including Jensen, police officers involved in the investigation, and a Washington State Patrol forensic scientist. Baus did not testify.

Baus did not deny that R.M. had been in his home. The defense argued, however, there was insufficient evidence to establish that the contact between R.M. and Baus occurred on the charging date, "on or about" April 23, 2016. Counsel also pointed out that there was no video surveillance footage from the casino or any other evidence showing that Baus approached R.M., and not the other way around. Considering R.M.'s difficult circumstances at the time and her acknowledgment that she had flirted with Baus, the defense suggested that R.M. may have "prey[ed] on" Baus. The defense also argued that R.M.'s memories and her statement were unreliable because of her drug use and that a sexual assault examination would have shown whether R.M. had sexual intercourse with Baus or someone else. The jury convicted Baus as charged.

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[4] R.M. felt she did not need a sexual assault exam because she was not vaginally assaulted.

[5] Deoxyribonucleic acid.

Prosecutorial Misconduct

Baus alleges several instances of prosecutorial misconduct during closing and rebuttal argument. We reject this argument as a basis for overturning the conviction.

Prosecutorial misconduct may deprive a defendant of his right to a fair trial. See State v. Jones, 144 Wn. App. 284, 290, 183 P.3d 307 (2008). The appellant bears the burden of demonstrating prosecutorial misconduct on appeal and must establish that the conduct was both improper and prejudicial. State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). "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. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994). Prosecuting attorneys have wide latitude during closing arguments to argue facts and reasonable inferences from the evidence. State v. Thorgerson, 172 Wn.2d 438, 453, 258 P.3d 43 (2011). This latitude allows a prosecutor to "freely comment on witness credibility based on the evidence." State v. Lewis, 156 Wn. App. 230, 240, 233 P.3d 891 (2010).

To establish prejudice sufficient to require reversal, a defendant who timely objected to the challenged conduct in the trial court must "show a substantial likelihood that the misconduct affected the jury verdict." In re Glasmann, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). Reversal is not required where the alleged error could have been obviated by a curative instruction. State v. Gentry, 125 Wn.2d 570, 596, 888 P.2d 1105 (1995). The "'failure to object to

an improper remark constitutes a waiver of error unless the remark is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.'" Thorgerson, 172 Wn.2d at 443 (quoting Russell, 125 Wn.2d at 86).

Presumption of Innocence

Baus contends that the prosecutor committed flagrant misconduct by undermining the presumption of innocence. Defense counsel stated in closing argument that the presumption of innocence "continues throughout the entire trial unless, during your deliberations, you find it has been overcome by the evidence beyond a reasonable doubt." Counsel further elaborated, "it's the end of the trial and the law says he sits here right now innocent."

The prosecutor argued in rebuttal,

> Defense counsel started with kind of a discussion of the presumption of innocence. What I heard her say was you're not allowed to come to any other conclusion. Well, that's really not what it says. The defendant is presumed innocent until you're convinced otherwise. It doesn't mean a plea of not guilty means end of story and you just dismiss what anyone else has to say to the contrary. That's not what it means. You evaluate the evidence and you determine whether or not – I mean, why are we here if the presumption of innocence means he's innocent.

During the same argument the prosecutor also described the phrase "an abiding belief" as "something that you believe yesterday, today, tomorrow."

The "presumption of innocence continues 'throughout the entire trial' and may be overcome, if at all, only during the jury's deliberations." State v. Venegas, 155 Wn. App. 507, 524, 228 P.3d 813 (2010) (quoting 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01, at 85 (3d ed.

2008)). The prosecutor's argument did not suggest otherwise. The argument was consistent with the jury's instructions.[6] Unlike the argument at issue in Venegas, the prosecutor did not indicate that the presumption of innocence erodes as the State presents evidence of the defendant's guilt during the trial. Nor did the prosecutor imply that Baus was guilty merely because the State filed charges against him. Rather, the prosecutor emphasized that the presumption of innocence may ultimately be overcome by evidence that meets the State's burden of proof. And to the extent that the prosecutor's explanation of the meaning of abiding belief was inartful in that it included "yesterday," it was not flagrant misconduct.[7]

Burden of Proof

Baus also contends that the prosecutor improperly shifted the burden of proof to the defense in discussing the reasonable doubt instruction. The prosecutor argued,

> Now, the reasonable doubt instruction talks about reasonable doubt being based on evidence or lack of evidence, but it talks about evidence based – I mean reasonable doubt that's based on something; right? So you can't just come here and throw out here's a man's name, here's a man's name. Maybe it's him or maybe she met the defendant three days earlier. Well, where's that come from? Is that, is that the way it works? You can just throw out a possibility over here and a possibility over here and come up with a hypothetical and that's enough reasonable doubt even though it's based on nothing? No. No. The law contemplates that it's based

[6] Instruction No. 4 provides, in relevant part: "A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt." The same instruction also states that jurors are "satisfied beyond a reasonable doubt," if after fairly and carefully considering all the evidence, they have an "abiding belief in the truth of the charge."

