

62268-4

62268-4

NO. 62268-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

TURGUT TARHAN,  
EMIR BESKURT,  
SAMET BIDERATAN,

Appellants.

2009 SEP 18 PM 4:49

STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION I

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE SUSAN CRAIGHEAD

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**BRIEF OF RESPONDENT**

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DANIEL T. SATTERBERG  
King County Prosecuting Attorney

RANDI J. AUSTELL  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 3rd Avenue  
Seattle, Washington 98104  
(206) 296-9650

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**A. ISSUES PRESENTED**

1. Whether the defendants waived appellate review of the deputy prosecutor's isolated error in voir dire by twice declining the trial court's offer to strike the venire and start voir dire anew, thereby curing any possible harm.

2. Whether it was within the trial court's broad discretion to exclude one marginally relevant statement by the victim where (1) the defense made no offer of proof as to the statement's materiality, (2) the probative value of the statement was outweighed by the danger of unfair prejudice and the admission of otherwise inadmissible evidence, (3) the defense was permitted to extensively cross-examine the victim and explore her credibility, and (4) the defense had a full opportunity to present and argue its theory of the case.

3. Where the deputy prosecutor's remarks in closing, that suggested Bideratan had tailored his testimony to conform to the trial evidence, focused on the evidence presented, as opposed to his right to be present at trial, was it within the trial court's discretion to deny a motion for mistrial?

4. Where defense counsel contended in their closing arguments that the prosecutor's remarks in her opening round of closing arguments were hyperbolic, an "emotional speech," and a "dramatic performance," may the prosecutor respond that, if her remarks were emotional, it is because *emotion is part of the evidence*; the *crime of rape is emotional*?

5. Whether the prosecutor's remarks in closing argument that focused on the evidence and reasonable competing inferences therefrom were provoked or invited by defense counsels' repeated badgering of the victim, repeated innuendo based on the victim's "provocative behavior," and repeated attacks on the victim's credibility. And, even if any of the remarks was an impertinent reply, have counsel waived appellate review by failing to object unless the remarks were flagrant or ill-intentioned?

6. May a prosecutor ask questions and advance arguments that support the victim's credibility, even if the comments touch upon, but do not manifest an intent to comment on, a defendant's constitutional right to be present at trial?

7. Whether the failure to object to pertinent remarks that were provoked or invited constitutes deficient performance, especially where counsel may have made a legitimate tactical choice not to object, but rather to respond in his own closing argument.

8. Where there is one isolated error in voir dire, is the cumulative error doctrine inapt because there are not multiple trial errors to cumulate?

9. Where the court at sentencing imposed an incorrect community custody term and an incorrect expiration date on a sexual assault protection order, is remand required so that the court may correct its errors?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The State charged co-defendants Emir Beskurt, Samet Bideratan and Turgut Tarhan with Rape in the Second Degree, contrary to RCW 9A.44.050(1)(a).<sup>1</sup> 1CP 1; 2CP 1; 3CP 1.<sup>2</sup> A jury convicted each co-defendant of the inferior degree crime of Rape in

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<sup>1</sup> "A person is guilty of rape in the second degree when . . . the person engages in sexual intercourse with another person by forcible compulsion."

<sup>2</sup> The Brief of Respondent will refer to the clerk's papers as 1CP (Beskurt); 2CP (Bideratan); 3CP (Tarhan).

the Third Degree, contrary to 9A.44.060(1)(a).<sup>3</sup> 1CP 11; 2CP 11; 3CP 16.

For each co-defendant, the trial court imposed a standard range 10-month sentence plus a community custody range of 36-48 months. 1CP 44, 46-47; 2CP 26, 28-29; 3CP 22, 24-25.

Post-conviction, the United States Immigration and Customs Enforcement detained the defendants, who were in the United States on student visas, and began removal proceedings. See generally 8/1/08 RP; 9/4/08 RP 8, 45-50.

Timely appeals followed. 1CP 53; 2CP 23; 3CP 19. By order entered July 28, 2009, this Court consolidated Beskurt's, Bideratan's and Tarhan's cases.<sup>4</sup>

## **2. SUBSTANTIVE FACTS**

On June 3, 2007, the 20-year-old victim, H.W., lived in an apartment with her best friend, Caroline Concepcion. 9RP 83, 90;

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<sup>3</sup> "A person is guilty of rape in the third degree when . . . such person engages in sexual intercourse with another person, not married to the perpetrator where the victim did not consent . . . to sexual intercourse with the perpetrator and such lack of consent was clearly expressed by the victim's words or conduct."

<sup>4</sup> A fourth co-defendant, Taner Tarhan, was likewise convicted of Rape in the Third Degree. Taner's appeal was not consolidated because he had yet to perfect his record when the other three co-defendants filed their respective opening briefs. As of August 31, 2009, Taner had not filed his opening brief.

10RP 38; 18RP 6-8.<sup>5</sup> That afternoon, H.W. and her male friend, Spencer Crilly, spent the afternoon at the swimming pool. 14RP 9-11. Concepcion worked most of the day, but afterward she joined H.W. and Crilly. 18RP 18-19. They all drank a couple of beers while Crilly and H.W. prepared dinner. 10RP 51, 61; 14RP 11-14; 18RP 21.

As they cooked, Concepcion looked out one of the apartment windows and saw Beskurt and "Tony" across the courtyard in Beskurt's apartment.<sup>6</sup> 13RP 132; 18RP 21; 19RP 43. Concepcion met them once before; she had been grilling chicken poolside when Beskurt and Tony introduced themselves. 10RP 70; 18RP 13; 21RP 31. The encounter, although brief, had been pleasant. 18RP 13-14. So, when Concepcion saw the men, she

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<sup>5</sup> The State adopts Beskurt's designation of the verbatim report of proceedings, see Br. of Beskurt at 4-5 n.1. In addition, the sentencing hearing that occurred on September 4, 2008, is referenced herein as 25RP.

<sup>6</sup> Taner and Turgut are identical twins. 18RP 22. The record is unclear at times whether a State's witness is referring to Taner or Turgut. For instance, Concepcion stated that she saw Taner, ostensibly known to her as "Tony," in Beskurt's apartment when she first looked out the window; however, later Concepcion identified Turgut as Tony. See 18RP 13-14, 21, 152. It appears that Concepcion misspoke and that she actually saw Turgut with Beskurt. See 19RP 43-44 (Bideratan testified that when he arrived at Beskurt's apartment, Beskurt and Turgut were already there and that Taner did not arrive until approximately 40 minutes later). See also 21RP 34 (Turgut stated that he and Beskurt saw Concepcion and H.W. at the window). For clarity, in this substantive fact section, the State will refer to the men by their first names. No disrespect is intended.

told H.W.; both women waved and through the open window invited the men to H.W.'s apartment. 10RP 58; 14RP 15; 18RP 21-23.

After a little while, Beskurt, Turgut and Bideratan went to H.W.'s apartment. 10RP 71-72; 14RP 20-21; 18RP 24-25; 21RP 34. They listened to music and drank beer. 10RP 78-80; 18RP 26; 19RP 45. Later, Taner joined the group. 10RP 71; 14RP 27; 19RP 44. With the exception of Crilly, who stayed in the kitchen and did not socialize, they got to know one another. 10RP 73; 14RP 22-27; 18RP 26.

Eventually, most everyone went to Beskurt's apartment and continued to socialize; Crilly remained at H.W.'s apartment. 10RP 80-81; 14RP 28-29; 18RP 27-28; 21RP 37. Soon thereafter, H.W., Concepcion, and at least two of the men went to a neighborhood grocery store.<sup>7</sup> 10RP 87; 18RP 29; 19RP 53; 21RP 45. The six met up again outside the apartment complex and they returned to Beskurt's apartment. 10RP 88; 18RP 31.

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<sup>7</sup> There is conflicting testimony over how many of the defendants went to the store. H.W. believed that all of the men went to the grocery store; Concepcion thought that Beskurt and Taner went to the store (this is another instance in which Concepcion referred to Taner as "Tony"). Bideratan and Turgut testified that only Beskurt and Turgut went to the store while Bideratan and Taner drove to a cash machine at a bank. Compare 10RP 87-88 with 18RP 29, 31 and 19RP 53 and 21RP 45.

At some point, Concepcion left to get a pack of cigarettes, but she did not tell anyone that she was leaving. 10RP 103; 18RP 34, 37-38. When H.W. noticed that Concepcion was gone, she asked the men if they knew where she was — but the men told her not to worry about it. 10RP 111-12.

Beskurt put his arm around H.W. and Taner started touching her leg. 10RP 106. H.W. brushed their hands away. 10RP 107. The men did not respond when H.W. told them to "knock it off." 10RP 108, 112. H.W. asked again for Concepcion — she felt confused and panicked. 10RP 111-12.

The men removed H.W.'s clothes. 10RP 109-11. They touched her breasts. 10RP 110. Different men at different times held her down as she struggled to get up.<sup>8</sup> 10RP 113; 111RP 127; 5RP 36-37. More than ten times H.W. told the men to stop. She repeatedly asked for Concepcion, but the men told H.W. not to worry — that Concepcion would be back soon. 10RP 114-15, 123; 11RP 126; 15RP 36-37.

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<sup>8</sup> H.W. did not forcefully physically resist because she was outnumbered and because she was afraid that the assault would escalate. See, e.g., 11RP 120-22; 13RP 12. Notably, one of the defendants, Beskurt, stands 6'8". 16RP 120. But each of the defendants is taller than H.W. 19RP 80.

Each of the defendants unclothed himself. 10RP 116. The defendants vaginally and orally raped H.W.<sup>9</sup> 10RP 116-17; 15RP 36-37, 42. The men forced H.W. to touch their genitals, and at least two of the men slapped H.W. across her face with his penis. 10RP 116-18; 11RP 164-65; 13RP 10. H.W. tried to get up but could not because the men held her down by her shoulders. 10RP 119; 11RP 120; 13RP 8.

Crilly had become concerned about H.W. 18RP 38-39. When he looked out the window, he saw the blinds in Beskurt's apartment were closed. 14RP 39-40. He had tried to call H.W. and sent her text messages, but had gotten no response. 14RP 40; 18RP 38-39. Crilly went to Beskurt's apartment. 14RP 40. When he knocked, he heard someone lock the door and the music got louder, but no one answered. 14RP 41, 67; 18RP 39; 19RP 68.

Minutes later, Concepcion knocked on the door. 10RP 127-28; 21RP 79. As the men looked through the peephole and whispered among themselves, H.W. rushed to the door. 10RP 128-28. H.W. was naked. 18RP 39-40. She was crying. 18RP

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<sup>9</sup> H.W. did not believe that any of the men had ejaculated; however, Bideratan's DNA was found in semen taken from vaginal and anal swabs; Bideratan was a "possible contributor" to the DNA found in the oral swab. 10RP 132-33; 13RP 96-97.

41-42. H.W. seemed in shock; she was breathing very hard, like she was having a panic attack. 18RP 42.

H.W. took Concepcion into the bathroom and immediately told her what had happened. 10RP 129; 18RP 41. H.W. asked Concepcion to get her clothes. 10RP 129; 18RP 42. Concepcion returned to the living room to get H.W.'s clothes. It was dark, but Concepcion could hear the men zipping up their pants. 18RP 42-43. Concepcion yelled at the men, "What's going on. What did you do?" 10RP 129; 18RP 44. The men responded, "Nothing, just hanging out." 18RP 44. She knew that they were lying. 18RP 45-46. By the time that Concepcion returned to the bathroom, H.W. had already fled the apartment. 10RP 129; 18RP 45.

Concepcion found H.W. in the stairwell, leaned over and crying. 10RP 129, 131-34; 18RP 47. Crilly saw H.W. in the stairwell, "curled up and just beating on [Concepcion]." 14RP 45. He said H.W. was falling apart; she seemed in shock. 14RP 44. Crilly tried to comfort H.W., but he had no idea what had happened. 14RP 47.

Concepcion took H.W. home, where H.W. ran to her bedroom. 10RP 135; 18RP 48. Concepcion calmed H.W. down enough that H.W. was able to tell her what had happened.

10RP 130; 18RP 47. H.W. told Concepcion that the men had pinned her down. 18RP 48. Concepcion asked her if the men had raped her; H.W. nodded her head yes. 10RP 134; 18RP 48. Concepcion called the police. 10RP 136; 18RP 48.

When the police and medics arrived, H.W. was crying. 9RP 71, 86. She appeared traumatized, scared, and very withdrawn. 9RP 85. One police sergeant saw H.W. in a fetal position, rocking. 9RP 132. H.W. told the police and the emergency medical technicians that four men had held her down and raped her; she had tried to stand up and get away, but the men pushed her down. 9RP 136, 154; 18RP 179-80. None of the responding emergency personnel thought that H.W. was intoxicated, although she and Concepcion told them that they had been drinking. 9RP 76-77, 89, 136-38; 18RP 183-84.

H.W. was transported by ambulance to Harborview Medical Center. 9RP 73; 18RP 52. While at Harborview, H.W. underwent a sexual assault exam. 10RP 145-49; 11RP 42-47; 15RP 30, 32, 35. H.W. told the medical personnel that four men had held her down and vaginally and orally raped her. 11RP 52-53, 56; 15RP 36-37, 42. H.W. was tearful and appeared overwhelmed by what the men had done to her. 11RP 53, 58, 61; 15RP 37. Although H.W. told

the nurse that she had had three beers, H.W. did not appear intoxicated. 11RP 76; 15RP 41, 88-89, 112.

The sexual assault nurse noticed that H.W. had two vaginal lacerations. 15RP 62-66. Both lacerations were bleeding mildly. 15RP 67. Although the lacerations could have been caused by consensual intercourse, in the nurse's experience, vaginal injuries of the type suffered by H.W. occur in sexual assaults.<sup>10</sup> 15RP 89-96, 127. Further, the presence of injuries visible to the naked eye (as opposed to seen with the aid of a colposcope) are fairly rare. 15RP 95, 155.

During a break in the examination, Seattle Police Detective Kyle Kizzier briefly interviewed H.W. 10RP 152; 15RP 130-40; 16RP 58-59, 68-69. As the interview progressed, H.W. became more upset, tearful and withdrawn. 16RP 70. If H.W. had not told the detective that she had had three beers, he would not have known that she consumed any alcohol. 16RP 73, 128.

While H.W. was at Harborview, she asked Concepcion to call her former boyfriend, Zach Morris, because H.W. knew that he could comfort her. 10RP 150-51; 16RP 16; 18RP 54. Concepcion

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<sup>10</sup> H.W. told the nurse that she had engaged in consensual sexual intercourse the previous evening with Crilly, but that intercourse had not been painful. 11RP 10-11, 109-11; 15RP 50.

met Morris outside Harborview and told him what had happened. 16RP 17; 18RP 54. When he saw H.W. she was "shaky, crying, really visibly upset, scared." 16RP 18. In the six years that Morris had known H.W., he had never seen her like that. 16RP 18.

After Harborview released H.W., Morris walked her home. 16RP 20. He tried to comfort her, but she cried and shook with fright throughout the night. 16RP 20-21. H.W. could not sleep; she had nightmares — not just that night, but many nights after the rape. 10RP 153-54; 16RP 20, 23; 18RP 58.

H.W. had been traumatized. 16RP 23. For a long time after the rape, people noticed a marked change in H.W. 14RP 53-54; 16RP 23; 18RP 58. Even one of the defense witnesses commented that, after the incident, it seemed like H.W. was just trying to "keep it together"; she "definitely had traits of someone who had gone through something traumatic." 17RP 9.

Bideratan and Turgut testified. They said that H.W. had "willingly participat[ed]" in sexual intercourse with each of the men. 19RP 62-69; 20RP 23; 21RP 60-81. Bideratan stated that when he came out from the bathroom, H.W. was having vaginal intercourse with Taner and oral intercourse with Beskurt. 19RP 61-63. Beskurt stepped aside and H.W. then gave Bideratan "oral pleasure."

19RP 63-64. Bideratan and Turgut described how the men changed positions so that H.W. could engage in oral and vaginal intercourse with each of them. 19RP 63-68; 21RP 61-78, 105.

Turgut said that as H.W. fellated the men and had vaginal intercourse with each man, she "seemed to be participating and enjoying herself." 21RP 65, 76. H.W. controlled the situation — she told each man (with her body language, not with words) where to be and what position she wanted to be in. 19RP 97.

When Crilly knocked on the door, Bideratan stated that H.W. said, "Oh, don't open the door when I'm like this." 19RP 66; 21RP 75. H.W. continued to have intercourse with the men. 19RP 68; 21RP 75-79. When Concepcion knocked on the door, H.W. told Turgut to stop and he did. 19RP 69; 21RP 81.

