

62872-1

62872-1

NO. 62872-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

---

STATE OF WASHINGTON,

Respondent,

v.

TANER TARHAN,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE SUSAN J. CRAIGHEAD

---

**BRIEF OF RESPONDENT**

---

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

16

TABLE OF CONTENTS

Page

A. ISSUES PRESENTED.....1

B. STATEMENT OF THE CASE.....2

1. PROCEDURAL FACTS .....2

2. SUBSTANTIVE FACTS.....3

C. ARGUMENT.....12

1. TANER WAIVED HIS PUBLIC TRIAL RIGHT  
VIS-À-VIS THE JURY QUESTIONNAIRES.....12

a. Taner Cannot Assert The Public's Open  
Trial Rights .....15

b. Taner Invited The Error That He Claims  
Occurred.....16

c. Under Momah, Taner May Not Claim That  
Structural Error Occurred .....18

2. TANER WAIVED HIS CLAIM OF  
PROSECUTORIAL ERROR IN VOIR DIRE  
AND, EVEN IF IT WAS NOT WAIVED, THE  
ERROR WAS HARMLESS BEYOND A  
REASONABLE DOUBT .....20

a. Facts .....20

b. The Deputy Prosecutor Erred, But The  
Defendant Waived Appellate Review By  
Twice Declining The Trial Court's Offers To  
Strike The Venire, Thus Curing Any Harm.....24

c. The Error Was Harmless Beyond A  
Reasonable Doubt .....26

3.	THE PROSECUTOR DID NOT COMMIT MISCONDUCT IN THE STATE'S CASE-IN-CHIEF OR CLOSING ARGUMENT .....	29
a.	The Prosecutor Properly Argued That Bideratan Manufactured An Exculpatory Story .....	32
b.	The Prosecutor's Remarks Were Invited, Provoked Or A Pertinent Reply .....	34
i.	Facts .....	35
a.	Direct.....	35
b.	Cross-examination .....	35
c.	Defendants' closing .....	37
d.	The State's rebuttal.....	41
ii.	The prosecutor did not disparage counsel .....	44
iii.	The prosecutor did not improperly appeal to the jury's sympathy.....	49
c.	The Prosecutor Did Not Misstate The Burden Of Proof.....	53
d.	The Prosecutor Did Not Improperly Comment On The Defendants' Constitutional Rights .....	54
i.	Facts .....	55
ii.	Argument .....	58
e.	RAP 2.5(a) Precludes Review Of Taner's Claim That The Prosecutor Committed Misconduct By Eliciting Improper Opinion Testimony .....	64

4.	TANER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL .....	69
5.	THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN LIMITING CROSS- EXAMINATION OF H.W. AND BY EXCLUDING EVIDENCE THAT WAS MARGINALLY RELEVANT AT BEST .....	73
a.	Facts .....	74
b.	The Trial Court Did Not Abuse Its Discretion In Excluding Minimally Relevant Evidence.....	77
c.	Any Error Was Harmless Beyond A Reasonable Doubt .....	86
6.	TANER WAS NOT DENIED HIS RIGHT TO A FAIR TRIAL BY CUMULATIVE ERROR .....	88
7.	THIS STATE CONCEDED THAT THE COMMUNITY CUSTODY TERM AND THE EXPIRATION DATE IN THE SEXUAL ASSAULT PROTECTION ORDER WERE INCORRECT .....	89
D.	<u>CONCLUSION</u> .....	90

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Brooks v. Kemp, 762 F.3d 1383 (1985) .....51

Brown v. United States, 356 U.S. 148,  
78 S. Ct. 622, 2 L. Ed. 2d 589 (1958) .....32

Brown v. United States, 370 F.2d 242  
(D.C. Cir. 1966) .....51

Bruno v. Rushen, 721 F.2d 1193  
(9<sup>th</sup> Cir. 1983), cert. denied,  
469 U.S. 920 (1984).....45

Davis v. Alaska, 415 U.S. 308,  
94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974) .....78

Delaware v. Fensterer, 474 U.S. 15,  
106 S. Ct. 292, 88 L. Ed. 2d 15 (1985) .....85

Delaware v. Van Arsdall, 475 U.S. 673,  
106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986) .....86

Hance v. Zant, 696 F.2d 940  
(11<sup>th</sup> Cir. 1983).....51

Jackson v. Smith, 406 F. Supp. 1370  
(W.D.N.Y. 1976) .....26

Kotteakos v. United States, 328 U.S. 750,  
66 S. Ct. 1239, 90 L. Ed. 1557 (1946) .....25

Montana v. Engelhoff, 518 U.S. 37,  
116 S. Ct. 2013, 135 L. Ed. 2d 361 (1996) .....78

Portuondo v. Agard, 529 U.S. 61,  
120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000) .....32

<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	70
<u>Taylor v. Illinois</u> , 484 U.S. 400, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988).....	78
<u>United States v. Nanez</u> , 694 F.2d 405 (5 <sup>th</sup> Cir. 1982).....	31
<u>United States v. Edwards</u> , 154 F.3d 915 (9 <sup>th</sup> Cir. 1998).....	68, 69
<u>United States v. Hermanek</u> , 289 F.3d 1076 (9 <sup>th</sup> Cir. 2002), <u>cert denied</u> , 537 U.S. 1223 (2003).....	68, 69
<u>United States v. Jackson</u> , 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968).....	58
<u>United States v. Pearson</u> , 746 F.2d 787 (11 <sup>th</sup> Cir. 1984).....	52
<u>United States v. Roberts</u> , 618 F.2d 530 (9 <sup>th</sup> Cir. 1979).....	68, 69
<u>United States v. Sanchez</u> , 176 F.3d 1214 (9 <sup>th</sup> Cir. 1999).....	68, 69
<u>Waller v. Georgia</u> , 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984).....	14
<u>Williamson v. Miller-Stout</u> , 546 U.S. 1108 (2006) .....	27
 <u>Washington State:</u>	
<u>Davidson v. Hensen</u> , 135 Wn.2d 112, 954 P.2d 1327 (1998).....	15
<u>In re Personal Restraint of Orange</u> , 152 Wn.2d 795, 100 P.3d 291 (2004).....	14

