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NO. 63073-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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STATE OF WASHINGTON,  
Respondent,  
v.  
LAURA CUTLER,  
Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY  
THE HONORABLE MONICA BENTON

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**BRIEF OF RESPONDENT**

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**A. ISSUE PRESENTED**

1. Failure to object at trial to an alleged improper argument constitutes a waiver of the defendant's prosecutorial misconduct claim unless the comments were so flagrant and ill-intentioned that the resulting prejudice could not have been obviated by a curative instruction. During closing argument, as part of a broader argument that the evidence did not support Cutler's self-defense claim, the prosecutor criticized the defense tactic of "muddying the waters" and challenged the defense to argue the evidence without putting the victim on trial. In rebuttal, the prosecutor told the jury not to be distracted by the "smoke and mirrors" of the defense in direct response to an argument made by counsel using the same metaphor. In addition to the court's instructions, the prosecutor also twice reminded the jury that the attorneys' remarks were not evidence. Cutler did not object to the prosecutor's comments. Has Cutler failed to establish that the prosecutor's argument was improper and so flagrant and ill-intentioned that any resulting prejudice could not have been cured?

**B. STATEMENT OF FACTS**

**1. PROCEDURAL FACTS**

The State charged Laura Cutler with one count of Assault in the Second Degree—Domestic Violence (DV). CP 1-5. Before trial, the State amended the information to one count of Assault in the First Degree—DV and one count of Assault in the Second Degree—DV. CP 13-14. The jury found Cutler not guilty of first degree assault and guilty of second degree assault. CP 89-91. The court imposed a standard range sentence of 98 days incarceration with credit for time served, followed by a period of 12 months' community custody. 8RP 3-21; CP 93-99.

**2. SUBSTANTIVE FACTS**

Thomas Brummel met Laura Cutler in the spring of 2006 while both were attending substance abuse treatment at Recovery Centers of King County. 3RP 12-13; 4RP 32.<sup>1</sup> In August, when their treatment had ended, Cutler invited Brummel to her house for dinner. 3RP 15-16; 4RP 33. Brummel arrived on Friday and

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<sup>1</sup> The State adopts the reference system for the Verbatim Report of Proceedings used by the appellant: 1RP (12/10/08), 2RP (12/11/08), 3RP 12/15/08), 4RP (12/16/08-AM), 5RP (12/16/08-PM), 6RP (12/17/08), 7RP (12/23/08), and 8RP (1/23/09).

stayed until Monday. 3RP 16; 4RP 33. Over the weekend, Brummel and Cutler had sex once. 3RP 16; 4RP 33. Afterward, Cutler told Brummel that she just wanted to be friends. 3RP 17; 4RP 34. Although Brummel was fine with a friendship, he still hoped to have a relationship with Cutler and continued to call her. 3RP 17-18; 4RP 34. By October, Brummel had given up. 3RP 17-18; 4RP 34. Brummel and Cutler did not speak again until a year later, when Brummel called her. 3RP 18-19; 4RP 35-37.

Cutler told Brummel that there was a room for rent in the house she was living in and invited him to become the fourth roommate in the four-bedroom house. 3RP 19-20; 4RP 37. After looking at the room, Brummel accepted Cutler's invitation. 3RP 20; 4RP 38. Brummel moved in mid-October 2007 and resumed his pursuit of a relationship with Cutler: complimenting her, flirting with her, and taking her out to eat. 3RP 21, 26, 40-41; 4RP 34, 36-37, 39; 6RP 44. Though Cutler had previously said that she wanted to remain "just friends," she kissed Brummel on the cheek on two occasions and talked about a potential future together. 4RP 41-42, 48-49; 67-68; 6RP 44-45.