[7] Dictionary definitions of "abiding" include "continuing or persisting in the same state without changing or diminishing" and "enduring." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 3 (2002).

> on something. The doubt is based on something, not on the fact there is a possibility that this potential hypothetical might happen and there's other men who she had contact with that week.

The court overruled the defendant's objection, stating, "[I]t's argument. The law has been given and is clear."

Baus argues that the prosecutor's argument is comparable to impermissible "fill-in-the-blank" remarks like those at issue in State v. Emery, 174 Wn.2d 741 (2012). In Emery, the prosecutor argued,

> [I]n order for you to find the defendant not guilty, you have to ask yourselves or you'd have to say, quote, I doubt the defendant is guilty, and my reason is blank. A doubt for which a reason exists. If you think that you have a doubt, you must fill in that blank.

174 Wn.2d at 750-51. The "fill-in-the-blank" argument was improper because it "subtly shifts the burden to the defense" by requiring the jury to articulate a reason to doubt. Emery, 174 Wn.2d at 760.

But here, the prosecutor did not tell the jury it had to be able to articulate a specific reason for doubting Baus's guilt before it could acquit. The prosecutor instead argued that based on the evidence before it, there was no reason to doubt his guilt. The instructions and the State's argument properly informed the jury that the State bore the burden of proof. The State's argument did not impermissibly shift the burden of proof.

Denigration of Defense Counsel

Baus argues that the prosecutor engaged in misconduct by denigrating his counsel and defense counsel's role. The prosecutor began closing argument by reminding the jury that, regardless of R.M.'s personal circumstances and poor

choices, she was entitled to personal security. The prosecutor then recounted some of the obstacles and indignities that R.M. endured in order to pursue justice, including being questioned by the police and an investigator, being photographed, and being treated unsympathetically at the hospital because of her addiction.

The prosecutor then discussed how the trial itself subjected R.M. to further humiliation because she was questioned by both counsel, challenged by defense counsel, and "put under a microscope:"

> She has to sit there (indicating) and she has to tell a room full of strangers about her weaknesses, about her life, about her mistakes, about the most terrifying thing that has ever happened to her, something that none of us could ever imagine in front of the guy that did it to her. I put her up there and I asked her to tell me all these things, to explain why she did what she did, to tell me about her bad decisions, and then when she breaks down describing how she was pleading for her life, begging to have a chance to see her child again, I coldly make her keep going: What happened next?
>
> But that's not the end. Then the defendant's lawyer starts asking her questions insinuating her bad choices, saying things like do you expect us to believe that? See, in ordinary polite society, we don't talk to each other like that. If you were telling somebody something, something humiliating, horrible and terrifying and they said to you, do you expect us to believe that - - -[8]

The trial court sustained defense counsel's objection, and instructed the prosecutor to "move on." Defense counsel did not request a curative instruction.

"It is improper for the prosecutor to disparagingly comment on defense counsel's role or impugn the defense lawyer's integrity." Thorgerson, 172 Wn.2d at 451 (prosecutor engaged in misconduct by referring to defense counsel's

[8] During cross-examination, defense counsel questioned R.M. about her written statement in which she indicated that at a point during the attack she "start[ed] to calm down a bit" and asked, "So are we supposed to believe that?"

presentation of his case as "bogus" and involving "sleight of hand," but the misconduct did not likely affect the verdict). A prosecutor's statements that malign defense counsel are impermissible because they can damage a defendant's opportunity to present his or her case. State v. Lindsay, 180 Wn.2d 423, 432, 326 P.3d 125 (2014). But comments that "can fairly be said to focus on the evidence" do not constitute misconduct. Thorgerson, 172 Wn.2d at 451.