<u>Seattle v. Patu</u> , 147 Wn.2d 717, 58 P.3d 273 (2002).....	16
<u>State v. Bautista-Caldera</u> , 56 Wn. App. 186, 783 P.2d 116 (1989).....	51
<u>State v. Berkins</u> , 2 Wn. App. 910, 471 P.2d 131 (1970).....	25
<u>State v. Bernson</u> , 40 Wn. App. 729, 700 P.2d 758 (1985).....	79
<u>State v. Bird</u> , 136 Wn. App. 127, 148 P.3d 1058 (2006).....	27
<u>State v. Black</u> , 109 Wash.2d 336, 745 P.2d (1987).....	81, 82
<u>State v. Bone-Club</u> , 167 Wn.2d 140, 217 P.3d 321 (2009).....	1, 12, 13, 14, 15, 16, 17, 18, 19
<u>State v. Borboa</u> , 157 Wn.2d 108, 135 P.3d 469 (2006).....	49, 50
<u>State v. Brightman</u> , 155 Wn.2d 514, 122 P.3d 150 (2005).....	14
<u>State v. Brown</u> , 132 Wn.2d 529, 940 P.2d 546 (1997).....	28, 30
<u>State v. Carver</u> , 122 Wn. App. 300, 93 P.3d 947 (2004).....	31, 47
<u>State v. Coleman</u> , 151 Wn. App. 614, 214 P.3d 158 (2009).....	13, 14, 19, 20
<u>State v. Collins</u> , 50 Wn.2d 740, 314 P.2d 660 (1957).....	28
<u>State v. Crane</u> , 116 Wn.2d 315, 804 P.2d 10 (1991).....	59

<u>State v. Deal</u> , 128 Wn.2d 693, 911 P.2d 996 (1996).....	27, 86
<u>State v. Easter</u> , 130 Wn.2d 228, 922 P.2d 1285 (1996).....	24, 27
<u>State v. Easterling</u> , 157 Wn.2d 167, 137 P.3d 825 (2006).....	14
<u>State v. Echevarria</u> , 71 Wn. App. 595, 860 P.2d 420 (1993).....	51
<u>State v. Fagalde</u> , 85 Wn.2d 730, 539 P.2d 86 (1975).....	25
<u>State v. Fleetwood</u> , 75 Wn.2d 80, 448 P.2d 502 (1968).....	49
<u>State v. Fleming</u> , 83 Wn. App. 209, 921 P.2d 1076 (1996).....	53, 54
<u>State v. Fricks</u> , 91 Wn.2d 391, 588 P.2d 1328 (1979).....	24
<u>State v. Garcia</u> , 57 Wn. App. 927, 791 P.2d 244, <u>review denied</u> , 115 Wn.2d 1010 (1990).....	70
<u>State v. Garrett</u> , 124 Wn.2d 504, 881 P.2d 185 (1994).....	71
<u>State v. Gentry</u> , 125 Wn.2d 570, 888 P.2d 1105, <u>cert. denied</u> , 516 U.S. 843 (1995).....	47, 49
<u>State v. Gregory</u> , 158 Wn.2d 759, 147 P.3d 1201 (2006).....	51, 59, 60, 62, 79
<u>State v. Greiff</u> , 141 Wn.2d 910, 10 P.3d 390 (2000).....	88
<u>State v. Henderson</u> , 114 Wn.2d 867, 792 P.2d 514 (1990).....	16

<u>State v. Hodges</u> , 118 Wn. App. 668, 77 P.3d 375 (2003).....	88
<u>State v. Hudlow</u> , 99 Wn.2d 1, 659 P.2d 514 (1983).....	78, 79
<u>State v. Jones</u> , 67 Wn.2d 506, 408 P.2d 247 (1965).....	85
<u>State v. Jones</u> , 71 Wn. App. 798, 863 P.2d 85 (1993), <u>review denied</u> , 124 Wn.2d 1018 (1994).....	58, 59
<u>State v. Jordan</u> , 106 Wn. App. 291, 23 P.3d 1100, <u>review denied</u> , 145 Wn.2d 1013 (2001).....	60, 61, 62
<u>State v. Kender</u> , 21 Wn. App. 622, 587 P.2d 551 (1978), <u>review denied</u> , 91 Wn.2d 1017 (1979).....	28
<u>State v. Kilgore</u> , 107 Wn. App. 160, 26 P.3d 308 (2001), <u>aff'd on other grounds</u> , 147 Wn.2d 288 (2002).....	78, 85
<u>State v. Kirkman</u> , 159 Wn.2d 918, 155 P.3d 125 (2007).....	65, 66, 68, 69
<u>State v. Klok</u> , 99 Wn. App. 81, 992 P.2d 1039 (2000).....	31
<u>State v. Lord</u> , 117 Wn.2d 829, 822 P.2d 177 (1991), <u>cert. denied</u> , 506 U.S. 856 (1992).....	31
<u>State v. Mak</u> , 105 Wn.2d 692, 718 P.2d 407, <u>cert. denied</u> , 479 U.S. 995 (1986).....	44, 45
<u>State v. Martin</u> , 151 Wn. App. 98 (2009), <u>review granted</u> , 168 Wn.2d 1006 (2010).....	33

<u>State v. McDaniel</u> , 83 Wn. App. 179, 920 P.2d 1218 (1996).....	79
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	70, 71
<u>State v. McKenzie</u> , 157 Wn.2d 44, 134 P.3d 221 (2006).....	30
<u>State v. Millante</u> , 80 Wn. App. 237, 908 P.2d 374 (1995), <u>review denied</u> , 129 Wn.2d 1012 (1996).....	47
<u>State v. Miller</u> , 110 Wn. App. 283, 40 P.3d 692, <u>review denied</u> , 147 Wn.2d 1011 (2002).....	32, 33, 59
<u>State v. Momah</u> , 128 Wn.2d 254, 906 P.2d 325 (1995).....	1, 13, 14, 16, 17, 18, 19, 20
<u>State v. Negrete</u> , 72 Wn. App. 62, 863 P.2d 137 (1993).....	71
<u>State v. Posey</u> , 161 Wn.2d 638, 167 P.3d 560 (2007).....	79, 80
<u>State v. Rehak</u> , 67 Wn. App. 157, 834 P.2d 651 (1992), <u>review denied</u> , 120 Wn.2d 1022 (1993), <u>cert. denied</u> , 508 U.S. 953 (1993).....	77
<u>State v. Rempel</u> , 53 Wn. App. 799, 770 P.2d 1058 (1989).....	28
<u>State v. Romero</u> , 113 Wn. App. 779, 54 P.3d 1255 (2002).....	28
<u>State v. Rupe</u> , 101 Wn.2d 664, 683 P.2d 571 (1984).....	58
<u>State v. Russell</u> , 125 Wn.2d 24, 882 P.2d 747 (1994), <u>cert. denied</u> , 514 U.S. 1129 (1995).....	31, 47, 88