On November 5, 2007, Brummel left the house sometime after noon. 3RP 26; 4RP 43-44. Two other roommates were gone

all day and did not return until after 6:00 p.m. 6RP 18-20, 39, 63. When they came home that evening, they found Cutler, who was half-naked, upset, crying, and drinking brandy. 6RP 18-21, 39-40, 44, 63-64. Two roommates tried to console Cutler but without success. 6RP 18-20, 39, 63. Several hours later, Cutler was still screaming, yelling and crying, so a roommate's girlfriend called 911. 6RP 68; Supp. CP\_\_ (Sub No. 73, transcript of 911 call); Ex. 34 (audio recording of 911 call).<sup>2</sup> Meanwhile, Brummel had returned home and was in Cutler's room talking to her when the police arrived. 3RP 27, 32; 4RP 44.

King County Sheriff's Deputy Jeffrey Barden arrived at the house and was told that Cutler was very drunk and out of control, but after one roommate checked on Cutler and found that she had calmed down, Deputy Barden left. 4RP 77-80; 5RP 5-8, 20; 6RP 69. Back inside the house, another roommate saw Cutler, who appeared intoxicated, in the hallway near her room still crying and naked from the waist down. 6RP 71, 72, 74, 76-77.

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<sup>2</sup> The audio recording of that 911 call, as well as the later call by Brummel was admitted as State's Exhibit 34 and played for the jury, who also had the benefit of a written transcript. The written transcript was not marked as an exhibit but was filed as a separate document (Sub No. 73). The content of the audio recording was not transcribed by the court reporter. Because the jurors were given copies of the transcript to assist them in listening to the 911 recording, the State has designated both for this Court's review.

Approximately 45 minutes after the first 911 call, Brummel ran out of the house screaming, dripping blood from his lower lip onto the floor as he ran. 3RP 53-54; 4RP 58, 105-06; 5RP 27-28; 6RP 29-30, 82. Brummel called 911 and reported that he had been kissing a woman when all of a sudden she bit his lip off. Ex. 34; Supp. CP \_\_\_\_ (Sub No. 73); 4RP 58. Deputy Barden and Deputy Jason Milne responded to the call along with an aid car. 4RP 76, 81-82; 5RP 24-26, 43.

Deputies Braden and Milne entered the house and went to Cutler's bedroom. 4RP 93, 101; 5RP 12, 27-29. They found Cutler moving around on top of the bed, naked from the waist down. 4RP 101; 5RP 12-13, 31, 33. Cutler was intoxicated, incoherent, and yelling unintelligibly. 4RP 103; 5RP 14-15. When the deputies approached her, Cutler threw a pillow at Milne and lunged at him. 4RP 102. After a brief struggle, Cutler was taken into custody. 4RP 103-04; 5RP 31-33. Cutler did not have any visible injuries and did not provide a statement to the police. 5RP 17-18, 38. Once Cutler had been taken to the patrol car, one of the medical technicians went into the house with Deputy Milne and located the missing portion of Brummel's lower lip before he was taken to the hospital. 3RP 59-60; 5RP 3, 35-36, 46-48.

At trial, Brummel testified that he returned home on November 5<sup>th</sup> to find Cutler sitting on the kitchen floor, naked from the waist down and masturbating. 3RP 26-27; 4RP 44. Brummel went into the living room to watch TV, but Cutler called him back to the kitchen. 3RP 27; 4RP 53-54. Cutler then told him to leave her alone, so Brummel left. 5RP 53-54. Brummel said her behavior led him to suspect that Cutler was drunk, but he did not know for sure until she admitted to it when he was in her bathroom taking a bath. 3RP 28-29; 4RP 47, 50. Cutler's emotional state was erratic—alternating between flashes of anger and happiness; wanting to be alone and being lonely. 4RP 34, 38, 43. When Brummel went back to the kitchen, Cutler was on the floor again, masturbating. 3RP 30. Brummel testified that Cutler's demeanor was flirtatious and giggly and that she asked him to "stick [his] penis in her mouth." 3RP 30-31. Brummel suggested that they lay down together in her room so he could console her. 3RP 30-31; 4RP 44, 47, 51, 54, 58-59. Shortly thereafter, Brummel left to talk to the police and when he came back inside, found Cutler masturbating on the kitchen floor for the third time. 3RP 39-42; 4RP 44.

