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Supreme Court No. 99679-2
Division III, No. 36359-7-III

IN THE
SUPREME COURT
OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

GORDON JAMES ENNIS,

Petitioner

PETITION FOR REVIEW FOLLOWING
APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SPOKANE COUNTY

The Honorable Judge James M. Triplet
The Honorable Judge Maryann C. Moreno

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Gordon Ennis asks this Court to accept review of the Court of Appeals' decision that affirmed his conviction for second degree rape.

B. DECISION FOR WHICH REVIEW IS SOUGHT

The Court of Appeals, Division III, filed on March 18, 2021. A copy of the Court's unpublished opinion is attached as Appendix A. Mr. Ennis timely seeks review of that decision.

C. ISSUES PRESENTED FOR REVIEW

Issue 1: Whether Division III's decision, affirming Mr. Ennis's conviction warrants review under RAP 13.4(b) where a non-corroboration instruction was a comment on the evidence and interfered with the constitutional right to present a defense.

Issue 2: Whether Division III's decision to affirm Mr. Ennis's conviction warrants review under RAP 13.4(b) where the State committed misconduct.

Issue 3: Whether Division III's decision warrants review under RAP 13.4(b), where Mr. Ennis was denied his Sixth Amendment right to conflict free representation.

D. STATEMENT OF THE CASE

Gordon Ennis, a veteran Spokane Police Sergeant, was invited by Doug and Heather Strosahl to a fall harvest party in their home in Colbert on October 24, 2015. (1RP 569, 1316-1317, 1369)¹. Mr. Strosahl, also a

¹ The volumes of transcripts are referred to in this opening brief as follows: "1RP" was transcribed by Terri Cochran, containing the trial and other motions on these dates: 2/7/18, 2/20/18, 2/22/18, 2/26/18, 2/27/18, 3/1/18, 3/5/18, 3/6/18, 3/7/18, 5/11/18, 6/4/18, 6/27/18, 7/13/18, 8/10/18/ 8/16/18, and 8/24/18. "2RP" was transcribed by Tammey McMaster, containing the hearing from 5/19/17. "4RP" was transcribed by Allison Stovall, containing the hearing from 6/7/17.

Spokane Police officer, invited several other friends and family. (1RP 568-569). K.S.², a probationary Spokane Police officer working in the sexual assault unit, was included. (1RP 569, 818-819, 872, 919).

Guests arrived sometime after 7:00 pm and socialized. (1RP 572-573). When Mr. Ennis arrived later, around 9 pm, K.S. greeted him “very warmly” by giving him a hug. (1RP 573, 750, 782, 834, 1387). The group moved into the living room, where Mr. Strosahl captured video of K.S. dancing in front of a seated Mr. Ennis; she bent down to hug him afterwards. (1RP 679-680, 726; State’s Exhibit P-33). Eventually K.S. sat in front of Mr. Ennis with her arm wrapped around his legs and head against his legs. (1RP 1356-57, 1394-1395; State’s Exhibit P-33). Some guests thought K.S. was acting flirtatiously towards Mr. Ennis. (1RP 649-650, 679-680, 725-726, 733-734). Later, K.S. testified she did not recall the incident, although she appeared lucid in the video. (1RP 844).

Around 11 p.m. all of the guests entered the hot tub and continued to drink. (1RP 575-584, 619, 760-762). After exiting the hot tub a few went to bed. (1RP 576-584, 619, 762). Later, there were varying opinions as to K.S.’s intoxication level, with four guests opining K.S. was not so intoxicated as to be unaware of her surroundings. (1RP 596, 730-731,

² Initials are used throughout the Appellant’s opening brief to respect this individual’s identity. *See State v. Emery*, 161 Wn. App. 172, 180 fn. 2, 253 P.3d 413 (2011).

733, 787-788, 792). Only one guest—K.S.’s roommate—thought she was nearly incoherent after the hot tub. (1RP 1057, 1061-1074).

By around 2 a.m., all the guests were either staying in guestrooms or had left, except Mr. Ennis, who stayed and conversed with Mrs. Strosahl. (1RP 597, 772). Having gone to bed earlier, Mr. Strosahl woke and joined Mr. Ennis and Mrs. Strosahl in the kitchen. (1RP 597-598). Soon after, the three of them went to see K.S. in the guestroom. (1RP 600, 658, 673-674). They turned on the light and teased K.S. about not being able to hold her liquor. (1RP 600, 658, 1420). K.S. sat up, smiled, and giggled in response to the group; she did not have a “glassy” look of intoxication and laughed in response to Mr. Strosahl’s joke. (1RP 600-601, 661, 1422). The trio returned to the kitchen. (1RP 600-601, 661-665).

Not long after, K.S. came to the kitchen, walked up to Mr. Ennis, wrapped her arms around his neck, and laid her head on his chest—actions that Mrs. Strosahl later revealed she thought were inappropriate as the embrace lasted a few minutes and Mr. Ennis was married. (1RP 601-602, 664-665, 1424-1426). The small group continued to talk, and K.S. responded to a smart comment from Mr. Strosahl. (1RP 602). K.S. was not stumbling nor did she appear to be unaware of her surroundings, did not appear to be uncoordinated, made eye contact with the Strosahl’s, and had walked down the hallway on her own. (1RP 586-587, 591, 652-653,

664-668, 690, 1426). Finally, around 2:30 a.m., the Strosahl's went to bed and Mr. Ennis and K.S. headed towards the guest room in what Mrs. Strosahl thought was a flirtatious manner. (1RP 602, 607-608, 668).

K.S. later indicated she did not recall being in the kitchen with Mr. Ennis and the Strosahl's. (1RP 923). Her memory of the party was mixed. (1RP 842). But she recalls waking up in a bed with Mr. Ennis next to her, feeling a thrusting in her pants and finding Mr. Ennis's fingers in her vagina. (1RP 848). She said she was not conscious or awake when Mr. Ennis touched her, and when she became aware of her surroundings, she moved away from him. (1RP 850, 927). According to K.S., Mr. Ennis got up, said he had to leave and left. (1RP 853).

Mr. Ennis's memory was different: K.S. pulled his hips towards her in the hallway and nuzzled into him, and he embraced her in return. (1RP 1426-1429, 1457, 1459). They moved to the bedroom where they became more intimate, with K.S. pulling Mr. Ennis's hands towards her vagina, which he then rubbed and inserted a finger into. (1RP 1429, 1447). But then Mr. Ennis stopped the encounter, realizing the personal and professional implications of their intimate actions, and told K.S. he needed to go home. (1RP 1430). Mr. Ennis said they were both under the influence of alcohol but K.S. never was incoherent. (1RP 1434, 1439).

K.S. later accused Mr. Ennis of nonconsensual sex. (1RP 849-851, 853-854, 862, 891-894). The State charged Mr. Ennis with a single count

of second degree rape, alleging K.S. had been “incapable of consent by reason of being physically helpless or mentally incapacitated.” (CP 1). Witnesses at trial testified consistent with the facts above. (1RP 564-1476). The jury found Mr. Ennis guilty. (CP 328; 1RP 1546-1548).

Mr. Ennis appealed, arguing his conviction should be reversed because: the noncorroboration instruction interfered with his right to present a defense and was an improper judicial comment on the evidence, the State committed prejudicial misconduct, and ineffective assistance of counsel.³ (CP 1268-1269); Appendix A. The Court of Appeals rejected these arguments and affirmed Mr Ennis’s conviction. *See* Appendix A. Mr. Ennis now seeks review by this Court.

E. ARGUMENT

Issue 1: Whether Division III’s decision, affirming Mr. Ennis’s conviction warrants review under RAP 13.4(b) where a non-corroboration instruction was a comment on the evidence and interfered with the constitutional right to present a defense.

It is important to note this Court recently granted review on the propriety of the noncorroboration jury instruction. *State v. Svalesson*, 195 Wn.2d 1008, 458 P.3d 790 (2020). Review of the issue was terminated upon the untimely death of the petitioner. *State v. Garza*, 2021 WL 351991, at *7 (Wn. Ct. App. Feb. 2, 2021); *see also* GR 14.1(a)

³ Mr. Ennis also challenged several other issues, which are not raised here.

(authorizing citation to unpublished opinions as nonbinding authority).

Yet the need to revisit this issue has not abated.

The noncorroboration instruction given to the jury in this case constituted an improper comment on the evidence under article IV, sec. 16, of the Washington State Constitution. Const. art. IV, sec. 16; (CP 324, Instruction No. 10; 1RP 1487). The noncorroboration instruction stated that “[i]n order to convict a person of second degree rape, it shall not be necessary that the testimony of the alleged victim be corroborated.” (CP 324, Instruction No. 10; 1RP 1487); *see* RCW 9.44.020(1). Because the noncorroboration instruction is an impermissible judicial comment on the evidence in violation of Article IV, sec. 16, of the State Constitution, Mr. Ennis respectfully requests this Court overrule *State v. Clayton*, 32 Wn.2d 571, 202 P.2d 922 (1949) because the precedent is incorrect and harmful. The instruction interfered with Mr. Ennis’s constitutional right to present a defense because the noncorroboration instruction, when combined with the affirmative defense to second degree rape, diminished the defense instruction. (CP 324-325, Instruction Nos. 10 & 11; 1RP 1487-1488).

Mr. Ennis’s trial defense counsel did not take exception to the noncorroboration instruction. (1RP 1478-1479). But a comment on the evidence is of such constitutional magnitude it may be raised for the first time on appeal. *State v. Lamphsire*, 74 Wn.2d 888, 893, 447 P.2d 727 (1968); *State v. Levy*, 156 Wn.2d 709, 719-720, 132 P.3d 1076 (2006).

a. The propriety of the noncorroboration instruction is outdated and this Court's precedence from *Clayton* needs to be revisited because it is incorrect and harmful.

As a threshold matter, Division III pointed out that a non-corroboration instruction “is at best anachronistic.” Appendix A, pg. 17. Division III acknowledged the noncorroboration instruction is based upon law from over one hundred years ago, a time when “corroboration of the complaining witness in a rape case was required by statute.” Appendix A, pg. 17 (citing *State v. Morden*, 87 Wash. 465, 467, 151 P. 832 (1915)). That statute was repealed in 1913 and the petitioner agrees that, for awhile, “it might have been important to communicate to a jury that there was no longer a requirement for corroboration.” Appendix A, pg. 17.

But today, all three appellate divisions have recognized misgivings about employing a noncorroboration instruction. *State v. Chenoweth*, 188 Wn. App. 521, 535-538, 354 P.3d 13 (Div. I, 2015); *State v. Zimmerman*, 130 Wn. App. 170, 180-183, 121 P.3d 1216 (Div. II, 2005); *State v. Steenhard*, 2019 WL 3302416, at *8-9 (Wn. Ct. App., Div. III, Jul. 23, 2019) (unpublished); *see also* GR 14.1(a) (authorizing citation to unpublished opinions as nonbinding authority). And the Washington State Supreme Court Committee specifically discourages the use of the noncorroboration instruction. 11 Wash. Prac. Pattern Jury Instr. Crim. WPIC 45.02 (4th Ed. 2016) (Comment). This is because the trial court's highlighting or emphasizing of one party's theory of the case over another

is an improper comment on the evidence. *See State v. Carpenter*, 78

Wn.2d 92, 101, 457 P.2d 1004 (1969). Judge Becker remarked in

Chenoweth:

If the use of the noncorroboration instruction were a matter of first impression, I would hold it is a comment on the evidence and reverse the conviction. I agree with the committee on pattern jury instructions that the matter of corroboration is really a matter of sufficiency of the evidence. Many correct statements of the law are not appropriate to give as instructions. But we are bound by *State v. Clayton*, 32 Wash.2d 571, 202 P.2d 922 (1949), to hold that the giving of such an instruction is not reversible error. *State v. Zimmerman*, 130 Wash.App. 170, 182–83, 121 P.3d 1216 (2005). Accordingly, I must concur.

Chenoweth, 188 Wn. App. at 538 (concurring, J. Becker).

In this case Division III agreed there “is no need for a corroboration instruction, and it would be better not to give one.” Appendix A, pg. 20; (citing 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 45.02 (4th ed. 2016) (Comment)). However, Division III noted it was bound by the 1949 *Clayton* decision. Appendix A, pgs. 17-19; 32 Wn.2d at 573-74.

Several other states have also acknowledged a noncorroboration instruction’s shortcomings and problematic implementation. In 2003, the Indiana Supreme Court overruled its “substantial history of appellate approval” and found the giving of a noncorroboration instruction was error. *Ludy v. State*, 784 N.E.2d 459, 462 (Ind., 2003). In 2015 the Florida Supreme Court found the noncorroboration instruction to be an improper comment on the evidence. *Gutierrez v. State*, 177 So.3d 226, 231-232 (Fla. 2015). Texas also

found error when a noncorroboration instruction was given to the jury. *Veteto v. State*, 8 S.W.3d 805, 816-17 (Tex. App. 2008), *abrogated on other grounds by State v. Crook*, 248 S.W.3d 172 (Tex. Crim. App. 2008).

Recently, Division III reversed and remanded a child molestation case, stating while the noncorroboration instruction was a correct statement of the law, the instruction's use contributed to prejudice suffered by the defendant when improper vouching occurred. *Steenhard*, 2019 WL 3302416 at *11-12; *see also* GR 14.1(a) (authorizing citation to unpublished opinions as nonbinding authority). The lower court noted in most sex cases, "the respective credibility of the victim and the defendant becomes crucial because the testimony of each directly conflicts and the two are the only percipient witnesses." *Id.* at *9. And Division III recognized the instruction "suggested to the jury" that the alleged victims' testimony, and not the defendant's testimony, "could prevail without verification from another witness." *Id.* at *11. While in Mr. Ennis's case Division III downplays the *Steenhard* opinion, it still recognized the derogation of fair trial rights due to the use of the noncorroboration instruction. *Id.* at *11; Appendix A, pg. 17 fn. 5. Mr. Ennis's case is not all that different from Mr. Steenhard's, as no one besides K.S. and Mr. Ennis were present during the incident.

Division III also stated the juror's role in assessing credibility and weight are frequently emphasized during closing argument, and thus there was no need for a noncorroboration instruction to include additional,

cautionary language, as suggested by *State v. Johnson*. 152 Wn. App. 924, 936, 219 P.3d 958 (2009); Appendix A, pgs. 19-20. The lower court stated credibility and weight were emphasized during closing arguments in Mr. Ennis’s trial, and the noncorroboration instruction was never mentioned. Appendix A, pg. 20. But that is not so. During both voir dire and rebuttal closing argument, the State pointed out to the jury the law does not require the victim’s statement be corroborated. (1RP 466, 1542). And at the apex of its opening statement, the State alluded to the same principle, stating “if you find [K.S.] credible, that will be enough to find guilty in this case.” (1RP 563). The State did indeed emphasize the noncorroboration instruction and this affected the fairness of the trial.

The doctrine of stare decisis provides stability and clarity in the law and gives parties a clear standard with which to determine rights. *State v. Stalker*, 152 Wn. App. 805, 810-811, 219 P.3d 722 (2009). But the doctrine is “not an absolute impediment to change.” *State v. Otton*, 185 Wn.2d 673, 678, 374 P.3d 1108 (2016). The courts can and will reject prior holdings “upon a clear showing that an established rule is incorrect and harmful.” *Id.*; *Stalker* 152 Wn. App. at 810-812. There are occasions “when a court should eschew prior precedent in deference to intervening authority where the legal underpinnings of our precedent have changed or disappeared altogether.” *Id.* at 678 (internal quotations & citations omitted). *Clayton* should be readdressed.

Review by this Court is merited under RAP 13.4(b)(1) and (2) because the Court of Appeals' decision conflicts with other decisions by the Court of Appeals and precedence of this Court that the judiciary shall not comment on the evidence. *State v. Allen*, 161 Wn. App. 727, 742, 255 P.3d 784 (2011) (instructions which could lead the jury to infer the trial court had opinions as to one witness's testimony over another are judicial comments on the evidence); *see State v. Jackman*, 156 Wn.2d 736, 743-744, 32 P.3d 136 (2006) (a judge is prohibited from "conveying to the jury his or her personal attitudes toward the merits of the case" or "instructing a jury that matters of fact have been established as a matter of law"); *State v. Lewis*, 6 Wn. App. 38, 41-42, 491 P.2d 1062 (1972) (a judge may not instruct the jury so as to single out specific evidence or emphasize particular facts of the case). Review is also merited under RAP 13.4(b)(3) and (4) because the propriety of the noncorroboration instruction is a significant question of law under Article 4, section 16 of the Washington Constitution and involves an issue of substantial public interest due to the misgivings expressed by all three divisions of the Court of Appeals. *Chenoweth, Zimmerman, Steenhard, supra*. Const. art. IV, sec. 16.

b. The noncorroboration instruction interferes with the right to present a defense.