<u>State v. Smith</u> , 82 Wn. App. 327, 917 P.2d 1108 (1996), <u>review denied</u> , 130 Wn.2d 1023 (1997).....	32, 34
<u>State v. Smith</u> , 144 Wn.2d 665, 30 P.3d 1245, 39 P.3d 294 (2001) .....	64
<u>State v. Stenson</u> , 132 Wn.2d 668, 940 P.2d 1239 (1997), <u>cert. denied</u> , 523 U.S. 1008 (1998).....	31, 48, 68
<u>State v. Stiltner</u> , 80 Wn.2d 47, 491 P.2d 1043 (1971).....	26
<u>State v. Strode</u> , 167 Wn.2d 222, 217 P.3d 310 (2009).....	15, 19
<u>State v. Swan</u> , 114 Wn.2d 613, 790 P.2d 610 (1990).....	30
<u>State v. Thach</u> , 126 Wn. App. 297, 106 P.3d 782, <u>review denied</u> , 155 Wn.2d 1005 (2005).....	49
<u>State v. Waldon</u> , 148 Wn. App. 952, 202 P.3d 325, <u>review denied</u> , 166 Wn.2d 1026 (2009).....	13, 14
<u>State v. Warren</u> , 165 Wn.2d 17, 195 P.3d 940 (2008), <u>cert. denied</u> , 129 S. Ct. 2007 (2009).....	47, 48
<u>State v. Watt</u> , 160 Wn.2d 626, 160 P.3d 640 (2007).....	86
<u>State v. Wicke</u> , 91 Wn.2d 638, 591 P.2d 452 (1979).....	25
<u>State v. Williamson</u> , 100 Wn. App. 248, 996 P.2d 1097 (2000).....	27
<u>State v. Wise</u> , 148 Wn. App. 425, 200 P.3d 266 (2009).....	15

<u>State v. Ziegler</u> , 114 Wn.2d 533, 789 P.2d 79 (1990).....	30, 34
---	--------

Other Jurisdictions:

<u>Hanf v. State</u> , 560 P.2d 207, 1977 OK CR 41 (1977).....	24
---	----

<u>Palmer v. State</u> , 572 So.2d 1012 (Fla. 4 <sup>th</sup> DCA 1991).....	25
---	----

<u>State v. Willard</u> , 144 Ohio App.3d, 761 N.E.2d 688 (2001).....	62, 63, 64
--	------------

Constitutional Provisions

Federal:

U.S. Const. amend. V.....	20, 21, 22, 24
U.S. Const. amend. VI.....	13, 26, 32, 73, 78

Washington State:

Const. art. I, § 10.....	13
Const. art. I, § 22 (amend. 10).....	13, 26, 33, 78

Statutes

Washington State:

RCW 7.90.156 .....	89
RCW 9.94A.545.....	89
RCW 9A.44.050.....	2
RCW 9A.44.060.....	3

Rules and Regulations

Washington State:

CrR 6.4 .....27  
ER 103 .....69  
ER 401 .....79  
ER 403 .....74, 79, 82  
RAP 2.5.....64, 68

Other Authorities

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*.....81, 82  
*Hamlet*, Act 3, scene 2, 222–30 .....45  
<http://dictionary.reference.com/browse/Bullying> .....45  
Royce A. Ferguson, 13 WASHINGTON PRACTICE, CRIMINAL PRACTICE AND PROCEDURE, § 4502 (3rd ed.) .....71  
RPC 3.1 .....71  
WPIC 1.02.....72  
WPIC 6.31.....28

**A. ISSUES PRESENTED**

1. Under Momah,<sup>1</sup> a defendant may waive his public trial right. Such waiver does not warrant automatic reversal. Here, the defendant asked the court to seal confidential jury questionnaires. By so doing, did the defendant waive his public trial right vis-à-vis the jury questionnaires? And, is the appropriate remedy remand for the trial court to engage in a Bone-Club<sup>2</sup> analysis on the record?

2. Whether the defendant 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.

3. Where the deputy prosecutor's remarks in closing, that suggested co-defendant 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, has 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?

---

<sup>1</sup> 167 Wn.2d 140, 147, 217 P.3d 321 (2009).

<sup>2</sup> 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995).

7. Whether the defendant's failure to object to allegedly improper opinion testimony waived review of the issue.

8. 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, and where the defendant fails to establish any prejudice.

9. 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.

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

11. The State has conceded error regarding the correct term of community custody and the expiration date of a Sexual Assault Protection Order.

## **B. STATEMENT OF THE CASE**

### **1. PROCEDURAL FACTS**

The State charged defendant Taner Tarhan and three co-defendants (Turgut Tarhan, Emir Beskurt and Samet Bideratan)<sup>3</sup> with Rape in the Second Degree, contrary to RCW 9A.44.050(1)(a).<sup>4</sup> CP 1. A jury convicted each co-defendant of the inferior degree crime of Rape in the

---

<sup>3</sup> The three co-defendants' cases are consolidated under Court of Appeals No. 62268-4-I.

<sup>4</sup> "A person is guilty of rape in the second degree when . . . the person engages in sexual intercourse with another person by forcible compulsion."

Third Degree, contrary to 9A.44.060(1)(a).<sup>5</sup> CP 80. The trial court imposed a standard range 10-month sentence plus a community custody range of 36-48 months. CP 105-14. Tarhan appeals. CP 115.

## 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; 10RP 38; 18RP 6-8.<sup>6</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>7</sup> 13RP 132; 18RP 21; 19RP 43. Concepcion met them once

---

<sup>5</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>6</sup> The State adopts Tarhan's designation of the verbatim report of proceedings (see Br. of Appellant at 11 n.2), but with one minor correction – Butler, not McGrath, was the court reporter for the afternoon session on July 24, 2008, designated as 20RP.

<sup>7</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

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 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>8</sup>

---

approximately 40 minutes later). See also 21RP 34 (Turgut stated that he and Beskurt saw Concepcion and H.W. at the window). For clarity, the State will refer to the men by their first names. No disrespect is intended.

<sup>8</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.

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.

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>9</sup> 10RP 113; 11RP 127; 15RP 36-37. More than ten times H.W. told the men to stop. She repeatedly asked for

---

<sup>9</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.

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.

Each of the defendants unclothed himself. 10RP 116. The defendants vaginally and orally raped H.W.<sup>10</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.

---

<sup>10</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.

18RP 39-40. She was crying. 18RP 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>11</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 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.

---

<sup>11</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.

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**

**1. TANER WAIVED HIS PUBLIC TRIAL RIGHT  
VIS-À-VIS THE JURY QUESTIONNAIRES.**

Taner contends that his and the public's right to an open trial were violated when the trial court sealed juror questionnaires without first conducting a Bone-Club analysis on the record. Br. of Appellant at 28-42. Taner further claims that this error is “structural” and therefore prejudice is presumed for which reversal and remand for a new trial is warranted. Br. of Appellant at 42.