The prosecutor's comment suggesting that defense counsel challenged the victim's testimony in a manner that was offensive to "polite society" was disparaging to defense counsel. See Thorgerson, 172 Wn.2d at 452. However, the larger context of the argument was not a personal attack on defense counsel or counsel's strategy. Rather, the prosecutor was reminding the jury that R.M. faced significant challenges in coming forward with her allegations. Counsel highlighted the fact that all participants in the process—including the prosecutor, the defense, and law enforcement—subjected R.M. to uncomfortable and unwanted scrutiny. The prosecutor encouraged the jury to consider these facts in evaluating R.M.'s credibility.

The trial court sustained defense counsel's timely objection and specifically instructed the prosecutor to abandon her line of argument. To the extent there was any residual prejudice, it could have been neutralized by an instruction to disregard the argument. In State v. Lindsay, the prosecutor characterized the defense's argument a "crock" and engaged in numerous other instances of misconduct. Lindsay, 180 Wn.2d at 442-43. Our Supreme Court determined that the cumulative effect of the repeated and prejudicial misconduct

could not have been cured by any instruction or series of instructions. Lindsay, 180 Wn.2d at 443. But here, the misconduct was neither repeated nor pervasive. Considering the larger context of the argument, the limited nature of the inappropriate remarks, and the weight of the evidence against Baus, there is not a substantial likelihood that the prosecutor's comments about the manner in which defense counsel questioned the victim affected the jury's verdict.

We conclude Baus has not established prosecutorial misconduct warranting a reversal of his conviction.

Condition of Community Custody

At sentencing, the trial court imposed a condition of community custody requiring Baus to avoid "drug areas, as defined in writing by the supervising Community Corrections Officer" (CCO). Baus contends this condition is unconstitutionally vague. We agree.

The guarantee of due process requires that laws, including sentencing conditions, not be vague. U.S. CONST. amend. XIV, § 1; WASH.CONST. art. 1, § 3; State v. Irwin, 191 Wn. App. 644, 652, 364 P.3d 830 (2015). To withstand a vagueness challenge, a condition of sentence must (1) provide ordinary people fair warning of proscribed conduct, and (2) have standards that are sufficiently definite enough to protect against arbitrary enforcement. State v. Bahl, 164 Wn.2d 739, 752-53, 193 P.3d 678 (2008); Irwin, 191 Wn. App. at 652-53. Failure to satisfy either prong renders the condition unconstitutional. Irwin, 191 Wn. App. at 653.

In Irwin, this court held that a similar community custody condition requiring further definition by a CCO was unconstitutionally vague. Irwin, 191 Wn. App. 652. A condition of sentence barred Irwin from places where "children are known to congregate," as defined by his CCO. Irwin, 191 Wn. App. 655. This court concluded that "[w]ithout some clarifying language or an illustrative list of prohibited locations . . . the condition does not give ordinary people sufficient notice to 'understand what conduct is proscribed.'" Irwin, 191 Wn. App. 655. Moreover, the authority given to the CCO to interpret the condition allowed for unconstitutionally arbitrary enforcement. Irwin, 191 Wn. App. 655.

Likewise here, leaving the definition of "drug areas" subject to the CCO's discretion deprives Baus of fair warning of the proscribed conduct. And while it is true that he may have notice of prohibited conduct once the CCO sets forth a definition of "drug areas" in writing, the condition still fails under the second prong of vagueness analysis because it is vulnerable to arbitrary enforcement. See Irwin, 191 Wn. App. at 655. For these reasons, the condition of community custody related to "drug areas" is unconstitutionally vague.

Accordingly, we affirm Baus's convictions, but remand to strike the challenged condition of community custody.

Andrus, J.

WE CONCUR:

Chun, J.

Becker, J.

Appendix B

FILED
11/28/2018
Court of Appeals
Division I
State of Washington

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

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY JOSEPH BAUS,

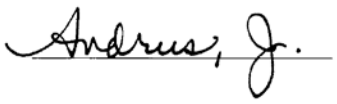
Appellant.

No. 76962-6-I

ORDER DENYING MOTION
TO PUBLISH

The respondent, State of Washington, has filed a motion to publish. A panel of the court has considered its prior determination and has found that the opinion will not be of precedential value; now, therefore it is hereby

ORDERED, that the unpublished opinion filed November 5, 2018, shall remain unpublished.



Judge

NIELSEN, BROMAN & KOCH P.L.L.C.

December 27, 2018 - 12:35 PM

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