The men said that they had not responded to Concepcion's accusation about raping H.W. because they felt that it was none of Concepcion's business. 19RP 70; 21RP 83-84. They were uncertain whether H.W. would want her friend to know that she had had sex with all four men. 20RP 32; 21RP 84. They thought that maybe Concepcion's accusation was borne out of jealousy because she seemed to like Beskurt. 18RP 137-38; 21RP 87-88.

After H.W. left with Concepcion, the men went to Bideratan's mother's house for a late (almost 10:00 P.M.) dinner. 19RP 77; 20RP 41. Upon their return a few hours later, the men were arrested by police officers stationed outside Beskurt's apartment. 9RP 140-45; 14RP 162-54; 19RP 78. Bideratan said that it was not until after they were arrested that it occurred to him that maybe it is not okay for four men to have intercourse with one woman. 19RP 106.

Additional procedural and substantive facts will be discussed in the argument section to which they pertain.

### **C. ARGUMENT**

Beskurt, Bideratan and Tarhan argue that their trial was unfair because the prosecutor committed numerous instances of misconduct in voir dire and trial. Their arguments should be rejected. With the exception of a single misstep in voir dire — a mistake that was not prejudicial and which could have been cured — the prosecutor fairly tried this hard-fought case. Each claim of misconduct raised on appeal — except one — was not objected to by the three very competent trial counsel who vigorously defended their clients, at times pushing the envelope through their aggressive questioning that, on at least one occasion, exceeded the bounds

set by the trial judge. Objections were not made to the majority of prosecutorial argument because, to those actually present at trial, the subject matter of the claims on appeal likely seemed to be within the bounds of proper argument. As the trial court noted, "This has been an extremely well-trying case." 23RP 32.

On appeal, however, defendants attempt to recast the trial — often using overheated rhetoric — as one travesty of justice after another. Beskurt's opening brief, in particular, is laden with vitriolic personal attacks against the deputy prosecutor who tried the case, and imputes misconduct from a wholly unrelated case (State v. Warren) to the trial prosecutor here and to the entire King County Prosecutor's Office. This rhetoric is unwarranted. The record establishes that the deputy prosecutor fought hard but fought fairly. With the one exception in voir dire, there was no misconduct. The defendants received a fair, albeit an imperfect trial. Lutwak v. United States, 344 U.S. 604, 619, 73 S. Ct. 481, 97 L. Ed. 593 (1953) ("[a] defendant is entitled to a fair trial but not a perfect one."). Their convictions should be affirmed.

**1. THE DEFENDANTS WAIVED THEIR CLAIM OF PROSECUTORIAL ERROR IN VOIR DIRE AND, EVEN IF IT WAS NOT WAIVED, THE ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT.**

Beskurt and Bideratan contend that they were denied due process and the right to a fair trial because the deputy prosecutor improperly commented on a defendant's Fifth Amendment rights. Although the prosecutor's comments were admittedly improper, the trial court ameliorated any potential prejudice with a strongly-worded curative instruction.

More significantly, however, the defendants waived appellate review of this claim. After the error, and because the anticipated trial length resulted in several hardship excusals, there was a shortage of prospective jurors. The trial court twice suggested striking the original venire and recommencing voir dire with a new venire. All counsel objected. Bideratan's counsel objected specifically because he preferred to have a flawed venire subject to attack on appeal rather than a venire cured of any possible defect. This strategy perverts the reasons for appellate review and should not be countenanced by this Court. Where possible, error should be corrected at trial, not on appeal. Accordingly, this Court should decline to address this claim.

a. Facts.

During voir dire, the deputy prosecutor remarked:

Okay, I want to talk a little bit - - we've obviously been talking quite a bit about what the rights of these four gentlemen are, and we've talked about the presumption of innocence, and in doing that we sort of also touched on what the burden of proof is.

Does everyone - - well, let me ask this: is there anyone who thinks it's a bad thing in a criminal case I have to give all of the evidence that I have or intend to present in court to the defense attorneys and their clients before trial, does anyone think that seems fair, unfair, that they get to know exactly what I've got? No?

JUROR 33: Do you know what they had?

PROSECUTOR: No. Do you think that seems unfair?

JUROR 33: Yeah.

PROSECUTOR: And why does that seem unfair?

MR. SAVAGE: Objection, Your Honor.<sup>11</sup>

COURT: It's sustained. It's more complicated than that.

PROSECUTOR: Well, sir, let me ask you this: if you were to learn during the course of the trial that I had never - - that the State doesn't have an opportunity to speak with defendants, do you think that is unfair?

JUROR 33: Speak with them?

PROSECUTOR: To speak with them, talk to them, prior to a case.

MR. SAVAGE: Your Honor, I object to the question. The Fifth Amendment says that she can't.

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<sup>11</sup> Mr. Savage was Mr. Bideratan's trial counsel.

PROSECUTOR: That doesn't mean the juror thinks the Fifth Amendment's a good thing.

COURT: Perhaps you could rephrase the question.

PROSECUTOR: Sir, let me ask you this: obviously if somebody is arrested with a crime, charged with a crime, they have the right to remain silent. They don't have to talk, and we come in here for this trial, not any of these four defendants has to get up and testify, they don't have to put on a shred of evidence, the burden is on me to prove the case. If they don't want to tell me before the case what they might testify to, they don't have to, because that's their right.

Does that seem like a good thing, a bad thing, unfair to the State?

MR. SAVAGE: Your Honor, I have a legal matter to take up before the Court.

2RP 150-51.

After a chambers conference, all defense counsel joined in Mr. Savage's motion for a mistrial. 2RP 154. The prosecutor mistakenly believed that nothing improper had occurred and advocated against a mistrial. 2RP 156-58.

The court ruled that, "It does not appear to me that the remarks in voir dire rise to the level of granting a mistrial. . . ."

2RP 164. However, to ameliorate any potential prejudice, the court instructed the jury as follows:

The Court needs to clarify a few points regarding the preparation of a criminal case. Both, the State and the defendants, are required to comply with Court Rules that govern the sharing of information with one another.

Under the Fifth Amendment to the United States Constitution, a defendant is never required to speak to the State or the police at any point, or to testify at trial, and the fact that a defendant has not done so cannot be used to infer guilt or prejudice him again in anyway.

2RP 172.

Voir dire continued. The anticipated length of the trial resulted in a series of hardship excusals that reduced the initial panel of 75 prospective jurors to 27. 3RP 33. The court ordered a supplemental panel. 3RP 33. The parties and the court discussed the possibility of striking the first venire and starting voir dire anew with a fresh panel of 150 prospective jurors. 3RP 56-58. The prosecutor queried why Mr. Savage objected to striking the original panel, which he claimed had been "unfairly tainted," especially in light of his motion for a mistrial. 3RP 56-57. Mr. Savage explained his rationale:

*With all due respect to the Court, we now have a potential error on appeal because of the Court's denial of my motion. If I voluntarily surrender the 27 jurors that are still here, I give that up. I'm very reluctant to give up a Constitutional argument on behalf of a client. . . .*

3RP 59 (italics supplied); see also 4RP 62. Counsel for Mr. Beskurt also objected; he stated that he would prefer to "plow ahead."<sup>12</sup> 3RP 58-59.

Later that same day, after many more hardship excusals, the court noted that, given the number of peremptory challenges it had granted each party, it did not appear mathematically possible to seat a jury. The court thus suggested striking the initial and supplemental panels and recommencing voir dire. 3RP 117-18, 123. Each defense counsel objected again. 3RP 118-20, 124-25.

The following day, the prosecutor expressed her belief that, with regard to the motion for a mistrial, the defense had been given an opportunity to cure whatever error counsel thought had occurred and that by rejecting the opportunity to strike the first panel and start anew, the defense waived the Constitutional claim on appeal. 4RP 62. The court continued with voir dire and ordered a third panel to supplement the venire. 4RP 63-64.

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<sup>12</sup> Counsel for Turgut and Taner Tarhan also objected to excusing the first panel and recommencing voir dire. 3RP 60.

- b. The Deputy Prosecutor Erred But The Defendants Waived Appellate Review By Twice Declining The Trial Court's Offers To Strike The Venire, Thus Curing Any Harm.

The State may not comment on the exercise of a defendant's right to remain silent. State v. Easter, 130 Wn.2d 228, 243, 922 P.2d 1285 (1996). An accused's invocation of his right to remain silent and refusal to assist the State in the preparation of its criminal case may not be eroded by permitting the State in its case-in-chief to call to the attention of the trier of fact the accused's pre-arrest silence to imply guilt. See id. There is no principled distinction between an improper comment in the State's case-in-chief and an improper comment made in voir dire. See Hanf v. State, 560 P.2d 207, 211, 1977 OK CR 41 (1977) ("It is error for the prosecutor to comment-either directly or indirectly-*at any stage of the jury trial*-upon the defendant's right to remain silent") (emphasis supplied); cf State v. Fricks, 91 Wn.2d 391, 396, 588 P.2d 1328 (1979) (it is improper for State to comment on Defendant's silence during closing argument).

The deputy prosecutor's remarks in voir dire were improper. As Beskurt and Bideratan noted in their opening briefs, the comments referenced an accused's Fifth Amendment rights and

permitted, but did not require or urge, the prospective jurors to infer that the system is unfair to the State.<sup>13</sup> See Br. of Beskurt at 19-21; Br. of Bideratan at 16. This was error.

Still, review is unwarranted because Beskurt and Bideratan waived their objection to the prosecutor's remarks. The general rule requires that, in order to preserve error, counsel call the error to the court's attention at a time when the error can be corrected. State v. Fagalde, 85 Wn.2d 730, 731, 539 P.2d 86 (1975). An appellate court will not usually permit a defendant to go to trial before a trier of fact acceptable to him, speculate on the outcome, and after receiving an adverse result, claim error for the first time on appeal when the misconduct could have been cured by the trial court. See State v. Wicke, 91 Wn.2d 638, 643, 591 P.2d 452 (1979). Counsel may not treat the criminal process as a "game for sowing reversible error in the record." See Kotteakos v. United States, 328 U.S. 750, 759, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946).

Appellate courts frequently refuse to review claims of error in voir dire where counsel could have ameliorated or cured the error through some means available at the time. See State v. Berkins,

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<sup>13</sup> Notably, the prosecutor did not invite the jury to draw an adverse inference. She was simply opening the topic for discussion.

2 Wn. App. 910, 918-19, 471 P.2d 131 (1970) (after empanelled jury saw manacled defendant, trial court denied motion for mistrial but invited counsel to request any other relief to obviate any potential prejudice; defendants' failure to request any other remedy held to be waiver); Palmer v. State, 572 So.2d 1012, 1013 (Fla. 4<sup>th</sup> DCA 1991) (defendant waived claim as to alleged defects in voir dire when he declined trial court's offer to dismiss entire panel and recommence voir dire with new panel); Fletcher v. McCreary Tire and Rubber Co., 773 F.2d 666, 668-69 (5<sup>th</sup> Cir. 1985) (plaintiff in civil case waived any right to trial by twelve jurors by refusing the trial court's offer to select a new panel of twelve jurors after juror excused for good cause day before trial commenced and plaintiff had agreed to waive selection of any alternate jurors); Jackson v. Smith, 406 F. Supp. 1370, 1374-75 (W.D.N.Y. 1976) (prospective jurors' observation of defendant in handcuffs did not require reversal where defendant waived voir dire or change of jury panel).

Here, although the error was timely brought to the court's attention, counsel had two opportunities after the court gave its curative instruction to strike the venire and conduct voir dire anew. Rather than definitively purge any potential prejudice, each counsel opted to keep the remaining 27 jurors from the first venire. 3RP

58-60. Bideratan's counsel made a tactical decision to try and preserve, rather than cure, any error for the express purpose of seeking a remedy from this Court. 3RP 59. The Court should not countenance such tactics. See Kotteakos, 328 U.S. at 759. Counsels' refusal to strike the venire waived appellate review of this claim.

c. The Error Was Harmless Beyond A Reasonable Doubt.

Even if this Court holds that counsels' refusal (twice) to recommence voir dire did not constitute waiver, the error was harmless.

Every criminal defendant has a federal and state constitutional right to a trial by an impartial jury. U.S. CONST. AMEND. VI;<sup>14</sup> Const. art. I, § 22 (amend. 10).<sup>15</sup> The right to trial by jury includes the right to an unbiased and unprejudiced jury. State v. Stiltner, 80 Wn.2d 47, 491 P.2d 1043 (1971). To justify reversal where the jury selection process substantially complies with the applicable rules or statutes, a defendant must show prejudice.

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<sup>14</sup> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."

<sup>15</sup> "In criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury."

State v. Williamson, 100 Wn. App. 248, 253, 996 P.2d 1097 (2000),  
cert. denied by Williamson v. Miller-Stout, 546 U.S. 1108 (2006).

The State bears the burden of showing that a constitutional error is harmless. Easter, 130 Wn.2d at 242. A constitutional error is harmless if the reviewing court is convinced beyond a reasonable doubt that the same result would have been reached in the absence of the error. State v. Deal, 128 Wn.2d 693, 703, 911 P.2d 996 (1996). Stated alternatively, an error is harmless if the Court can conclude that the error "in no way affected the final outcome of the case." State v. Stephens, 93 Wn.2d 186, 191, 607 P.2d 304 (1980) (citation omitted). Whether an error is harmless is a question of law that this Court reviews de novo. State v. Bird, 136 Wn. App. 127, 133, 148 P.3d 1058 (2006).

In this case, the trial court did not deprive any defendant of his right to a fair trial by an impartial jury. Neither Beskurt nor Bideratan offers any evidence demonstrating that the individuals actually selected as jurors in this case were biased or that they were denied a fair trial.<sup>16</sup> When the defense accepted the panel, without further objection, counsel collectively had seven remaining

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<sup>16</sup> Tarhan has not claimed that any error occurred in voir dire.

peremptory challenges.<sup>17</sup> 7RP 99-103. This Court presumes "that each juror sworn in a case is impartial and above legal exception, otherwise, he would have been challenged for cause." State v. Rempel, 53 Wn. App. 799, 804, 770 P.2d 1058 (1989) (quoting State v. Kender, 21 Wn. App. 622, 626, 587 P.2d 551 (1978), review denied, 91 Wn.2d 1017 (1979)). The error, therefore, was not prejudicial.<sup>18</sup> See State v. Collins, 50 Wn.2d 740, 744, 314 P.2d 660 (1957) (following improper inquiry of venire by both the State and the defense, error, if any, was not prejudicial where defendant accepted the jury while having available four peremptory challenges).

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<sup>17</sup> The trial court granted the defense collectively a total of 18 peremptory challenges, far more than the number of peremptory challenges required by the court rule. Compare 3RP 4, 10-11 with CrR 6.4(e). The defense exercised 11 of those peremptory challenges. 7RP 99-103.

<sup>18</sup> In fact, one of the defense attorneys, counsel for Turgut Tarhan, revisited the topic of a defendant's Fifth Amendment rights later in voir dire:

Ladies and Gentlemen, Judge Craighead earlier, and I think we also discussed it, told you that people accused of crimes or investigated for crimes have a Constitutional right to remain silent. And the fact that a person exercises that right in this country and chooses to remain silent, can't be used against them in court and can't be used to prejudice them in anyway. It is possible that one or maybe more of the defendants in this case might not testify.

My question is how will you as a juror in this case, if you are selected, be able to give respect to that Constitutional right to remain silent and follow the judge's instruction that it can't be used to infer guilt.

7RP 89.

Further, Beskurt and Bideratan fail to demonstrate prejudice. The prosecutor's comments here were ambiguous at best, as suggested by the trial court's ruling denying the motion for a mistrial. It is within the court's discretion to deny a mistrial with an appropriate corrective instruction. See State v. Romero, 113 Wn. App. 779, 791, 54 P.3d 1255 (2002). The trial court obviated any potential prejudice with its curative instruction.<sup>19</sup> 2RP 172. The jury is presumed to follow the court's instructions. State v. Brown, 132 Wn.2d 529, 618, 940 P.2d 546 (1997).