The Court should reject this claim for three reasons. First, Taner does not have standing to challenge the *public's* open trial rights. Second, Taner's counsel specifically asked the trial court to seal juror questionnaires to ensure both juror privacy and jury impartiality. Thus, error, if any, vis-à-vis Taner's open trial rights, was invited. Finally, even if error occurred, the remedy is not reversal, but, rather, remand for the trial court to reconsider its order and engage in a Bone-Club analysis.

“Whether the right to a public trial has been violated is a question of law subject to de novo review.” State v. Momah, 167 Wn.2d 140, 147, 217 P.3d 321 (2009).

A criminal defendant has a right to a public trial under both the federal and state constitutions. U.S. CONST. AMEND. VI<sup>12</sup>; CONST. ART. I, § 22.<sup>13</sup> Article I, section 10 of our constitution requires that “[j]ustice in all cases shall be administered openly. . . .” In addition to court proceedings, Article I, section 10 ensures public access to court records. State v. Waldon, 148 Wn. App. 952, 957, 202 P.3d 325, review denied, 166 Wn.2d 1026 (2009). Juror questionnaires are “court records.” State v. Coleman, 151 Wn. App. 614, 621-23, 214 P.3d 158 (2009).

The Washington Supreme Court has held that generally, when a party requests a courtroom closure, the trial court must consider five factors (“Bone-Club” factors) on the record and enter findings justifying its closure order before closing the courtroom during trial.<sup>14</sup> State v.

---

<sup>12</sup> “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.”

<sup>13</sup> “In criminal prosecutions the accused shall have the right ... to have a speedy public trial.”

<sup>14</sup> These factors are as follows: 1) there must be a compelling interest justifying the closure and, if the interest is a reason other than the defendant's right to a fair trial, there must be a serious and imminent threat to the interest in question; 2) anyone present when the closure motion is made must be given an opportunity to object; 3) the method of closure must be the least restrictive means available for protecting the threatened interest; 4) the court must weigh the competing interests of the proponent of closure and the

Easterling, 157 Wn.2d 167, 175, 137 P.3d 825 (2006); see also Waldon, 148 Wn. App. at 967 (holding that an order sealing court records requires a Bone-Club analysis); Coleman, 151 Wn. App. at 623 (same vis-à-vis juror questionnaires). To overcome the presumption of openness, the party seeking closure must show an overriding interest that is likely to be prejudiced and that the closure is narrowly tailored to serve that interest. In re Personal Restraint of Orange, 152 Wn.2d 795, 806, 100 P.3d 291 (2004) (citing Waller v. Georgia, 467 U.S. 39, 45, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)).

Generally, the failure to conduct a Bone-Club analysis on the record results in reversal for a new trial. State v. Brightman, 155 Wn.2d 514, 518, 122 P.3d 150 (2005); but see Momah, 167 Wn.2d at 150 (finding that not all courtroom closures trigger a conclusive presumption of prejudice warranting automatic reversal for a new trial; holding that “[i]n each case the remedy must be appropriate to the violation”) (quoting Waller, 467 U.S. at 50); Coleman, 151 Wn. App. at 623-24 (finding that the trial court's failure to conduct a Bone-Club analysis before sealing jury questionnaires results in remand for reconsideration of the closing order under Bone-Club and Waldon).

---

public; and 5) the closure order must be no broader in application or duration than is necessary. Bone-Club, 128 Wn.2d at 258-59.

a. Taner Cannot Assert The Public's Open Trial Rights.

As a preliminary matter, Taner cannot assert the public's right to an open trial; he lacks standing to make such a claim. See State v. Strode, 167 Wn.2d 222, 236, 217 P.3d 310 (2009) (Fairhurst, J., concurring):

While I agree with the lead opinion's result in this case, I do not agree with its conflation of the rights of the defendant, the media, and the public. A defendant should not be able to assert the right of the public or the press in order to overturn his conviction when his own right to a public trial has been safeguarded as required under *Bone-Club* or has been waived.

“Where there is no majority agreement as to the rationale for a decision, the holding of the court is the position taken by those concurring on the narrowest grounds.” Davidson v. Hensen, 135 Wn.2d 112, 128, 954 P.2d 1327 (1998). Moreover, even the plurality opinion conceded in its response to the concurrence that it was not addressing Strode's public trial rights:

The concurring justice asserts that any discussion of the public's right to open trials conflates the rights of the defendant and the public because a defendant should not be able to assert the rights of the public or press. Strode has not asserted any rights belonging to the public or press concerning public trials.

Strode, 167 Wn.2d at 230 n.4 (plurality). See also, State v. Wise, 148 Wn. App. 425, 442, 200 P.3d 266 (2009) (holding that the defendant lacked standing to raise public's open trial rights).

b. Taner Invited The Error That He Claims Occurred.

Taner next asserts that his right to a public trial was violated when the trial court sealed the juror questionnaire without engaging in a Bone-Club analysis. However, Taner invited the very error that he says occurred. See Momah, 167 Wn.2d at 153-54 (discussing the invited error doctrine vis-à-vis courtroom closures).

The doctrine of invited error applies regardless of whether counsel intentionally or inadvertently encouraged the error. Seattle v. Patu, 147 Wn.2d 717, 720, 58 P.3d 273 (2002). The invited error rule recognizes that “[t]o hold otherwise [i.e. to entertain an error that was invited] would put a premium on defendants misleading trial courts.” State v. Henderson, 114 Wn.2d 867, 868, 792 P.2d 514 (1990).

Because of heavy pre-trial publicity, and in an attempt to avoid contaminating the venire, Momah's counsel agreed to privately question potential jurors in chambers. Momah, 167 Wn.2d at 145-46. In addition, “Momah affirmatively assented to the closure, argued for its expansion, had the opportunity to object but did not, actively participated in it, and benefitted from it.” Id. at 151. The trial court closed the courtroom “to safeguard Momah's right to a fair trial by an impartial jury, not to protect any other interests.” Id. at 151-52.

Similarly, in this case, Taner's counsel sought questioning of prospective jurors by a “**confidential questionnaire.**” CP 1301 (emphasis in original). Counsel argued to the trial court that such a questionnaire was needed to ensure a fair and impartial jury. CP 1302. As in Momah, counsel was worried about media coverage about forcible sex crimes.”<sup>15</sup> Id. Significantly, the jury questionnaire that *Taner proposed* assured prospective jurors that, “Your responses will be available only to the judge, the defendant and the attorneys for both parties. . . .” CP 1311. The questionnaire further assured the jurors that, if selected, “*your responses will be sealed in the permanent record and thus not available for public scrutiny.*”<sup>16</sup> Id. (Emphasis supplied).