Brummel took Cutler back to her bedroom where they were talking, hugging and kissing. 3RP 44-45, 47; 4RP 52, 54-55. Brummel also rubbed Cutler's back over her sweatshirt. 3RP 44-45, 47; 4RP 52, 54-55. Brummel testified that he wanted to have sex with Cutler, but did not want to take advantage of the fact that she was drunk and upset. 3RP 46; 4RP 21. Brummel stated that he had concluded that kissing her was acceptable because Cutler kissed him back and was a willing participant. 3RP 39, 45-46; 4RP 20-21, 26-27, 30, 51-52, 59, 65.

During the five to ten minutes that Brummel and Cutler were on her bed kissing and talking, Cutler told him a couple of times, "[I] love you but I hate you," which Brummel thought was a joke. 3RP 47; 4RP 63, 66. Brummel asked Cutler why she hated him and she replied, "[b]ecause you're a fucking nerd . . . [O]h my God, I'm in love with a nerd." 3RP 47, 50; 4RP 63. Brummel stated that they were sitting on the bed at about a 45 degree angle from each other when Cutler paused for a moment, got up on her knees, turned to face him, pulled Brummel closer, and clamped down on his lower lip. 3RP 51-52; 4RP 55, 58. As Cutler bit down on Brummel's lip, she leaned backward, ripped out a chunk of Brummel's lip, and spit it out onto the floor. 3RP 52-53; 4RP 58.

Brummel, in horrible pain, immediately ran from Cutler's bedroom to his bathroom to see what had happened. 3RP 53-54; Ex. 25. Upon discovering that a large portion of his lower lip was gone, Brummel ran outside to the front porch and called 911. 3RP 54-56 4RP 56; Supp. CP\_\_ (Sub No. 73); Ex. 34.

During cross-examination, defense counsel confirmed with Brummel that although he knew Cutler did not want to have a relationship with him after their one night stand in 2006, he had pursued her for three months anyway. 4RP 33-34. Brummel also stated that he began thinking about Cutler about a year later because he wanted a girlfriend, and tracked Cutler down through one of her old roommates. 4RP 35-36.

Defense counsel then questioned Brummel about his intentions with Cutler that night. Brummel acknowledged that he had initially assumed that he would have sex with Cutler, though they never discussed it. 4RP 51, 59. Brummel stated that his assumption about sexual activity was due, at least in part, to the fact that Cutler had no pants on. 4RP 59. Brummel further testified that he later felt conflicted about the idea of having sex with Cutler because he had started to pity her, but "[a]t the same time, it was her idea to start kissing and everything..." 4RP 52.

Cutler asserted two defenses at trial: voluntary intoxication and self-defense based on Brummel's allegedly unwanted sexual advances. 1RP 11-13; 7RP 2-31; CP 15-27. Cutler did not present any evidence. 7RP 32.

Prior to closing arguments, the court read aloud the full set of jury instructions. 7RP 32; CP 63-88. The first instruction was Washington Pattern Jury Instruction-Criminal 1.02, which states in part: "The attorneys' remarks, statements and arguments are intended to help you understand the evidence and apply the law. They are not evidence." CP 66. The prosecutor then gave her closing argument.

The prosecutor began her argument by explaining to the jury the differences between first degree and second degree assault. The prosecutor next summarized the evidence as to Brummel's injury that supported the conclusion that Cutler had inflicted great bodily harm, or in the alternative, substantial bodily harm. 7RP 35-38, 43-45. The prosecutor also briefly addressed the voluntary intoxication defense.

The prosecutor then turned her attention to the self-defense claim, explaining the elements of the defense to the jury and that the State had the burden of disproving the defense beyond a

reasonable doubt. 7RP 46. The prosecutor stated that the evidence showed that Cutler did not reasonably believe that she was about to be injured by Brummel and that, even if she did, Cutler used excessive force to defend herself. 7RP 46-47. The prosecutor emphasized that Brummel had not acted forcefully or aggressively toward Cutler, and that it was Cutler, not Brummel, who leaned closer to bite his lip. 7RP 47. Cutler also did not have any visible injuries. 7RP 48. The prosecutor then pointed out that other alternatives were available to her, short of biting off Brummel's lip, because she knew that there were other people in the house and could have screamed for help, called police or pushed Brummel away from her. 7RP 48.