Division III disagreed Mr. Ennis's right to present a defense was violated, stating he identified no evidence he was prevented from presenting. Appendix A, pgs. 21-22; (CP 325, Instruction No. 11; 1RP 1487-1488).

It is a defense to second degree rape if the defendant proves by a preponderance of the evidence he or she "reasonably believed that the victim was not mentally incapacitated and/or physically helpless." RCW 9A.44.030(1) (reasonable belief defense); 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 19.03 (4th Ed. 2016). Here, the trial court instructed the jury that it was a defense to this charge if Mr. Ennis reasonably believed K.S. was not incapacitated at the time of the act, but it also instructed the jury that K.S.'s testimony need not be corroborated to find the defendant guilty of second degree rape. (CP 324-325, Instruction Nos. 10 & 11; 1RP 1487-1488). Yet the trial court's noncorroboration instruction was misleading, interfered and muddled the reasonable belief defense instruction defense because it placed special emphasis on K.S.'s testimony but detracted from Mr. Ennis' testimony in defense. (CP 324, Instruction No. 10; 1RP 1487); *Clayton, supra*.

Both the United States and Washington Constitutions guarantee the right to present a defense. U.S. Const. amend. VI, XIV; Const. art. I, sec. 22. In general, objections to jury instructions may not be raised for the first time

on appeal unless it relates to a “manifest error affecting a constitutional right.” *Id.* (citing RAP 2.5(a)(3) (other citation omitted). “Jury instructions are sufficient if they allow the parties to argue their theories of the case, do not mislead the jury, and, when taken as a whole, properly inform the jury of the law to be applied.” *State v. O’Donnell*, 142 Wn. App. 314, 321, 174 P.3d 1205 (2007). To comply with due process, jury instructions must also “fully instruct the jury on the defense theory” and “give the jury discretion to decide questions of fact.” *State v. Koch*, 157 Wn. App. 20, 33, 237 P.3d 287 (2010). A case must be reversed where a misleading jury instruction deprives a defendant of his ability to argue his theory of the case. *State v. LeFaber*, 128 Wn.2d 896, 903, 913 P.2d 369 (1996). A defendant is not required to argue a theory to correct an erroneous statement of the law in jury instructions. *Id.* at 903.

Mr. Ennis’s defense rested on consent, and whether he reasonably believed K.S. was not mentally or physically incapacitated. (CP 325, Instruction No. 11; 1RP 1426-1429). He did not have to prove her capacity or incapacity—just whether he reasonably believed she was incapacitated—and that is a question about credibility and corroboration. But because the court instructed the jury that K.S.’s testimony need not be corroborated in order to convict Mr. Ennis of second degree rape, the court’s silence as to Mr. Ennis’s opposing testimony and emphasis on K.S.’s interfered with his constitutional right to a “fair opportunity to

defend against the State’s accusations.” *Chambers*, 410 U.S. at 294; U.S. Const. amends. VI; XIV; Const. art. I, sec. 22. The court’s instruction misled the jury because it eroded its authority to decide questions of fact, depriving Mr. Ennis of his ability to argue his theory of the case (consent and the reasonable belief defense) without the weight of an improper judicial comment on the evidence. *LeFaber*, 128 Wn.2d at 903. If the judge had not improperly commented on the testimony, Mr. Ennis’s presentation of his defense would have been even-handed. But that did not happen. Mr. Ennis did not have to prove beyond a reasonable doubt K.S. was incapacitated—he only needed to prove he believed she was by a preponderance of the evidence. These competing burdens of proof muddy the meaning of the jury instructions and which standard the jury was to apply.

Review is merited: Division III’s decision conflicts with prior decisions of this Court and the Court of Appeals; a significant question of law exists under the State and federal constitutions because it involves the right to present a defense; and the decision involves an issue of substantial public interest—allowing defendants to fairly and fully argue their theories of defense. *Koch*, 157 Wn. App. at 33; *LeFaber*, 128 Wn.2d at 903; U.S. Const. amend. VI, XIV; Const. art. I, sec. 22; RAP 13.4(b)(1)-(4).

The combination of the noncorroboration instruction and capacity defense instruction diluted the defense theory. Review is necessary.

Issue 2: Whether Division III’s decision to affirm Mr. Ennis’s conviction warrants review under RAP 13.4(b) where the State committed misconduct.

Mr. Ennis raised several issues concerning State misconduct at trial, but Division III disagreed by finding none of those instances were misconduct or flagrant and ill-intentioned. *See* Appendix A, pgs. 22-45.

Repetitive prosecutorial misconduct can have a cumulative effect as to be so flagrant that “no instruction or series of instructions can erase their combined prejudicial effect.” *State v. Lindsay*, 180 Wn.2d 423, 443, 326 P.3d 125 (2014). When a case is a credibility contest, a prosecutor’s improper arguments easily serve as the deciding factor. *State v. Walker*, 164 Wn. App. 724, 738, 265 P.3d 191 (2011). Presumably, “trained and experienced prosecutors... do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case.” *State v. Fleming*, 83 Wn. App. 209, 215, 83 Wn. App. 209 (1996).

The cumulative effect of the State’s multiple instances of misconduct prejudiced Mr. Ennis. *Lindsay*, 180 Wn.d at 443 (finding cumulative error). This case was a credibility contest between K.S. and Mr. Ennis.

a. The State committed misconduct by commenting on the defendant’s constitutional right to silence in closing argument.

The State and federal constitutions protect a defendant’s right to self-incrimination, including the right to silence. U.S. Const. amend. V; Const.

art. I, secs. 9 & 22. Comments on the accused's silence occurs when the State uses them as evidence of guilt or to suggest an admission of guilt. *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). Washington courts have recognized “tailoring” arguments—arguments that the defendant opportunistically tailored his testimony after hearing all evidence in the case—are permitted under article I, section 22 of the State constitution but “only when the argument of tailoring can be inferred from a defendant’s testimony: either direct, or in cross-examination.” Appendix A, pg. 27.

As a threshold matter, this Court determined the Washington Constitution provides greater protection to defendants than the federal constitution, adopting Justice Ginsburg’s dissenting view in *Portuondo v. Agard*. *State v. Berube*, 171 Wn. App. 103, 114-117, 286 P.3d 402 (Div. I, 2012) (citing *Portuondo*, 529 U.S. 61, 73, 120 S.Ct. 1119, 146 L.Ed.2d 47 (2000), and *State v. Martin*, 171 Wn.2d 521, 252 P.3d 872 (2011)). Justice Ginsburg stated tailoring arguments should be disallowed “where there is no particular reason to believe that tailoring has occurred and where the defendant has no opportunity to rebut the accusation.” *Berube*, 171 Wn. App. at 116.

The State made improper comments and references to Mr. Ennis’s silence when it made the following statements during closing argument:

Part of what you will do in this case is to look at the testimony and examine it. *We heard the defendant’s statement for the first time yesterday when he took the stand.* The defendant is presumed innocent He is not presumed credible.

(1RP 1496) (emphasis added).

...

And again, this applies equally to the defendant's statement. *You can look at the timing and accuracy of a statement, and you can also consider how someone testifies and what motive or bias they may have.*

(1RP 1497) (emphasis added).

...

You can look *at the timing of statements in this case* and the testimony that contradicts not only the claim by the defendant that [K.S.] was flirting, but also that by the time this occurred she had suddenly been ridden all of the effects of being intoxicated.

(1RP 1499) (emphasis added).

...

The defendant spoke to you the other day *after having two years and four months and access to reports and being seated in the courtroom throughout this*, and he gave you a version of events that you must analyze.

(1RP 1500) (emphasis added).

...

That took away some options from the defendant as to what he would testify to. His testimony was full of justifications, not taking responsibility. Ladies and gentlemen, actions can speak louder than words.

(1RP 1510) (emphasis added).

Mr. Ennis raised these statements in a motion for new trial as improper comments on silence. (CP 340, 410-463; 1RP 1684-1750, 1761-1767).

Division III held these statements were either not comments on silence or were not flagrant and ill-intentioned. Appendix A, pgs. 30-33. The Court reasoned this because of testimony during direct and cross-examination by Mr. Ennis that his recollection of events matched the timelines set forth by the State, and also because he spent over two years since the incident thinking about the allegation. Appendix A, pgs. 30-33; (1RP 1390-1391, 1396, 1406, 1423, 1427, 1437-1438.) In contrast, when raised as an issue in the defendant’s motion for a new trial, the trial court’s conclusion differed. The trial court found this statement was not tailoring— “[t]he defendant spoke to you the other day *after having two years and four months and access to reports and being seated in the courtroom throughout this*, and he gave you a version of events that you must analyze”—because Mr. Ennis had not made prior statements that he was now correcting with the benefit of having heard the testimony of others. Appendix A, pg. 32; (1RP 1781).

Mr. Ennis did not change his testimony based on what others had previously testified to, nor did he change his testimony from prior statements. (1RP 1367-1470). Prior court of appeals’ decisions have noted it was appropriate to question a defendant “about the changes in his story and his opportunities to prepare those changes.” *State v. Hilton*, 164 Wn. App. 81, 98, 261 P.3d 683 (Div. III, 2011); *see State v. Teas*, 10 Wn. App.2d 111, 125, 447 P.3d 606 (Div. II, 2019) (same); *see State v. Berube*,

171 Wn. App. 103, 114-117, 286 P.3d 402 (Div. I, 2012) (same). In *Hilton*, the defendant's testimony varied from his initial statement to the police. 164 Wn. App. at 96. In *Teas*, the same thing occurred. 10 Wn. App.2d at 125. And in *Berube*, the defendant initially told law enforcement he did not see the victim the night of the shooting, but at trial testified had drinks with her that evening. 171 Wn. App. at 106-110, 114.

Division III relied on *Berube* to hold the tailoring by the State in closing argument was permissible, as well as deferring to the trial court's assessment of the closing statements as addressed in a motion for new trial. Appendix A, pgs. 29-33. But the State did not have any basis for making generic tailoring arguments during closing argument, and review is merited pursuant to RAP 13.4(b)(2) as Division III's decision conflicts with prior court of appeals opinions, *Berube*, *Hilton*, and *Teas*, *supra*. The tailoring arguments in those cases were based upon conflicting prior statements, which did not occur here because Mr. Ennis did not make any prior statements to the police nor did he testify he tailored his testimony to fit in with other witnesses' accounts. (1RP 1367-1470); U.S. Const. amends. V, XIV; Const. art. 1, secs. 9 & 22; RAP 13.4(b)(2)

Review is merited as this Court has not provided guidance on the propriety of generic tailoring arguments made during closing argument. *Martin*, 171 Wn.2d at 536 n. 8; RAP 13.4(b)(1). Although discussed in *Martin*, this Court did not rule on the issue. 171 Wn.2d 521, 536 n. 8, 252

P.3d 872 (2011). This Court has only recognized specific tailoring is permissible during cross-examination and did not address whether generic tailoring (as used here) is permissible during closing argument. *Martin*, 171 Wn.2d at 536 fn.8. Review is necessary. RAP 13.4(b)(1). Review is also merited under RAP 13.4(b)(3) and (4). The propriety of generic tailoring during closing argument is a significant question of constitutional law and an issue of substantial public interest because generic tailoring “abridges a defendant’s right to be present at trial and testify.” *See State v. Wallin*, 166 Wn. App. 364, 372, 376, 269 P.3d 1072 (2012) (generic tailoring at closing argument was constitutionally impermissible because the defendant did not testify he based any of his answers on what he learned from the evidence). The context in which the prosecutors’ comments on Mr. Ennis’s silence were made, concerning the testimony and witnesses’ credibility, and as such, the sequence of events comments on Mr. Ennis’s silence violated his state and federal constitutional right to remain silent and right to appear to testify on his behalf. U.S. Const. amends. V, XIV; Const. art. 1, secs. 9 & 22.

It is worth noting the State attempted to obtain written findings of fact and conclusions of law from the trial court on whether the statements in closing were proper. (CP 1138-1148). Those proposed findings were rejected by the trial court after Mr. Ennis objected to them. (CP 1138-1148, 1223-1241). When the prosecution’s findings were first drafted, the

State left out key portions of its closing argument, altering the context and import of its closing argument statements on silence. (CP 1138-1148, 1223-1241). This was a veiled effort to establish findings by the trial court which were not accurate portrayals of the record. (CP 1138-1148, 1223-1241).

The Prosecuting Attorney's arguments were not subtle. These were comments on silence. The negative inference from the State's comments was that only guilty people do not talk. That was the whole cloth of the State's argument and the State tried to remove it from the record because it impacts credibility, especially of Mr. Ennis. This is a constitutional issue about the right to silence. U.S. Const. amend. V; Const. art. I, secs. 9 & 22. Repeatedly the State asked the jury to reach a negative inference which impliedly assumes the defendant is guilty because only the guilty will not talk to the police and explain their story. On top of this, the State emphasized in trial that K.S.' story did not need to be corroborated. (1RP 466, 563, 1542). Review must be granted.

b. The State committed misconduct by eliciting improper testimony.

During trial it was established Mr. Ennis was cooperative with authorities when DNA samples were taken, which the State objected to because it argued it would be unable to rebut such testimony without broaching Mr. Ennis's Fifth Amendment rights. (1RP 1465-1467). Despite

making it clear to the trial court the State knew it was walking a fine line, the State persisted in improper rebuttal testimony when it later asked one of its detectives about Mr. Ennis's silence:

[STATE]: ... Did you indicate in your report that he *remained silent* during the contact and conversations?
[Detective]: I indeed did.

(1RP 1472) (emphasis added).

Division III reasoned this statement was just further evidence of “a contemporaneous record that Ennis did not say anything” at the time of the DNA collection. Appendix A, pg. 34. Despite the State's use of *Miranda* language to ask the silence question, Division III defends this by stating “reasonable jurors would have understood the question and answer as rebutting Ennis's testimony that he made the offer [to clip his fingernails during the DNA collection meeting with authorities], not as a comment on his exercise of a Fifth Amendment right.” Appendix A, pg. 34. Yet the State merely needed to ask whether the officer's report indicated whether Mr. Ennis offered to clip his fingernails. (1RP 1472). This would have been appropriate rebuttal that did not touch upon constitutional rights. And the State had already rebutted Mr. Ennis's testimony by asking the officer, just prior to this, whether he remembered Mr. Ennis offering to clip his nails. (1RP 1472). Framing the question using *Miranda* language—“remain silent”—violated Mr. Ennis's Fifth Amendment rights. (1RP 1472).

Failure to object to the State's improper remarks on a defendant's constitutional right to silence does not waive the issue on appeal when the remark amounts to manifest error. *State v. Dixon*, 150 Wn. App. 46, 57, 207 P.3d 459 (2009) (citing RAP 2.5(a)(3)). If the State's misconduct directly violates a constitutional right, it is subject to constitutional harmless error. *State v. French*, 101 Wn. App. 380, 385-386, 4 P.3d 857 (2000).

Pre-arrest silence is recognized as protected under the Fifth Amendment in Washington State. *State v. Easter*, 130 Wn.2d 228, 922 P.2d 1285 (1996); *see also Doyle v. Ohio*, 426 U.S. 610, 619, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976) (due process of the Fourteenth Amendment prohibits impeachment for silence post-*Miranda*, even when defendant testifies at trial). At trial "*the State may not elicit comments from witnesses or make closing arguments relating to a defendant's silence to infer guilt from such silence.*" *Easter*, 130 Wn.2d at 236 (emphasis added). This is because a defendant's "Fifth Amendment right to silence can be circumvented by the State just as effectively by questioning the arresting officer or commenting in closing argument as by questioning the defendant himself." *Id.* at 236. "The implication is that suspects who invoke their right to silence do so because they know they have done something wrong." *State v. Burke*, 163 Wn.2d 204, 222, 181 P.3d 1 (2008). "It is settled that the State may not, consistent with due process, use post-arrest silence following *Miranda* warnings to

impeach a defendant's testimony at trial.” *State v. Belgarde*, 110 Wn.2d 504, 511, 755 P.2d 174 (1988) (citing *Doyle*, 426 U.S. 610).