Moreover, based on the order to seal in this case, the trial court considered—albeit not on the record—the Bone-Club factors. See CP 119. The trial court made specific findings in its order to seal the questionnaires: “The Court having reviewed the applicant's motion and declaration to seal specific documents or this file, *and pursuant to applicable case law and court rules*, finds compelling circumstances to grant the order exist. . . .” CP 119 (emphasis added). The court explained

---

<sup>15</sup> Unlike Momah, the defendants in this case had not been the subject of pre-trial media attention, at least as far as the undersigned deputy knows.

<sup>16</sup> See also CP 1319-39. It is clear that here, as in Momah, the defendant sought to have court closures, albeit in this case it was not the actual closure of the courtroom, but rather, the sealing of the questionnaires.

that sealing was necessary because, “Jurors signed confidential questionnaires containing information concerning sexual abuse with the understanding that the questionnaires would be sealed.” CP 119.

Taner contends that the trial court's sealing order was only for the benefit of protecting juror privacy,<sup>17</sup> however, that claim ignores his argument at trial that such an order was needed to protect Taner's right to a fair and impartial jury—the very concern of the trial court in Momah. Thus, just as the trial court in Momah substantially complied with Bone-Club, so, too, did Taner's trial court.

c. Under Momah, Taner May Not Claim That Structural Error Occurred.

The majority in Momah concluded that although not a “classic case of invited error,” Momah's participation in and affirmative agreement with the courtroom closure, resulted in relief short of reversal. Momah, 167 Wn.2d at 154-56. The court stated, “[C]ourts grant automatic reversal and remand for a new trial only when errors are structural in nature.” Id. at 155. A structural error “renders a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.” Id. at 155-56. The court recognized that not only would reversal be disproportionate to

---

<sup>17</sup> Br. of Appellant at 37 (claiming that the sealing order “was entered for the sole purpose of protecting juror privacy—rather than to promote Tarhan's right to a fair trial.”)

the violation, it would result in a windfall for Momah, despite no showing that Momah's case was actually rendered unfair by the closure. Id. at 150.

Likewise, this Court has recognized that sealing juror questionnaires without engaging in a Bone-Club analysis on the record is not structural error. Coleman, 151 Wn. App. at 623-24. Here, as in Coleman, the questionnaires were used preliminarily to voir dire, which proceeded in open court. Also as in Coleman, the juror questionnaires were not sealed until several days after the jury was seated and sworn. Compare Coleman at 624 with CP 11 (trial began on 6/20/08) and CP 22 (jurors seated and sworn 7/2/08) and CP 119-20 (order to seal entered 7/8/08).

Taner infers from the trial court's caution to counsel about taking the questionnaires home to review, that the questionnaires were unavailable to the public. Br. of Appellant at 39-40 (citing 1RP 39-40). However, the trial court's concern that the questionnaires might get "Xeroxed and sent around town," does not necessarily mean that the questionnaires were unavailable to members of the public who wished to review them *in the courtroom*.

Moreover, as in Momah, Taner agreed to and benefitted from the procedure followed. Further, unlike in either Momah or Strode, all of voir dire was conducted in open court, and all peremptory and cause challenges

were heard and decided in open court. As in Momah and Coleman, Taner fails to show any structural error justifying the reversal of his conviction.

**2. TANER WAIVED HIS CLAIM OF PROSECUTORIAL ERROR IN VOIR DIRE AND, EVEN IF IT WAS NOT WAIVED, THE ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT.**

Taner contends that he was denied due process and the right to a fair trial because the deputy prosecutor improperly commented on a defendant's Fifth Amendment rights. Br. of Appellant at 14-17, 44-45. Although the prosecutor's comments were admittedly improper, the trial court ameliorated any potential prejudice with a strongly-worded curative instruction.

More significantly, however, Taner 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. 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>18</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.

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.

---

<sup>18</sup> Mr. Savage was Mr. Bideratan's trial counsel.

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.<sup>19</sup>

2RP 172.

---

<sup>19</sup> Taner's counsel stated that he did not believe that a curative instruction could cure the error. 2RP 154, 165.

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. Taner's counsel also objected to excusing the first panel and recommencing voir dire. 3RP 60.

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 court continued with voir dire and ordered a third panel to supplement the venire. 4RP 63-64.

- b. The Deputy Prosecutor Erred, But The Defendant 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; 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>20</sup> This was error.

---

<sup>20</sup> Notably, the prosecutor did not invite the jury to draw an adverse inference. She was simply opening the topic for discussion.

Still, review is unwarranted because Taner waived his 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, 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); 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. Counsel's 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 counsel's 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>21</sup> Const. art. I, § 22 (amend. 10).<sup>22</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

---

<sup>21</sup> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."

<sup>22</sup> "In criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury."

substantially complies with the applicable rules or statutes, a defendant must show prejudice. 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). 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. Taner does not offer any evidence demonstrating that the individuals actually selected as jurors in this case were biased or that he was denied a fair trial. When the defense accepted the panel, without further objection, counsel collectively had seven remaining peremptory challenges.<sup>23</sup> 7RP 99-103. This Court presumes “that each juror sworn in a case is impartial and above legal exception,

---

<sup>23</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.

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. 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).

Further, Taner fails 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>24</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

---

<sup>24</sup> Additionally, the trial court 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.” CP 1266; WPIC 6.31.

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

**3. THE PROSECUTOR DID NOT COMMIT MISCONDUCT IN THE STATE'S CASE-IN-CHIEF OR CLOSING ARGUMENT.**

Taner claims that his conviction must be reversed because of prosecutorial misconduct. Specifically, he contends the prosecutor committed misconduct by (1) arguing that consent was the only available defense, (2) disparaging defense counsel, (3) appealing to the jury's sympathy, (4) misstating the burden of proof, (5) commenting on the defendants' right to confront their accuser, and (6) making herself an unsworn witness against Taner. Br. of Appellant at 45-54.

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 Taner now asserts were misconduct, Taner 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 Bideratan Manufactured An Exculpatory Story.

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); State v. Martin, 151 Wn. App. 98 (2009) (holding that, under the Washington State Constitution, art. I, § 22, it was not misconduct for the prosecutor to cross-examine the defendant on his ability to tailor his testimony), review granted, 168 Wn.2d 1006 (2010).

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.<sup>25</sup> 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."<sup>26</sup>

Here, the trial court did not find that the deputy prosecutor's comments were improper; it said that *if* there had been an improper

---

<sup>25</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.

<sup>26</sup> Although Taner's counsel ultimately joined in the co-defendant's motion for a mistrial, he did not object to the prosecutor's comments. 22RP 53-54.

argument, it did not warrant a curative instruction, much less mistrial. 22RP 56-57. 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, Taner has not established that *he* was 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 not create a substantial likelihood that the jury's verdict was affected. 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 Taner raises on appeal were objected to at trial. Thus, Taner has waived appellate review of the following claims, unless the conduct was flagrant and ill-intentioned. See Ziegler, 114 Wn.2d at 540.