Finally, the jury would have reached the same result even if the deputy prosecutor had not made her ill-advised remarks in voir dire. There is nothing to show that the jury improperly considered the defendants' silence; i.e., that the comment on the defendants' right to silence affected the final outcome of the case. Indeed, two defendants testified at trial and claimed that the sexual intercourse was consensual as to all defendants. The jury considered — and

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<sup>19</sup> Additionally, the trial court instructed the jury both before testimony began and before deliberations commenced that, "[T]he lawyers' remarks, statements, and argument are intended to help you understand the evidence and apply the law. They are not evidence, however, and you should disregard any remarks, statements or arguments that are not supported by the evidence or by the law as the Court gives it to you." 9RP 26-27; 1CP 15; WPIC 1.02. The trial court further instructed the jury that none of the defendants were compelled to testify ". . . and the fact that any defendant has not testified cannot be used to infer guilt or prejudice him in any way." 1CP 21; WPIC 6.31.

rejected — this testimony. The error was thus harmless beyond a reasonable doubt.

**2. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN LIMITING CROSS-EXAMINATION OF H.W. AND BY EXCLUDING EVIDENCE THAT WAS marginally RELEVANT AT BEST.**

The defendants raise two related issues in connection with the trial court's ruling to exclude a remark made by H.W. at the hospital immediately after the rape. The ruling, they contend, violated their right to present a defense and their Sixth Amendment right to confront witnesses. Specifically, they argue that they should have been allowed to cross-examine H.W. on her response to Detective Kizzier concerning what she would like to see happen to the defendants. H.W. had replied, in part, "I don't want to tell you yeah send them to jail, but I just don't want to see them." 1RP 88-89. The defense argued that H.W.'s remark was atypical for a rape victim and suggested ambivalence, which could support their theory that she had consented to the sexual intercourse.

The defendants have failed to show a constitutional violation. The defense never offered any evidence as to what a typical rape victim would say, assuming that there is a "typical" rape victim. Further, in placing this limitation on cross-examination of H.W., the

trial court carefully considered the marginal relevance of the defense line of questioning and ruled, under ER 403, that it was out-weighted by the danger of unfair prejudice and the potential for distraction and admission of other inadmissible evidence. At the same time, the defendants had a full opportunity to present their theory of the case. Also, the court permitted the defendants to cross-examine H.W. extensively and to fully explore her credibility. The limitation was within the trial court's discretion.

a. Facts.

At the hospital, immediately after the rape, Detective Kizzier asked H.W. what she would like to see happen. 1RP 88-89. H.W. responded that she really did not know how the whole thing (the legal process) worked. She did not want to see the defendants or feel threatened in her apartment building; she certainly did not want to see them that night, but that she did not want to say, "[Y]eah, send them to jail." 1RP 88-89; 1CP 109. H.W. then reiterated that she "simply didn't want the defendants anywhere near her, particularly that next day/night." 1CP 109.

The State sought a pre-trial ruling to exclude as irrelevant and prejudicial H.W.'s remark, "I don't want to tell you yeah send them to jail, but I just don't want to see them." 1RP 88-89; 1CP

108-09. The defendants objected on the basis that H.W.'s statement could be viewed as ambivalence, as opposed to a lack of knowledge regarding how the criminal justice system works.

1RP 92. Counsel argued that H.W.'s remark could be reflective of her having consented to sexual intercourse with the four defendants and that because she consented, she did not want the defendants incarcerated. 1RP 92. The defendants claimed that if H.W. had, in fact, been raped, "She'd want them in jail for the rest of their lives." 1RP 95; 16RP 31.

The State argued that the statement was irrelevant and unfairly prejudicial in that the jurors might take H.W.'s words out of context and be reluctant to hold the defendants accountable if they believed that the victim did not want to pursue criminal prosecution. 1RP 93, 96. H.W.'s views regarding potential incarceration changed once the initial shock abated, and she had a few moments to reflect and to gain an understanding of the legal process. 1RP 96-99; 1CP 109. Indeed, during pretrial plea negotiations, H.W. told the prosecutor that she preferred to proceed to trial, face the defendants, testify and then be cross-examined by four defense attorneys in front of fourteen strangers plus the court and the court staff rather than simply let the defendants enter guilty pleas to a

reduced charge where they might potentially serve only six months in jail. 1RP 98-99.

After taking the issue under advisement for *three days*, the court ruled:

Okay, and I have thought a lot about this, because I understand the defense argument that her comments that night could be interpreted to show her ambivalence about what should happen to the defendants, and, by logical extension, her ambivalence about what has befallen her.

I really have considered that the State has a really good argument that, *by itself, the statement that the defense would want to elicit is misleading*, and in so far as - - because of the circumstances, but also it could create the impression that the complaining witness doesn't really have a stake or doesn't really care about what happens at this point, and that's, obviously, not true.

And when I imagine - - I've tried different scenarios in my mind about how could the State clarify the situation or rehabilitate the complaining witness about this, and every time I come up with a scenario *it ends up getting into information about possible punishment or about pre-trial plea negotiations or both, none of which should be considered by the jury.*

And so I just do not see how I can allow that statement to come in, given that I would - - in order to be fair, have to allow the State to rehabilitate the witness on this point, and I just can't see how it can be done, so far that reason I'm going to exclude the statement about not being sure if the defendants should go to jail that night.

4RP 96-97 (italics supplied).

Immediately before Detective Kizzier's testimony, Tarhan's counsel asked the court to reconsider and modify its ruling to permit *the detective* to testify as to H.W.'s remark at the hospital. 16RP 30-31. The trial court reiterated its reasons for not allowing cross-examination of H.W. on the remark. 16RP 31-32. The court said that, although it understood why the defense wanted to elicit this information, its initial concerns "remain a big concern for me." 16RP 32.

The court had further concerns that the remark might open the door to improper opinion testimony. 16RP 33-34. According to the State's offer of proof, Detective Kizzier asks every alleged victim what he or she would like to have happen because it assists him in "evaluating their credibility." 16RP 33-34. Detective Kizzier would have said that H.W.'s response helped him to determine that she was "credible and believable." 16RP 34. The court said that it did not want "to go down that road."<sup>20</sup> 16RP 34.

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<sup>20</sup> It would have been improper for the detective to express his personal opinion regarding H.W.'s credibility, but the court could have prohibited the prosecutor from asking the detective why he asked H.W. that particular question. It was nevertheless well within the trial court's discretion to simply exclude H.W.'s remark and thereby eliminate the possibility of any counsel opening the door to improper opinion testimony.

Finally, the court was mindful that not only had the State relied on its pre-trial ruling and that it would have altered its trial strategy had it known that the court would permit this testimony, but also that H.W. had completed her testimony. 16RP 36-41. The court reiterated that it would be unfair to allow the isolated remark, taken out of context, into evidence. 16RP 41. The court said that it would permit the defense to elicit from the detective evidence that H.W.'s primary concern at the hospital was not seeing the defendants, but "I'm just not comfortable revisiting the ruling as to the statement itself."<sup>21</sup> 16RP 39, 41.

b. The Trial Court Did Not Abuse Its Discretion In Excluding Minimally Relevant Evidence.

A defendant has a constitutional right to present a defense consisting of relevant evidence that is not otherwise inadmissible. State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992), review denied, 120 Wn.2d 1022 (1993), cert. denied, 508 U.S. 953 (1993). Limitations on the right to introduce evidence are not unconstitutional unless they affect fundamental principles of justice.

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<sup>21</sup> The defense declined the court's invitation to inquire of the detective whether H.W.'s main concern was not seeing the defendants. The defense only wanted to elicit that H.W. had remarked that she did not want to tell the detective to send the defendants to jail, not that H.W. had articulated other concerns, such as not seeing the defendants. See 16RP 39-41.

Montana v. Engelhoff, 518 U.S. 37, 116 S. Ct. 2013, 135 L. Ed. 2d 361 (1996) (stating that the "accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence" (quoting Taylor v. Illinois, 484 U.S. 400, 410, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988))).

The Sixth Amendment to the United States Constitution<sup>22</sup> and Const. art. I, § 22<sup>23</sup> grant criminal defendants the right to confront and cross-examine adverse witnesses. State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983), (citing Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974)). Courts should zealously guard this right and allow the defendant great latitude to expose a witness's bias, prejudice, or interest. State v. Kilgore, 107 Wn. App. 160, 184-85, 26 P.3d 308 (2001), aff'd on other grounds, 147 Wn.2d 288 (2002).

The scope of such cross-examination is nevertheless within the discretion of the trial court. Hudlow, 99 Wn.2d at 22. An appellate court will not reverse a trial court's ruling on the scope of

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<sup>22</sup> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

<sup>23</sup> "In criminal prosecutions the accused shall have the right to . . . meet the witnesses against him face to face."

cross-examination absent a manifest abuse of discretion; i.e., discretion that is manifestly unreasonable, or is exercised on untenable grounds or for untenable reasons. State v. McDaniel, 83 Wn. App. 179, 184-85, 920 P.2d 1218 (1996).

Under ER 401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Relevant evidence must be both material and probative. State v. Sheets, 128 Wn. App. 149, 155, 115 P.3d 1004 (2005) (citing State v. Clark, 78 Wn. App. 471, 477, 898 P.2d 854 (1995)), review denied, 156 Wn.2d 1014 (2006). Materiality requires a logical nexus between the evidence and the factual issue that the jury must resolve. State v. Harris, 97 Wn. App. 865, 869, 989 P.2d 553 (1999), review denied, 149 Wn.2d 3017 (2000). Relevant evidence is admissible unless, under ER 403, the probative value is substantially outweighed by the danger of unfair prejudice.<sup>24</sup> In addition to determining relevancy and weighing possible unfair prejudice, the trial court has an

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<sup>24</sup> ER 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

obligation to ensure that the jury will not be misled by the evidence. State v. Bernson, 40 Wn. App. 729, 737, 700 P.2d 758 (1985).

This Court reviews a trial court's exclusion of evidence for an abuse of discretion. State v. Posey, 161 Wn.2d 638, 648, 167 P.3d 560 (2007). The trial court's balancing of the danger of prejudice against the probative value of the evidence is a matter within the trial court's discretion, which the Court will overturn "only if no reasonable person could take the view adopted by the trial court." Posey, 161 Wn.2d at 648 (citing Hudlow, 99 Wn.2d at 17).

Additionally, this Court reviews a trial court's relevancy determinations for manifest abuse of discretion. State v. Gregory, 158 Wn.2d 759, 835, 147 P.3d 1201 (2006). A trial court, not an appellate court, is in the best position to evaluate the dynamics of a jury trial and, therefore, the prejudicial effect and relevancy of evidence. Posey, 161 Wn.2d at 648.

The trial court exercised its discretion properly in excluding H.W.'s comment. The court carefully considered the issue before ruling that any little probative value of the evidence was outweighed by the danger of unfair prejudice. See, e.g., Posey, 161 Wn.2d at 651 (Chambers, J., concurring) (in prosecution for raping a high school classmate, trial court did not err in finding that the prejudicial

effect of the proffered evidence — an e-mail by the victim saying that she might enjoy being raped — outweighed its probative value: "A review of the record reflects that the trial court gave great thought and consideration to its evidentiary ruling."). Significantly, H.W. made the remark in an interview that occurred during the stressful aftermath of the rape, and during a momentary break in a very invasive physical examination.<sup>25</sup> 10RP 143-49, 152; 15RP 60; 16RP 68-69. The court balanced the minimal relevance of the remark against the substantial likelihood that it would mislead the jury. 4RP 96-97. The court determined that the remark, in isolation, painted a skewed picture of H.W.'s view. 16RP 32.

With regard to consent, H.W.'s remark at the hospital was ambiguous at best. When the detective first interviewed H.W., she undoubtedly was overwhelmed by what had just occurred. See 11RP 58, 61. Most likely, H.W. was unconcerned *at that particular moment* with whether the defendants were jailed. Understandably, her primary concerns were whether she had contracted a sexually transmitted disease and that she would be safe returning to her apartment. 11RP 51; 15RP 43.

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<sup>25</sup> Notably, H.W. testified that she did not know what was happening when she spoke with the social worker at the hospital. 11RP 160.

Moreover, there is no logical or necessary nexus between H.W.'s statement and whether she consented to sexual intercourse. Even the defense said that the statement established H.W.'s "ambivalence," which in turn they argued, *could* support their theory of consent. 1RP 92, 94-95; 16RP 30-31, 38-39. The defense claimed that H.W. failed to act much like a rape victim. 1RP 94-95; 16RP 30-31, 38-39. Tarhan's counsel argued, "The key thing is that she didn't feel violated in the way we might expect. . . ." 16RP 38-39. According to the defense, unless a victim of rape says, "[A]bsolutely these men should go to jail for this," it reflects an ambivalence that is tantamount to consent. 16RP 38-39.

Yet, the defense failed to proffer any evidence as to the reaction of a "typical" rape victim — perhaps, because there is no typical rape victim. See Deborah A. Dwyer, *Expert Testimony on Rape Trauma Syndrome: An Argument For Limited Admissibility-State v. Black*, 109 Wash.2d 336, 745 P.2d (1987), 63 Wash. L. Rev. 1063, 1078-79 & n.102 (discussing the consensus among researchers that there is not a "typical" rape victim). A victim often blames herself; thus, the trial court was properly concerned that H.W.'s comment could mislead the jury. See id. at 1066, 1081 & n.112 (victim's calm demeanor may appear unreasonable to jurors).

Because there is no "normal" reaction to rape, the trial court exercised its discretion properly and excluded the remark. See id. at 1085 (noting the unfortunate reality that assumptions about "normal" reactions to rape still prevail).

Absent an offer of proof that would have provided the missing logical nexus, the trial court's exclusion of the evidence was a proper exercise of its discretion. See ER 103(a)(2); State v. Ray, 116 Wn.2d 531, 538, 806 P.2d 1220 (1991) (one of the purposes of an offer of proof is to inform the trial court of the legal theory underlying the admissibility of the evidence). This Court can affirm on any basis apparent in the record, even if the trial court did not consider it. See, e.g., State v. Sondergaard, 86 Wn. App. 656, 657-68, 938 P.2d 351 (1997).

In addition, the court rejected the evidence because it had the potential to sidetrack the jury, raising issues about the pre-trial plea negotiations and possible punishment — of which neither would be appropriate considerations for the jury. 1RP 88-93, 97-99; 4RP 96-97; 16RP 32. This, too, was a proper basis upon which to exclude the evidence. ER 403.

Finally, the court refused to reconsider late in the trial because reconsideration would have been "particularly prejudicial

to the State." 16RP 39. The prejudice was especially acute because H.W. had already testified and had been excused by the court, without objection.<sup>26</sup> 13RP 31; 16RP 39-40. The court's ruling was not an abuse of its considerable discretion.

Moreover, the ruling did not preclude the defense from presenting its theory of the case. In his opening statement, Bideratan's counsel characterized the event from his client's perspective as H.W. "enjoying sexual relations" with the defendants. 9RP 47. "There was no yelling and screaming, no protesting, no saying no, nothing shown by [H.W.] that she was not enjoying what was going on." 9RP 47-48. "[H.W.] willingly participated." 9RP 48. The defense predicted that, "We believe the evidence is going to clearly show that [H.W.] welcomed the attention of these men, invited them, and for reasons best known to herself is now suffering a remorse for *allowing herself to engage in this type of activity.*" 9RP 49 (italics added).

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<sup>26</sup> Even though it would have been the State that recalled H.W. to explain what, if anything, she meant by her remark, this may well have been an attempt by the defense to subject H.W. to yet a fifth day on the witness stand. See, e.g., 16RP 40 (Beskurt's counsel expressed his frustration that the court would not permit the defense to inquire of the detective "because it might inconvenience [H.W.] from coming back later on in recall.").

Taner Tarhan's counsel attacked H.W.'s credibility during his opening statement. He predicted that "[H.W.'s] going to give you a story about what happened on June 3rd, 2007." 9RP 50. He referred to it as a "shifting story," and he then proclaimed that "the Defense is going to have an opportunity to tell you *what really happened.*" 9RP 51, 53 (italics supplied).

In addition to determinedly cross-examining H.W. to try and establish that the sexual intercourse was consensual, Bideratan and Turgut Tarhan testified that H.W. was a willing participant. See, e.g., 11RP 118-19, 130; 12RP 20-21, 32-34, 80-81; 19RP 63-69, 97, 108-09; 20RP 23; 21RP 47, 57, 62-80. Tarhan testified that H.W. seemed to be "enjoying herself." 19RP 65, 76.

To support their theory of consent, the defense called a witness who encountered H.W. and the defendants in the elevator upon their return from the trip to the grocery store. See 12RP 20-23; 16RP 191-96. The witness, John Boggio, lived in the same apartment complex and he knew H.W. casually, from passing one another in the hallway. 16RP 192. He did not know any of the defendants. 16RP 193. However, Boggio recognized Beskurt as the man who had his arm around H.W. when he (Boggio) got into

the elevator. 16RP 195. Boggio said that H.W. did not appear uncomfortable by Beskurt's casual physical contact.<sup>27</sup> 16RP 195.