Finally, the prosecutor addressed Brummel's credibility and the State's burden of proof. 7RP 49-53. The prosecutor told the jury that "[t]here is nothing in the to convict instructions that require you to like Mr. Brummel, and there's nothing in the to convict instructions that require you to necessarily dislike the defendant." 7RP 49. As long as the jurors believed Brummel, it was enough to convict Cutler beyond a reasonable doubt; additional witnesses were not required. 7RP 49.

The prosecutor continued:

[M]r. Brummel's testimony was credible, because he was upfront from the very beginning about what happened. He didn't try to hide the fact that he cared about the defendant, and he didn't try to hide the fact that he was initially considering being intimate with the defendant . . . he could have told a completely different story. He could have concealed these facts, which may sound unfavorable for him to admit . . . but he did come into court and tell you what happened.

7RP 50-51.

Before addressing what she anticipated the defense argument would be, the prosecutor reminded the jury that what she said and what the defense attorney said was not evidence. 7RP

51-52.

The defense is going to get up and muddy the waters and try to distract you from what the real issue at hand is. They're going to put Mr. Brummel on trial. Mr. Brummel is the victim here, and that is not what you've been summoned here to do. The defendant is the person who is on trial in this case. The defense is going to attack Mr. Brummel's character, is going to call him names, to make it so that you don't like him or won't want to like him. And even in their attack of Mr. Brummel, the best that they can do is paint him to be some monster because he actually was interested in the defendant, because he tried to do nice things for her, tried to take her out to eat once in a while, he told her she was pretty, and he was trying to be a nice guy toward the defendant.

I challenge the defense to actually argue the evidence in this case without putting Mr. Brummel on trial, because that is not what you were summoned here to

do. You were summoned here to evaluate the evidence and make a determination as to the defendant's guilt or innocence.

7RP 52-53.

Defense counsel began her closing argument by telling the jurors that the "smoke and mirrors" tactic that the State mentioned earlier in the trial was not needed in this case because Brummel told them what they needed to know. 7RP 54. Brummel had told them that he was "trying to score" that night, and despite the fact that he and Cutler had not discussed having sex, he assumed that they would. 7RP 54. Counsel then recounted the testimony that showed Cutler had been drunk and argued that, as a result, Cutler did not have the ability to form the requisite intent at the time of the assault. 7RP 55-56.

Counsel next addressed Brummel's credibility. 7RP 58-60. The defense asserted that in light of Cutler's consistent rejection of his advances, it was unreasonable for Brummel to believe that Cutler's feelings for him had suddenly changed. 7RP 58-59. She also contended that Brummel's testimony was not credible when he stated that his sexual desire for Cutler earlier in the evening later changed to pity. 7RP 58-59. Counsel further questioned the logic of Brummel's testimony that he thought it appropriate to take Cutler,

who was distraught and half-naked, into her bedroom to comfort her by kissing, hugging, and rubbing her as they lay on her bed. 7RP 60.

Counsel then said that Cutler “was too intoxicated, incapacitated, to consent” to the sexual contact initiated by Brummel and told the jury:

You know why Mr. Brummel got his lip bit off, because he was kissing a woman who didn’t want to be kissed by him. It’s as simple as that. No smoke and mirrors, no illusion, not even a stretch of the imagination.

\* \* \*

[E]very single one of us has the right to defend [ourselves] against a violent crime to the death. There’s no way around it.

If a violent crime is being advanced against you, and rape is one of them, you can defend it to the death of the other. Tom Brummel only got his lip bit off.

7RP 61, 65.

Defense counsel concluded her argument by stating that there was reason to doubt her client’s guilt because Cutler lacked the ability to form the requisite intent and had acted “unapologetically” in her own defense. 7RP 70.