Taner claims that the prosecutor disparaged defense counsel, improperly appealed to the juror's sympathy, misstated the burden of proof, commented on the defendant's right to confront adverse witnesses,

and acted as an unsworn witness against the defendants. 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. Moreover, counsel's failure to object to the prosecutor's questioning of Detective Kizzier waived appellate review of any alleged improper opinion testimony. Accordingly, there was no misconduct.

i. Facts.

a. Direct.

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

b. Cross-examination.

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. 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 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'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>27</sup> See 4RP 16-21, 31-39, 70 (court rules on

---

<sup>27</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

the permissible scope of inquiry). In arguing that H.W. was either a “rape victim or 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>28</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

---

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.

<sup>28</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. . .”).

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:

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 designed to get the jury to overlook the evidence in this case.

22RP 98. Turgut'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).

Turgut'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 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 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>29</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>30</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).

---

<sup>29</sup> Mr. Beskurt's trial counsel.

<sup>30</sup> Mr. Bideratan's trial counsel.

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 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 Turgut'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?” 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.

Taner contends that the prosecutor's remarks about the “bullying manner” in which questions that “border[ed] on the offensive” were asked of H.W. constituted misconduct. Br. of Appellant at 46. This claim should be rejected.

A prosecutor has wide latitude in a closing argument to “draw and express reasonable inferences from the evidence.” 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>31</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>32</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

---

<sup>31</sup> Available at: <http://dictionary.reference.com/browse/Bullying>.

<sup>32</sup> Notably, at sentencing, the trial court addressed H.W. and told her that she had shown “tremendous strength and tenacity.” 25RP 20.

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>33</sup>

The prosecutor's remarks were tied directly to the evidence and counsels' closing remarks. The prosecutor reminded the jurors that it is what “the witnesses say, not what the attorneys tell you they said and not 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.

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

---

<sup>33</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).

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).

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, Taner cannot demonstrate that he suffered the kind of “enduring and resulting prejudice” that would justify reversal of his rape conviction. 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, Taner has not shown a substantial likelihood that the remarks affected the jury's verdict. See State v. Warren, 165 Wn.2d 17, 29-30, 195 P.3d 940 (2008) (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), cert. denied, 129 S. Ct. 2007 (2009).

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. CP 1260. 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.

Taner next contends that the prosecutor's comments “appealed to the sympathies, passions and prejudices of the jury.” Br. of Appellant at 46. There was no part of the prosecutor's closing argument or case-in-chief—including her examination of H.W., who described her trial experience as “horrendous”—that improperly appealed to the passions and prejudices of the jury. The claim thus fails.

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'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 her 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. 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.<sup>34</sup> She said, “But let's set the emotion aside for a minute. Let's look again at the evidence in this case. . . .”

---

<sup>34</sup> The prosecutor exhorted the jury to rely on only the evidence when deciding the verdict, which is what distinguishes this case from the string citation of cases upon which Taner relies. See Br. of Appellant at 47-48, (citing, e.g., State v. Echevarria, 71 Wn. App. 595, 596-98, 860 P.2d 420 (1993) (prosecutor urged jury to convict, not on the basis of the evidence, but rather on the basis of fear and repudiation of drug dealers, referencing the “war on drugs,” and the “battlefield[s]” that are our neighborhoods and schools); State v. Bautista-Caldera, 56 Wn. App. 186, 194-95, 783 P.2d 116 (1989) (prosecutor improperly exhorted the jury to “send a message to society about the general problems of child sexual abuse”)). Taner cites Brown v. United States, 370 F.2d 242 (D.C. Cir. 1966) and parenthetically explains it was reversed where “prosecutor argued that if the jury acquitted defendant, ‘you might as well have martial law.’” Br. of Appellant at 48. The case was not reversed because of prosecutorial misconduct; it was reversed because of an incorrect evidentiary ruling by the trial court. Taner also cites Hance v. Zant, 696 F.2d 940 (11<sup>th</sup> Cir. 1983), a case reversed by Brooks v. Kemp, 762 F.3d 1383, 1398-99 (1985).

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. For this additional reason, Taner's claim fails.

Taner next 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 that it appealed to the passions of the jury. See Br. of Appellant at 49. This Court should reject Taner's baseless claim.

As a preliminary matter, it was wholly inappropriate for Turgut's counsel to introduce Turgut's family (and thus, Taner's family) to the jury during trial. See 21RP 20, 26. Turgut's 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 Turgut “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 Taner of a fair trial should be rejected.

c. The Prosecutor Did Not Misstate The Burden Of Proof.

Taner next contends that the State misstated the burden of proof by arguing that if the jury believed H.W., it would be “enough to convict these four men of rape.”<sup>35</sup> Br. of Appellant at 49-51. Taner hangs his claim on this Court's decision in State v. Fleming, 83 Wn. App. 209, 921 P.2d 1076 (1996), a case that is inapt.

In Fleming, the prosecutor argued that in order to find the defendants not guilty of rape in the second degree, “[y]ou would have to find either that [D.S.] has lied about what occurred in that bedroom or that she was confused; essentially that she fantasized what occurred back in that bedroom.” Fleming, at 213. The Court held that such argument misstated the law and misrepresented both the role of the jury and the burden of proof. Id. The jury “was required to acquit unless it had an abiding conviction in the truth of her testimony.” Id. Thus, if the jury was uncertain whether D.S. was telling the truth or whether her recollection of

---

<sup>35</sup> 22RP 32.

the events was accurate, it was required to acquit—in neither of these instances would the jury also have to find that D.S. was lying or mistaken, in order to acquit. Id.

By contrast, in this case, the prosecutor argued that if the jury believed H.W., it would be enough to find the defendants guilty. The prosecutor stated, “There is no law, there is no requirement, that the State corroborate [H.W.’s] testimony. . . If you believe her, it is enough.” 22RP 32. This argument is fundamentally different from the argument held improper in Fleming. This argument does not turn the defendant's presumption of innocence on its head or talk about acquittal. Furthermore, the argument does not state—or imply—that a conviction would be proper unless the State met its burden as to each essential element. The State merely argued that, taken as true, H.W.’s testimony established such proof.

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

Taner further contends that the prosecutor impermissibly commented on his right to be present at trial and to confront H.W. He claims that the prosecutor invited the jury to draw adverse inferences from him exercising his constitutional rights. Br. of Appellant at 43-46. The Court should reject this contention. The comments were not focused on the defendant's 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 Turgut'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>36</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-

---

<sup>36</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>37</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 of the victim or implied that Gregory should have spared her the unpleasantness of going through trial. Gregory, at 807.

---

<sup>37</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.

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.