In addition, the defense called Beskurt's neighbor, Mark Zealor, who was home on the night of the incident. 19RP 12, 16-17, 21. At no time did Zealor hear any screams from the adjacent apartment or any other sounds consistent with a cry for help. 19RP 21.

In closing, the defense repeated its theory of the case. One of Beskurt's counsel's two themes was that this was a case of "drunken regret." 22RP 58-59. Taner's counsel argued that the jury should consider H.W.'s level of intoxication for credibility purposes, but he claimed that H.W. had not had so much to drink that she was "incapable of giving her consent." 22RP 113. Bideratan's counsel said that he agreed with the other lawyers: "[H.W.'s] tears are embarrassment and shame" resulting from the "choice" that H.W. made that night. 22RP 88; 23RP 8.

In addition to presenting and arguing the defense theory of the case, counsel vigorously cross-examined H.W. "[T]he

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<sup>27</sup> Later, Boggio acknowledged the possibility that one of the other co-defendants (perhaps Taner — although Boggio stated that he could not tell Taner apart from Turgut) had his arm around H.W. 17RP 5. H.W. denied that Taner had put his arm around her in the elevator. 12RP 20-23.

Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." Delaware v. Fensterer, 474 U.S. 15, 20, 106 S. Ct. 292, 88 L. Ed. 2d 15 (1985). The trial court gave counsel wide latitude in cross-examining H.W. to expose any bias, prejudice or interest. See United States v. Beardslee, 197 F.3d 378, 383 (9<sup>th</sup> Cir. 1999) (one consideration in determining whether a defendant's Confrontation Clause right to cross-examination was violated is whether the exclusion of evidence left the jury with sufficient information to assess the credibility of the witness). However, a court is well within its discretion to reject lines of questions where the evidence is vague or merely speculative or argumentative. State v. Jones, 67 Wn.2d 506, 512, 408 P.2d 247 (1965); Kilgore, 107 Wn. App. at 184-85. Similarly, a court may limit reasonably a criminal defendant's right to cross-examine a witness based on concerns about, among other things, confusion of the issues or interrogation that is only marginally relevant. Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986).

As argued extensively above, the inference that the defense wanted the jury to draw from H.W.'s remark was speculative, argumentative, tended to confuse the issues, would lead to extraneous inquiries, and had only marginal relevance. Accordingly, the trial court's decision to place this one limitation on the defense was not an abuse of the court's discretion.

Bideratan relies on Holley v. Yarborough, 568 F.3d 1091 (9<sup>th</sup> Cir. 2009), a case that is easily distinguished. Holley was charged with multiple counts of child molestation, lewd and lascivious conduct and indecent exposure, among other crimes. Id. at 1096. Holley wanted to impeach the 11-year-old victim by presenting testimony of two neighborhood children that the victim had told them several things. First, she said that she had done "weird stuff" in a closet with her boyfriend, a term that the victim had used to describe what Holley had done to her. Second, she said that a neighborhood boy had wanted to "hump her brains out." Third, she stated that her 10-year-old brother had wanted to have sex with her. Id. at 1096-97. The trial court excluded any references to sex or sexual conduct by others. Id. at 1097. The Ninth Circuit Court of Appeals held that the trial court had erred by excluding prior claims by the victim of her own sexual appeal and

evidence that Holley could use to rebut the prosecutor's argument. The prosecutor claimed that a little girl like the victim would not fabricate things of a sexual nature. Id. at 1099. Holley was thus deprived of his right to allow the jury to evaluate the credibility of the victim's allegations. Id. The court emphasized that the trial court's decision to *completely limit* the victim's cross-examination was both unreasonable and disproportionate. Id.

By contrast, the trial court in this case both reasonably and proportionately limited the cross-examination of H.W. and Detective Kizzier. The trial court stated that it would permit the defense to establish through its cross-examination of Detective Kizzier that H.W.'s main concern was not seeing the defendants. 16RP 40. The defense could have argued any *reasonable inference* from that evidence. Further, unlike Holley, where the defense was denied critical, relevant, impeachment evidence, the excluded evidence in this case — one isolated remark — had very little probative value. The trial court was properly concerned that the remark could mislead the jury because it implied that H.W. did not "really have a stake or doesn't really care about what happens at this point and that's, obviously, not true." 4RP 96-97.

Tarhan claims that the State did not have a compelling reason to ask the court to exclude H.W.'s remark. That is incorrect. The State sought to keep out misleading, and thus prejudicial, information. "The State's interest under *Hudlow* is to preclude evidence that may interfere with the fairness of the trial." State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002) (citing Hudlow, 99 Wn.2d at 15-16). The trial court too was concerned about fairness. The court said that, "I just don't see how I can allow that statement to come in, given that I would -- *in order to be fair*, have to allow the State to rehabilitate the witness on this point, and I just can't see how it can be done. . . ." 4RP 97 (italics added). The court also recognized the unfairness of reconsidering its ruling after the State had relied on its original order *in limine*. 16RP 39-40.

Tarhan contends that H.W.'s state of mind was relevant irrespective of her understanding of the defendants' potential punishment. Tarhan claims that, "Whether [H.W.'s] understanding of the potential punishment faced by the defendants was accurate at the time she made the statement is irrelevant because the statement was *not* being offered to prove her state of mind, not the truth of the matter asserted." Br. of Tarhan at 20 (italics added). Presumably, the word "not" was included erroneously. In any

event, Tarhan is mistaken. A declarant's then existing state of mind is an exception to the general prohibition on hearsay, which means that the statement *is* offered for the truth of the matter asserted. ER 801(c); ER 803(a)(3). Thus, what H.W. understood at the time of the remark is contextually significant.<sup>28</sup> Nevertheless, the trial court may exclude the evidence pursuant to ER 403, as it did here.

c. Any Error Was Harmless Beyond A Reasonable Doubt.

The defendants have failed to show any constitutional violation. However, even if this Court finds that the trial court abused its discretion, any error was harmless.

Confrontation Clause violations are subject to harmless error analysis. State v. Watt, 160 Wn.2d 626, 634-35, 160 P.3d 640 (2007). As stated above, a constitutional error is harmless if the reviewing court is convinced beyond a reasonable doubt that the same result would have been reached in the absence of the error. Deal, 128 Wn.2d at 703. Given the extent of cross-examination permitted, and the overall strength of the prosecution's case, any error was harmless beyond a reasonable doubt. See Van Arsdall,

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<sup>28</sup> Tarhan may have meant to argue both below and on appeal that the remark constitutes circumstantial evidence of H.W.'s then current state of mind, in which case the evidence would not be "hearsay." See 5B K. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 803.10 (4<sup>th</sup> ed. 1999).

475 U.S. at 684 (list of non-exclusive factors to consider when determining whether a Confrontation Clause error is harmless).

The trial court permitted extensive cross-examination. 11RP 99-130, 132-65; 12RP 7-53, 54-86; 13RP 6-15, 26-30. The defense had a full opportunity to explore H.W.'s credibility, perception of the event and "ambivalence." For example, counsel cross-examined H.W. on her alcohol consumption and whether it may have affected her memory. See, e.g., 11RP 34. Counsel then argued in closing that H.W.'s testimony was suspect because the alcohol had impaired her memory of the event. See 22RP 60-62.

The defense fully explored any "ambivalence" that H.W. may have experienced after the assault. The defense established that it was Caroline Concepcion, not H.W., who first referred to the incident as "rape." 18RP 48, 150-51. Likewise, it was Concepcion who called the police.<sup>29</sup> 10RP 134-36; 18RP 48, 151. Counsel argued that this ambivalence showed that H.W. regretted her "choice." See, e.g., 22RP 87-89, 105, 115-16, 142-43.

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<sup>29</sup> The defense had intimated through this line of questioning that H.W. must not have been raped otherwise she would have immediately wanted to call the police. However, as H.W. explained, calling the police was not her first thought: "I really didn't think of it at first. I didn't -- my thought was just to get out of the apartment." 11RP 130.

Finally, the State's case was extremely strong. Witnesses who saw H.W. immediately after the rape, described her as "traumatized, scared, shaking, very withdrawn"; "in a fetal position, rocking"; "overwhelmed"; "curled up and just beating on Caroline [Concepcion]"; "very scared and traumatized"; "she seemed in shock." 9RP 85-86, 132; 11RP 58, 61; 14RP 45; 16RP 23; 18RP 42. One of the *defense* witnesses described seeing H.W. after the incident: "She definitely had traits of someone who had gone through something traumatic." 17RP 9.

Any error in excluding one remark by H.W. was harmless beyond a reasonable doubt.

### **3. THE PROSECUTOR DID NOT COMMIT MISCONDUCT IN CLOSING ARGUMENT.**

The defendants claim that their convictions must be reversed because of prosecutorial misconduct. Specifically, Beskurt and Bideratan contend the prosecutor committed misconduct by arguing that consent was the only available defense. Beskurt, Bideratan and Tarhan also contend that the prosecutor committed misconduct by (1) disparaging defense counsel, (2) appealing to the jury's sympathy, and (3) commenting on the defendants' right to confront

their accuser. Finally, Beskurt claims that the prosecutor used the Rape Shield Statute as "both a shield and a sword."

These arguments fail. A prosecutor is permitted to argue that the defendant's testimony was tailored to comport with the evidence. In addition, the defendants provoked many of the State's arguments with their own closing arguments and then, by failing to object to all but one of the challenged remarks that they now assert were misconduct, the defendants waived any claim of error. Moreover, to the extent that any of the prosecutor's arguments were improper, any error was harmless.

To establish prosecutorial misconduct, the defendant must show that the prosecutor's conduct was both improper and prejudicial. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). Prejudice is established only if the defendant demonstrates a substantial likelihood that the misconduct affected the jury's verdict. Id. at 52. The impropriety and prejudicial impact of a prosecutor's remarks "must be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." Brown, 132 Wn.2d at 561.

Absent an objection to the comments during the trial, a request for a curative instruction, or a motion for mistrial, the issue of prosecutorial misconduct cannot be raised for the first time on appeal unless the misconduct was so flagrant and ill-intentioned that the prejudice could not be obviated by a curative instruction. State v. Ziegler, 114 Wn.2d 533, 540, 789 P.2d 79 (1990).

The absence of a motion for mistrial at the time of the argument strongly suggests to a court that the argument or event in question did not appear critically prejudicial . . . in the context of the trial. Moreover, counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for a new trial or on appeal.

State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990) (internal quotations omitted). Even if a prosecutor's remarks "touch on" a constitutional right, the failure to object to such comments constitutes a waiver of review. State v. Klok, 99 Wn. App. 81, 992 P.2d 1039 (2000).

When a defendant objects or moves for mistrial based on alleged prosecutorial misconduct, this Court defers to the trial court's ruling, and it will not be disturbed absent an abuse of discretion. State v. Stenson, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). "The trial court is in the

best position to most effectively determine if prosecutorial misconduct prejudiced a defendant's right to a fair trial." State v. Lord, 117 Wn.2d 829, 887, 822 P.2d 177 (1991), cert. denied, 506 U.S. 856 (1992).

Moreover, a prosecutor's remarks are not grounds for reversal, even if otherwise improper, if they were invited or provoked by defense counsel and were pertinent to reply to his arguments. State v. Carver, 122 Wn. App. 300, 306, 93 P.3d 947 (2004); State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994) (prosecutor's remarks not improper if provoked by defense counsel and are in reply to his acts and statements), cert. denied, 514 U.S. 1129 (1995). The prosecutor, as an advocate, is entitled to make a fair response to defense counsel's arguments. Id. at 87; see also United States v. Nanez, 694 F.2d 405, 410 (5<sup>th</sup> Cir. 1982) (where defense counsel in closing argument attacks the prosecutor or her witnesses, the prosecutor, as an advocate, is entitled to make a fair response in rebuttal).

a. The Prosecutor Properly Argued That The Defendant Manufactured An Exculpatory Story.

i. Facts.

Bideratan's DNA was found in swabs taken from H.W.'s vagina, anus and mouth.<sup>30</sup> 13RP 68-70, 95-97. In closing argument, the deputy prosecutor contended that, based on the presence of his DNA, Bideratan's only defense was consent. The prosecutor argued that,

In addition to [H.W.'s testimony] you have DNA. Mr. Bideratan made a big mistake that night, because his DNA was found in [H.W.'s] mouth, it was found in her vagina, and it was found where it, apparently, leaked down by her anus, and the fact that that DNA was there prevented Mr. Bideratan or any of the other defendants from getting up here and saying, "Never happened, don't know what she's talking about, we never had sex."

MR. SAVAGE. Your Honor, I object, the suggestion that such a thing would've happened is entirely improper.

THE COURT: Could you move on, Counsel.

PROSECUTOR: What that DNA forced Mr. Bideratan to do - -

MR. SAVAGE: Objection, Your Honor, didn't force him to do anything.

THE COURT: Sustained.

PROSECUTOR: Ladies and gentlemen, if that DNA had not been there, I would suggest to you that

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<sup>30</sup> Bideratan's DNA was in the semen present in H.W.'s vagina and in the anal swab; he was a "possible contributor" to the semen present on the oral swab. 13RP 96-97.

it would've been a lot easier to say no sex had happened, but there was DNA in her mouth, there was DNA in her vagina, and so the only way out of this - -

MR. SAVAGE: Objection, Your Honor, I'd like to have a sidebar.

MR. MCFARLAND: I join in this.<sup>31</sup>

After a bench conference, the court sustained the objection and then permitted the State to proceed with its argument.

PROSECUTOR: Thank you, Your Honor. Ladies and gentlemen, before our break we were talking about all the different reasons you had to believe [H.W.], and one of those reasons is that Mr. Bideratan's DNA was found in [H.W.'s] mouth and in her vagina, and with that, the only available defense is that this was consensual.

MR. SAVAGE: Objection, Your Honor.

THE COURT: Overruled, based on our earlier discussion.

MR. SAVAGE: Very well, Your Honor.

PROSECUTOR: The only available defense was that this was consensual, and [H.W.] told you - -

THE COURT: Overruled for the same reasons.

PROSECUTOR: And [H.W.] told you that it was not. Now, in addition to the DNA, to the vaginal lacerations, to what everybody saw H.W. acting like

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<sup>31</sup> Mr. McFarland was counsel for Turgut Tarhan.

that night, after the defendants were done with her,  
you also have the defendants themselves.

22RP 38-40.

After the State completed its argument, the court asked  
Mr. Savage to memorialize the sidebar.

MR. SAVAGE: Not only the leading up to the sidebar, but subsequent thereto, I objected to the prosecutor's argument that but for the DNA, Mr. Bideratan would have taken the stand and perjured himself in some other direction, and but for with (*sic*) the DNA, Mr. Bideratan had no other defense except to say it was consensual.

The latter just simply isn't true. Mr. Bideratan always has the defense of just sitting here and doing nothing at all, he doesn't have to testify, so an additional problem with the Prosecutor's problem (*sic*) is it's a backhanded way of commenting on the defendant's right not to testify, the emphasis being, well, he was forced to get up here because the DNA, so he had to get up and lie to cover himself.

He didn't have to do that, he didn't have to testify at all, and to suggest that he would've perjured himself in some other direction but for the DNA, is entirely improper, by suggesting that he would've been testifying before you but lying in some other way, and certainly the implication that he would've lied, absent the DNA, can't be said to be acceptable on the theory that he is tailoring his defense to meet the evidence, and I think that a curative instruction would not have solved the problem, and I move for a mistrial, and I so move again.

22RP 52-53. Tarhan's counsel added that the court had declined his request for a curative instruction.<sup>32</sup> 22RP 54. Each counsel joined in the motion for mistrial. 22RP 53-54.

The State replied that it may properly argue that a defendant has tailored his testimony. 22RP 54-55. The State did not intend for its argument to suggest that Mr. Bideratan had perjured himself, although given the two opposing theories of the case, the prosecutor commented that "it was not a secret to anyone" that the State's position was that Mr. Bideratan's testimony was "far from the truth." 22RP 55. Further, during the sidebar, the State understood "the court was convinced that it was a proper argument, and where there's a proper argument, there is no need for a curative instruction." 22RP 56.

The trial court ruled as follows:

And what I ruled, just to make sure the record is clear, is I sustained Mr. Savage's objections, including his final one - - and I did that, and I should say his final one before the sidebar - - and I sustained that one, in part, because it - - the Prosecutor's comments fell on the heels of the other comments, where I had just sustained objections, and that was

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<sup>32</sup> It does not appear that Tarhan's counsel proposed language for a curative instruction, even after the court expressed that, assuming such an instruction was justified, it was "unable to come up with one that . . . would be fair to the parties and would not unduly highlight the Prosecutor's argument on this point." 22RP 56.

because it seemed to me that although the State is completely allowed to argue that the defendants are tailoring their testimony, that the argument went a little further than that, and it seemed to me that it was proper to not go in that direction any longer.