Division III’s holding should be reviewed for being contrary to established case law that prearrest silence may not be used to impeach a defendant. RAP 13.4(b)(1); *Belgarde*, 110 Wn.2d at 511; *Easter*, 130 Wn.2d at 236. Review is also merited as a significant question of law under the federal constitution and involves an issue of substantial public interest. RAP 13.4(b)(3) and (4); U.S. Const. amends. V, XIV.

c. The State’s repeated vouching for the “truthfulness” and credibility of the victim witness during closing argument warrants reversal for prosecutorial misconduct.

Improper vouching for a witness’ credibility occurs “if a prosecutor expresses his or her personal belief as to the veracity of the witness” *State v. Ish*, 170 Wn.2d 189, 196, 241 P.3d 389 (2010). “It is misconduct for a prosecutor to state a personal belief as to the credibility of a witness.” *State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008); see also *State v. Dhaliwal*, 150 Wn.2d 559, 577-78, 79 P.3d 432 (2003). A prosecutor improperly vouches for the credibility of a witness by stating that a witness is telling the truth. *State v. Ramos*, 164 Wn. App. 327, 341 n.4, 263 P.3d 1268 (2011) (finding the prosecutor improperly vouched for the credibility of witnesses by arguing they “were just telling you what they saw and they are not being anything less than 100 percent candid.”). “Whether a witness has testified truthfully is

entirely for the jury to determine.” Ish at 196 (citing *United States v. Brooks*, 508 F.3d 1205, 1210 (9th Cir. 2007)). “A prosecutor owes a defendant a duty to ensure the right to a fair trial is not violated.” *Ramos*, 164 Wn. App. at 333 (citation omitted).

During closing argument and rebuttal closing, the State vouched for the credibility of K.S. five times. (1RP 1513-1514, 1543-1544). It said:

[K.S.] never stopped Officer Heuett from making that report, *because she knew the truth*. And [K.S.] *has abided by that truth* for two years and four months.

(1RP 1513) (emphasis added).

...

[K.S.] refused to give up on a job she loves, and *she has abided by the truth in this courtroom under oath in front of each of you and everyone else here*.

(1RP1514) (emphasis added).

...

And ladies and gentlemen, *when you find [K.S.]’s credibility to be such that her statement to you is nothing more and everything that includes the truth*, you will realize under the law that the state has met its burden....

(1RP 1543) (emphasis added).

...

[T]he defendant in his—in his statement suggested to you that this was a woman that had an agenda; that she was so jilted by this experience and her sexual aggressiveness being stopped by a defendant that she began a vendetta; *that she stayed with that for two years and four months; that she, committed to a*

profession that supposed to be about the truth, stayed with that truth.

(1RP 1543) (emphasis added).

...

[W]hen you look at the facts in this case... *the truth and the reality of what occurred will be clear.* Not based on emotion, not based on games by the state, *not based on anything else than the truthful word of [K.S.].*

(1RP 1543-1544) (emphasis added).

Defense counsel never objected. (1RP 1513-1514, 1543-1544).

Division III held these statements were not vouching because they did not indicate the prosecutor's personal opinion as to K.S.'s veracity but were rather inferences from the evidence. Appendix A, pg. 36. But it was not a permissible inference, based on K.S.'s testimony, for the State to argue that her profession as a police officer was "supposed to be about the truth" and she "stayed with that truth." (1RP 1543). There, the State is opining that because K.S. is a police officer she is more trustworthy. (1RP 1543). K.S. did not testify that her profession was about the truth, or that she told the truth because of her profession. (1RP 811-851, 853-883, 885-938). Nor was the comment that "the reality of what occurred will be clear" due to the "truthful word of [K.S.]" related to her testimony as a professional policewoman. (1RP 1544). That comment was vouching by the State and was also coupled with the State's emphasis in rebuttal closing that "in the State of Washington

the law does not require the testimony of the victim to be corroborated.”
(1RP 1542).

The misconduct was intentional and it prejudiced Mr. Ennis. The trial was solely about credibility and who the jury could believe—K.S. or Mr. Ennis—the only two people who could testify about what really happened. No curative instruction would have fixed the error due to the importance of credibility in this case. *O'Donnell*, 142 Wn. App. at 328.

Review is merited. RAP 13.4(b)(1)-(4). Vouching is well-known to be improper conduct in our State and Division III's decision conflicts with examples of vouching in the Court of Appeals and this State's Supreme Court case history. *Ish*, 170 Wn.2d at 196; *Warren*, 165 Wn.2d at 30; *Ramos*, 164 Wn. App. at 341 n.4; RAP 13.4(b)(1) and (2). Also, vouching denies a defendant his right to a fair trial, which is both a significant constitutional question and an issue of substantial public interest. RAP 13.4(b)(3) and (4); U.S. Const. amend. XIV; Const. art. I, secs. 3 & 22.

d. The State committed misconduct by impugning defense counsel.

A prosecutor may argue evidence does not support the defense's theory of the case. *State v. Lindsay*, 180 Wn.2d 423, 431-432, 326 P.3d 125 (2014). But a prosecutor may not impugn the integrity of defense counsel. *Id.* at 431-432 (citations omitted). “Prosecutorial statements that malign defense counsel can severely damage an accused's opportunity to present his or her case and are therefore impermissible.” *Id.* at 432

(citation omitted). “[I]ncivility threatens the fairness of the trial, not to mention public respect for the courts.” *Id.* at 432.

It is also misconduct “for a prosecutor to express a personal opinion as to the credibility of a witness....” *Lindsay*, 180 Wn.2d at 437-438. This is misconduct because it “violates the advocate-witness rule, which ‘prohibits an attorney from appearing as both a witness and an advocate in the same litigation.’” *Id.* at 437 (citation omitted). For example, “labeling testimony ‘the most ridiculous thing *I’ve ever heard*’ is an obvious expression of personal opinion as to credibility.” *Id.* at 438 (finding the statement, in conjunction with others made by the State, was improper).

Here, the prosecutor both commented on the credibility of a witness, Melissa Beaver, and impugned defense counsel. *Lindsay*, 180 Wn.2d at 438 (recognizing a prosecutor’s comment was both an impermissible comment on the credibility of the defendant witness and defense counsel’s closing argument). Whilst cross-examining Ms. Beaver, the State made the following commentary about her testimony:

No, that’s fine. Mr. Cossey can clean that up, and you can explain why you’re changing it now.

(1RP 1361). Defense counsel objected, the court sustained. (1RP 1361).

Division III held the statement did impugn the witness and was less uncertain it impugned trial defense counsel but held the error was harmless because Ms. Beaver was not a key witness. Appendix A, pg. 39. However, this decision is contrary to established case law. The comment impugned the integrity of defense counsel because it suggested defense counsel was sneaky and dishonest, and denigrating defense counsel's role in front of the jury. *See Lindsay*, 180 Wn.2d at 433.

The State's misconduct was also not harmless. The comment about "clean[ing] that up" was a comment on the witness's credibility, stating Ms. Beaver was not being truthful in her testimony. (1RP 1361). Ms. Beaver testified she had observed K.S. and Mr. Ennis's interactions closely that evening, and one thing she specifically recalled was K.S. sitting by Mr. Ennis with her "arms kind of up on his legs and . . . leaning in on him." (1RP 1356-1357). When Mr. Ennis moved away, K.S. "just kind of moved closer and continued to put her legs on him." (1RP 1356-1357). This behavior demonstrates K.S.'s intent to seek physical contact with Mr. Ennis—which supported his testimony K.S. was the initiator of intimacy with him later that evening.

The State's misconduct was not harmless. Review is merited because whether a defendant has a fair trial is a significant question of law under both the State and federal constitution, which is also an issue of substantial public interest. RAP 13.4(b)(3) and (4). A fair trial is

jeopardized when the State commits misconduct as it did here. U.S. Const. amend. XIV; Const. art. I, secs. 3 & 22.

e. The State improperly expressed an opinion as to the defendant's guilt during testimony.

The State also impermissibly expressed an opinion on the defendant's guilt by stating nine times, during questioning, that K.S. had been sexually assaulted. (1RP 862, 866, 867, 869, 876, 877, 879-880, 933-934).

Specifically:

[STATE]: Why didn't you tell him who had *assaulted* you?

(1RP 862) (during K.S. testimony) (emphasis added).

...

[STATE]: Had you at that point told him who *assaulted* you?

(1RP 866) (during K.S. testimony) (emphasis added).

...

[STATE]: So I want to take you to the point where you wake up *after you had been assaulted* and it's in the morning.

(1RP 867) (during K.S. testimony) (emphasis added).

...

[STATE]: Did you tell [your roommate] at that point who had *assaulted* you?

(1RP 869) (during K.S. testimony) (emphasis added).

...

[STATE]: And did you tell him how you were being *assaulted*?

(1RP 876) (during K.S. testimony) (emphasis added).

...

[STATE]: And were those the clothes that you were wearing when you woke up being *sexually assaulted*?

(1RP 877) (during K.S. testimony) (emphasis added).

...

[STATE]: And can you tell me a little bit—at this point you've been sexually assaulted that—why would you shower?

(1RP 879-880) (during K.S. testimony) (emphasis added).

...

[STATE]: And so it was a couple of minutes almost immediately after that you report that *you were assaulted* to [Mr. Rassier]?

(1RP 933) (during K.S. testimony) (emphasis added).

Defense counsel eventually objected:

[STATE]: Okay. You'd been up -- *you'd suffered a sexual assault*, been up until midnight --

MR. COSSEY: Judge, I'm going to object on that. She's doing it constantly. It's not appropriate. She's constantly making that statement. It's not appropriate.

[STATE]: Your Honor, *I'm stating the fact that there was an assault where fingers were placed inside this woman's vagina*. That's why we're here.

MR. COSSEY: It's an allegation, and she's making it as a fact that she's -- when she's asking questions.

(1RP 933-934) (emphasis added). The prosecutor rephrased her question, and no curative instruction was provided. (1RP 934).

“[A] witness may testify as to matters of law, but may not give legal conclusions.” *State v. Olmedo*, 112 Wn. App. 525, 532, 49 P.3d 960

(2002) (citing ER 704). “Improper legal conclusions include testimony that a particular law applies to the case, or testimony that the defendant’s conduct violated a particular law.” *Id.* at 532. “Assault” is a legal term of art. In general, the common law recognizes assault as an intentional touching of another person that is harmful or offensive. 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 35.50 (4th Ed. 2016); *see State v. Smith*, 159 Wn.2d 778, 154 P.3d 873 (2007). Touching is offensive if the touching would offend an ordinary person who is not unduly sensitive. WPIC 35.50. “An act is not assault, if it is done with the consent of the person alleged to be assaulted.” WPIC 35.50.

Here, Division III declined to recognize the State was expressing an opinion on guilt each time it concluded during questioning that Mr. Ennis had assaulted K.S. Appendix A, pg. 40-41. However, the decision is clearly inapposite with another similar decision to the Court of Appeals, *State v. Olmedo*. 112 Wn. App. at 532. In *Olmedo*, it was improper for an expert to testify that propane tanks were not approved by DOT because it was a legal conclusion that was supposed to be determined by the jury; a legal conclusion invades the province of the jury and a defendant’s constitutional right to a jury trial. *Id.* at 532-533; *see State v. Winborne*, 4 Wn. App.2d 147, 178, 420 P.3d 707 (2018) (remanded for a new trial; officer testimony that defendant drove “recklessly” or “eluded” were direct statements on defendant’s guilt).

Division III did recognize the final comment by the State was objectionable: “I’m stating the fact that there was an assault where fingers were placed inside this woman’s vagina. That’s why we are here.” Appendix A, pg. 41-42; 1RP 934. But Division III found this statement lacked flagrancy or ill-intention, stating: “This statement was atypical of this prosecutor’s conduct in the trial, and we wonder if she misspoke. We agree with Ennis that this response to the objection was objectionable, but the fact remains that defense counsel did not object.” Appendix A, pg. 42. First, Division III is acting as a factfinder by making this conclusion about the State’s conduct. Second, trial defense counsel did interject and appears to have attempted to soften the statement by pointing out it was merely an allegation. (1RP 934). The State was on notice trial defense counsel already objected to the use of the word “assault” and pointed out it was inappropriate. (1RP 933-934). For the State to continue to make an additional, objectionable, legal conclusory statement on guilt—“there was an assault where fingers were placed inside this woman’s vagina”—is flagrant and ill-intentioned. There is no other explanation for this conduct.

Review is merited: (1) Division III’s opinion conflicts with another decision in the Court of Appeals; (2) whether the State expressed an opinion on guilt by stating a legal conclusion is a significant question of law under both constitutions as it invades the jury’s province; (3) and this issue is one of substantial public interest because of the constitutional

implications. *Olmedo*. 112 Wn. App. at 532 (Div. III); U.S. Const. amend. VI, XIV; Const. art. 1, secs. 3, 21, & 22; RAP 13.4(b)(2)-(4).

f. Whether cumulative error applies when multiple instances of misconduct were so flagrant and ill-intentioned no curative instruction would have obviated the prejudice.

Repetitive and prejudicial prosecutorial misconduct can have a cumulative effect as to be so flagrant that “no instruction or series of instructions can erase their combined prejudicial effect.” *State v. Lindsay*, 180 Wn.2d 423, 443, 326 P.3d 125 (2014) (quotations omitted).

There is a substantial likelihood the State’s improper comments affected the jury’s verdict, especially because the case was based solely on which witnesses were credible to the jury. Only two people—Mr. Ennis and K.S.—were present for the incident and their testimony hinged on credibility. The State’s misconduct was effective at undermining a fair and just determination and hampered the defendant’s opportunity to present his defense. *Lindsay*, 180 Wn.2d at 432, 443-44.

The State’s evidence was not overwhelming. Only K.S. and Mr. Ennis were present during the incident. Mr. and Mrs. Strosahl and Mr. Ennis testified K.S. was awake and interacting with them minutes before the alleged incident. (1RP 663-665, 667-668, 733, 1333-1334, 1424). Mr. Ennis testified K.S. initiated intimacy leading to what he believed was consensual contact. (1RP 1425-1429, 1457, 1459). In addition, other party guests did not think K.S. was incoherent. (1RP 733, 787-788, 792).

Review of the State's misconduct must be granted.

Issue 3: Whether Division III's decision warrants review under RAP 13.4(b), where Mr. Ennis was denied his Sixth Amendment right to conflict free representation.

Before the first trial, Mr. Ennis's trial defense counsel, Mr. Cossey, represented to the court he had obtained information from another attorney, Mr. Bugbee, regarding a critical defense involving Mr. Strosahl. (2RP 9-13, 15, 19; 4RP 39-40, 55-58, 66-67, 76-82). Mr. Cossey stated to the trial court the information he obtained was something he promised to Mr. Bugbee he would not disclose. (2RP 15).

After trial, Mr. Ennis's new counsel filed a motion for a new trial, citing Mr. Cossey's conflicted representation. (CP 410-463, 808-1018). Attached thereto was a declaration of Mr. Ennis and his wife. (CP 450-452, 454-456). The declaration stated Mr. Cossey had information from Mr. Bugbee that Mr. Strosahl had sexual contact with K.S. the night of the party. (CP 451). Mr. Ennis believed this information was going to be used in his defense, but it never was. (1RP 564-1476; CP 451-452).

Under the Sixth Amendment, a criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal." *State v. Kylo*, 166 Wn.2d 856,

862, 215 P.3d 177 (2009). The claim is reviewed de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

Ineffective assistance of counsel occurs when an attorney's deficient representation prejudices the defendant. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Tactical decisions made by counsel cannot serve as a basis for an ineffective assistance of counsel claim. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011).

“Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest.” *Strickland*, 466 U.S. at 688 (citation omitted). Effective assistance of counsel includes “representation that is free from conflicts of interest.” *State v. Regan*, 143 Wn. App. 419, 425, 177 P.3d 783 (2008).

It is the duty of the trial court to investigate potential conflicts between client and attorney if the court knows or reasonably should have known a potential conflict exists. *Regan*, 143 Wn. App. at 425-426. However, “if the defendant does not make a timely objection in the trial court, a conviction will stand unless the defendant can show that his lawyer had an actual conflict of interest that adversely affected the lawyer's performance.” *Id.* (citation omitted).