The prosecutor began her rebuttal by stating:

Smoke and mirrors, that's what that was. Look here, don't look there, hate the victim, pity the defendant. Look at the victim and how unlikeable he is, not at the defendant. Mr. Brummel is not on trial, the defendant is. The defendant's actions are the ones that are in question, not Mr. Brummel's.

7RP 70. The prosecutor then responded to the defense arguments regarding voluntary intoxication and self-defense. 7RP 71-72.

The prosecutor concluded her rebuttal by reiterating to the jury that:

[A]ny argument that I say, any argument that the defendant makes that is not supported by the evidence you must disregard. That's what I meant by the smoke and mirrors, because they're trying to throw everything at you, muddy the waters, cloud everything up, so that you'll just throw your hands up and say there's no way we can make a decision on this, we have to find her not guilty.

But [give] yourselves more credit than that. [Give] yourselves more credit that you can see past smoke and mirrors, that you can view all of the defendant's actions, all of the things that she did that point to her guilt in this case, to return with the proper verdict, guilty of assault in the first degree and guilty of assault in the second degree.

7RP 73. Cutler did not object to any of the prosecutor's remarks.

7RP 33-53, 70-73.

**C. ARGUMENT**

**1. CUTLER'S FAILURE TO OBJECT TO THE PROSECUTOR'S CLOSING ARGUMENT CONSTITUTES A WAIVER OF HER CLAIM BECAUSE THE PROSECUTOR'S COMMENTS WERE NOT FLAGRANT AND ILL-INTENTIONED.**

Cutler asserts that the prosecutor committed misconduct during in closing argument and rebuttal. Specifically, Cutler asserts that the prosecutor suggested that acquitting Cutler based on self-defense "would be tantamount to trying and convicting Brummel for a sex offense" and tried to garner sympathy for Brummel by accusing defense counsel of "trickery and dirty tactics." App. Br. at 10, 12. However, Cutler did not object at the time to the remarks she now alleges were improper. Because the prosecutor's comments, that the defense was utilizing the tactics of putting the victim on trial and attempting to distract the jury by "muddying the waters" or creating "smoke and mirrors," were not flagrant and ill-intentioned, this argument should be rejected.

To establish prosecutorial misconduct, the defendant must show that the conduct complained of 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. 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." State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). A prosecutor is given wide latitude in closing argument to draw and express reasonable inferences from the evidence. State v. Hoffman, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991).

Failure to object to an improper argument constitutes a waiver of the claimed error unless the improper argument was so flagrant and ill-intentioned that it caused an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. State v. Gentry, 125 Wn.2d 570, 640, 888 P.2d 1105 (1995); Hoffman, 116 Wn.2d at 93. The absence of an objection by defense counsel "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046 (1991). "[C]ounsel 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.” Id. (internal quotations omitted).

Here, the prosecutor spent the bulk of her closing argument summarizing the evidence that established the elements of both assault charges, as well as the evidence that disproved Cutler’s claims that intoxication prevented her from forming the requisite intent to commit assault and that she acted in self-defense.

7RP 49-51. The prosecutor also outlined the reasons that the jury should find Brummel’s testimony credible and argued that, if believed by the jury, his testimony alone was sufficient to convict Cutler of assault. 7RP 49-51.

The prosecutor then reasonably anticipated that defense counsel would attack Brummel in her closing argument. After all, Cutler was claiming that she had to defend herself against his unwanted sexual advances and assault. It is was defense counsel’s hyperbole that the prosecutor was anticipating when she told the jury that the defense argument would be an effort to “muddy the waters” and try to distract the jury from the real issue by putting Brummel on trial: “The defense is going to attack Mr. Brummel’s character, is going to call him names, to make it so you

don't like him or won't want to like him." 7RP 52. The prosecutor continued:

I challenge the defense to actually argue the evidence in this case without putting Mr. Brummel on trial, because that is not what you [the jurors] were summoned here to do. You were summoned here to evaluate the evidence and make a determination as to the defendant's guilt or innocence.

7RP 52-53.