I thought about a curative instruction, but I was unable to come up with one that I thought would be fair to the parties and would not unduly highlight the . Prosecutor's argument on this point, and I, frankly, was not persuaded that *if there was improper argument*, it was serious enough to justify a curative instruction.

The State did come out and use the phrase that consent was the only available defense, and while it is true that simply holding the State to its burden is construed as a defense by lawyers, I think to lay people a defense is usually more of an affirmative kind of position, which certainly consent is in this context. So I did not think that the argument justified a curative instruction, and certainly I could not come up with one that I thought would work, and I do not think a mistrial is appropriate here, so I will deny the motion for a mistrial.

22RP 56-57 (italics supplied).

ii. Argument.

When a defendant takes the stand, "his credibility may be impeached and his testimony assailed like that of any other witness." Portuondo v. Agard, 529 U.S. 61, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000) (quoting Brown v. United States, 356 U.S. 148, 154, 78 S. Ct. 622, 2 L. Ed. 2d 589 (1958)). A defendant is not insulated "from suspicion of manufacturing an exculpatory story consistent with the available facts." State v. Smith, 82 Wn. App.

327, 335, 917 P.2d 1108 (1996), review denied, 130 Wn.2d 1023 (1997), overruling on Sixth Amendment grounds recognized by State v. Miller, 110 Wn. App. 283, 284-85, 40 P.3d 692, review denied, 147 Wn.2d 1011 (2002). Provided that the argument focuses on the evidence and not on the constitutional right to be present at trial and to confront witnesses against him, such argument is proper. Miller, 110 Wn. App. at 284.

In Smith, the prosecutor suggested during his cross-examination of the defendant that he had constructed his version of the incident to fit the crime scene photographs. Id. at 334. This Court held that it was permissible for the prosecutor to argue that a defendant had tailored his testimony to conform to the trial evidence. Id. at 335; see also Miller, 110 Wn. App. at 284-85 (prosecutor's argument that defendant had the opportunity to tailor his testimony to the evidence not improper).

Similarly, in this case, the prosecutor merely pointed out that Bideratan had to explain the presence of his DNA in H.W.'s mouth, vagina and anus. Bideratan could not deny that he had engaged in sexual intercourse with H.W. Certainly, Bideratan could have chosen not to testify and simply put the State to its burden of

proving that he committed a rape.<sup>33</sup> But because he chose to testify, he was not insulated from the accusation that he manufactured an exculpatory story — consent. See Smith, 82 Wn. App. at 335.

Here, the trial court did not find that the comments were improper; it said that *if* there had been an improper argument, it did not warrant a curative instruction, much less mistrial. 22RP 56-57. That was why the court permitted the State to finish its argument after the sidebar. See 22RP 38-40. The trial court did not abuse its discretion in denying a mistrial because the prosecutor's remarks were not improper. See Smith, 82 Wn. App. at 335.

Assuming the remarks were improper, Beskurt and Bideratan have not established that they were prejudiced by them. Although the prosecutor inadvertently stated that because the DNA was found, it prevented Mr. Bideratan or *any of the other defendants* from denying that sexual intercourse had occurred, it was clear, in context, that her remarks were intended to cast suspicion on Bideratan's exculpatory story. The misstatement did

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<sup>33</sup> In fact, Taner Tarhan's counsel did just that. He urged the jury to blame him and not his client for his client's constitutionally protected choice to not testify. 22RP 122. He argued for acquittal based on the State's "lack of evidence," and its failure to meet its burden of proof. 22RP 122-23.

not create a substantial likelihood that the jury's verdict was affected.

Bideratan contends the remarks engendered prejudice by inviting the jury to conclude that "the defendants were guilty by virtue of presenting a defense." Br. of Bideratan at 34. That is incorrect. The prosecutor invited the jury to conclude that the defendants were guilty by virtue of presenting a defense *that was contrary to all of the other evidence*. See, e.g., 22RP 45-47 (argument about whether, relative to all of the evidence, the defendants' story made sense). It is not improper for a prosecutor to argue that the evidence does not support the defendant's theory. Russell, 125 Wn.2d at 87.

Moreover, Bideratan's counsel addressed the remarks head-on:

Does [Bideratan] have a reason to lie? Of course he does. Any defendant charged with any crime has a reason to lie . . . but according to the prosecuting attorney's logic, if the defendant has a reason to lie, that means he does lie, and, therefore, let's go from accusation directly to prison, because no matter what he has to say, it's not to be believed. Truth comes only from the mouths of the State's witnesses, so why worry about trials. Let's get rid of these things and get these guys in jail and let them do their time, their years or whatever it is, don't pay any attention to what they have to say, because they can't be believed anyway. That's the theory.

23RP 5-6. The fact that Bideratan's counsel made similar remarks "weakens the claim the remarks of the prosecutor were prejudicial and resulted in denial of a fair trial." See Brown, 132 Wn.2d at 563-64.

Additionally, the trial court instructed the jury it was not to consider counsels' remarks, statements and arguments as evidence, and that remarks, statements or arguments not supported by the evidence must be disregarded. 1CP 15; WPIC 1.02. The jury was also instructed that it had to "decide the case of each defendant separately." 1CP 39; WPIC 3.02. The jury is presumed to have followed the court's instructions. See Brown, 132 Wn.2d at 618. There is nothing in this case to forestall that presumption. The Court should reject this claim.

b. The Prosecutor's Remarks Were Invited,  
Provoked Or A Pertinent Reply.

None of the remaining instances of alleged misconduct that the defendants raise on appeal were objected to at trial. Thus, the defendants have waived appellate review of the following claims, unless the conduct was flagrant and ill-intentioned. See Ziegler, 114 Wn.2d at 540.

Beskurt, Bideratan and Tarhan claim that the prosecutor disparaged defense counsel. Also, Beskurt and Bideratan contend that the prosecutor improperly appealed to the juror's sympathy.<sup>34</sup> This Court should reject these claims. The defendants' closing arguments were themselves provocative and disparaging to the State. The State's response was a pertinent reply to defense counsels' acts and statements. Accordingly, there was no misconduct.

i. Facts.

a) Direct.

Early in Turgut Tarhan's testimony, his attorney had him point to his mother, father and girlfriend. 21RP 20, 26. Tarhan's sister was not present in court that day; however, counsel asked Tarhan whether she was the woman with the "young baby" who had been present "throughout a good part of the trial." 21RP 26.

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<sup>34</sup> In conclusory fashion, Bideratan states, "And, it was an improper call for the jury to sympathize with [H.W.]." Br. of Bideratan at 20. However, Bideratan fails to cite to any portion of the prosecutor's argument in support of his claim. Thus, without knowing the specific remarks about which he now claims error, the State cannot respond to his contention. See RAP 10.3(a)(6) (requires parties to provide "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record"); State v. Cox, 109 Wn. App. 937, 943, 38 P.3d 371 (2002) (defendant could not pursue an appeal on a claim for which he failed to provide more than a single sentence in his brief, and that without legal authority. The Court said, "We are not required to construct an argument on behalf of appellants."). Similarly, the State should not be required to construct Bideratan's argument on this claim.

Tarhan confirmed that his sister had attended most of the trial.

21RP 26.

b) Cross-Examination.

As stated above, counsels' respective cross-examinations of H.W. were vigorous. Bideratan's counsel was, perhaps, the most tenacious. For instance, with regard to the inconsistency between H.W.'s testimony (she did not scream during the rape) and her statement to the social worker at Harborview hospital (she screamed once), Bideratan's counsel inquired:

Q. You did not scream?

A. I didn't.

Counsel asked H.W. to refresh her recollection by reviewing the social worker's report.

Q. Have you finished?

A. Yes.

Q. Now, does that not say that you freaked out and started screaming?

A. It does.

Q. All right. Well, now we're left with one of two choices, I guess. *Either you did scream and you've misled the jury, or - -*

A. I wasn't screaming, sir.

Q. *- - or you lied to [the social worker]. Which is it?*

PROSECUTOR: Objection, Your Honor, those are not the only two choices.

THE COURT: Could you rephrase, Mr. Savage?

Q. Well, which is the truth, you did scream or you didn't scream?

A. I didn't scream, sir.

Q. Then why did you tell [the social worker] you did?

A. I'm unsure why I said that at the time.

Q. Well, now, [H.W.], that won't do.

A. I don't have a better answer for you, sir, I really don't.

Q. You're in the intake room, you're trying to recite a truthful event, and you're telling the intake nurse you screamed.

Now, why did you say that if you didn't?

The prosecutor objected, "Your Honor, she has answered this question."

THE COURT: I'll allow this one question, and no more on the subject. You may answer.

A. I don't have a good answer for you. I don't know why I said that at the time. I did not scream.

Q. *Could you have said it in order to make yourself appear to be more of a victim?*

11RP 158-60 (italics added).

H.W. struggled to explain how each man had degraded her by slapping her across the face with his penis:

Q. Well, do I understand you to say that these men, all of them or some of them, slapped you in the face with their penis?

A. Yes, they were.

Q. Where were they standing when they did this, because you were lying flat on your back, on the couch?

A. Correct. They were standing over me and kneeling down.

Q. And taking their penis and slapping you back and forth across the face with it?

A. No, it was - -

Q. *Is that another question you don't have an answer to?*

11RP 164 (italics supplied).

c) Defendants' closing.

Counsel acknowledged that their respective cross-examinations had been pointed.<sup>35</sup> Beskurt's counsel addressed H.W.'s "growing certainty" with regard to the number of defendants who had accompanied her and Concepcion to the store. He said that H.W. had "picked this story and *was tired of being attacked.*" 22RP 71. On the same subject — H.W.'s growing certainty — counsel argued that, "[H.W.] forgot an awful lot, but she kind of *got her strength back over the weekend*, when she came back she knew what she was certain of and things that she hadn't been

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<sup>35</sup> After one pointed exchange, H.W. said, "Sir, I think I need a minute, please." 12RP 87. The court asked, "Do you need a break, ma'am?" H.W. replied, "I do. I'm sorry." 12RP 87.

certain of she was now certain of. *She got her strength back.*"

22RP 99. He described a portion of cross-examination on Concepcion as "*torturous.*" 22RP 70. Counsel conceded that, "*We pushed [H.W.] in cross-examination.*" 22RP 100. Taner Tarhan's counsel said that "*it was like pulling teeth*" to get information from H.W. about how many beers she had consumed. 22RP 113. Counsel stated, "The defense lawyers just seemed *like they had to fight for that.*" 22RP 109.

Counsel attacked the victim in closing. Even though the trial court had ruled that information concerning the intimate nature of H.W.'s relationship with Spencer Crilly could come in for the limited purposes of showing any bias that Crilly had and to offer an alternative explanation for the vaginal lacerations that H.W. had post-rape, defense counsel used the information to excoriate H.W.<sup>36</sup> See 4RP 16-21, 31-39, 70 (court rules on the permissible scope of inquiry). In arguing that H.W. was either a "rape victim or

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<sup>36</sup> After counsels' repeated violations of the trial court's ruling, see, e.g., 14RP 68-71, 102-04, the prosecutor objected. The court said that it had been "waiting for an objection." 14RP 124. The court reiterated that it did not "allow this evidence to come in for the purpose of developing whether or not [H.W.] is lying about the nature of her relationship with these two men. That's exactly the purpose the Rape Shield Law [is there] for, is to not have to put alleged victims through having their sexual history be put on trial." 14RP 125. Moreover, the court understood that the information adduced by the State was a preemptive elicitation of only the information that the court had ruled would be proper cross-examination. 14RP 124.

a loose woman," Beskurt's counsel harped about the timing of H.W.'s relationship with Crilly relative to when H.W. stopped seeing her previous boyfriend, Zach Morris:

So what is it that [H.W.] wants you to believe? [H.W.] wants you to believe that her relationship with Spencer came after her relationship with Zach, and that she's a monogamous person. Who she slept with, when her relationship started, none of that matters at all, ladies and gentlemen, *and it certainly doesn't suggest, either, that she's more likely to consent, or that she's more likely to be raped, that is not the point at all.*<sup>37</sup>

*But Ms. Keating wanted you to know that she was a good girl, so she asked her the questions about whether or not she had overlapping relationships.*

22RP 94-95 (italics added). He reiterated that H.W. had lied about whether the relationships overlapped because, "[H.W.] didn't want you to think badly of her." 22RP 95-96. Bideratan's counsel said that H.W. was "*no Rebecca of Sunnybrook Farm.*" 23RP 8. He then referred to H.W.'s degradation at having been slapped across the face with a penis as "just kind of silly." 23RP 10-11.

Beskurt's counsel argued that H.W.'s emotional response to cross-examination was contrived:

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<sup>37</sup> See also 22RP 60-61 for a similar argument (counsel argued that H.W. had been drinking and that she had dressed in a "particular way," and he mentioned her "provocative behavior," but he then assured the jury that these facts did not mean that H.W. "deserved what she got."); see also 22RP 132 ("none of us are suggesting that she deserved this. . .").

It was unfortunate, of course, to have somebody come into court and cry and show the emotions she did, but go back and look at your own notes, if you wrote down when she was crying, and I think what you'll see is this interesting correlation between crying and not really having an answer to the question.

22RP 99-100. And on several occasions, he remarked that H.W.'s credibility was at issue. See 22RP 80 ("[I]s [H.W.] credible when she tells us what happened?"); see also 22RP 73 ("the only way to answer that is to evaluate the credibility of [H.W.]"); 22RP 82 ([H.W.'s] credibility is certainly called into question. . . ."); 22RP 59 (H.W. not credible because her memory "waxes and wanes.").

Counsel attacked the prosecutor in closing argument.

Beskurt's counsel referred to the prosecutor's closing argument as an emotional speech. 22RP 98. Turgut Tarhan's counsel argued,

This is not a case about [H.W.], and *I think the prosecutor gave a very dramatic performance to you about what a horrible rape can be*, but I really don't think she spent much time discussing the evidence.

. . . .  
*I ask you to listen critically to what [the prosecutor] said so far today, and I would submit that it was, in large part, a lot of emotion, a lot of hyperbole, and not a lot of the facts. . . .*

22RP 131-32 (italics added).

Bideratan's counsel's closing argument began:

This is the last time I will have a chance to talk to you on behalf of Samet Bideratan, and after I get

through, the *Prosecuting Attorney gets to get up and tell you everything that's wrong with what I've had to say, and I've got to sit there and smile and take it*, I don't get another go around, and *the Prosecuting Attorney's Office has a habit of saving two or three what they think of as real zingers to bring before you*, because they know we can't get up and answer. . . .

23RP 3 (italics added).

Turgut Tarhan's counsel discussed the burden of proof:

Now, many of you are parents. *What would you demand if it were one of your children that was on trial for this or another serious crime, what proof would you demand the State bring in in order for your son or daughter to be convicted?* And I think that's a way to give you sort of a gut feeling of what is required in proof beyond a reasonable doubt, because you can look at my client, and you know he has a family, they've been pointed out to you, and he may not be a perfect person, he may not be a perfect son, he may not be, certainly on June of last year, a perfect boyfriend, but he is not a rapist, and the evidence has not overcome that presumption of innocence, which he deserves.

22RP 130-31 (italics supplied).

d) The State's rebuttal.

The prosecutor began her rebuttal with the legal aphorism:

There's a saying in the courthouse, when you have the facts on your side, pound the facts, when you have the law on your side, pound the law, and when you don't have either one, pound the victim, and ladies and gentlemen, yesterday afternoon and this

morning, that is exactly what you have seen happen.<sup>38</sup>

23RP 12.

She addressed the innuendo that somehow H.W. had this coming:

And while [Beskurt's counsel], at least for his part, tried to convince you to the contrary, that *the point of some of the questions asked of [H.W.] and her friends, some of which, quite frankly, bordered on the offensive, was simply to show you that [H.W.] was lying.* I think that when you look back over those questions, the many questions asked of [H.W.], you will agree that the purpose has been, or at least in part, to suggest or plant the seed *that [H.W.] had this coming.* They then go on to describe her flirtatious behavior defense is essentially arguing that based on what she wore short shorts and a bikini underneath that this was promiscuous behavior.

23RP 13 (italics added).