As support of Taner's claim to the contrary, Taner relies on State v. Willard, 144 Ohio App.3d, 761 N.E.2d 688 (2001). In Willard, the prosecutor committed multiple instances of misconduct, the cumulative

effect of which denied Willard a fair trial. Willard, 761 N.E.2d at 695.<sup>38</sup>

The specific portion of the prosecutor's argument in Willard that Taner relies on is as follows:

So [F.D.] sits here, and we're talking five feet, six feet, from the man who raped her. And she tries to shy away, she tries to hide her face, anything that she can do to get away from that. She goes through all this, and then she has to sit and undergo and endure cross-examination at the hand's of her assailant's attorney. Does anybody think that this has been fun?

Id. at 693.

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 Willard exercising a constitutional right (i.e., his right to cross-examination) while concomitantly appealing to the sympathies of the jurors for the victim. Id. at 694. The court in Willard noted that, “Although, when viewed alone, any single remark may not be enough to require reversal, we conclude that the cumulative effect of the prosecutor's improper statements in the present case denied defendant a fair trial.” Id. at 695.

---

<sup>38</sup> The prosecutor: (1) referred to facts not in evidence; (2) improperly commented on Willard's physical appearance, commenting that “this is what a man who rapes his daughter looks like”; (3) appealed to the passions of the jury by indicating that the defendant's counsel had “embarrassed and belittled the alleged victim during cross-examination”; and (4) misstated evidence during closing argument. Willard, 761 N.E.2d at 692-93.

The comments here are unlike those addressed in Willard. In this case, the prosecutor's remarks were not an attack on the defendant or his right to confront witnesses. Moreover, they did not encourage the jury to punish the defendant simply for requiring H.W. to testify. Instead, they focused on how 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). There is no evidence that the comments were flagrant or ill intentioned. Thus, Taner's failure to object, request a curative instruction or move for mistrial has waived review of this claim.

- e. RAP 2.5(a) Precludes Review Of Taner's Claim That The Prosecutor Committed Misconduct By Eliciting Improper Opinion Testimony.

Taner argues that the prosecutor improperly elicited opinion testimony and thus made herself into an unsworn State's witness. Br. of

Appellant at 51-54. However, because Taner failed to object below, he has waived this claim on appeal.

Taner contends for the first time on appeal that the prosecutor elicited improper opinion testimony from Detective Kizzier. Taner did not object below, therefore, he has waived any challenge on appeal with respect to this issue. See 16RP 54-58, 92-93. Because the admission of testimony alleged to constitute an opinion on a victim's—or a defendant's—credibility is not an error of constitutional magnitude, it may not be raised for the first time on appeal. State v. Kirkman, 159 Wn.2d 918, 155 P.3d 125 (2007).

In Kirkman, the Washington Supreme Court clarified what constitutes a manifest constitutional error. Not all trial errors implicate a constitutional right; rather, only certain constitutional questions (defined narrowly) are reviewable on appeal. Kirkman, 159 Wn.2d at 934-35. A party at trial must object to a perceived error in order to allow the trial court an opportunity to cure the error. Id. at 935.

Moreover, to be “manifest,” the error must have “practical and identifiable consequences” in the trial. Id. The defendant must show actual prejudice on appeal. Id.

In the context of alleged improper opinion testimony, manifest error requires an explicit or almost explicit statement by the witness that

constitutes a personal opinion on the defendant's guilt. Id. at 936-37.

Furthermore, the Supreme Court has consistently found curative a trial court's instructions to a jury concerning the jury's role in determining the credibility of witnesses.<sup>39</sup> Id. at 937.

Because Taner did not object below, and he has failed to allege—must less establish—actual prejudice, this Court should decline to address this issue. Moreover, even assuming that Detective Kizzier rendered improper opinion testimony, the trial court's instructions to the jury cured any error. See Kirkman at 937; CP 1259, 1267.

Additionally, it is a mischaracterization to depict Detective Kizzier's testimony as unsworn testimony by the trial deputy prosecutor. Just after calling Detective Kizzier as a witness, the deputy prosecutor inquired about how *generally* a case is investigated or filed, as compared with what jurors may have seen on T.V. 16RP 54-58. Detective Kizzier explained that, after a case is investigated, it is referred to the prosecutor's office for a determination of whether to file charges. The detective then interrupted the deputy prosecutor, and stated, unsolicited:

Again, as I said, my job is really more of gatherer of facts. We'll get cases that in some cases we don't have

---

<sup>39</sup> The trial court's instructions to the jury in this case, as in Kirkman, stated (1) that jurors “are the sole judges of the credibility of the witnesses and of what weight is to be given to the testimony of each” and (2) that they “are not bound” by expert witness opinions, but “determin[e] the credibility and weight to be given such opinion evidence.” CP 1259 (instruction 1), 1267 (instruction 6).

enough information. It goes to the prosecutor's office when I'm able to determine that, yes, a crime was committed and someone has been identified, and it goes to the prosecutor's office to decide whether or not they are now going to file charges against that individual or individuals.

If I'm unable to determine who did it, if I don't have a complete case, if I'm absent some element of the crime in order to show that a crime occurred, then it won't go to the prosecutor's office.

16RP 55-56. There was no objection by any counsel.

A little later, the detective testified about joint (police, prosecutor and victim) interviews, which can either precede or follow a charging decision. 16RP 58. There was no objection. Still later, the prosecutor said that she had neglected to ask Detective Kizzier earlier (when he had testified "just in general terms" about investigations), whether information that might tend to exonerate a defendant would be turned over. 16RP 92. Again, there was no objection. Detective Kizzier stated that he had both a legal and moral obligation to turn over such information. 16RP 93.

Here, there was no explicit statement of opinion by either the police or the deputy prosecutor on H.W.'s or the defendants' credibility and there were no objections. Moreover, because a jury had been seated in this case, the jurors most certainly knew that the State (prosecutor and detective) believed that the four defendants had committed a rape. Also, the trial court instructed the jurors, "You are not to consider the filing of

the information or its contents as proof of the matters charged.” 1RP 129-30; 3RP 69-70; 5RP 8-9. The jury is presumed to have followed the instruction. Stenson, 132 Wn.2d at 729-30. There is nothing in this case to forestall that presumption.

The defense may not fail to object and then seek relief from this Court on an alleged error of non-constitutional magnitude. RAP 2.5(a). See Kirkman, 159 Wn.2d at 938.