Viewed in isolation, the prosecutor's remark that the defense attorney was going to call Brummel names and attack his character, followed by the personal challenge to the defense to argue the evidence rather than put the victim on trial were probably improper. However, when viewed in context, the prosecutor's argument appears to have been more of an attempt to expose the weaknesses in Cutler's self-defense claim than an attempt to disparage counsel or garner sympathy for Brummel. The entire self-defense claim hinged on whether the evidence showed that Cutler had a reasonable belief that she was preventing an imminent sexual assault by Brummel, and that the amount of force she used was also reasonable. See CP 78. Because Cutler did not testify, this theory could only be advanced through defense counsel's cross-examination of Brummel and then argued in closing.

During a lengthy cross-examination, defense counsel asked Brummel a series of questions designed to portray him as a man that stalked Cutler by searching for her a year after their lone sexual encounter, who would not accept Cutler's repeated rejection of his affection, and who was eager to take advantage of Cutler's intoxication to satisfy his sexual desires. 4RP 23-59, 69. This portrayal was contradicted by Brummel's testimony that while in Cutler's bedroom, she was a willing participant in the sexual activity and had told Brummel that she was in love with him. 3RP 39, 45; 4RP 21, 26-27, 52, 65. Brummel further testified that Cutler had to get on her knees, turn to face him and pull him closer by his shirt to bit his lower lip off. 3RP 51-53; 4RP 55, 58. In contrast to Brummel, Cutler had no visible injuries. 5RP 17-18, 38. Given this line of questioning and Brummel's testimony, the prosecutor could reasonably anticipate an attack on Brummel's character and veracity during defense counsel's closing argument. Further, when viewed in the context of the State's entire argument, the prosecutor's remarks were also part of her broader theme that the evidence did not support the self-defense theory of the case. See State v. Graham, 59 Wn. App. 418, 429, 798 P.2d 314 (1990).

Additionally, there is nothing in the record to support Cutler's assertion that the prosecutor, in making the complained of remarks, was effectively suggesting to the jury that an acquittal of Cutler based on self-defense equated to convicting Brummel of a sex offense. On the contrary, it was defense counsel who implied during her closing argument that Brummel was the one who should have been on trial for an attempted sexual assault: "You know why Mr. Brummel got his lip bit off, because he was kissing a woman who didn't want to be kissed by him. It's as simple as that." 7RP 61. Counsel then argued that Cutler's actions were more than justified, and suggested that Brummel was lucky that he "only got his lip bit off." 7RP 65.

Cutler also asserts that the prosecutor's remarks maligned defense counsel and counsel's role in the criminal justice system. While a personal attack on defense counsel's integrity could constitute misconduct, "criticism of defense counsel's attempts to discredit witnesses, as well as comments on a defense tactic" may be permissible. United States v. Santiago, 46 F.3d 885, 892 (9th Cir.1995) (internal quotations omitted) (comments about defense tactics, including statement that counsel tried "to sully and dirty up two...government witnesses" permissible); see also State

v. Neslund, 50 Wn. App. 531, 562-63, 749 P.2d 725 (1988)

(recognizing that impugning defense counsel's integrity may be reversible misconduct). A prosecuting attorney does not disparage a defendant's right to present a defense or demean defense counsel when he or she argues that the evidence does not support defense counsel's theory. Graham, 59 Wn. App. at 429 (cited with approval in State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994)).

Bruno v. Rushen provides a useful example. 721 F.2d 1193 (9th Cir.1983), cert. denied, 469 U.S. 920 (1984). In Bruno, the prosecutor, during closing argument, insinuated that defense counsel had tampered with a witness, implied that the retention of defense counsel was indicative of guilt, and suggested that all defense counsel are retained "solely to lie and distort the facts and camouflage the truth." Id. at 1194-95. The court found that the prosecutor's remarks on Bruno's exercise of his constitutional right to counsel and on the integrity of defense counsel were improper and constituted reversible error. Id.