The prosecutor took up counsels' personal attacks,

Now, a number of the defense attorneys have tried to gain great mileage, not only by casting aspersions on [H.W.] yesterday, *but by casting aspersions on me,* by suggesting that my speech, as [Beskurt's and Bideratan's counsel] call it, was *based on hyperbole*

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<sup>38</sup> Later, when discussing Bideratan's counsel's cross-examination of the toxicologist, the prosecutor repeated the adage:

Mr. Savage made a big deal of how many shots it would mean [H.W.] had. Shots? There was no evidence, whatsoever, that she was drinking shots. But do you know why Mr. Savage did that, ladies and gentlemen? Because when you look at it from that perspective, it's more dramatic, it makes [H.W.] look worse. And when you don't have the facts and you don't have the law, you pound the victim.

23RP 19.

*and emotion*, and failed to address any of the evidence in this case.

23RP 14 (italics supplied).

The prosecutor refuted counsels' assertion that H.W. had shed crocodile tears — cried only when she did not have an answer to counsels' questions on cross-examination:

Apparently, Mr. Meryhew<sup>39</sup> missed a very significant portion of [H.W.'s] testimony on direct, where when we got to the tough stuff I had to go slow, I had to give her a moment so that she could get through it, and, apparently, Mr. Meryhew missed the part of [H.W.'s] direct, where she was so emotional she begged me, please, just ask me another question that will make this easier. *Apparently, he missed the part of [H.W.'s] testimony where she sat there in tears, bullied by Mr. Savage's<sup>40</sup> questions, while she tried to describe exactly how it was these men slapped her in the face with their penises. She was mortified to say it, there's no doubt, but she was very capable of giving you an answer, and she did just that.*

23RP 15 (italics supplied).

Along the same vein, the prosecutor dispelled counsels' contention that H.W.'s clarity about some of the facts was suspect:

And yeah, there were times during her testimony when [H.W.] seemed to get clearer about a few things. Perhaps that was because among four days of testimony she had time to go back and really revisit this in a way she had not before. Perhaps it

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<sup>39</sup> Mr. Beskurt's trial counsel.

<sup>40</sup> Mr. Bideratan's trial counsel.

was because over the weekend she finally got some sleep, or perhaps it was because the questions - - *questions themselves and the bullying manner in which they were asked* were designed to elicit just those types of responses from [H.W.], designed to confuse her, designed to make her think she'd given a different answer before, designed to get her to say, either, yes - - anything is possible, or to dig in her heels. To be frank, I'm not even sure I could've withstood some of the questioning that was posed by defense, and why was that? Why were those questions asked of [H.W.] in that way? Perhaps so that defense counsel could get right here in closing argument and tell you [H.W.] is not to be believed.

23RP 26-27 (italics added). She also noted the very real possibility that the trauma of having been raped made it difficult for H.W. to recall certain details, not what counsel had coined H.W.'s "aspirational memory." 23RP 21.

The prosecutor spoke about the emotional toll that the rape had taken on H.W., and answered Beskurt's counsel's contention that the prosecutor's remarks in closing had been "emotional":

[H]e's right, there was emotion in my remarks to you. Why? Because this case screams with emotion, and, in fact, *emotion is part of the evidence, and rape is emotional*, it's emotional, regardless of what unsophisticated words you use to describe it. Whether it's the most awkward thing you can imagine or whether it's terrifying and horrific, it is emotional, and the fact that one uses unsophisticated words doesn't make it not rape.

23RP 14-15 (italics added). She then reiterated what the court and counsel had said, "that neither sympathy nor prejudice should guide your verdict." 23RP 15. The prosecutor next told the jury that it had to "set the emotion aside" and "look again at the evidence" — evidence that should lead the jury to a verdict of guilty. 23RP 16.

The prosecutor replied directly to Tarhan's counsel's argument regarding the presumption of innocence, "Mr. McFarland asked you if your sons were on trial? What evidence would be enough? Well, ladies and gentlemen, if your daughter had been the victim, what kind of evidence would be enough?"<sup>41</sup> 23RP 29.

The prosecutor then finished her rebuttal argument by telling the jury that it had heard enough evidence to convict the defendants. 23RP 29.

- ii. The prosecutor did not disparage counsel.

The defendants contend that the prosecutor's remarks about the "bullying manner" in which questions were asked of H.W. constituted misconduct. This claim should be rejected.

A prosecutor has wide latitude in a closing argument to "draw and express reasonable inferences from the evidence."

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<sup>41</sup> The State disagrees with Beskurt's appellate counsel's position that the prosecutor's remarks were "*entirely unprovoked*." Br. of Beskurt at 38.

State v. Mak, 105 Wn.2d 692, 698, 718 P.2d 407, cert. denied, 479 U.S. 995 (1986) (footnote omitted). Absent specific evidence in the record, no particular defense counsel can be maligned. Bruno v. Rushen, 721 F.2d 1193, 1195 (9<sup>th</sup> Cir. 1983), cert. denied, 469 U.S. 920 (1984). Specific evidence in this case supported the prosecutor's statements. Accordingly, it was not misconduct for the prosecutor to draw and express a reasonable inference from counsels' acts and statements. See Mak, 105 Wn.2d at 698.

A bully is an "overbearing person who habitually badgers and intimidates smaller or weaker persons."<sup>42</sup> A review of counsels' complete cross-examinations, and, in particular the portions quoted above, confirms that counsel repeatedly badgered H.W. See, e.g., 11RP 158-60, 164. Their gratuitous comments were quarrelsome. Counsel did not object to the prosecutor's remarks in rebuttal because they knew that the prosecutor's depiction of the "bullying manner" was accurate — and because it was an accurate characterization, it was not misconduct.<sup>43</sup>

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<sup>42</sup> See <http://dictionary.reference.com/browse/Bullying>. The prosecutor did not call counsel a bully; rather, she questioned the "bullying manner" in which the questions had been asked. See Br. of Bideratan at 21 (contending that the prosecutor called defense counsel a bully).

<sup>43</sup> Notably, at sentencing, the trial court addressed H.W. and told her that she had shown "tremendous strength and tenacity." 25RP 20.

Likewise, the aphorism, albeit in a modified form, is true.<sup>44</sup> Counsels' closing arguments were Shakespearian. See Hamlet, Act 3, scene 2, 222–30 (Queen Gertrude to Hamlet: "The lady doth protest too much, methinks."). Counsel repeatedly talked about H.W.'s relationships with Crilly and Morris, or her "short shorts" or her "provocative" behavior or that she was "no Rebecca of Sunnybrook Farm," while protesting (too much, methinks) that they were not suggesting that H.W. had this coming.<sup>45</sup>

The prosecutor's remarks were tied directly to the evidence and counsels' closing remarks.<sup>46</sup> Immediately following the aphorism, the prosecutor reminded the jurors that it is what "the witnesses say, not what the attorneys tell you they said and not

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<sup>44</sup> The original aphorism states, "If you have the facts on your side, pound the facts. If you have the law on your side, pound the law. If you have neither on your side, pound the table." See [http://en.wiktionary.org/wiki/pound\\_the\\_table](http://en.wiktionary.org/wiki/pound_the_table); see also Findley v. Jones Motor Freight, Division Allegheny Corp., 639 F.2d 953, 960 (3<sup>rd</sup> Cir. 1981) (quoting aphorism); Hatch v. State Farm Fire And Casualty, 930 P.2d 382, 398 (Wyo. 1997) (O'Brien, J., concurring) (same); Hendricks v. State, 640 S.W.2d 932, 936 (Tex. Cr. App. 1982) (same).

<sup>45</sup> See 22RP 60 and 137 (argument concerning the manner in which H.W. had been dressed); 12RP 78 (during cross-examination counsel asked H.W. if she had worn "short shorts"); 22RP 60 (argument concerning H.W.'s "provocative" behavior).

<sup>46</sup> Beskurt contends that the prosecutor's remark, "[T]he bottom line that defense counsel would have you believe is that [H.W.] has perpetrated a lie on all of you and on this court," is improper. Br. of Beskurt at 31. This comment was a direct response to counsel's closing argument that, "[H.W.] has not presented an honest, accurate picture." 22RP 134. It was not improper; it was a pertinent reply.

what the attorneys tell you they meant, but what the witnesses say, is the evidence, and Mr. Bideratan and Mr. Tarhan told you [H.W.] wanted this. They told you she screamed out in pleasure."

23RP 13.

Finally, the prosecutor did not accuse counsel of "trickery." See Br. of Bideratan at 19-20. Rather, the prosecutor addressed the manner in which H.W. had been cross-examined. The focus of the prosecutor's remarks was counsels' tactics, not counsels' integrity. Compare State v. Guizotti, 60 Wn. App. 289, 803 P.2d 808 (1991) (characterization of defense counsel's arguments as "smoke" was an unfortunate choice of words, but not error) with Bruno, 721 F.2d at 1195 (prosecutor suggested that defense counsel is retained solely to lie, distort facts, and camouflage the truth).

During cross-examination on H.W., more than once the prosecutor objected because counsel was "putting words in this witness's mouth." For example, Taner Tarhan's counsel inquired about flirtation:

Q. Well, let me ask you specifically as to Taner, was Taner ever flirting with you?

A. Not that I recall. I mean, I don't - - I don't remember that."

Q. So that's definitely possible?

PROSECUTOR: Your Honor, objection. At this point counsel's putting words in this witness's mouth. She said she doesn't recall.

THE COURT: Sustained.

12RP 30. Similarly, the defense assumed facts not in evidence by repeatedly asking H.W. about a second trip to the market — a trip about which H.W. consistently testified that she had no memory. See 11RP 161-62, 166-78; 12RP 66-70.

The prosecutor linked the manner of cross-examination of H.W. with the evidence in the case and the competing inferences that each side wanted the jury to draw. The defense argued that H.W.'s testimony was suspect because she had gained clarity about certain details over the weekend whereas the State's comments focused on *if* H.W. had actually gotten clearer and, if so, *why*. In other words, the State's comments centered on H.W.'s credibility and were not intended to denigrate defense counsel. "A prosecutor is afforded wide latitude in drawing and expressing reasonable inferences from the evidence, including commenting on the credibility of witnesses and arguing inferences about credibility based on evidence in the record." State v. Millante, 80 Wn. App.

237, 250, 908 P.2d 374 (1995), review denied, 129 Wn.2d 1012 (1996).

By contrast, the cases upon which the defendants rely involved flagrant and ill-intentioned misconduct or matters outside the record.<sup>47</sup> See State v. Warren, 165 Wn.2d 17, 29, 195 P.3d 940 (2008) (improper to argue reasons that children who are victims of sexual abuse delay reporting when no such evidence had been admitted), cert. denied, --- U.S. ---, 129 S. Ct. 2007, --- L. Ed. 2d --- (2009); State v. Belgarde, 110 Wn.2d 504, 507-09, 755 P.2d 174 (1988) (conviction reversed despite defense counsel's failure to object where misconduct was so flagrant and ill-intentioned that no curative instruction could have obviated the prejudice engendered by the misconduct; prosecutor asserted defendant was associated with a "deadly group of madmen" and "butchers that kill indiscriminately," likening defendant's American Indian membership to "Kadafi" and "Sean Finn" of the Irish Republican Army); State v. Reed, 102 Wn.2d 140, 145-46, 684 P.2d 699 (1984) (prosecutor called the defendant a liar no less than four times and case clearly

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<sup>47</sup> Beskurt claims that the prosecutor "urged the jury to decide the case based on matters outside the record." Br. of Beskurt at 33. However, Beskurt has not cited to any portion of the prosecutor's argument that relied on matters outside the record.

a "murder two," and not manslaughter, said the defense counsel did not have a case, and exhorted the jury to disbelieve the defense witnesses because "they were from out of town and drove fancy cars").

Tarhan relies on Walker v. State, 790 A.2d 1214 (2002), a case involving prosecutorial statements in closing argument that focused on the method, manner and tone of defense counsel's cross-examination of the victim. Id. at 1218. The State does not quibble with the Walker court's conclusion that the challenged remarks in that case constitute misconduct (although, because trial counsel failed to object, the court exercised its discretion and declined to review the remarks for "plain error"). Id. at 1220. However, Walker is easily distinguished from the instant case. In Walker, rather than object to any of the allegedly improper remarks, counsel opted to respond in defense counsel's closing argument. Id. Here, defense counsels' closing arguments provoked the challenged remarks. Thus, in this case there was no misconduct. See Carver, 122 Wn. App. at 306; Russell, 125 Wn.2d at 87.

Even if this Court disagrees and finds that the prosecutor's remarks disparaged defense counsel, the defendants cannot demonstrate that they suffered the kind of "enduring and resulting

prejudice" that would justify reversal of their rape convictions. See State v. Gentry, 125 Wn.2d 570, 640, 888 P.2d 1105, cert. denied, 516 U.S. 843 (1995). Assuming that the prosecutor's argument improperly commented on defense counsel, none of the defendants has shown a substantial likelihood that the remarks affected the jury's verdict. See Warren, 165 Wn.2d at 29-30 (prosecutor's argument in which she described defense counsel's argument as a "classic example of taking these facts and completely twisting them to their own benefit, and hoping that you are not smart enough to figure out what in fact they are doing" improper, but comments not so flagrant and ill-intentioned that no instruction could have cured them); see also State v. Negrete, 72 Wn. App. 62, 66-67, 863 P.2d 137 (1993) (improper, but not irreparably prejudicial, for prosecutor to argue that the defense attorney was being paid by the defendant "to twist the words of the witnesses").

In part, the challenged remarks appear to be a direct response to the personal attack on the victim during cross-examination and in argument. See, e.g., Warren, 165 Wn.2d at 30 (after defense had attacked victim's credibility during opening statements and cross-examination, prosecutor properly argued a reasonable inference from the facts concerning the victim's

credibility — that victim's statements had a "ring of truth."). The prosecutor noted the reasons H.W.'s testimony may have gained certainty, besides the defense implication that H.W. had fabricated. Furthermore, in context, it is very unlikely that the comments affected the verdict.

In analyzing prejudice, this Court does not look at the comments in isolation, but in the context of the total argument, the issues in the case, the evidence, and the trial court's instructions to the jury. Warren, 165 Wn.2d at 28 (citation omitted). In the context of the lengthy closing arguments, it is quite possible that the jurors scarcely noticed the remarks, or if they did, it is likely that they viewed them as simply examples of rhetorical sparring between lawyers. Jurors were instructed to disregard remarks by attorneys that were not supported by the evidence and to decide the case only on the evidence presented. 1CP 15. Jurors are presumed to follow the instruction that counsels' arguments are not evidence. Stenson, 132 Wn.2d at 729-30.

- iii. The prosecutor did not improperly appeal to the jury's sympathy.

While granted wide latitude in closing argument, prosecutors may generally not appeal to the passions and prejudices of a jury.

State v. Thach, 126 Wn. App. 297, 316, 106 P.3d 782, review denied, 155 Wn.2d 1005 (2005). However, a prosecutor may detail the circumstances of the crime, provided that the argument does not invite an irrational or purely subjective response by the jury. Gentry, 125 Wn.2d at 644. "[I]t may be proper argument for the prosecutor to reference the nature of the crime and the effect on the victims. 'A prosecutor is not muted because the acts committed arouse natural indignation.'" State v. Borboa, 157 Wn.2d 108, 123, 135 P.3d 469, 476 (2006) (quoting State v. Fleetwood, 75 Wn.2d 80, 84, 448 P.2d 502 (1968)).

Here, the prosecutor discussed the toll that the crime had taken on H.W., not in a way that would have provoked an irrational response by the jury, but to refute aspersions that the defense counsel had cast upon her credibility. She commented that H.W. had testified "not just one day, not even just two days, [H.W.] came back for four days." 22RP 42. She remarked that H.W.

bravely came back, day after day, to answer the questions, she told you she was running on empty, she had no sleep, she was having nightmares when she did sleep, she was losing pay every day that she missed work, and yet, without fail, she came back and told you what happened to her.

22RP 32.

It is not improper for the prosecutor to acknowledge H.W.'s emotional reaction to testifying and re-experiencing the trauma. See Borboa, 157 Wn.2d at 123 (prosecutor's repeated questioning regarding the witness's emotional reaction to the events and his description of the charges as "horrible" in his closing argument were not misconduct). Indeed, Taner Tarhan's counsel in his opening statement told the jury that "this [case] is emotional." 9RP 50. It is clear from the prosecutor's entire argument that the challenged comments were designed to support H.W.'s credibility, not to appeal to the juror's passions and prejudices.

The remarks in rebuttal were also a pertinent reply to counsel's assessment of the prosecutor's closing argument as a "very dramatic performance," fraught with "a lot of emotion, a lot of hyperbole, and not a lot of the facts" 22RP 131-32. In response, the prosecutor acknowledged that "this case screams with emotion, and, in fact, emotion *is part of the evidence*, and *rape is emotional*." 23RP 14-15. Thus, the comments were tied to the nature of the crime, the effect on the victim, the evidence in the case and were a pertinent response to counsel's provocative remarks.