To demonstrate adverse effect a defendant need not show prejudice such that the outcome of the trial would have been different without the

conflicted representation. *Regan*, 143 Wn. App at 428. Rather, the defendant need only show “that some plausible alternative defense strategy or tactic might have been pursued but was not and that the alternative defense was inherently in conflict with or not undertaken due to the attorney’s other loyalties or interests.” *Id.* (quotations omitted). The conflict of counsel either must cause a “lapse in representation contrary to the defendant’s interests” or “have likely affected particular aspects of counsel’s advocacy on behalf of the defendant.” *Id.* (internal quotations and citations omitted). “Joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing.” *State v. Robinson*, 79 Wn. App. 386, 394, 902 P.2d 652 (1995). Conflicts of interest are reviewed de novo. *Regan*, 143 Wn. App. at 428.

Division III held it could not consider whether evidence of sexual contact between Mr. Strosahl and K.S. would have affected the outcome of the trial because it did not have access to the evidence. Appendix A, pg. 50. Yet this conflicts with *Regan*, a court of appeals decision, because Mr. Ennis need not demonstrate the outcome of the trial would have been different—only that some plausible alternative strategy or tactic might have been used but was not because of the lawyer’s conflicts. *Regan*, 143 Wn. App at 428. Division III also stated Mr. Ennis was highly involved in his defense, thus he knew Mr. Cossey would not be using the information from Mr. Bugbee in his defense. Appendix A, pg. 49. However, Mr.

Ennis, a non-lawyer, likely presumed Mr. Cossey was saving that information as a surprise tactic for later in trial. Mr. Cossey knew of this defense, he knew Mr. Strosahl had admitted to having sexual contact at the party with K.S. This possible defense affected K.S.'s credibility and alleged incapacity, and Mr. Cossey chose not to use it. This was a plausible alternative defense strategy that was not used due to a conflict. Besides, evidence *was* in the record: Mr. Ennis declared he was told the information from Bugbee would be used in his defense. Appendix A, pg. 47; (CP 450-451). Review should be granted. This issue involves a conflicting court of appeals decision (*Regan, supra*), is a significant question of constitutional law (effective assistance of counsel), and as such involves a substantial issue of public interest. RAP 13.4(b)(2), (3) and (4); U.S. Const. amend. VI, XIV; Const. art. 1, sec. 22.

F. CONCLUSION

For the reasons stated herein, this Court should grant review.

Respectfully submitted this 16th day of April, 2021.

/s/ Mark E. Vovos
Mark E. Vovos, WSBA #4474

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)
Plaintiff/Respondent) COA No. 36359-7-III
vs.)
GORDON JAMES ENNIS) PROOF OF SERVICE
Defendant/Petitioner)
_____)

I, Mark E. Vovos, counsel for the Petitioner herein, do hereby certify under penalty of perjury that on April 16, 2021, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the petition for review to:

Mr. Gordon James Ennis, DOC #406486
Cell C-421U
Monroe Correctional Complex--WSRU
PO Box 777
Monroe, WA 98272

I also served a copy on the Respondent at SCPAappeals@SpokaneCounty.org using the Washington State Appellate Courts' Portal.

Dated this 16th day of April, 2021.

/s/ Mark E. Vovos
Mark E. Vovos, WSBA #4474
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APPENDIX A

FILED
MARCH 18, 2021
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. 36359-7-III
Respondent,)	
)	
v.)	
)	
GORDON JAMES ENNIS,)	UNPUBLISHED OPINION
)	
Appellant.)	

SIDDOWAY, J. — K.S.,¹ a probationary officer with the Spokane Police Department, attended a small party at the home of Douglas and Heather Strosahl in October 2015 at which she claims she consumed too much alcohol and, while incapacitated, was raped by a superior officer, Gordon Ennis. A trial that began in June 2017 was declared a mistrial when pretrial publicity about the charge and alleged

¹ Initials are used to protect the victim’s identity, consistent with a general order of this court. *See* General Order of Division III, *In re the Use of Initials or Pseudonyms for Child Victims or Child Witnesses* (Wash. Ct. App. June 18, 2012) available at https://www.courts.wa.gov/appellate_trial_courts/?fa=atc.genorders&div=III.

evidence destruction prevented selection of a jury. The parties agreed to seek a change of venue but in February 2018 decided to try again to empanel a jury in Spokane.

A jury was selected and following a nine-day trial, it found Ennis guilty of second degree rape. He replaced his lawyer and moved for a new trial, alleging instructional error, prosecutorial misconduct, and ineffective assistance of counsel, including on the basis that his trial lawyer failed to develop evidence about Doug Strosahl that Ennis argued would have been helpful to his defense. The motion was denied.

Ennis appeals, renewing the arguments made in his new trial motion and making new allegations of ineffective assistance of counsel and prosecutorial misconduct. We affirm.

FACTS AND PROCEDURAL BACKGROUND

K.S. was working as a probationary police officer for the Spokane Police Department in October 2015 when she was invited to a party to be held on Saturday night, October 24, at the home of Doug and Heather Strosahl.² K.S. had graduated from Freeman High School in 2008 and obtained a criminal justice degree from Spokane Community College in 2012, with a view to becoming a police officer like her father.

² The Strosahls were engaged at the time of the party and had married by the time of trial. We refer to Heather Strosahl by her married name, and given the common last name, we frequently identify the Strosahls by their first names to avoid confusion. We intend no disrespect.

After working security jobs and volunteering as a reserve officer, she had been hired full-time by the police department in spring 2014.

Doug Strosahl had worked for 20 years in the Spokane Police Department and taught and mentored K.S. when she attended community college and participated in a reserve officer training program. Doug invited K.S. and Gordon Ennis to the party. Ennis was a Spokane police sergeant who had been a friend of both Strosahls for over 20 years. Ennis had served as a firearm instructor and taught K.S. while she was in training. Other guests at the Strosahls' party included Heather Strosahl's sister and several of her friends and coworkers. K.S. attended the party with her roommate, Callie Roseland.

Roseland did not consume alcohol at the party, but K.S. did, and like several others, became very intoxicated. She brought a six-pack of hard cider and estimated that she finished three of the hard ciders, each mixed with a shot of Fireball whiskey. She joined others in another shot of Fireball and vaguely recalls being offered a sip of Ennis's drink late in the evening, when guests had moved outside to the Strosahls' hot tub.

Ennis was one of the only people K.S. knew at the party. K.S. behaved warmly, and some guests would later say flirtatiously, toward him. Although K.S. has no recollection of it, at one point, she and Heather danced before Ennis, after which K.S. gave him a hug. Both she and Ennis would later testify that they had never had anything

but a professional relationship, however, and K.S. testified that she had “zero interest” in anything else. Report of Proceedings (RP)³ at 835.

At around 11:00 p.m., most of the partiers moved out to the hot tub, where people continued to drink. By the time they came inside an hour or more later, alcohol consumption had taken its toll on several. Heather’s coworker, Melissa Beaver, became ill and lay down on the floor of a bedroom in the basement. With the help of another of Heather’s coworkers, Megan Weese, Heather got Beaver out of her swimsuit and into some dry clothes. Heather did not see Beaver again until the next morning. Beaver would later testify that her last recollection of the party was of being in the hot tub. When she awakened the next morning, she did not immediately know where she was. She was sick until around 7:00 on Sunday night.

Doug Strosahl had gone from the hot tub to his bedroom to change into dry clothes when he realized how intoxicated he was. He was lightheaded and nauseous, and when he lay down, the room was spinning. He fell asleep for a couple of hours and was hung over the next day.

K.S. does not recall leaving the hot tub but has a snapshot “vision” of throwing up into something. RP at 847. She had borrowed a swimsuit from Heather that she evidently removed, because she wandered naked into the living room, where Roseland,

³ “RP” references are to the verbatim report of proceedings of the trial, unless otherwise indicated.

who was looking for her, saw her, stopped her, and led her to a bathroom. After K.S. lay naked on the bathroom floor, “completely incoherent” and “mumbling” according to Roseland, Roseland obtained help from Heather and Weese caring for K.S. as she vomited into the toilet. RP at 1063. Heather and Weese dressed K.S. in sweatpants and a T-shirt belonging to Heather and led her to a bedroom where Heather described the two women as “hoist[ing]” her into the bed. RP at 593. For clarity, we refer to this bedroom in which K.S. was intended to stay as “her” bedroom.

K.S. threw up again in her bedroom, using a bowl or bucket that Heather had left next to the bed. As Roseland sat with her, waiting for her to calm down and fall asleep, Ennis came in. Roseland describes K.S. as mostly incoherent and mumbling. The one thing she said to Roseland and Ennis that made sense was, “I don’t want you guys to think I’m a bad cop.” RP at 1068-69. Roseland and Ennis assured her they did not think she was a bad cop. The two of them conversed while they waited for K.S. to fall asleep. When she dozed off, they left her bedroom and joined Heather and Weese in the kitchen. Heather told Roseland that K.S. could spend the night, for which Roseland was grateful.

K.S. thereafter left her bedroom on two occasions that she does not recall. The first time she wandered into a nearby bedroom where Heather’s sister, Gina Watkins, planned to spend the night. K.S. stumbled into the room holding the bowl she was supposed to use if she vomited again. Watkins called to her sister and Heather and Roseland responded to help. K.S. lay on the bed and vomited into the bowl. Heather and

Roseland walked K.S. back to her bedroom and put her back in bed. Ennis was aware that K.S. needed help being returned to her bedroom from Watkins's room.

Roseland left for home a little after 1:00 a.m. Weese called her husband at 1:08 a.m. to let him know she was taking care of a couple of "drunk girls" and would be home shortly. RP at 766.

Sometime around 2:30 a.m., K.S. left her bedroom again, wandering into the kitchen where Heather, Ennis, and Doug, who had awakened and come downstairs, were the last partiers standing. A few minutes earlier, Heather, Ennis, and Doug had looked in on K.S. and teased her about not being able to hold her liquor. Heather, Ennis, and Doug would later testify that when K.S. wandered into the kitchen, she walked up to Ennis, put her arms around his neck, and lay her head on his shoulder. The Strosahls left to go to bed and Heather told Ennis to help K.S. get back to bed. The Strosahls saw Ennis and K.S. walk back toward her bedroom. Heather recalls it being 2:38 a.m. when she got in bed.

According to K.S., she awakened to the feeling of fingers in her vagina, thrusting aggressively. She was not sure where she was. Ennis was on the bed next to her. When she realized what was happening, she started crying and tried to move away. Ennis pulled his hand away, said, "I got to go" and quickly got up and left. RP at 853. K.S. waited a few moments and then took her cell phone and locked herself in an adjacent bathroom.

She tried to call Spenser Rassier, a fellow police officer, friend, and occasional date. He was out of town for military training. Her phone records reveal that she tried to call him four times between 3:05 a.m. and 3:07 a.m., and he answered the fourth call. He would later describe her as “very upset” and crying during the call. RP at 962. She told him she was at a party at the Strosahls, that she had too much to drink, and that she woke up in a bedroom to someone fingering her, which Rassier understood to mean fingering her vagina. She would not tell Rassier who it was, but he was left with the impression that it was a police officer and someone he would know. K.S. and Rassier spoke for 54 minutes. After getting off the phone with him, she went back to her bedroom and went to sleep.

She awakened again shortly after 7:00 Sunday morning and called Roseland, asking her to pick her up. She told her what had happened. On Roseland’s arrival, they spoke further and agreed they should tell Doug what had occurred. K.S. texted Doug at 8:22 a.m., asking him to come chat with her. He came to her bedroom, where K.S. told him, in Roseland’s presence, what Ennis had done. K.S. was surprised at his reaction, which she characterized as “downplay[ing] it.” RP at 876. He asked if she needed any water and left the room. When he did not return, K.S. found and changed into her own clothing, and she and Roseland left. Upon arriving home, she threw up again, showered, and, feeling ill, crawled into bed. She would later explain that she showered because she “felt . . . gross,” and “wasn’t thinking about evidence collecting.” RP at 880, 894.

That morning, Heather Strosahl laundered the clothing that she and Weese had dressed K.S. in the night before. She later testified she was unaware of K.S.'s allegation of assault and was simply cleaning up bath towels, swimsuits, and other laundry from the party.

On Sunday afternoon, K.S. contacted her former field training officer, Kyle Heuett, for help, telling him what had happened. He informed her sergeant. At 8:44 p.m. that night, Detective Brandon Armstrong was called and assigned to investigate K.S.'s allegation. K.S. went to the hospital to have a sexual assault kit done that night after speaking with her sergeant. She then traveled to the public safety building and sometime around midnight provided a statement to Detective Armstrong and Sergeant Jack Rosenthal.

Arrangements were made to serve a search warrant for deoxyribonucleic acid (DNA) on Ennis at his lawyer's office on the afternoon of October 26. The intention had been to collect fingernail clippings from Ennis, but it was not possible because his nails had been trimmed so short that trying to cut any further could have injured him. Detective Armstrong directed close up pictures to be taken of Ennis's hands.

Armstrong obtained a warrant to search Ennis's car, and among the evidence that was collected were DNA swabs of the driver's seat belt. DNA obtained from the seat belt included Ennis's DNA, that of his wife, and that of a third person, which proved to be a match for K.S. The crime lab's forensic examiner concluded that the estimated

probability of selecting an unrelated individual at random from the United States population with a matching profile was 1 in 1.4 million. It was undisputed that K.S. had never been in Ennis's car.

In early December 2015, the State charged Ennis with second degree rape for "engag[ing] in sexual intercourse with [K.S.] when [she] was incapable of consent by reason of being physically helpless or mentally incapacitated." Clerk's Papers (CP) at 1. Ennis waived his speedy trial rights and a first trial was not undertaken until June 2017.

Pretrial proceedings

In pretrial proceedings in May 2017, both counsel raised questions about what testimony by or about Doug Strosahl might be offered in the upcoming trial. Doug had retained his own lawyer, Chris Bugbee. Ennis's lawyer, Robert Cossey, and the prosecutors each questioned what the other knew or had planned when it came to Doug, including whether the defense might offer him as an alternative suspect. Asked directly by the judge if there were potential suspect issues with Doug Strosahl, Cossey responded, "I gave my word to Mr. Bugbee I would not disclose that." RP (May 19, 2017) at 15. The trial court concluded, "I need to know what's going on with the Strosahl issue" and set a hearing for May 25, saying, "I want Bugbee here." RP (May 19, 2017) at 18-19.

Doug Strosahl appeared at the May 25 hearing not with Bugbee, but with a new lawyer, Joseph Sullivan. Cossey represented that after speaking with Sullivan, any issues raised by his conversation with Bugbee were moot because Doug would be testifying

consistent with the police report. Sullivan said the same thing, and that Doug would not be asserting a Fifth Amendment privilege, which was one of the court's concerns.

Whatever Bugbee told Cossey remained, for the time being, a mystery. But the State's concerns were assuaged by Cossey's assurance on May 25, and even more adamantly on June 7, that information he received from Bugbee "is not going to be used by me in any shape or form in this trial." RP (June 7, 2017) at 80.

Also discussed on June 7 was a State in limine motion preventing Doug Strosahl from testifying that he did not report what K.S. told him the morning after the party because he did not think her story made sense, something he evidently said at one point. Cossey told the court he was not opposed to that being excluded.

Mistrial

A mistrial was declared during jury selection for the June 2017 trial. Not only did venire members report on a juror questionnaire that they had seen pretrial publicity, but a number read or watched news coverage during the voir dire process, contrary to admonitions from the judge. A defense motion for a mistrial was granted. In August 2017, the parties filed a joint recommendation for a change of venue.

The change of venue recommendation was never noted for hearing. The State was no longer advancing it when, in early February 2018, a new trial judge presided at a status conference for a trial set to begin a few weeks later in Spokane. Cossey told the court that Ennis was not withdrawing his venue change motion but wanted to see if it was

possible to seat a Spokane jury. He told the court, “I will tell you my client and I have discussed this; and we would prefer this case to stay in this county, in our courthouse, and with you.” RP at 11-12. The court agreed to treat the motion as reserved until after voir dire.

Voir dire was completed and a jury was successfully empaneled without any renewal by the defense of a request for a venue change.

The State’s evidence at trial was consistent with the facts recounted above. The State relied substantially on K.S.’s testimony and that of Roseland, as well as testimony from all of the testifying party guests that K.S. had been very intoxicated at points during the evening. It was undisputed that she had wandered through the house naked, was at one point passed out on the bathroom floor, vomited multiple times, and had to be dressed and delivered to bed by others. The State relied on her 3:07 a.m. call to Rassier and her conversations with Roseland and Doug Strosahl early Sunday morning. When Ennis testified on his own behalf in the defense case, the State took the opportunity in cross-examination to establish that he had violated written conditions of his pretrial release that he not have contact with Doug Strosahl and not discuss his case with any member of local law enforcement. He admitted that in violation of those conditions he had seen and spoken with Strosahl twice and had also used a Spokane police officer and a Spokane dispatcher in an attempt to get information to Doug.