Likewise, in State v. Warren, the prosecutor argued that there were a "number of mischaracterizations" in defense counsel's closing argument that were "an example of what people go through

in a criminal justice system when they deal with defense attorneys” and “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.” 165 Wn.2d 17, 29-30, 195 P.3d 940 (2008). The court held that these comments improperly disparaged defense counsel’s role, but were not so flagrant and ill-intentioned that no instruction could have cured the impropriety. *Id.* at 30; see also State v. Negrete, 72 Wn. App. 62, 66-67, 863 P.2d 137 (1993) (the prosecutor’s comment in rebuttal that defense counsel was “being paid to twist the words of the witnesses...” in response to counsel’s argument that an undercover officer was a “trained liar” and that the confidential informant was paid to “frame people” was improper, but not irreparably prejudicial).

Here, unlike Bruno and Warren, the prosecutor did not attack the role of the defense attorney or disparage counsel’s character by falsely accusing her of trickery or dirty tactics when she commented that the defense was going to “muddy the waters” and try to distract the jury from “the real issue” of determining Cutler’s guilt. 7RP 52. The prosecutor was simply, and permissibly, arguing that the jury should see through defense counsel’s attempts to discredit

Brummel, and the tactic of trying to put Brummel's actions on trial. 7RP 52; see Santiago, 46 F.3d at 892. After all, defense counsel was suggesting that Brummel was a stalker, when, in fact, Cutler asked Brummel to move in. 3RP 20. Defense counsel also suggested that Brummel was a rapist, when, in fact, Cutler was a willing participant in the sexual activity on that night, was unhurt, and never told police that she had been defending herself when she bit Brummel's lip off. 3RP 19-20; 4RP 21, 52, 65; 5RP 3-4; 7RP 61, 63-65.

The prosecutor was entitled to respond to these arguments as well as the defense attorney's statement that no "smoke and mirrors" were needed in this case because Brummel's testimony made it perfectly clear that he intended to have sex with Cutler on that night, despite her obvious intoxication. 7RP 54-55, 70. In rebuttal, the prosecutor told the jury that the defense argument consisted of "smoke and mirrors," meaning that "[a]ny argument that the defendant makes that is not supported by the evidence you must disregard. That's what I meant by the smoke and mirrors, because they're trying to throw everything at you, muddy the waters, cloud everything up. . ." 7RP 72-73. The prosecutor then

reiterated that it was Cutler, and not Brummel, that was on trial and whose actions were in question. 7RP 70.

These remarks were not a “damning attack on the defense” that disparaged defense counsel, nor did the remarks suggest that an acquittal of Cutler based on self-defense would result in the “re-victimization of Brummel” as Cutler claims. App. Br. at 15. It is perfectly acceptable to argue all reasonable inferences from the evidence and to argue that the facts do not support opposing counsel's argument. Both parties did just that *without* objection.

The absence of an objection by defense counsel to the alleged impropriety at the time strongly suggests that the remarks did not appear particularly prejudicial in the context of the trial. See Swan, 114 Wn.2d at 661. Moreover, any potential prejudice from these remarks was mitigated by the prosecutor's reminder to the jurors of their duty to impartially evaluate the evidence presented and the court's instruction prior to argument, which was repeated twice by the prosecutor, that the attorneys' arguments were not evidence. 7RP 51-53. The jury is presumed to have followed the court's instructions. State v. Hanna, 123 Wn.2d 704, 711, 871 P.2d 135 (1994).

Even if certain remarks in the prosecutor's argument were improper, Cutler cannot show that the comments were so flagrant and ill-intentioned that a curative instruction would not have obviated any prejudice. See Gentry, 125 Wn.2d at 640.

**D. CONCLUSION**

For the foregoing reasons, the State requests that this Court affirm Cutler's assault conviction.

DATED this 2nd day of November, 2009.

Respectfully submitted,

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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 Dana Lind, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. LAURA CUTLER, Cause No. 63073-3-I, in the Court of Appeals, Division I, for the State of Washington.

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

W Brame

Name Wynne Brame  
Done in Seattle, Washington

11/2/09  
Date