Beskurt and Bideratan equate the prosecutor's remarks here with the misconduct in State v. Clafin, 38 Wn. App. 847, 690 P.2d

1186 (1984), review denied, 103 Wn.2d 1014 (1985), a case that is inapposite. In Claflin, the prosecutor read a poem utilizing "vivid and highly inflammatory imagery" in describing the emotional effect of rape on victims and that contained numerous prejudicial allusions to matters outside the actual evidence. Claflin, at 850-51. The poem was an appeal to the jury's passion and prejudice. Id. at 850. It was so prejudicial that no curative instruction could have neutralized the harm. Id.

Here, the prosecutor never commented on evidence that was not properly admitted. The State's explanation of the emotional impact that the rape had on H.W. was not improper. Rather, it was a response to defense counsel's suggestion that the manner in which H.W. had testified was suspect. See 22RP 99-100. As such, it was not improper. See State v. Gregory, 158 Wn.2d 759, 808-09, 147 P.3d 1201 (2006) (not impermissible for State to present testimony about how rape victim felt testifying because the purpose in presenting it was to rebut the defendant's argument that the victim's version of event was not credible). And, as noted above, it was a pertinent reply to counsels' criticism of the prosecutor's closing argument.

More importantly, however, the prosecutor urged the jury to reach its decision based on the evidence. She said, "But let's set the emotion aside for a minute. Let's look again at the evidence in this case. . . ." 23RP 16. She encouraged the jury to consider "all of those reasons based in the evidence" when considering H.W.'s credibility. 23RP 16. Urging the jury to rely on the evidence presented is precisely what a prosecutor should do in closing argument. United States v. Pearson, 746 F.2d 787, 796 (11<sup>th</sup> Cir. 1984). Even assuming impropriety, any potential prejudice could have been obviated by a curative instruction, unlike the egregious misconduct in Claflin.

Beskurt contends that the prosecutor's rhetorical question, "[I]f your daughter had been the victim, what kind of evidence would be enough," was improper. He claims both that it appealed to the passions of the jury and it was an impertinent reply to Turgut Tarhan's trial counsel's "entirely appropriate" comment. See 22RP 130-31. This Court should reject Beskurt's baseless claim.

As a preliminary matter, there was nothing appropriate about Tarhan's counsel introducing Tarhan's family to the jury during trial. See 21RP 20, 26. Counsel put irrelevant evidence into the record from which he then appealed to the passions of the jury during

argument; he alluded to his client's presumption of innocence and suggested that the State's burden of proof was higher simply because Tarhan "has a family." 22RP 130-31. The prosecutor's remarks were in direct response to counsel's implication that the jurors should demand certainty because that is what they would demand if their family member was on trial. The response was therefore pertinent and invited. Moreover, the prosecutor answered her own rhetorical question by telling the jury that it had enough evidence to convict the defendants. The claim that prosecutorial misconduct deprived the defendants of a fair trial should be rejected.

c. The Prosecutor Did Not Improperly Comment  
On The Defendants' Constitutional Rights.

Beskurt and Tarhan contend that the prosecutor impermissibly commented on their right to be present at trial and to confront H.W. They claim that the prosecutor invited the jury to draw adverse inferences from them exercising their constitutional rights. The Court should reject this contention. The comments were not focused on the defendants' constitutional rights; instead, they provided the jury a means by which to assess H.W.'s credibility. Accordingly, they were not improper.

i. Facts.

H.W. recounted all of the people to whom she had made statements about the rape, such as the police, medical personnel, deputy prosecutors, defense counsel, family members and her employer. 11RP 26-28. The prosecutor inquired further:

Q. Has that been difficult, to tell so many people about what happened to you?

A. It's embarrassing, yes.

Q. [H.W.], why is that embarrassing?

A. Because it - -

MR. MCFARLAND: Objection, relevance.

THE COURT: Overruled.

....

A. I shouldn't have to tell them something like this. It's not something I wanted.

Q. And has it been easy for you to come into court and - -

A. Not at all.

Q. This courtroom and talk about it?

A. Not at all.

Q. [H.W.], the night before last, when you were getting ready to come in and testify yesterday, how many hours of sleep did you get?

MR. MERYHEW: Objection, Your Honor, relevance.

THE COURT: Overruled.

A. I didn't sleep at all. I couldn't turn myself off, I couldn't stop thinking about everything.

Q. [By prosecutor] And [H.W.] when you knew that you had to come back today to continue testifying, how much sleep were you able to get last night?

A. Not much, a few hours.

Q. [H.W.], *is this the first time since the incident that you've had to be in a room, staring at the defendants?*

A. Yes.

Q. And how has that been for you?

A. It's awkward, uncomfortable, really, really uncomfortable.

11RP 28-31. The State then tendered H.W. for cross-examination.

Beskurt's counsel explored what the word "awkward" means to H.W., because she had used the word to describe, in part, how she felt about the rape.

Q. (By Meryhew) Now, you've used that word, "awkward," and I wonder if you can just kind of tell me a little bit more about what you mean by that word.

11RP 129. H.W. explained what she meant by awkward and then

Mr. Meryhew asked,

Q. *And it's awkward to be here in the room with [the defendants] here today.*

A. Very, very awkward.

11RP 129.

On re-direct, the prosecutor asked H.W., "What has the experience of testifying been like for you?" 13RP 15. The court overruled Tarhan's counsel's relevancy objection. H.W. responded, "It's been horrendous" — horrendous because she had missed a lot of work; she could not sleep; and, she was having nightmares, something she had not experienced in a while. 13RP 15.

During closing argument, the prosecutor discussed H.W., "who was clearly terrified and overwhelmed by what she endured in this courtroom." 22RP 30. The prosecutor stated that H.W. came back for four days. "She sat on the witness stand for four days and answered questions, and she told you, *with these four men staring at her, with their families staring at her, she told you what they did, she told you how she got through it.*" 22RP 42-43 (italics added).

The prosecutor connected H.W.'s demeanor to her credibility. She spoke about how H.W. could have embellished her story by, for instance, claiming that the men had a weapon.

22RP 43. But H.W. did not exaggerate:

In fact, through this whole courtroom process, [H.W.] remained so polite and demur, that at one moment, at one point when trying so hard to describe who did what to her and when they did it, [H.W.] turned to Mr. Bideratan and said, "I'm sorry, I don't know your name." She apologized to the man who had raped her, she apologized. That, ladies and

gentlemen, was a moment in court that simply cannot be manufactured, that was a moment of truth that can't be made up, and it gave you a really good picture into who [H.W.] is.

22RP 44. She noted that H.W. also had no idea

that the events of that evening would end up over a year later in this courtroom, where what was taken from her and how it was taken would be analyzed in excruciating detail, in front of a room full of strangers. She had no idea that she would be questioned about that evening as if she were the one on trial. . . .

22RP 24.

At no point during the closing argument did any of the defendants object.

ii. Argument.

The State may not act in a manner that would unnecessarily chill the exercise of a constitutional right, nor may the State invite the jury to draw negative inferences from the defendant's exercise of a constitutional right. State v. Rupe, 101 Wn.2d 664, 705, 683 P.2d 571 (1984) (citing United States v. Jackson, 390 U.S. 570, 581, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968)); State v. Jones, 71 Wn. App. 798, 810-11, 863 P.2d 85 (1993) (State may not invite the jury to draw an adverse inference from the defendant's exercise of his right to cross-examine witnesses), review denied, 124 Wn.2d 1018 (1994). However, it may be permissible for a prosecutor to

ask questions that might touch upon a defendant's constitutional rights.<sup>48</sup> See Gregory, 158 Wn.2d at 806 (citations omitted). The relevant issue is "whether the prosecutor manifestly intended the remarks to be a comment on that right." Id. at 807 (quoting State v. Crane, 116 Wn.2d 315, 331, 804 P.2d 10 (1991)). Provided the focus of the questioning or the argument "is not upon the exercise of the constitutional right itself,' the inquiry or argument does not infringe upon a constitutional right." Gregory, at 807 (quoting Miller, 110 Wn. App. at 284).

For example, in Gregory, the prosecutor asked the rape victim, "[H]ow do you feel about having to testify in court and . . . be cross-examined?" Gregory, 158 Wn.2d at 805. After the trial court overruled defense counsel's relevancy objection, the victim responded:

You know, it's like I had stated. I've tried for two years to put this behind me, you know. I want to get on with my life. It's a horrific experience. I'm angry. I just want to get it over with. You know, it's like for two years, I tried to forget about it. And since this trial started, I've had to remember it. I've had sleepless nights again. I've gone through nightmares again. And I'm just-I'm upset. I'm really upset. And I just would like to get on with my life and, you know, put this behind me, you know. It's just one of those things that-

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<sup>48</sup> Notably, Beskurt's counsel also inquired of H.W. about how she felt being in court with the defendants. 11RP 129.

I don't like having to recall all this stuff. I hate it. I hate having to remember it, you know. I hate having to go through all these feelings, you know, that I went through, you know. And it's just-I just-I just-I just-I wouldn't want my worst enemy to have to go through what I've gone-

Id. at 805-06 (citation to trial transcript in Gregory omitted). During closing argument, the prosecutor repeated the victim's remarks and he then argued that the victim would not have subjected herself to the trial process simply to avenge a broken condom.<sup>49</sup> Id. at 806. The defense did not object. Id.

On appeal, Gregory contended that the prosecutor had chilled the exercise of his rights to trial and to confrontation by asking the victim how she felt about cross-examination. Id. The Washington Supreme Court rejected Gregory's claim; it found that the questioning and argument focused on the *credibility* of the victim versus Gregory's exercise of his rights. Id. at 807-08. See also State v. Jordan, 106 Wn. App. 291, 296-97, 23 P.3d 1100, review denied, 145 Wn.2d 1013 (2001). The court noted that the State had not specifically criticized the defense's cross-examination

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<sup>49</sup> In Gregory, the defense was consent. Gregory claimed that the sexual intercourse had been a consensual encounter with a prostitute and, after the condom broke, she demanded more money, which Gregory refused to pay. The defense theory was that the prostitute retaliated by falsely alleging rape. Gregory, 158 Wn.2d at 778-80.

of the victim or implied that Gregory should have spared her the unpleasantness of going through trial. Gregory, at 807.

In Jordan, witness Terrence Cole testified for both the State and the defense. Jordan, 106 Wn. App. at 297. In his testimony as a defense witness, Cole omitted salient details that he had provided to the police in their initial interviews with him. Id. On cross-examination, the prosecutor inquired as follows:

Q. Would it be accurate to say when you gave the statements on the 20<sup>th</sup> of January and March second these events were a lot fresher in your mind, weren't they?

A. I guess you could say that, sir.

Q. And Mr. Jordan wasn't present when you gave these statements, looking at you while you spoke, was he?

A. No, sir.

Id. at 296. Later, in his rebuttal argument, the prosecutor told the jury that it needed to differentiate between "Mr. Cole, who's sitting here in the witness stand with the *defendant looking at him* here and worried about getting what they call the snitch jacket in prison, and Mr. Cole who's approached by the officers. . . ." Id. (italics added).

On appeal, Division 3 of this Court held that the prosecutor's questions, taken in context, were asked in order to allow the jury to

make a credibility determination regarding Cole, i.e., there were other plausible reasons for why Cole's statements differed at certain times and under different circumstances. Id. at 297. The Court found no evidence that the State was "flagrantly and with ill intent" trying to comment on Jordan's right to confront witnesses against him. Id.

Similar to the State's inquiry and argument in Gregory and Jordan, the questions asked and the arguments advanced here were not impermissible comments on the defendants' exercise of constitutional rights; rather, the fact that H.W. had to testify in front of the defendants and their families was used to support H.W.'s credibility by explaining her in-court demeanor. Understandably, H.W. had a visceral reaction to seeing the four defendants in court and having to testify in detail about what had occurred. The fact that H.W. was unnerved, not sleeping and having nightmares, provided the jury with a plausible alternative explanation for inconsistent statements, deficiencies in her memory or crying on the witness stand; the defense contention that H.W. had fabricated the rape allegation was not the only explanation. See Gregory, 158 Wn.2d at 807-08; Jordan, 106 Wn. App. at 296-97. Hence, the

thrust of the prosecutor's argument was on credibility, not the exercise of the defendants' constitutional rights.

Beskurt contends that that the prosecutor asked the jury to draw an adverse inference from Beskurt's attendance at trial, but Beskurt's citations to the record do not support his claim. See Br. of Beskurt at 29 (citing 8RP 41, 45).<sup>50</sup> This Court should reject Beskurt's unsupported contention. See RAP 10.3(6).

Beskurt and Tarhan argue that the current case is distinguishable from Gregory because, according to them, the prosecutor here both specifically criticized the bullying manner in which defense counsel cross-examined H.W. and implied that the defendants should have spared her the trial experience. The Court should reject the comparison. As argued above, the prosecutor's remarks about defense counsel's manner were both invited and a reasonable inference from the evidence. Additionally, there is no evidence that the prosecutor manifestly intended her remarks to be a comment on the defendants' right to be present at trial or to confront H.W. See Gregory, 158 Wn.2d at 806.

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<sup>50</sup> Volume 8 of the proceedings contains only 18 pages. The other volume from that same day (9RP), which does have at least 45 pages, is inapt as well. The pages cited are part of Mr. Savage's opening remarks.

As further support of their claim to the contrary, Beskurt and Tarhan rely on State v. Jones, 71 Wn. App. 798, 811, 863 P.2d 85 (1993), the first Washington case to address the issue of a prosecutor's commentary on the exercise of the right to confrontation. The case is inapposite. In Jones, the prosecutor, on cross-examination, noted that the defendant had expressed frustration at the prosecutor having inadvertently blocked his view. The prosecutor asked Jones, "[W]eren't you frustrated because I was blocking your view from her such that you could not stare at her as she was testifying here; isn't that right?" Id. at 805. Later, the prosecutor argued to the jury that our criminal justice system is inherently flawed because it still requires child victims to appear in court "with the defendant sitting right there, staring at them." Id. at 805-06. The prosecutor commented that the victim had been so traumatized by her "direct eye contact" with Jones that she refused to return to court for further testimony. Id. at 806.

The argument was not made in the context of the evidence or the jury's responsibility to assess a witness's credibility, but rather it invited the jury to draw a negative inference from Jones exercising a constitutional right (i.e., that he lied when he professed love and concern for the victim). Id. at 806, 811-12. However,

noting that Jones had failed to object, the court held that in light of the overwhelming evidence against Jones, the statements did not warrant reversal. Id. at 812.

Similarly, in Burns v. Gammon, 173 F.3d 1089, 1095 (8<sup>th</sup> Cir. 1999), the court found that comments encouraging the jury to punish the defendant for exercising his confrontation right — by subjecting the victim to the humiliation of having to testify in public — were improper, but did not warrant reversal.<sup>51</sup> Id. at 1090. The court's ruling was based largely upon the fact that the isolated comments were not objected to by the defendant, and there was overwhelming evidence of his guilt; therefore, the court held that the comments did not have a decisive effect on the jury's decision. Id. at 1096.

The comments here are unlike those addressed in either Jones or Burns. In this case, the prosecutor's remarks were not an attack on the defendants or their right to confront witnesses. Moreover, they did not encourage the jury to punish the defendants simply for requiring H.W. to testify. Instead, they focused on how

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<sup>51</sup> During argument regarding punishment, the prosecutor asked the jury "to consider the fact that Burns, by exercising his constitutional right to a jury trial and to confront witnesses, forced the victim to attend trial, take the stand and relive the attack." Burns v. Gammon, 260 F.3d 892, 896 (8<sup>th</sup> Cir. 2001) ("Burns II").

the jury could use H.W.'s emotional reaction — both to seeing the defendants for the first time since they raped her and having to testify publicly about that rape — to help assess her credibility, a key issue in the trial. The comments were proper.

Moreover, even if the Court disagrees and finds the remarks improper, any potential prejudice could have been cured by a proper instruction. See State v. Smith, 144 Wn.2d 665, 679, 30 P.3d 1245, 39 P.3d 294 (2001) (some improper prosecutorial remarks may "touch upon" constitutional rights but are still curable by a proper instruction); Klok, 99 Wn. App. at 84 (same). There is no evidence that the comments were flagrant or ill intentioned. Thus, Beskurt's and Tarhan's failure to object, request a curative instruction or move for mistrial has waived review of this claim.

d. The Prosecutor's Remarks Did Not Violate The Rape Shield Statute.