In addition to Ennis, Heather Strosahl in particular, and some of the other parties, testified that as the evening passed, K.S. sobered up and was not incapacitated by 2:30 a.m., when she was left to return to her bedroom with Ennis. The State sought to impeach some of their testimony with statements they had provided to detectives shortly after the party. Heather, for instance, had told detectives in 2015 that when she, Ennis, and Doug checked on K.S. at around 2:15 a.m., it was at her suggestion that they do a sweep and “make sure everybody’s still alive.” RP at 599. Heather also told detectives that when they looked in on her, K.S. “kind of moaned,” and then, “reached out and was saying, ‘Sarge, Sarge,’” to which “Gordon’s like, ‘Okay, you’re all right. Go back to sleep.’” RP at 601.

Called as a defense witness, Beaver testified that she did not notice K.S. exhibiting intoxicated behavior, saying “[s]he seemed to be walking normal” and “talking just fine.” RP at 1354. When cross-examined, however, Beaver acknowledged telling detectives that when first introduced to K.S., she thought K.S. was “a little wasted.” RP at 1360.

The defense waived opening statement at the outset of trial and even at the beginning of the defense case, so Ennis’s testimony, which came on the final day of trial testimony, was the first the jury heard about his defense. He admitted to engaging in sexual intercourse with K.S. at around 2:45 a.m. on October 25, but testified it was consensual.

Ennis testified that after K.S. came into the kitchen at around 2:30 a.m. and hugged him, she pulled on his waist toward her bedroom and they walked down the hall together. He testified she was not stumbling, swaying, or slurring her words. He testified that when he and she were about halfway down the hall, K.S. “leaned against the wall . . . [a]nd she grabbed me around the—the butt, and she pulled my hips in close to her and embraced me.” RP at 1426. Once in her bedroom, he testified that K.S. put her legs around him, stroked his thigh and they engaged in mutual touching. When he began to rub her vagina through the outside of her sweatpants he testified that she pushed down her pants, grabbed his wrist and moved his hand between her legs. He inserted a finger in her vagina, which he said “continued for a little bit of time.” RP at 1429.

Although testifying he was “lik[ing] it,” he said he realized it was moving toward “full sex” and began thinking about the implications for his personal life (he was married) and his professional life. RP at 1429-30. He testified he told K.S. he needed to go home, but she wanted him to stay. When he insisted he could not stay, he testified K.S. pulled up her sweatpants and her demeanor changed. Ennis told her it was not her fault and if she wanted to talk about it they could at work, but he “need[ed] to go.” RP at 1430.

Asked by Cossey if he cut his fingernails short in preparation for the evidence collection meeting, Ennis denied it, testifying he had cut them a few days earlier. Later, in redirect examination by Cossey, Ennis testified that he offered to clip his fingernails for law enforcement during the DNA collection meeting, but his offer was declined.

The State called Detective Armstrong in rebuttal, eliciting his testimony that he had no recollection of Ennis ever offering to cut his own fingernails. The prosecutor then asked, “Did you indicate in your report that he remained silent during the contact and conversations?” RP at 1472. The detective responded, “I indeed did.” *Id.* The defense did not object.

In surrebuttal, the defense called Shirley Vanning, Cossey’s investigator, who testified she was present for the DNA collection meeting and Ennis *had* offered to clip his fingernails. In cross-examination, she agreed that she had created no record of what took place at that meeting.

The jury began its deliberations at 11:10 a.m. It took slightly less than three hours to return its verdict finding Ennis guilty as charged.

Postverdict events

Following the verdict, Ennis changed counsel, hiring attorney Mark Vovos, who filed a motion for a new trial on several grounds. One was ineffective assistance of counsel by Cossey, who Ennis now claimed had a conflict of interest that adversely affected his defense. In support of his new trial motion, Ennis submitted declarations of himself and his wife, both of whom claimed that in a meeting at Cossey’s office on November 2, 2015, Cossey told them that Doug Strosahl’s lawyer, Bugbee, had informed him that Doug had consensual sexual contact with K.S. at the Strosahls’ party, prior to the contact that took place between K.S. and Ennis. They claim they were told that the

contact Doug had was manual stimulation and insertion of fingers, and that K.S. had believed Doug to be Ennis. They claim they were told by Cossey not to tell anyone. They nonetheless believed the information would be used in Ennis's defense.

Bugbee retained a lawyer who promptly obtained orders that temporarily prevented the clerk's office from making public the new trial motion and its supporting declarations, pending hearing of a motion by Bugbee to seal the records. While the trial court temporarily protected the materials from public disclosure, it ultimately denied the motion to seal, noting that the media had objected and finding that the *Ishikawa*⁴ factors were not met.

The State filed a motion for leave to depose Cossey, arguing that by filing the declarations, the Ennises had waived attorney-client privilege. The trial court agreed with the State in part, and, in a letter ruling, authorized the State to interview Cossey, identified the scope of the privilege waiver, and granted Ennis's request for a protective order preventing disclosure of the information obtained. Cossey was interviewed about information he received from Bugbee, his decision not to use the information, and his conversations with the Ennises. Cossey disputed important aspects of the Ennises' declarations. The State's opposition to Ennis's new trial motion, which attached a

⁴ *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982).

transcript of Cossey's interview, was sealed pending completion of Ennis's criminal case, including appeal and any retrial.

The court denied the motion for a new trial. Ennis appeals. Further details about the trial evidence and procedure are provided in addressing Ennis's assignments of error.

ANALYSIS

Ennis identifies four categorical issues on appeal and identifies over a dozen sub issues. We address them in the order presented.

I. CORROBORATION INSTRUCTION

The Washington criminal code provides, with respect to the sex offenses proscribed by chapter 9A.44 RCW, that "[i]n order to convict a person of any crime defined in this chapter it shall not be necessary that the testimony of the alleged victim be corroborated." RCW 9A.44.020(1). In June 2017, before Ennis's first aborted trial and nine months before his second trial, the State proposed the following jury instruction:

In order to convict a person of Second Degree Rape, it is not necessary that the testimony of the alleged victim be corroborated.

Clerk's Papers (CP) at 89. Ennis did not object to the instruction, which was given.

Ennis now argues that the instruction was a judicial comment on the evidence and interfered with his constitutional right to present a defense. RAP 2.5 generally precludes an appellant from complaining of error for the first time on appeal, but Ennis argues that

the giving of the instruction qualifies as “manifest constitutional error” reviewable under RAP 2.5(a)(3).

Before 1913, corroboration of the complaining witness in a rape case was required by statute. *See State v. Morden*, 87 Wash. 465, 467, 151 P. 832 (1915). That changed with repeal of the statute in 1913, and the challenged corroboration instruction accurately states Washington law as it has existed since the 1913 repeal. *See id.* For a time, it might have been important to communicate to a jury that there was no longer a requirement for corroboration. Today, a corroboration instruction is at best anachronistic; depending on the case, it can be problematic.⁵ It is not problematic in this case.

Comment on the evidence

In *State v. Clayton*, 32 Wn.2d 571, 573, 202 P.2d 922 (1949), the defendant challenged the giving of a corroboration instruction not unlike the one given here

⁵ Ennis cites as persuasive *State v. Steenhard*, an unpublished decision from this court in which the giving of a corroboration instruction (timely objected to) was a factor in the majority’s decision to reverse and remand child molestation charges for a new trial. No. 35578-1, slip op. at 16 (Wash. Ct. App. Jul. 23, 2019) (unpublished), https://www.courts.wa.gov/opinions/pdf/355781_unp.pdf.

In *Steenhard*, sexual misconduct allegations that were fantastical in some respects were made by two young girls. Given defense evidence of the number of people at the times and places where the misconduct allegedly occurred, the absence of corroboration was an issue. The State elicited testimony vouching for the girls’ truthfulness from two witnesses.

No error was found in the giving of the corroboration instruction; rather, viewed in light of improper vouching, the instruction contributed to prejudicial error. *Id.* It was a confluence of factors that created a risk that the jury would not subject the victims’ testimony to the even-handed examination it deserved.

upon the ground that it constitutes a comment on the evidence, violative of Article IV, § 16, of the state constitution, in that the instruction singles out the prosecutrix from all the other witnesses and tells the jury that the weight of her testimony is such that a conviction can be based upon it alone.

Judicial comments on the evidence are explicitly prohibited by the constitution and a challenge to a comment on the evidence can be raised for the first time on appeal. *State v. Levy*, 156 Wn.2d 709, 719-20, 132 P.3d 1076 (2006).

In *Clayton*, the Supreme Court observed that article IV, section 16's language that "[j]udge[s] shall not charge [juries] with respect to matters of fact, nor comment thereon," "means no more than that the judge is forbidden to convey or indicate to the jury, by word or act, his personal opinion as to the truth or falsity of any evidence introduced upon the trial." 32 Wn.2d at 573. The Court acknowledged that with the corroboration instruction it had given in Clayton's trial

the trial court in a sense singled out the testimony of the prosecutrix. However, what the court thereby told the jury was not that the uncorroborated testimony of the prosecutrix in the instant case *was sufficient* to convict the appellant of the crime with which he was charged, but, rather, that in cases of this particular character, a defendant *may* be convicted upon such testimony alone.

Id. at 574 (some emphasis added). It observed that "the trial court expressed no opinion as to the truth or falsity of the testimony of the prosecutrix, or as to the weight which the court attached to her testimony, but submitted all questions involving the credibility and weight of the evidence to the jury for its decision thereon." *Id.* at 573-74.

The same is true of the instruction given in Ennis's trial. The instruction accurately stated the law as provided by RCW 9A.44.020(1). It expressed no view as to the truth or falsity of K.S.'s testimony or the weight to be given it. The instructions submitted those matters to the jury.

Ennis points out that a member of our court expressed sympathy with the view that a corroboration instruction is a comment on the evidence in *State v. Chenoweth*, 188 Wn. App. 521, 538, 354 P.3d 13 (2015) (Becker, J., concurring). As Judge Becker conceded, however, we do not write on a clean slate. *See id.* On the issue of whether a corroboration instruction is an unconstitutional comment on the evidence, *Clayton* is binding on us. *See State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984) (once the Washington State Supreme Court has decided an issue of state law, its conclusion is binding on lower courts).

Ennis also points out that in *State v. Johnson*, 152 Wn. App. 924, 936, 219 P.3d 958 (2009), it was suggested that perhaps a corroboration instruction should always incorporate in the court's instruction elsewhere that the jury is to resolve all issues of credibility and weight. If instructions on the jurors' role in assessing credibility and weighing evidence were often overlooked in closing arguments, we might agree. But in criminal cases, instructions about the jurors' responsibility to assess credibility and weight are among a few that the State or the defense, and ordinarily both, consistently

address during closing argument. That happened in the closing arguments in Ennis's trial. The State never mentioned the corroboration instruction.

In his briefing on appeal, Ennis argues that he should have been as free as K.S. to argue that his testimony did not need to be corroborated. We agree. It might have been a strange argument to make in his case because, as the trial court pointed out in denying Ennis's new trial motion, this was a case in which both sides presented quite a bit of corroborative-type evidence on the issue in dispute: K.S.'s capacity. Nonetheless, Ennis could easily have made the argument that his testimony did not have to be corroborated by pointing to the trial court's instructions. It is unimaginable, if defense counsel had argued that Ennis's testimony did not have to be corroborated, that the State would have objected. If the State did the unimaginable and objected, it is inconceivable that the trial court would not have overruled the State's objection. And if both the unimaginable and inconceivable happened, with the jury led to believe that the defense, but not the State, must present corroborating evidence, we would reverse any conviction and order a new trial.

There is no need for a corroboration instruction, and it would be better not to give one.⁶ If the instruction is given, however, standard instructions will generally enable the

⁶ Ennis points out that the Washington Supreme Court Committee on Jury Instructions recommends against giving such an instruction, and this court has shared the committee's misgivings in published and unpublished decisions. As the committee points out, "[t]he matter of corroboration is really a matter of sufficiency of the evidence"

defense to put the instruction in a proper perspective. This is probably what the Supreme Court had in mind in *Clayton*, when, having rejected the argument that a corroboration instruction is a judicial comment on the evidence, it made the further observation that judgments will not be reversed for an error that could not reasonably be presumed to have prejudiced the appellant. 32 Wn.2d at 574, 577. Given the jury instructions available to a criminal defendant, it will be the rare case where the giving of a corroboration instruction is reversible error.

Deprivation of the constitutional right to present a defense

Citing *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973), and *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010), Ennis also characterizes the giving of the corroboration instruction as violating his due process right to a meaningful opportunity for his defense to be heard. Despite the breadth of *Chambers*'s reference to a "right to a fair opportunity to defend against the State's accusations," 410 U.S. at 294, the right to present a defense is not implicated by anything happening at trial that a defendant later contends was unfair. In *Chambers* and *Jones*, the rights at issue were the right to confront and cross-examine witnesses and call witnesses

and "[w]hether a jury can or should accept the uncorroborated testimony of the prosecuting witness or the uncorroborated testimony of the defendant is best left to argument of counsel." 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL § 45.02, cmt. at 917 (4th ed. 2016). As Judge Becker observed in her concurrence in *Chenoweth*, "Many correct statements of the law are not appropriate to give as instructions." 188 Wn. App. at 537.

on one's own behalf. *Id.*; *Jones*, 168 Wn.2d at 720. Ennis does not identify any evidence he was prevented from presenting as a result of the unobjected-to corroboration instruction.

He instead makes a conclusory argument that the corroboration instruction, in conjunction with instruction on the defense of reasonable belief that he requested, "misled" and "confus[ed]" the jury. Appellant's Opening Br. at 52-53. Even if that were so, he cites no authority that clear and consistent jury instructions are one of the minimum guarantees of due process. And he fails to provide an example of any argument he was entitled to make, but was prevented from making, by virtue of the two instructions. No violation of his right to present a defense is shown.

II. PROSECUTORIAL MISCONDUCT AND RELATED INEFFECTIVE ASSISTANCE OF COUNSEL

Ennis alleges seven instances of prosecutorial misconduct on appeal. One of the instances of alleged misconduct was argued as a basis for a new trial, so we have the benefit of the trial court's view. After an overview of the applicable law, we first address the misconduct alleged in the new trial motion and then turn to the misconduct alleged only on appeal.

A. OVERVIEW

Prosecutorial misconduct is not attorney misconduct in the sense of violating rules of professional conduct. *State v. Fisher*, 165 Wn.2d 727, 740 n.1, 202 P.3d 937 (2009).

It is, instead, a term of art that refers to “prosecutorial mistakes or actions [that] are not harmless and deny a defendant [a] fair trial.” *Id.* To succeed on a prosecutorial misconduct claim, an appellant has the burden of establishing that the prosecutor’s conduct was improper (as being at least mistaken) and was prejudicial. *State v. Stenson*, 132 Wn.2d 668, 718-19, 940 P.2d 1239 (1997).

When a defendant fails to object in the trial court to a prosecutor’s statements, he waives his right to raise a challenge on appeal unless the remark was so flagrant and ill intentioned that it evinced an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. *Id.* at 719. “Defense counsel’s decision not to object or request a curative instruction ‘strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.’” *State v. Gauthier*, 189 Wn. App. 30, 38-39, 354 P.3d 900 (2015) (quoting *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990)).

The hurdles to obtaining relief based on prosecutorial misconduct are purposefully high. *In re Pers. Restraint of Richmond*, No. 37057-7-III, slip op. at 3-4 (Wash. Ct. App. Mar. 18, 2021), https://www.courts.wa.gov/opinions/pdf/370577_pub.pdf.

Inconsequential prosecutorial missteps do not merit remand. *See id.* Deference is owed to the trial court’s ability to oversee the administration of justice, defense counsel’s judgment about whether an objection was worth raising, and a jury’s ability to independently assess the merits of the case. *Id.*

When a defendant has alleged prosecutorial misconduct in the trial court, we will give deference to the trial court's ruling on the matter. *Stenson*, 132 Wn.2d at 719. The trial court is in the best position to most effectively determine if prosecutorial misconduct prejudiced a defendant's right to a fair trial. *Id.*

B. MISCONDUCT ALLEGED IN SUPPORT OF NEW TRIAL MOTION: COMMENT ON THE RIGHT TO SILENCE

Ennis relied in moving for a new trial on one allegation of prosecutorial misconduct: the following statements made by the prosecutor in closing argument (the emphasis is Ennis's):

Part of what you will do in this case is to look at the testimony and examine it. We heard the defendant's statement for the first time yesterday when he took the stand. The defendant is presumed innocent He is not presumed credible.