The cases upon which Taner relies are inapposite. See Br. of Appellant at 51-52 (citing United States v. Roberts, 618 F.2d 530 (9<sup>th</sup> Cir. 1979) (finding that the prosecutor committed prejudicial misconduct when he referred to evidence not in the record, stated that the police could corroborate a chief prosecution witness and that the police were monitoring the witness's testimony to make sure that he told the truth); United States v. Edwards, 154 F.3d 915 (9<sup>th</sup> Cir. 1998) (finding that the Assistant United States Attorney could no longer appear on behalf of the government, following his discovery of a critical piece of evidence during trial); United States v. Sanchez, 176 F.3d 1214 (9<sup>th</sup> Cir. 1999) (finding that the prosecutor committed misconduct when he cross-examined the defendant about his reputation for being a big drug dealer, which not only assumed facts not in evidence, but asked a question for which the prosecutor had no good-faith basis); United States v. Hermanek, 289 F.3d

1076 (9<sup>th</sup> Cir. 2002) (finding that prosecutor violated the witness-advocate rule by using words like “us” and “we” to describe the investigation thereby placing his credibility before the jury, even though prosecutor did not take the stand), cert denied, 537 U.S. 1223 (2003)).

Unlike Roberts and Sanchez, the prosecutor here did not rely on evidence that was not in the record. Had trial counsel found the prosecutor's examination of Detective Kizzier—or Detective Kizzier's answers—improper, counsel was obligated to object and move to strike the offending testimony. See ER 103; Kirkman, 159 Wn.2d at 926. Unlike Edwards, there is nothing in the record in the instant case to establish that the deputy prosecutor was involved in any part of the criminal investigation. Rather, Detective Kizzier testified about how criminal investigations generally proceed. Again, Taner's remedy if he found the testimony objectionable was to object and permit the trial court to cure any alleged error. See Kirkman, 159 Wn.2d at 926. Finally, unlike in Hermanek, the prosecutor here never described the investigation in terms of what “we” (she and the police) did. Taner's claim thus fails.

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

Taner 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. Br. of Appellant at 56-58. This claim should also be rejected. Because the prosecutor did not commit misconduct, Taner's counsel had no duty to object. Further, even if any of the prosecutor's remarks were improper, Taner'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 Taner's counsel should have objected, Taner 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, Taner'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 (3rd ed.).

Here, in the context of both the prosecutor's closing argument and the trial as a whole, it was undoubtedly apparent to Taner's 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. State v. Negrete, 72 Wn. App. 62, 67, 863 P.2d 137 (1993).

Furthermore, even if improper, defense counsel may have made a legitimate tactical decision not to object during the prosecutor's closing argument.<sup>40</sup> But 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, 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. CP 1260; WPIC 1.02. Under these circumstances, there is

---

<sup>40</sup> Taner states in conclusory fashion that, "there were numerous occasions when a timely objection by trial counsel could have prevented the jury's exposure to improper and highly prejudicial testimony and arguments." Br. of Appellant at 57-58. However, Taner does not specify even one of those "numerous occasions."

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

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

Taner raises 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, he contends, violated his right to present a defense and his Sixth Amendment right to confront witnesses. Br. of Appellant at 58-60. Specifically, he argues that the defense 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.

Taner has failed to show a constitutional violation. None of the defendants ever 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 for 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 Turgut'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.

In addition, 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>41</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

---

<sup>41</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.

affect fundamental principles of justice. 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>42</sup> and Const. art. I, § 22<sup>43</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 cross-examination absent a manifest abuse of discretion; i.e., discretion that is manifestly

---

<sup>42</sup> “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”

<sup>43</sup> “In criminal prosecutions the accused shall have the right to . . . meet the witnesses against him face to face.”

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.” Relevant evidence is admissible unless, under ER 403, the probative value is substantially outweighed by the danger of unfair prejudice. In addition to determining relevancy and weighing possible unfair prejudice, the trial court has an 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. Gregory, 158 Wn.2d

at 835. 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>44</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 and determined that the remark, in isolation, painted a skewed picture of H.W.'s view. 4RP 96-97; 16RP 32.

---

<sup>44</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.

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.

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. Turgut'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).

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. 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).

Taner'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 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. Turgut 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>45</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

---

<sup>45</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.

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 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; 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.

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.

c. Any Error Was Harmless Beyond A Reasonable Doubt.

Taner has 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 Delaware v. Van Arsdall, 475 U.S. 673, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986) (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>46</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.

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

---

<sup>46</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.

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.

**6. TANER WAS NOT DENIED HIS RIGHT TO A FAIR TRIAL BY CUMULATIVE ERROR.**

Taner argues that, even if he cannot gain reversal of his conviction on any individual claim of error, this Court should nevertheless find that cumulative error denied him 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 claim is 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, Taner cannot seek reversal of his conviction under this doctrine. See Russell, 125

Wn.2d at 93 (cumulative effect of errors may mandate reversal if the errors materially affected the outcome).

**7. THIS STATE CONCEDED THAT THE COMMUNITY CUSTODY TERM AND THE EXPIRATION DATE IN THE SEXUAL ASSAULT PROTECTION ORDER WERE INCORRECT.**

Taner contended that the trial court erred at sentencing when it imposed a community custody range that exceeded the statutory maximum and when it issued a sexual assault protection order with an expiration date of August 1, 2015. The State agreed. Pursuant to RCW 9.94A.545(1), the maximum term of community custody that the trial court could have imposed was 12 months. Pursuant to RCW 7.90.156(6)(c), the expiration date of the Sexual Assault Protection Order must be set for two years following the completion of community custody. (Taner has completed his community custody.)

Accordingly, the parties filed a joint motion to allow the trial court to modify the judgment and sentence. On May 12, 2010, Commissioner Mary Neel of the Court granted the agreed motion. On May 20, 2010, the trial court entered an order modifying the Judgment and Sentence.<sup>47</sup>

---

<sup>47</sup> On June 9, 2010, the State filed a supplemental designation of clerk's papers to have the order transmitted to this Court. For convenience, the State has attached a copy of the order as Appendix B.

**D. CONCLUSION**

For the reasons stated above, this Court should affirm Taner Tarhan's conviction for rape in the third degree.

DATED this 16 day of June, 2010.

Respectfully submitted,

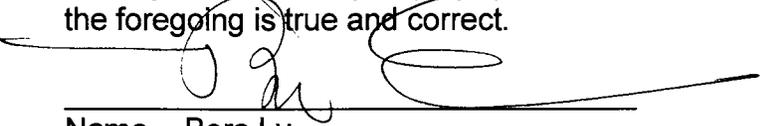
DANIEL T. SATTERBERG  
King County Prosecuting Attorney

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 Steven Witchley, the attorney for the appellant, at Law Offices of Ellis, Holmes & Witchley, PLLC, 705 Second Avenue, Suite 401, Seattle, WA 98104, containing a copy of Brief of Respondent, in STATE V. TANER TARHAN, Cause No. 62872-1-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

08/16/10  
Date

RECEIVED  
COURT OF APPEALS  
DIVISION ONE

JUN 16 2010