Beskurt next contends that the prosecutor committed reversible error by using the Rape Shield statute, RCW 9A.44.020, as both a shield and a sword. This claim is without merit. As set forth above, the defense repeatedly violated the trial court's ruling on the permissible scope of cross-examination on H.W. and Crilly's relationship. See § C.3.b.i.c, supra. The prosecutor's remarks in

summation were a direct, pertinent response to defense counsels' portrayal of H.W. as a "loose woman."

RCW 9A.44.020 prohibits use of a rape victim's past sexual behavior on the issue of credibility. RCW 9A.44.020(2). The trial court permitted the defense to introduce evidence of the intimate nature of H.W.'s relationship with Crilly only to: (1) establish Crilly's potential bias, and (2) provide an alternative explanation for the vaginal lacerations that H.W. had post-rape. 4RP 18-20, 31, 70. Moreover, the court stated that the information should be elicited by one attorney; the same information was not to be elicited by each defense attorney. 4RP 21; 12RP 4-6 (citation to case omitted).

Despite the court's explicit ruling, defense counsel nevertheless cross-examined both H.W. and Crilly about when their relationship became intimate in order to demonstrate that H.W.'s intimacy with Crilly overlapped her relationship with her previous boyfriend. See, e.g., 14RP 68-72. Bideratan's counsel conceded that he was one of the attorneys who had violated the court's order; he argued the point of the questions is to "establish that [H.W.] is a liar." 14RP 121.

The court expressed its frustration at counsel's expansion of its ruling: "I didn't allow this evidence to come in for the purpose of

developing whether or not [H.W.] is lying about the nature of her relationship with these two men. That's exactly the purpose the Rape Shield Law [is there for], is to not have to put alleged victims through having their sexual history be put on trial." 14RP 125.

Furthermore, the court rejected counsels' contention that the State had somehow opened the door; as a legitimate preemptive strike, the prosecutor had elicited only the information that the court had ruled admissible. 14RP 124.

In her opening round of closing arguments, the prosecutor asked rhetorically whether H.W. seemed to be the flirt that Bideratan and Tarhan had portrayed her as:

And so what you have to ask yourselves is in light of everything that you know, in light of everything you know about that night and everything that you know about [H.W.], does their story make sense? They have painted for you the picture of a woman who was a flirt and a tease, a sexual aggressor, who trapped these four men into an experience that at least two of them later decided they didn't very much care for. Now, I'm sure that somewhere out there you all could find a woman who after only two hours of knowing four men would agree to have sex with them, but the real question, the real question for this trial is[:] is [H.W.] one of those women? Is she the kind of girl that says come hither, and then says come hither, come hither, and come hither again? Is she the kind of girl that has sex with four men that she's known for less than two hours while her friend goes to get cigarettes? And you all can answer that question, because after four weeks of testimony you know

[H.W.], in fact, you all spent more time with [H.W.] than these men ever did. And if [H.W.] is the victim that they want you to believe she is, the in control, in charge kind of girl, don't you think that after four days on the stand you would've seen some tiny glimmer of that, some suggestion that there's a different [H.W.]? That's a duplicity that's pretty amazing, if we're to accept what the defendants want you to believe.

22RP 45-47.

These remarks were a fair retort to the insinuation raised during the defense questioning of H.W. and Crilly and were therefore pertinent. The defense had insinuated promiscuity by its backhanded suggestion to H.W. that the timing of her relationship with Crilly reflected poorly on her credibility. The State merely asked the jurors to consider what they had seen of H.W. throughout her testimony and to reject as unfounded the defendants' character assassination.

e. Error, If Any, Was Harmless.

Beskurt's and Tarhan's counsel urge this Court to review any error under the constitutional harmless error standard. Whether this higher constitutional harmless error analysis applies to prosecutorial misconduct claims is still an open question under

Warren. See Warren, 165 Wn.2d at 26 n.3.<sup>52</sup> However, the State believes the appropriate test for alleged prosecutorial misconduct — even when such conduct touches upon a constitutional right — is (1) whether the prosecutor's conduct was improper and (2) whether there is a substantial likelihood that the misconduct affected the verdict. See State v. Jackson, -- Wn. App. --, 209 P.3d 553, 557 n.1 (2009) (citations omitted); Smith, 144 Wn.2d at 679. Moreover, defense counsel's failure to object constitutes waiver on appeal unless the misconduct is "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice incurable by a jury instruction." Gregory, 158 Wn.2d at 841.

Most significantly, as detailed above, the evidence of rape was very strong. Although the jury did not unanimously agree on rape by forcible compulsion, there was no question that H.W. had not consented.<sup>53</sup> H.W. told the defendants to stop — over and over again, by her words and her actions. See 10RP 113-15; 11RP 126;

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<sup>52</sup> In Warren, the court applied the standard "incurable prejudice" analysis to the prosecutor's improper remarks misstating the burden of proof and declined to decide whether a constitutional error analysis is even appropriate in the prosecutorial misconduct analysis. State v. Dixon, 150 Wn. App. 46, 58 n.4, 207 P.3d 459 (2009). Significantly, the Supreme Court applied the flagrant and ill-intentioned standard post-Warren. See State v. Fisher, 165 Wn.2d 727, 747, 209 P.3d 553 (2009).

<sup>53</sup> See 25RP 5 (trial court noted that, "It's apparent from the verdict forms that the jury was hung on rape two.").

13RP 12. And when H.W. tried to get up, the defendants held her down. 10RP 113, 118-19; 11RP 120-21, 127, 157-58.

Given the overwhelming evidence of non-consensual intercourse, the defendants cannot demonstrate that they were prejudiced by the prosecutor's reference to defense counsel or the defendants' presence at trial. The failure of each attorney to object during the argument, or to move for a mistrial after argument, suggests that these comments, in context, were not substantially prejudicial. Moreover, any prejudice could easily have been obviated by a curative instruction had one been requested.

Therefore, this claim should be rejected.

**4. TARHAN RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.**

Tarhan also contends that if this Court finds that the prosecutor committed misconduct but holds that it was not so egregious that a curative instruction could not have neutralized its impact, his counsel was ineffective for failing to object. This claim should also be rejected. Because the prosecutor did not commit misconduct, Tarhan's counsel had no duty to object. Further, even if any of the prosecutor's remarks were improper, Tarhan's counsel may have made a legitimate tactical choice not to object and

highlight the comment, but rather to respond in his own closing argument. Finally, even if Tarhan's counsel should have objected, Tarhan has failed to demonstrate any resulting prejudice.

To prevail on a claim of ineffective assistance of counsel, a defendant must show: (1) that counsel's performance fell below an objective standard of reasonableness (the performance prong); and (2) that but for the inadequate representation, there is a reasonable probability that the trial's outcome would have been different (the prejudice prong). Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If the reviewing court decides that either prong has not been met, it need not address the other prong. State v. Garcia, 57 Wn. App. 927, 932, 791 P.2d 244, review denied, 115 Wn.2d 1010 (1990).

When reviewing claims of ineffective assistance of counsel, appellate courts engage in a strong presumption that trial counsel was competent. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Trial counsel's legitimate strategies or tactics cannot be the basis for claims of ineffective assistance of counsel. Id. (citing State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994)).

In this case, Tarhan's counsel's performance during the prosecutor's closing argument did not fall below an objective standard of reasonableness. As established above, no misconduct occurred. An attorney is not obligated to — in fact, should not — object to the legitimate arguments of opposing counsel. RPC 3.1. Moreover, a party may not object to statements made by opposing counsel to the jury when he has invited such statements by his own argument. See Royce A. Ferguson, 13 WASHINGTON PRACTICE, CRIMINAL PRACTICE AND PROCEDURE, § 4502 (3<sup>rd</sup> ed.).

Here, in the context of both the prosecutor's closing argument and the trial as a whole, it was undoubtedly apparent to all defense counsel that the prosecutor's arguments addressed above were proper. Defense counsel's failure to object, move for a mistrial, or seek a curative instruction strongly suggests *not* ineffective assistance of counsel, but rather, that the argument did not appear incurably prejudicial or inappropriate in the context of the trial. Negrete, 72 Wn. App. at 67.

Furthermore, even if improper, defense counsel may have made a legitimate tactical decision not to object during the prosecutor's closing argument. It is common knowledge that in trial

practice, attorneys ought to be cautious in lodging repeated objections. Trial lawyers are often taught:

It is well worth noting that not every valid objection needs to be made. There is little point to objecting if . . . the information is not ultimately harmful to your case. Moreover, there are often good reasons to refrain from objecting. Objections are tiresome. They interrupt the flow . . . they distract attention from the real issues at hand, and they have an awful tendency to degenerate into posturing and/or whining. It is always possible that the objecting lawyer will lose points with the judge or jury by constantly interrupting the opposition. . . . Juror reaction, then, becomes a reason to utilize objections wisely and sparingly. . . .

Steven Lubet, Modern Trial Advocacy: Analysis and Practice

220 (National Institute for Trial Advocacy, 1993).

While defense counsel chose not to object, for the most part, during the prosecutor's closing argument, he responded in his own closing argument by reminding the jury of its duty to require the State to prove each element of the charged crime beyond a reasonable doubt. 22RP 124-26. He also reminded the jury that it had to find that a rape occurred based on *the evidence*. 22RP 132. He then proceeded to highlight the problems that he perceived with H.W.'s credibility. 22RP 134-46. Based upon the above, it is apparent that defense counsel made the legitimate tactical decision to challenge the prosecutor's argument not in the form of objections

that might annoy the jury, but rather by crafting his own skillful closing argument designed to direct the jurors' attention to the evidence, or lack of evidence, deemed significant by Tarhan. Given that, his performance did not fall below an objective standard of reasonableness.

Even assuming counsel's failure to object cannot be characterized as tactical and amounted to deficient performance, there is no reasonable probability that the outcome of the trial would have been different but for counsel's failure to object. This case was not simply a "he said-she said" rape case. Rather, as repeatedly noted, the evidence in this case was overwhelming: in addition to H.W.'s testimony, the State presented testimony from several responding officers, three witnesses who had contact with H.W. before and immediately after the defendants raped her, a sexual assault nurse, a social worker and other medical personnel who treated H.W., and the detective. All of their stories corroborated one another, with only relatively minor variations.

Finally, the trial court instructed the jury that the attorneys' remarks, statements and arguments were not evidence, and that remarks, statements or arguments not supported by the evidence must be disregarded. 1CP 15; WPIC 1.02. Under these

circumstances, there is no reasonable probability that the outcome of the proceedings would have been different had counsel objected.

**5. THE DEFENDANTS WERE NOT DENIED THEIR RIGHT TO A FAIR TRIAL BY CUMULATIVE ERROR.**

Beskurt, Bideratan and Tarhan argue that, even if they cannot gain reversal of their convictions on any individual claim of error, this Court should nevertheless find that cumulative error denied them a fair trial. This claim is unavailing.

The cumulative error doctrine is limited to cases where there have been several trial errors that, standing alone, may not justify reversal; when combined, however, they may deny a defendant a fair trial. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). As argued above, with the exception of the one error voir dire, which all defendants waived, the claims are without merit. There is no trial error to cumulate in this case. See State v. Hodges, 118 Wn. App. 668, 674, 77 P.3d 375 (2003) (where defendant identified no errors, cumulative error doctrine does not apply).

Even if this Court disagrees and finds that more than one error occurred, as argued above, any error was harmless. Thus, the defendants cannot seek reversal of their convictions under this doctrine. See Russell, 125 Wn.2d at 93 (cumulative effect of errors

may mandate reversal if the errors materially affected the outcome).

**6. THIS CASE MUST BE REMANDED TO CORRECT THE COMMUNITY CUSTODY TERM AND TO CORRECT THE EXPIRATION DATE IN THE SEXUAL ASSAULT PROTECTION ORDER.**

a. Community Custody Term.

Beskurt, Bideratan and Tarhan contend that the trial court erred at sentencing when it imposed a community custody range that exceeded the statutory maximum. They are correct. This Court should remand for the trial court to impose no more than 12 months of community custody.

Community custody ranges are established by the Sentencing Guideline Commission and the ranges according to offense category are listed in the Washington Administrative Code. WAC 437-20-010. Generally, a person convicted of a sex offense should receive a community custody range of 36 to 48 months.<sup>54</sup> WAC 437-20-010. However, if the court imposes a term of

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<sup>54</sup> Rape in the third degree is a sex offense. See RCW 9.94A.030(42)(a)(i) (2009).

confinement for one year or less, the maximum term of community custody is 12 months. RCW 9.94A.702.<sup>55</sup>

In this case, the trial court imposed confinement for 10 months and a community custody range of 36-48 months. 1CP 44, 46-47; 2CP 26, 28-29; 3CP 22, 24-25. This was error. The matter should be remanded for imposition of a community custody term not to exceed 12 months.

b. Sexual Assault Protection Order.

Additionally, Beskurt, Bideratan and Tarhan claim that the trial court erred when it issued a sexual assault protection order with an expiration date of August 1, 2015. Again, they are correct. Because the trial court erred in computing the community custody term, it similarly erred in computing the expiration date of the sexual assault protection order.

When a defendant is convicted of a sex offense, the sentencing court may restrict the offender's ability to have contact with the victim. RCW 7.90.150(6)(a). The court may issue a sexual assault protection order. Id. The statute provides:

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<sup>55</sup> LAWS OF 2008, CH. 231, § 57 repealed former RCW 9.94A.545, which contained the same provision. LAWS OF 2008, CH. 231, § 55 states that any sentencing that occurs on or after August 1, 2009, is governed by the laws in effect at the time of the sentencing.

A final sexual assault protection order entered in conjunction with a criminal prosecution shall remain in effect for a period of two years following the expiration of any sentence of imprisonment and subsequent period of community supervision, conditional release, probation, or parole.

RCW 7.90.150(6)(c).

In this case, the trial court calculated the expiration date as August 1, 2015, based on its erroneous belief that the community custody term was for a range of 36-48 months. Supp. 1CP \_\_\_ (Sub no. 88, sexual assault protection order),<sup>56</sup> 2CP 35-37; 3CP 52-54. Because the defendants were each sentenced to 10 months imprisonment, to be followed by community custody, not to exceed 12 months, the protection order must expire two years after community custody expires. See RCW 7.90.150(6)(c). Thus, upon remand for entry of the correct term of community custody, the court should also re-issue sexual assault protection orders with the correct expiration date.

**D. CONCLUSION**

For the reasons stated above, the defendants' convictions for rape in the third degree should be affirmed. The Court,

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<sup>56</sup> On August 24, 2009, the State filed a supplemental designation of clerk's papers to transmit to this Court the sexual assault protection order in Beskurt's case.

however, should remand the case so that the sentencing court may correct the community custody term and the expiration date on the sexual assault protection order.

DATED this 8<sup>th</sup> day of September, 2009.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

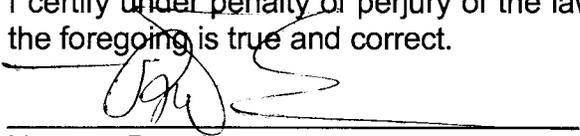


By: \_\_\_\_\_  
RANDI J. AUSTELL, WSBA #28166  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Susan F. Wilk, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of Brief of Respondent, in STATE V. EMIR BESKURT, Cause No. 62316-8-1, in the Court of Appeals, Division I, for the State of Washington.

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

  
Name Bora Ly  
Done in Seattle, Washington

09-08-2009  
Date

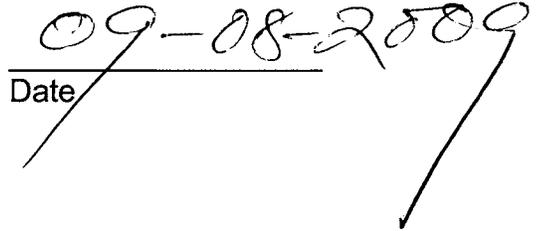
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Suzanne Lee Elliott, the attorney for the appellant, at 1300 Hoge Building, 705 Second Ave., Seattle, WA, 98104, containing a copy of Brief of Respondent, in STATE V. SAMET BIDERATAN, Cause No. 62408-3-1, in the Court of Appeals, Division I, for the State of Washington.

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



Name Bora Ly  
Done in Seattle, Washington

  
Date

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Casey Grannis, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of Brief of Respondent, in STATE V. TURGUT TARHAN, Cause No. 62268-4-I, in the Court of Appeals, Division I, for the State of Washington.

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

  
\_\_\_\_\_

Name Bora Ly  
Done in Seattle, Washington

09-08-2009  
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Date

CLERK OF COURT  
STATE OF WASHINGTON  
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