CP at 412 (*see* RP at 1496).

And again, this applies equally to the defendant's statement. You can look at the timing and accuracy of a statement, and you can also consider how someone testifies and what motive or bias they may have.

Id. (*see* RP at 1497).

You can look at the timing of statements in this case and the testimony that contradicts not only the claim by the defendant that [K.S.] was flirting, but also that by the time this occurred she had suddenly been ridden all of the effects of being intoxicated.

Id. at 413 (*see* RP at 1499).

The defendant spoke to you the other day after having two years and four months and access to reports and being seated in the courtroom throughout

this, and he gave you a version of events that you must analyze. And it's a version of events, ladies and gentlemen, that was driven by the fact that despite the defendant's efforts, DNA was discovered in this case. The defendant had hoped first that he would go undetected because [K.S.] was not in any condition he thought to remember the report.

Id. (see RP at 1500).

That took away some options from the defendant as to what he would testify to. His testimony was full of justifications, not taking responsibility. Ladies and gentlemen, actions can speak louder than words.

Id. (see RP at 1510). Ennis contends that this argument improperly commented on his exercise of his right to silence.

The Washington and United States Constitutions protect a defendant's right against self-incrimination, which includes the right to silence. U.S. CONST. amend. V; WASH. CONST. art. I, § 9. When silence is protected, we distinguish between comments on silence and mere references to silence. *State v. Burke*, 163 Wn.2d 204, 221-22, 181 P.3d 1 (2008). "A comment on an accused's silence occurs when used to the State's advantage either as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt." *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). Analyzing how the reference is used—its "imputation"—"examines the prosecutor's intent and whether the jury would naturally and necessarily take the comments as referring to the defendant's silence." *Burke*, 163 Wn.2d at 222 (citation and internal quotation marks omitted).

In responding to Ennis’s motion for a new trial, the prosecutor argued that her statements challenged by Ennis did not comment on silence; they concerned the credibility of Ennis’s testimony and included a permitted “tailoring” argument. Sealed CP at 1349-54. A tailoring argument calls the jury’s attention to the fact that a criminal defendant who chooses to testify has had the opportunity to hear all other witnesses and can tailor his testimony accordingly. *Portuondo v. Agard*, 529 U.S. 61, 63, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000). In *Portuondo*, the United States Supreme Court rejected an argument that its decision in *Griffin v. California*, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965), should be extended to foreclose tailoring arguments under the Fifth Amendment to the United States Constitution. In *Griffin*, the Supreme Court had held that the Fifth Amendment forbade comment by the prosecution or instruction by the court that an accused’s silence is evidence of guilt. *Id.* at 615.

In *Portuondo*, the Supreme Court held that the principles and reasoning that prohibit comments suggesting that silence is evidence of guilt do not apply to a prosecutor’s comments that a defendant who testifies has tailored his testimony. Comments about tailoring, the Court reasoned,

concern[the defendant’s] *credibility as a witness*, and [are] therefore in accord with our longstanding rule that when a defendant takes the stand, “his credibility may be impeached and his testimony assailed like that of any other witness.” *Brown v. United States*, 356 U.S. 148, 154, 78 S. Ct. 622, 2 L. Ed. 2d 589 (1958). “[W]hen [a defendant] assumes the role of a witness, the rules that generally apply to other witnesses—rules that serve the truth-seeking function of the trial—are generally applicable to him as

well.” *Perry v. Leeke*, 488 U.S. 272, 282, 109 S. Ct. 594, 102 L. Ed. 2d 624 (1989).

529 U.S. at 69 (third and fourth alterations in original).

Washington courts have construed the Washington Constitution as placing limits on tailoring arguments. Tailoring arguments are permitted under article I, section 22 of the Washington Constitution, but only when the argument of tailoring can be inferred from a defendant’s testimony: either direct, or in cross-examination.

State constitutional protections against tailoring arguments were first addressed in *State v. Martin*, 171 Wn.2d 521, 252 P.3d 872 (2011), in which our high court undertook a *Gunwall*⁷ analysis and concluded that article I, section 22 of the Washington Constitution is more protective than the Sixth Amendment to the United States Constitution, which was also at issue in *Portuondo*. *Martin* adopted the position of Justice Ginsburg’s dissent in *Portuondo*. Justice Ginsburg agreed that a criminal defendant’s opportunity to tailor could be relevant credibility evidence, but in her view, allowing tailoring arguments to be made in every case, absent any evidence developed on the issue, went too far. It “transforms a defendant’s presence at trial from a Sixth Amendment right into an automatic burden on his credibility.” *Portuondo*, 529 U.S. at 76 (Ginsburg, J., dissenting).

⁷ *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

Martin quoted the following language from Justice Ginsburg’s dissent as “compatible with the protections provided by article I, section 22”:

“The truth-seeking function of trials may be served by permitting prosecutors to make accusations of tailoring—even wholly generic accusations of tailoring—as part of cross-examination. Some defendants no doubt do give false testimony calculated to fit with the testimony they hear from other witnesses. If accused on cross-examination of having tailored their testimony, those defendants might display signals of untrustworthiness that it is the province of the jury to detect and interpret. But when a generic argument is offered on summation, it cannot in the slightest degree distinguish the guilty from the innocent. It undermines all defendants equally and therefore does not help answer the question that is the essence of a trial’s search for truth: Is this particular defendant lying to cover his guilt or truthfully narrating his innocence?”

171 Wn.2d at 535-36 (quoting *Portuondo*, 529 U.S. at 79 (Ginsburg, J., dissenting)).

Martin continued, “In other words, Justice Ginsburg distinguished a comment in closing argument that is ‘tied only to the defendant’s presence in the courtroom and not to his actual testimony’ from accusations made during cross-examination of the defendant The latter, she concluded, do not violate the Sixth Amendment.” *Id.*

In *State v. Berube*, 171 Wn. App. 103, 117, 286 P.3d 402 (2012), this court held that the State can argue tailoring in closing without having explored it in cross-examination if the defendant’s testimony in direct examination provides a basis for the argument. It was argued in closing in *Berube* that the defendant tailored his direct testimony to conform to his mother’s testimony, which conflicted with his own earlier statement to police. This court rejected *Berube*’s argument that the closing argument was

improper because he was not cross-examined about tailoring, holding that the State's argument was nonetheless "a logical attack on the defendant's credibility and does not burden the right to attend or testify. And it makes no sense to require the State to raise the issue again on cross-examination in order to make its credibility argument in closing."

Id.

In defending against Ennis's new trial motion, the State contended it made a tailoring argument that had a basis in Ennis's trial testimony. *See* Sealed RP at 1711. In direct examination, Ennis's trial lawyer repeatedly asked, and Ennis repeatedly agreed, that his recollection of events was consistent with a time line compiled and testified to by Detective Armstrong. *See, e.g.,* RP at 1390-91, 1396, 1406, 1423, 1427.

After this direct testimony tying Ennis's recollection of events to Detective Armstrong's testimony, the prosecutor led her cross-examination of Ennis with the following questions, receiving the following answers:

Q. Mr. Ennis, you've had an opportunity to review Detective Armstrong's timeline and the reports in this matter prior to testifying, correct?

A. Some of the reports and the timeline, yes, ma'am.

Q. And you've had access to those things for over two years before today, correct?

A. Off and on, yes.

RP at 1435. Later, she questioned him about his ability to provide almost two hours' worth of trial testimony to "a variety of details down to the minutiae."

RP at 1437. Ennis responded:

A. Well, it's something that I've thought about, all the details of that party as soon as the allegation was made.

Q. So—

A. I started thinking back to everything that I had seen, everything that I had heard at that party. For two years and four months it's all I've thought about every single day. So yeah, I have some pretty good recall of what happened that night.

Q. And you thought about how to explain your actions to your wife?

A. Yes, ma'am.

RP at 1437-38.

One issue, then, is whether the prosecutor's challenged statements were a comment on Ennis's exercise of his right to remain silent or, instead, a permitted argument that his opportunity to tailor was a reason to doubt his credibility.

In refusing to grant a new trial on account of the prosecutor's statements in closing, the trial court explained in her oral ruling that she had broken the challenged statements into three comments. The first, that "[w]e heard the defendant's statement for the first time yesterday when he took the stand," she found to be brief and "somewhat ambiguous." RP at 1779. She observed that "it was in the midst of a discussion with regard to credibility." *Id.* at 1780. As the trial court pointed out, the prosecutor made no specific reference to silence or to any exercise of Ennis's Fifth Amendment rights.

Recognizing that no objection was made, she said, “[t]he comment would have to have been a comment on silence; and it would have to have been flagrant, ill-intentioned, or unable to be cured by instruction. And it was none of those things.” *Id.*

Second, as analyzed by the trial court, were the prosecutor’s challenged statements suggesting that jurors consider the timing of statements. These challenged statements appear at pages 1497 and 1499 of the report of proceedings. At this point in the prosecutor’s argument, she directed the jurors’ attention to their instruction on assessing witness testimony (apparently displaying it on a screen), specifically pointing out that “[p]art of what you consider is the reasonableness of the testimony in the context of the entirety of the case and other witnesses. You can look at the timing and accuracy of a statement, and you can also consider how someone testifies and what motive or bias they may have.” RP at 1497.⁸ These challenged comments occurred in the course of the

⁸ The verbatim report of proceedings reports the prosecutor as referring to instruction 12, but it is apparent that the instruction being displayed, which the prosecutor described as a “multiple-page instruction,” with the language she was discussing “at the top of page 2,” must have been instruction 1. RP at 1496. Language at the top of page 2 of instruction 1 states, in part:

In considering a witness’s testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness’s memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness’s statements in the context of all of the other

prosecutor's attack on the plausibility of Ennis's version of events. *See* RP at 1497-99.

The trial court construed references to "timing" in this context to be references to statements made at the party at around the time of commission of the crime, adding "and again, there was no objection. So I don't believe that that was even a subtle comment on silence." RP at 1781.

The last category was the prosecutor's reference to Ennis's testimony about the two years he had to think about events on the night and morning of the party. The trial court said these statements "come[] the closest to tailoring that you get." RP at 1781. She did not view them as tailoring, however, because Ennis had not made prior statements that he was now correcting with the benefit of having heard the testimony of others. She did not view them as a comment on silence, however, and observed that, here again, there was no objection.

With respect to the last category of statements, we view tailoring differently and are satisfied that the prosecutor had a basis in Ennis's testimony for making a tailoring argument.

Beyond that, the trial court, having been present for the closing arguments, assessed this claim of prosecutorial misconduct from a superior vantage point. Her

evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

CP at 314.

conclusions that the prosecutor's statements were not comments on silence and were not so flagrant and ill intentioned that any resulting prejudice could not have been cured by instruction are reasonable. We defer to them.

C. OTHER ALLEGED PROSECUTORIAL MISCONDUCT

Ennis alleges six other instances of prosecutorial misconduct for the first time in his opening brief.

Eliciting improper testimony on Ennis's exercise of his right to silence

Recall that Ennis testified that during the evidence collection meeting he offered to cut his own fingernails, and that the prosecutor questioned Detective Armstrong about that in its rebuttal case. Ennis does not challenge the prosecutor's question to the detective about whether he remembered Ennis making such a statement, or the detective's answer that he did not. He does challenge the prosecutor's follow-up question, which he characterizes as whether Ennis "'remained silent during the [DNA collection] contact and conversations?'" and the detective's response that Ennis did, in fact, remain silent. Appellant's Opening Br. at 73-74 (alteration in original) (quoting RP at 1472). Ennis argues that the question concerned silence after Ennis had received *Miranda*⁹ warnings and was "completely unnecessary," since the detective had already testified to not recalling such an offer. *Id.* at 74.

⁹ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Ennis’s brief does not fully reproduce the prosecutor’s follow-up question. The prosecutor asked, “Did you *indicate in your report* that [Ennis] remained silent during the contact and conversations?” thereby drawing the detective’s attention to his contemporaneous report. RP at 1472 (emphasis added). Evidence of a contemporaneous record that Ennis did not say anything carries weight that goes beyond the detective’s testimony that, two years later, he did not recall such a statement.

“If an accused elicits evidence pertaining to post-arrest silence, then the State can introduce rebuttal evidence on the same subject under the open door rationale.” *State v. Rushworth*, 12 Wn. App. 2d 466, 475, 458 P.3d 1192 (2020); *State v. Holmes*, 122 Wn. App. 438, 443, 93 P.3d 212 (2004) (“[W]here a defendant claims to have provided information to the officers at the time of arrest” the State may introduce “evidence that actually the defendant remained silent.”).

Ennis argues that the State went too far when it couched the question “us[ing] *Miranda* language.” Appellant’s Reply Br. at 11. But inquiring about the report was legitimate rebuttal and the prosecutor might have wanted to remain true to the report language she was asking about. In context, reasonable jurors would have understood the question and answer as rebutting Ennis’s testimony that he made the offer, not as a comment on his exercise of a Fifth Amendment right.

Vouching

It is improper for a prosecutor to personally vouch for or against a witness's credibility. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). "Improper vouching generally occurs (1) if the prosecutor expresses his or her personal belief as to the veracity of the witness or (2) if the prosecutor indicates that evidence not presented at trial supports the witness's testimony." *State v. Ish*, 170 Wn.2d 189, 196, 241 P.3d 389 (2010). "Prosecutors may, however, argue an inference from the evidence, and prejudicial error will not be found unless it is 'clear and unmistakable' that counsel is expressing a personal opinion." *Brett*, 126 Wn.2d at 175 (quoting *State v. Sargent*, 40 Wn. App. 340, 344, 698 P.2d 598 (1985)).

Mr. Ennis contends the following comments in the prosecutor's closing argument were improper vouching (the emphasis is Ennis's):

[K.S.] never stopped Officer Heuett from making that report, *because she knew the truth*. And [K.S.] *has abided by that truth* for two years and four months.

Appellant's Opening Br. at 82 (alterations in original) (quoting RP at 1513).

[K.S.] refused to give up on a job she loves, and *she has abided by the truth in this courtroom under oath in front of each of you and everyone else here*.

Id. at 83 (alteration in original) (quoting RP at 1514).

And ladies and gentlemen, *when you find [K.S.]'s credibility to be such that her statement to you is nothing more and everything that includes the truth*, you will realize under the law that the state has met its burden.

Id. (alteration in original) (quoting RP at 1543).

[T]he defendant in his—in his statement suggested to you that this was a woman that had an agenda; that she was so jilted by this experience and her sexual aggressiveness being stopped by a defendant that she began a vendetta; *that she stayed with that for two years and four months; that she, committed to a profession that supposed to be about the truth, stayed with that truth.*

Id. (alteration in original) (quoting RP at 1543).

[W]hen you look at the facts in this case . . . *the truth and the reality of what occurred will be clear.* Not based on emotion, not based on games by the state, *not based on anything else than the truthful word of [K.S].*

Id. (alterations in original) (quoting RP at 1543-44). No objection was made to this argument.

The complained-of statements are not vouching because they do not indicate the prosecutor’s personal opinion as to K.S.’s veracity. They are inferences tied to the evidence. During K.S.’s testimony, she was asked about some of the things she had to deal with as a result of reporting being raped by Ennis:

I’ve had friends not talk to me ever again; you have—yeah, I’ve had a lot of that; a lot of I walk in the room and people glare at me; people see me in public and immediately duck to avoid me; a lot of hearing rumors; just everything in the media.

RP at 935. Although K.S. testified that she was still working as a police officer “[b]ecause I love the job,” she said her work life was “pretty shit—it’s pretty bad.” *Id.* at 935-36. Asked about what had changed, she answered:

[J]ust not being able to trust anybody there has been the biggest thing. Um, I had—I had my job like up on this pedestal, that it was the greatest thing ever and I’m so thankful to be a police officer and work for the city, and then just like that I—I never wanted to go to work again, because very quickly it was evident that people I thought had my best interests didn’t and people that I thought I could trust my life with I can’t even trust my emotions with.

Id.

It was fair argument to ask jurors which made more sense: That K.S. put herself through all of this out of anger that Ennis cut off a one-time consensual sexual encounter? Or because she had been raped?

There was no clear and unmistakable statement of personal opinion. The argument was proper.

Commenting on a witness’s credibility and impugning defense counsel

In addition to it being improper for a prosecutor to personally vouch for or against a witness’s credibility, it is improper for a prosecutor to disparagingly comment on defense counsel’s role or impugn defense counsel’s integrity. *State v. Thorgerson*, 172 Wn.2d 438, 451, 258 P.3d 43 (2011). A prosecutor improperly impugns defense counsel’s integrity when she states that defense counsel is using deception or dishonesty. *E.g., State v. Lindsay*, 180 Wn.2d 423, 433, 326 P.3d 125 (2014) (stating that defense counsel’s argument was a “crook” implied the use of deception and dishonesty); *Thorgerson*, 172 Wn.2d at 452 (referring to the defense case as “sleight of hand” was

improper because the phrase implied the use of “wrongful deception or even dishonesty”).

During Beaver’s testimony in the defense case, she testified that she did not observe any intoxicated behavior by K.S. The State’s cross-examination included the following exchange:

Q. Do you recall being interviewed by detectives Jeffery Mitchell and Rob Satake?

A. Yes.

....

Q. Okay. And do you recall them talking about, or asking you about being introduced to [K.S.] and Callie in the kitchen?

A. Yes.

Q. Do you recall telling them, “I don’t know if they were trying to be funny. I think they were just a little wasted at that point in time”?

A. Um, I do recall that. However—

Q. Okay. I know you told Mr. Cossey just now that they weren’t, but—

A. Right.

Q. —you did tell detectives back then that?

A. Correct.

Q. Okay.

A. But wasted—

Q. *No, that’s fine. Mr. Cossey can clean that up, and you can explain why you’re changing it now.*

MR. COSSEY: Objection, your Honor.

THE COURT: Okay, sustained.

RP at 1360-61 (emphasis added). Because an objection was timely made, Ennis must demonstrate only that the prosecutor's statement was improper and prejudicial.

The State properly concedes that the prosecutor's objected-to statement improperly, argumentatively, impugned Beaver's credibility. But it argues the error was harmless. We agree. The court sustained the defense objection, signaling that the statement was improper. Whether Beaver was changing her report of events was something that was legitimately explored and that the jury could assess for itself. And Beaver was not a key witness on the disputed issue in the case, since she became intoxicated and was dressed and put to bed by others even before K.S. was.

Whether the statement impugned counsel is questionable, but arguable. When a witness is asked to confirm having made a prior inconsistent statement, it is not unusual for the witness to try to offer an unresponsive explanation. The questioner is permitted to cut that off. It is possible, but not clear, that jurors would view the prosecutor's statement, "Mr. Cossey can clean that up" differently than the more typical, "Counsel will have an opportunity to ask you about that." Here again, however, any error was harmless. The statement was fleeting and it was far from a clear implication that for defense counsel to "clean up" Beaver's testimony would be deceptive and dishonest. And again, the trial court sustained the objection, signaling that the question was improper.

Questioning about “assault”

Ennis next argues that the prosecutor impermissibly expressed an opinion on guilt by questioning K.S. nine times about being “assaulted”: *e.g.*, ““Why didn’t you tell him who *assaulted* you?”” and ““Had you told him at that point who *assaulted* you?”” Appellant’s Opening Br. at 89 (quoting RP at 862, 866). No objection was made until the ninth question, when the following exchange occurred:

Q. Okay. You’d been up—you’d suffered a sexual assault, been up until midnight—

MR. COSSEY: Judge, I’m going to object on that. She’s doing it constantly. It’s not appropriate. She’s constantly making that statement. It’s not appropriate.

MS. FITZGERALD: Your Honor, I’m stating the fact that there was an assault where fingers were placed inside this woman’s vagina. That’s why we’re here.

MR. COSSEY: It’s an allegation, and she’s making it as a fact that she’s—when she’s asking questions.

THE COURT: Okay. Why don’t you rephrase.

MS. FITZGERALD: Okay.

RP at 933-34.

The nine questions that are challenged followed K.S.’s testimony, in describing her call to Rassier, that “I was telling him I was scared and what happened. Um, I didn’t tell him who, but I told him that *I was just assaulted.*” RP at 862 (emphasis added). The first two questions by the prosecutor that are challenged sought more detail about what K.S. told Rassier about being assaulted. In asking for more details, there was nothing

improper about the prosecutor asking those questions using the verbiage K.S. testified she used. The prosecutor was not required to ask, *e.g.*, “Why didn’t you tell him who *did that thing you told him had just happened?*”

As for the next seven questions, six unobjected to, Ennis cites no authority that asking questions using a victim’s shorthand for what happened automatically amounts to expressing the prosecutor’s personal opinion. In the case on which he relies, *State v. Reed*, the court found that the prosecutor asserted his personal opinion about the credibility of witnesses and Reed’s guilt where

he called [Reed] a liar no less than four times. Next, the prosecutor stated that the defense counsel did not have a case, and that the petitioner was clearly a “murder two”. Finally, he implied that the defense witnesses should not be believed because they were from out of town and drove fancy cars.

102 Wn.2d 140, 145-46, 684 P.2d 699 (1984). The prosecutor’s questioning in this case comes nowhere near the misconduct present in *Reed*.

The prosecutor’s use of K.S.’s shorthand in asking questions is not reasonably understood as a clear and unmistakable expression of a personal opinion. Particularly where the defense did not move in limine for a blanket prohibition on use of the term, and there was no defense objection, we find no misconduct.

In his reply brief, Ennis argues that “the most egregious” part of the prosecutor’s misconduct was her response to the defense objection, when she said, “I’m stating the

fact that there was an assault where fingers were placed inside this woman’s vagina. That’s why we’re here.” Appellant’s Reply Br. at 18; RP at 934.

The statement was atypical of this prosecutor’s conduct in the trial, and we wonder if she misspoke. We agree with Ennis that this response to the objection was objectionable, but the fact remains that defense counsel did not object. Nor did he ask the court to strike the prosecutor’s response or request a curative instruction. He did take what was arguably a more effective step—he pointed out, “It’s an allegation.” RP at 934. The objection defense counsel *had* made was implicitly sustained, and the prosecutor did not thereafter refer to an “assault” in her questioning. Ennis does not demonstrate that the prosecutor’s response to the objection was so flagrant and ill intentioned that an instruction could not have cured any resulting prejudice.

Violating motion in limine

Ennis next argues that the State violated an in limine order. The State, not the defense, moved to “[p]rohibit Doug Strosahl from expressing an opinion as to the credibility of [K.S.’s] disclosure on October 25, 2015.” CP at 51 (boldface omitted). The State was concerned about Doug saying he did not report K.S.’s allegations because he believed her version of events “did not ‘make sense.’” *Id.* It based its motion on “ER 608, which prohibits a witness from commenting on the credibility of another witness.” *Id.* The defense did not object and the motion was granted.

During trial, the State made several references to the fact that Doug did not report K.S.'s allegations. Those references did not violate the terms of the in limine order nor did they implicate the ER 608 basis for the order. There was no misconduct. If Ennis believed the State opened the door to an explanation of why Doug did not report, his remedy was to ask the court to revisit the in limine order.

Using impeachment evidence as substantive evidence

Ennis next complains that the State relied on impeachment evidence as substantive evidence when it argued in closing that “at two o’clock” Heather Strosahl “was so worried about how intoxicated [K.S.] was she wanted to go check on her. She talked about doing the rounds, checking to make sure everybody was alive.” RP at 1494.

Heather testified when questioned by the prosecutor that by the time Doug got out of bed and joined her and Ennis in the kitchen, she was no longer concerned about K.S. The prosecutor then had Heather read to the jury part of the statement Heather provided to detectives in 2015, in which she said that she, Ennis and Doug decided to “go check on [K.S.], make sure she’s doing okay,” and that Heather had “wanted to do, you know, a sweep of—make sure everybody’s still alive.” RP at 599. The defense did not object or ask for a limiting instruction.

A witness may be impeached with a prior out-of-court statement of a material fact that is inconsistent with her testimony in court, even if such a statement would otherwise be inadmissible as hearsay. *State v. Clinkenbeard*, 130 Wn. App. 552, 569, 123 P.3d 872

(2005). Impeachment evidence reflects on the witness's credibility but is not probative of the substantive facts encompassed by the evidence. *Id.* (citing *State v. Johnson*, 40 Wn. App. 371, 377, 699 P.2d 221 (1985)). When prior inconsistent statements are admitted as impeachment evidence, an instruction cautioning the jury to limit its consideration of the statement to its intended purpose is necessary and proper. *Johnson*, 40 Wn. App. at 377. But the limitation on use of the evidence is waived if no objection to the introduction of a prior inconsistent statement is made and no limiting instruction is sought. *See State v. Myers*, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997). Here, there was no objection or request for a limiting instruction, so the State was free to rely on the evidence as substantive evidence.

Ennis's reliance on *Clinkenbeard* to argue otherwise is misplaced. *Clinkenbeard*, a prosecution for first degree sexual misconduct with a minor, recognized that absent an objection or request for a limiting instruction, a defendant ordinarily waives objection to the State's use of impeachment evidence as substantive evidence. 130 Wn. App. at 571. The court "decline[d] to deem [the] issue waived" on the particular facts of *Clinkenbeard*'s case, however. *Id.* This was in part because the minor victim's prior inconsistent statements were the only evidence that she and the victim had engaged in sexual intercourse. *Id.* at 570. Additionally, there were serious problems with the record. The court could not be sure that there had *not* been an objection or limiting ruling. *Id.* at 571.

Here, there is no reason not to find a waiver of the limitation on use of the evidence.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Ennis argues he was denied effective assistance of counsel because Cossey made multiple errors, including by representing him despite an actual conflict of interest.

When adjudging ineffective assistance of counsel, we look at the entirety of counsel's performance. *E.g.*, *State v. Ciskie*, 110 Wn.2d 263, 284, 751 P.2d 1165 (1988). Alleged deficiencies by counsel are viewed cumulatively when assessing prejudicial impact. *E.g.*, *Turner v. Duncan*, 158 F.3d 449, 457 (9th Cir. 1998); *Harris v. Wood*, 64 F.3d 1432, 1438 (9th Cir. 1995).

To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate (1) that defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness; and (2) counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If a defendant fails to establish one prong, we need not consider the other. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

In order for the court to find deficient performance, the defendant must establish "that counsel made errors so serious that counsel was not functioning as the 'counsel'

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guaranteed the defendant by the Sixth Amendment.’” *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011) (quoting *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987)). “The threshold for the deficient performance prong is high” and there is ““a strong presumption that counsel’s performance was reasonable.’” *Id.* at 33 (quoting *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)). “When counsel’s conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient.” *Kylo*, 166 Wn.2d at 863.

A defendant must affirmatively prove the required prejudice. *Strickland v. Washington*, 466 U.S. 668, 693, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). “It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.” *Id.* (citation omitted).

Ineffective assistance of counsel claims are reviewed de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

Conflict-free representation

Ennis first renews the argument made as a part of his motion for a new trial that an agreement by Cossey not to use the information provided to him by Bugbee violated his duty of loyalty and created an actual conflict of interest.

The State's opposition to the conflict of interest argument relied on its interview of Cossey. It attached a transcript of Cossey's interview to its opposition. The State's opposition and the Cossey interview both remain sealed. In announcing her denial of the new trial motion in open court, the trial court made public the matters material to her conclusion that Ennis had not demonstrated that Cossey had a conflict of interest. We confine our discussion of sealed materials to matters the trial court made public, finding them sufficient to explain our decision as well. We quote at length from the trial court's ruling:

So the crux of the conflict and the facts that gave rise to the conflict that's been alleged start with some declarations that Mr. and Mrs. Ennis presented to the court, and they discuss a meeting that they had in Mr. Cossey's office back in November of 2015. And at that time both Mr. and Mrs. Ennis in their declarations contend that Mr. Cossey told them that he had had a conversation with homeowner Doug Strosahl's counsel, Mr. Bugbee, and that Mr. Cossey had advised them that he had learned from Mr. Bugbee that Mr. Strosahl had had consensual sexual contact with [K.S.] during the party; that the contact was prior to any contact with Mr. Ennis; that the contact was similar in nature to that had between [K.S.] and Mr. Ennis; and that when Mr. Strosahl and [K.S.] had contact, that [K.S.] believed that Mr. Strosahl was actually Mr. Ennis.

That was all contained in those declarations. And Mr. Ennis's declaration indicates that he was told by Mr. Cossey not to tell anyone. Mr. Ennis's declaration also indicates that he believed that this particular information would be used in his defense and would help him defend his case.

Mrs. Ennis's declaration is similar, but it adds that Mr. Strosahl had told Mr. Bugbee that [K.S.] had called Mr. Strosahl "Gordon"; that she also believed that that information would be used in defending her husband and she also believed that it was going to be used in the state's direct

examination of Mr. Strosahl. We know, of course, that the state never called Mr. Strosahl.

So part of the conflict is, of course, the fact that it's alleged that Mr. Cossey told Mr. Bugbee—or Mr. Bugbee asked Mr. Cossey not to tell anybody about it; Mr. Cossey said, “Okay, but I'm going to tell my client about it.” So that's really in a nutshell what the conflict is: that there's some divided loyalties; that Mr. Cossey failed to use that information to mount a full defense; and that there were some restrictions placed upon Mr. Cossey by virtue of his promise to Mr. Bugbee not to use it.

So again, we know that Mr. Strosahl was never called as a state's witness; he was called by the defense, however. And I went back through Mr. Strosahl's testimony. And he answered all of Mr. Cossey's questions, talked about where he was that evening, talked about [K.S.]'s level of intoxication and the fact that he himself, Mr. Strosahl, was very intoxicated. And as I recall, he had indicated that midway through the party he went to bed because he'd had so much to drink he didn't feel well, he eventually got up out of bed, he went into the kitchen, made some observations and went right back to bed.

Now, Mr. Cossey was interviewed by the parties. And, of course, this is key. He recalls the conversation that he had with Mr. Bugbee. And his recollection of that conversation was that it was—it was given to him or spun to him in the hypothetical along the lines of Mr. Strosahl may have engaged in the same type of contact with the victim. But Mr. Cossey's—Mr. Cossey indicated that at no time was he ever told that this contact between the two was consensual; and in fact Mr. Cossey believed that the opposite was true, that it was not consensual. And he firmly believed that that's what Mr. Bugbee told him. So that changes things a bit, and I'll get to that in just a minute.

Mr. Cossey confirmed that he was asked by Mr. Bugbee to keep it confidential. Mr. Cossey told Mr. Bugbee, “I'm going to tell my client, of course.” And again, key to this also is the fact that Mr. Cossey was told that Mr. Strosahl would not testify to this; “If you question him, he's not going to admit that this behavior ever happened.”

Mr. Cossey denies that Mrs. Ennis was present at that November meeting. But importantly, Mr. Cossey also indicates that Mr. Ennis was very, very involved in his defense and that Mr. Ennis stated unequivocally that he didn't want to implicate Mr. Strosahl in any of this; that his defense

was consent; that this was a consensual act between himself and [K.S.] and that that's the way the defense was going to turn.

Mr. Cossey opines that because the defense was consent, that this type of testimony would not be of assistance to Mr. Ennis. There would be some very significant evidentiary issues with regard to Mr. Strosahl admitting to a nonconsensual act of this nature, that being Fifth Amendment considerations, hearsay considerations, that sort of a thing. But again, Mr. Bugbee at least as far as Mr. Cossey was concerned made clear that Mr. Strosahl was not going to testify, he wasn't going to allow Mr. Strosahl to testify. And as I recall, Mr. Strosahl's second attorney reiterated the same thing.

RP at 1774-77.

At this point in her oral ruling, the trial court commented on hearings that took place in 2017, when the case was assigned to a different judge. As she observes, and as the record bears out, in the hearings taking place on May 25 and June 7, 2017, there was veiled discussion of Bugbee sharing information with Cossey. What was not veiled at all, however, and was stated with Ennis present, was that Cossey would not be using the information obtained from Bugbee "in any shape or form" at trial. RP (June 7, 2017) at 80.

The trial court then continued with her oral ruling:

We know that Mr. Strosahl was eventually interviewed sometime, I believe, in May of 2017. [K.S.] was interviewed, and according to Mr. Cossey, was very clear and very definite that Mr. Ennis was the perpetrator of this crime.

I will note too that typically when I see motions like this I oftentimes will have something from the witness that will say, "I was ready, willing, and able to come in and testify, yet nobody asked me to do that, nobody asked me these certain questions." I don't have anything from Mr. Strosahl

indicating that he would have testified. What I've got is a hearsay or double hearsay kind of a situation, again, with some very particular evidentiary problems if that was going to be attempted to be admitted.

So in order to find a conflict of interest here, I've got to find that Mr. Cossey failed to pursue the other suspect defense based upon the fact that he had loyalties or promises to somebody else. And that conflict has to cause a lapse in representation, it has to be contrary to Mr. Ennis's interests, and it has to affect Mr. Cossey's advocacy.

I considered all of the case law that was presented. I can't ignore the fact that Mr. Ennis is involved in law enforcement; he's specially trained; he's involved in the criminal justice system; he was involved in this case from day one. I don't doubt that he had an equal role in or a very significant role in determining strategy in how this case was going to proceed. And I have no doubt in finding that Mr. Ennis knew that Mr. Strosahl's testimony would not be admitted or even admissible. So based upon all of that, I'm going to find that there was no conflict of interest here that affected Mr. Cossey's representation of Mr. Ennis.

RP at 1778-79.

When an ineffective assistance claim is raised on appeal, the reviewing court may consider only facts within the record. *Grier*, 171 Wn.2d at 29 (citing *McFarland*, 127 Wn.2d at 335). Before we could begin to consider whether evidence of consensual sexual contact between Doug Strosahl and K.S. on the night of the party would have had a reasonable probability of changing the outcome of trial, we would first have to see the evidence and a demonstration that it was admissible. If demonstrating ineffective assistance depends on evidence outside the trial record, a defendant must file a personal restraint petition supported by the necessary evidence. *Id.* (citing *McFarland*, 127 Wn.2d at 335; *Strickland*, 466 U.S. at 691).

Ennis cannot establish ineffective assistance on the existing record. His remedy is to file a personal restraint petition supported by Doug Strosahl’s sworn testimony about the contact and that he would have testified to the contact at trial had he been asked.¹⁰

Failure to request change of venue

Ennis next argues Cossey was ineffective by failing to pursue a change of venue. He argues the court would have granted a motion for a change because the judge presiding at the first trial granted a mistrial on account of pretrial publicity.

Any decision to change venue rests largely within the discretion of the trial court. *State v. Clark*, 143 Wn.2d 731, 756, 24 P.3d 1006 (2001). Pretrial publicity is not a sufficient basis, itself, to require a change of venue. “[A] defendant must show a probability of unfairness or prejudice from pretrial publicity.” *State v. Hoffman*, 116 Wn.2d 51, 71, 804 P.2d 577 (1991).¹¹ Conducting voir dire is a means to determine

¹⁰ Assuming such evidence is provided in support of a personal restraint petition, a reference hearing might be required, given Cossey’s position that he was led to believe the contact was not consensual and Doug Strosahl would refuse to testify.

¹¹ When deciding whether to grant a motion to change venue, courts consider: “(1) the inflammatory or noninflammatory nature of the publicity; (2) the degree to which the publicity was circulated throughout the community; (3) the length of time elapsed from the dissemination of the publicity to the date of trial; (4) the care exercised and the difficulty encountered in the selection of the jury; (5) the familiarity of prospective or trial jurors with the publicity and the resultant effect upon them; (6) the challenges exercised by the defendant in selecting the jury, both peremptory and for cause; (7) the connection of government officials with the release of publicity; (8) the severity of the charge; and (9) the size of the area from which the venire is drawn.” *State v. Munzanreder*, 199 Wn. App. 162, 181, 398 P.3d 1160 (2017).

whether an impartial jury can be impaneled, unless media coverage is so pervasive that bias can be presumed. *State v. Jackson*, 150 Wn.2d 251, 271, 76 P.3d 217 (2003). “[I]f a defendant does not exercise all peremptory challenges it is presumed that he or she was satisfied with the jury.” *Clark*, 143 Wn.2d at 759 (quoting *State v. Rice*, 120 Wn.2d 549, 558-59, 844 P.2d 416 (1993)).

As *Strickland* observed, “If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.” 466 U.S. at 697. The State’s description of the jury selection process and the jury selected for Ennis’s trial persuades us that it is easy to dispose of this claim on the ground of Ennis’s inability to show actual prejudice.

The State provided the following description of Ennis’s jury and how it was selected (we have deleted the State’s supporting citations to the record):

The parties were given nine peremptory challenges each—six for the first twelve jurors and three for the alternates. The defendant waived two peremptory challenges—one for the first twelve jurors and one for the alternate jurors; the State waived three peremptory challenges—two for the first twelve jurors and one for the alternates.

Of the 15 jurors⁵⁰ who were ultimately empaneled, only five jurors indicated any prior knowledge of the case. Each of these individuals told the court that despite previously hearing of the case, they could all be fair and impartial; one indicated a belief that the news was not always correct; one indicated that she did not form any opinions based upon what she had previously read; one indicated that he had heard something through co-workers about jury duty for the case, but nothing substantive about the case itself, and did not see any news coverage in the paper, television, or internet; one indicated that she had heard that jurors were being called for

the case, and knew that it involved a police officer, but nothing substantive about the allegations; and, an alternate juror stated that although she had heard of the incident on both the TV and internet, she understood her duty was to judge the case based upon the evidence only; she recognized the news can be incorrect or biased.

⁵⁰Including the alternate jurors.

Br. of Resp't at 74-75 (record citations omitted).

In reply, Ennis argues only that venire juror 37, who had read extensively about the case, who he challenged for cause, and who nonetheless was seated as the first alternate juror, was biased. He did not exercise an available peremptory to remove her, however, and she ultimately was not needed and was excused.

This information on the jury's selection suggests not only that a motion to change venue would not have been granted, it makes it impossible for Ennis to affirmatively demonstrate that he was actually prejudiced by the seating of a biased jury.

Dismissal of a valid defense

Ennis next argues that Cossey provided ineffective assistance when he “discarded [the reasonable belief] defense during closing argument, telling the jury not to consider it.” Appellant's Opening Br. at 110. He relies on the following closing argument (the emphasis is Ennis's):

I believe that there are certain jury instructions that are going to be important. And one of them goes—it's No. 11, and Judge Moreno read it. And it's the one that says, “If the defendant reasonably believed that [K.S.] was not mentally incapacitated or physically helpless,” *if he had that*

reasonable belief, given everything we've shown you, everything you've seen, the video, the pictures, everything you've heard, that if more likely than not that you believe he reasonably believed she was capable of consent, then that is another prong that you have to consider in your deliberations. But I don't believe you need to do that, because here's why. They're telling you his story doesn't make sense. There was two people there. Only those two people know what happened. Go through the timeline. Go through the testimony. You will make the decision that [K.S.'s] version of what happened that night does not make sense. We know what her reasons are. She told you those. She told you her motivation.

Id. at 111 (alterations in original) (citing RP at 1535). Before explaining the defendant's burden of proof, the exact text of the court's instruction 11 was, "It is a defense to a charge of rape in the second degree that at the time of the act the defendant reasonably believed that [K.S.] was not mentally incapacitated or physically helpless." CP at 325.

We reject the premise that the defense was "discarded" and Cossey told the jury "not to consider it." Cossey directed the jurors' attention to the instruction, telling them it was one of "certain jury instructions that are going to be important." Appellant's Opening Br. at 110; RP at 1535. He argued, "I don't believe you have to [consider]" the affirmative defense, but this was based on his argument that once they considered the evidence, the jurors would conclude that by 2:40 a.m., K.S. "had her full faculties, knew what was going on, and was a willing participant." RP at 1535-36.

The only legal authority cited by Ennis in support of this challenge is case law holding it can be deficient representation not to request a reasonable belief instruction

when the facts support it. Cossey requested the instruction. He reminded the jury of it during closing. He elected to argue that the jury would not need to reach the affirmative defense because they would be satisfied the State had not proved its case.

“There are countless ways to provide effective assistance in any given case,” and “[e]ven the best criminal defense attorneys would not defend a particular client in the same way.” *Strickland*, 466 U.S. at 689. Because of the difficulties of eliminating the distorting effects of hindsight, we indulge a strong presumption that counsel was effective and “the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.” *Id.* (internal quotation marks omitted). Ennis has not overcome the presumption here.

Failure to present exculpatory evidence

Ennis next takes issue with Cossey’s failure to elicit certain exculpatory evidence from Weese and Beaver. The State objected to the evidence, so in order to prove that failure to elicit the evidence was ineffective assistance, Ennis must show, among other things, that the evidence was likely to be admitted over the State’s objection. *Cf. In re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004) (where failure to object is characterized as ineffective assistance, defendant must show that objection would have been sustained).

Immediately before the State called Weese as a witness, counsel spoke with the trial court outside the presence of the jury about a motion in limine involving Weese on

which the court had reserved ruling. They explained that when Weese was interviewed, she said she had been under the impression that Ennis and K.S. were “a couple,” but when pressed about why she thought that, “she really [could not] answer that.” RP at 740. Cossey told the court that he and the prosecutor had agreed that Weese could talk about her observations but “she cannot use her intuition or her gut instincts as part of her testimony.” *Id.*

Immediately before the State called Beaver, the lawyers told the trial court that Beaver presented an issue similar to the issue presented by Weese. Specifically, when interviewed by detectives, Beaver volunteered that she thought K.S. “had some kind of puppy love going” for Ennis, but when asked for her reasons, she was not able to provide any. RP at 799. “She just state[d] that that was her feeling and that’s what she thought was going on.” *Id.* Here again, Cossey agreed with the prosecutor that Beaver’s observations were admissible but her “feeling” that K.S. had “puppy love going” for Ennis was not.

Ennis argues that Cossey’s acquiescence to the State’s objection to the testimony was unreasonable. He argues that the testimony would probably have changed the outcome of the trial. Since no offer of proof was made, the only exculpatory evidence supported by the record is Weese’s unexplained inference that K.S. and Ennis were a couple and Beaver’s unexplained inference that K.S. had “puppy love going” for Ennis.

For a lay witness’s testimony in the form of an opinion or inference to be admissible, it must (among other things) be “helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue.” ER 701(b). An opinion or inference may be unhelpful and objectionable on the grounds that the subject matter is sufficiently understandable to a lay jury to allow the jurors to hear the facts and reach their own conclusions without the interjection of the witness’s opinion. 5B KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 701.5 at 12 (6th ed. 2016) (citing *Johnson v. Caughren*, 55 Wash. 125, 104 P. 170 (1909)).

We found no postrule Washington case law on this ER 701(b) requirement, but federal authority on Federal Rules of Evidence (FRE) 701(b), which ER 701(b) parallels, provides guidance. *See Beal v. City of Seattle*, 134 Wn.2d 769, 777, 954 P.2d 237 (1998) (“Where a state rule parallels a federal rule, analysis of the federal rule may be looked to for guidance.”).

A leading federal treatise describes FRE 701(b) as placing a limitation on lay opinion where the costs of the opinion outweigh its benefits. 29 CHARLES ALAN WRIGHT & VICTOR GOLD, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 6255 (2d ed. 2016). Three ways in which the cost of a lay opinion can outweigh its benefits are where it deprives the jury of details the jury needs to determine the facts, where it adds nothing, and where the witness lacks a sufficient basis for the opinion. *Id.* at 171-73. “[T]he costs

of lay opinion increase and the benefits diminish the closer the opinion approaches the crucial issue[] in the case.” *Id.* at 174.

The decision of the federal Second Circuit Court of Appeals in *Hester v. BIC Corp.*, 225 F.3d 178, 185 (2d Cir. 2000), is illustrative. In that case, the court held that “in an employment discrimination action, Rule 701(b) bars lay opinion testimony that amounts to a naked speculation concerning the motivation for a defendant’s adverse employment decision.”

Witnesses are free to testify fully as to their own observations of the defendant’s interactions with the plaintiff or with other employees, but the witness’s opinion as to the defendant’s ultimate motivations will often not be helpful within the meaning of Rule 701 because the jury will be in as good a position as the witness to draw the inference as to whether or not the defendant was motivated by an impermissible animus. The four witnesses here testified that they observed Beck treat Hester with (variously) condescension, coldness, hostility or disregard, as compared with the three or so other Group Leaders, who were white. A jury can draw its own conclusions from observed events or communications that can be adequately described to it, such as the observed differential treatment described by Hester’s witnesses. But their speculative lay opinion that this differential is attributable to race rather than anything else, is not helpful in this case because it merely tells the jury what result to reach.

Id. (brackets, citations, and quotation marks omitted) (quoting *United States v. Rea*, 958 F.2d 1206, 1215-16 (2d Cir. 1992).

Ennis cannot demonstrate that Weese’s and Beaver’s unexplained inferences were likely to be admitted over the State’s objection. “The trial court is vested with wide discretion under ER 701.” *State v. Kinard*, 39 Wn. App. 871, 874, 696 P.2d 603 (1985).

Evidence established that the night of the party was the first time Weese and Beaver met K.S. Presenting the evidence of what these two witnesses observed about K.S.'s demeanor and actions put the jury in as good a position as the witnesses to assess whether their observations bore on Ennis's claim that the sex was consensual. The issue of whether K.S. was enamored of Ennis or only liked and respected him was a material one, so the cost of admitting unhelpful opinions was high.

Also, with respect to Weese's testimony, Ennis cannot demonstrate that it probably would have changed the outcome of trial. The testimony of both K.S. and Ennis established that they were not a couple. Excluding Weese's mistaken inference that they were could not have had any impact whatsoever on the outcome of the trial.

Failure to object to the State's misconduct

Without any authority, discussion of the facts, or analysis, Ennis asserts that Cossey's failure to object to the alleged instances of prosecutorial misconduct was deficient and prejudicial. We decline to address the assertion. Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.

Brownfield v. City of Yakima, 178 Wn. App. 850, 876, 316 P.3d 520 (2014); RAP 10.3(a)(6).

IV. CUMULATIVE ERROR

Ennis finally asks that in the event we find no single alleged error to be reversible error, we find that the cumulative effect of trial court errors warrants reversal. Under the

cumulative error doctrine, a defendant may be entitled to a new trial when the trial court's multiple errors combine to deny the defendant a fair trial. *State v. Lazcano*, 188 Wn. App. 338, 370, 354 P.3d 233 (2015) (citing *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994)). The defendant bears the burden of proving an accumulation of error of sufficient magnitude to warrant a new trial. *Id.* (citing *Lord*, 123 Wn.2d at 332).

The only error we have found—arguably two errors—is the prosecutor's objected-to statement in cross-examining Beaver that argumentatively impugned Beaver's credibility and arguably impugned defense counsel. Viewed as two errors, cumulatively, they come nowhere near casting doubt on the fairness of Ennis's trial.

STATEMENT OF ADDITIONAL GROUNDS

In a pro se statement of additional grounds (SAG), Ennis makes what he characterizes as further arguments in support of (1) Cossey's alleged conflict of interest, (2) the giving of the corroboration instruction, and (3) the prosecutor's alleged misconduct in commenting on Ennis's silence. These issues were adequately addressed by counsel. They will not be considered further. *See* RAP 10.10(a) (a SAG is available for matters that have not been adequately addressed by counsel's briefing).

Ennis makes an additional argument of ineffective assistance of counsel. He complains of Cossey's failure to object to the State's motion in limine preventing Doug Strosahl from expressing an opinion as to the credibility of K.S.'s disclosure of the

alleged assault. Ennis argues that Strosahl’s opinion would not have been a mere lay opinion; it would have been the opinion of a law enforcement expert who has taught college level classes on interviewing and report writing. SAG at 10.

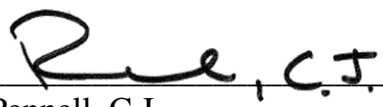
An objection to one witness’s opinion of another witness’s credibility is actually *most* likely to be sustained when the opinion is expressed by a police officer. “Testimony from a law enforcement officer regarding the veracity of another witness may be especially prejudicial because an officer’s testimony often carries a special aura of reliability.” *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007). Cossey’s decision not to object to the in limine motion was not deficient performance.

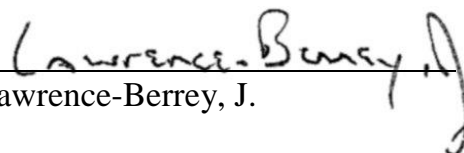
Affirmed.

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.


Siddoway, J.

WE CONCUR:


Pennell, C.J.


Lawrence-Berrey, J.

MARK E. VOVOS, P.S.

April 16, 2021 - 2:10 PM

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