

NO. 63158-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

LARRY BAKER,

Appellant.

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

The Honorable Ronald L. Castleberry, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Multiple instances of prosecutorial misconduct in closing argument denied appellant a fair trial.

2. Appellant's counsel was ineffective for failing to request inferior degree offense instructions on second and third degree rape.

3. The community custody condition prohibiting appellant from perusing or possessing pornographic materials is unconstitutionally vague.

4. The community custody condition prohibiting appellant from possessing sexual stimulus material for his "particular deviancy" is unconstitutionally vague.

Issues Pertaining to Assignments of Error

1. Did multiple occurrences of prosecutorial misconduct deprive appellant of his right to a fair trial?

a. The prosecutor improperly invoked the missing witness doctrine in closing argument. After the appellant objected, the court gave an incomplete and ineffective curative instruction, and there was a substantial likelihood the misconduct affected the jury's verdict. Was appellant denied his right to a fair trial?

b. The prosecutor improperly expressed a personal opinion about the credibility of a key defense witness and argued facts not in evidence to

further undermine that witness's credibility. Did prosecutorial misconduct deny appellant his right to a fair trial?

c. The prosecutor improperly disparaged defense counsel for making an argument reasonably supported by the evidence. The prosecutor also impermissibly denigrated defense counsel's role and appealed to jurors' passions when he encouraged jurors to put themselves in the victim's shoes and imagine being "grilled" by defense counsel. Was appellant therefore denied his right to a fair trial?

d. Based on the above acts, did the combined effects of the prosecutor's misconduct deny appellant a fair trial?

2. Where defense counsel was ineffective in failing to request inferior degree instructions on second and third degree rape, is reversal of appellant's first degree rape conviction required?

3. As a condition of community custody, the sentencing court prohibited appellant from possessing or accessing pornographic materials as directed by his Community Corrections Officer (CCO). Must this condition be stricken as unconstitutionally vague?

4. As a condition of community custody, the sentencing court prohibited appellant from possessing or controlling sexual stimulus material for his particular deviancy. Must this condition be stricken as unconstitutionally vague?

B. STATEMENT OF THE CASE¹

The Snohomish County prosecutor charged appellant Larry Baker with first degree rape and a deadly weapon sentencing enhancement. CP 110-11. A jury convicted Baker as charged. CP 40-41.

The court sentenced Baker to a minimum high-end standard range sentence of 147 months of confinement, including a 24-month deadly weapon enhancement. CP 11-29; former RCW 9.94A.712(1)(a)(i) (2006).² The court also sentenced Baker to community custody for life. CP 20-21, 25-26.

The morning of August 19, 2007, 17-year-old B.C. left her friend's house, where she had spent the previous night, and walked to work at the McDonalds on 128th Street Southwest for an 8:00 a.m. shift. 2RP 172-75, 177-80; 3RP 301. It was raining and B.C. was late so she borrowed a raincoat. 2RP 180-82. As B.C. neared the "4th Avenue Village" apartments on Fourth Avenue West, a man ahead of her on the sidewalk

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – 10/17, 12/5, 12/8/08 and 1/2/09; 2RP – 1/5 and 1/6/09; 3RP – 1/7/09; 4RP – 1/8/09; 5RP – 1/9/09; and 6RP – 1/13, 1/15, and 3/2/09.

² RCW 9.94A.712 was recodified as RCW 9.94A.507 per laws of 2008, chapter 231, § 56(4). This brief refers to the laws in effect on the date of the offense and at Baker's March 2009 sentencing. Laws of 2008, ch. 231 §§ 6, 55.

reached down to pick something up, looked back at her, and then entered the apartment complex. 2RP 186-87, 260.

As B.C. passed the complex entryway, the man grabbed her arm, placed a box cutter blade near her neck, and warned her to keep quiet. 2RP 189, 214. B.C. was frightened. 2RP 189. The man pulled B.C. to a carport in the complex and ordered her to take off her clothes. 2RP 176, 189.

After B.C. took off her pants, underpants, and shoes, the man pulled her to some bushes near a window. 2RP 189, 231, 253-54. The man dropped the box cutter in the landscaping bark and B.C. lost track of it. 2RP 194.

The man told B.C. to bend over and she complied. 2RP 195. When he asked B.C. to insert his penis for him, B.C. lied she “never did that before,” hoping he would leave her alone. 2RP 195-96. B.C. also told him she was on her period. 2RP 195-96. Undeterred, the man unsuccessfully tried to insert his penis, then told B.C. to lie down. 2RP 197. He then raped B.C. vaginally, repeatedly asking her if she liked it. 2RP 189, 197-98.

When the man was finished, he commented he would see B.C. around and left her. 2RP 189, 202. B.C. retrieved her clothing, dressed,

and hurried to McDonald's, where the manager called the police. 2RP 189, 204.

Police officers obtained the man's description from B.C. and drove her back to the apartments. 2RP 205, 266. A frightened B.C. refused to get out of the police car, instead pointing out the general area where the incident occurred. 2RP 205-07, 249, 269, 287-88. The next day, B.C. worked with a detective to create a composite sketch of the man. 2RP 209; 4RP 507-09. DNA evidence eventually linked Baker to the incident. 4RP 510-11; 5RP 603-05.

At trial, B.C. identified Baker as her attacker. 2RP 176. B.C. first recognized Baker the moment he grabbed her arm but did not recall where she had seen him. 2RP 176, 206, 237, 279. B.C. later realized he seemed familiar because B.C.'s boyfriend and some of his friends knew Baker. 2RP 237.

B.C. would not have had sex with Baker if he had not grabbed her and threatened her with the box cutter. 2RP 202. Even if he had no box cutter, she might have had sex with him anyway because he was much stronger than her. 2RP 202-03.

Deputy Joel Fenske responded to the McDonald's and then to the apartment complex. 3RP 323. Fenske assisted with an attempted canine track, but the dog lost the scent a quarter mile northwest of the apartments

near the intersection of 124th Street Southwest and Eighth Avenue West. 3RP 329-30.

Based on a variety of factors, responding officers concluded the rape occurred 20 feet from the location B.C. pointed out. 3RP 349-50, 360-63, 368, 370, 410-11; 4RP 495. Detective Steven Martin raked his hand through a sandy area near a juniper bush and found a box cutter buried in the debris with its retractable blade exposed. 3RP 351-52, 362-64, 369, 394-411, 427-28; 4RP 502-03; Exs. 19-22. Police officers photographed the box cutter in situ after Martin found it, but contrary to preferred practice, they did not photograph the area before Martin disturbed it. 3RP 390-94. Martin denied planting the box cutter. 3RP 428.

Detective Martin and his partner arrested and interviewed Baker about five weeks after the incident. 3RP 376-77; 4RP 512-13, 518-20. Baker acknowledged knowing a woman by the name of "B." and acknowledged cheating on his girlfriend with 10 different women since moving to Washington about 10 months earlier. Ex. 56; 4RP 526-27. But he told police officers he did not recall meeting a girl on the street and having sex with her outside an apartment complex. Ex. 56.

The day of the arrest, police searched Baker's apartment and found a box cutter similar to the one police found in the sand in the apartment

courtyard. 4RP 485-89. Baker's fiancée later testified she used the box cutter for household chores. 5RP 632.

Nurse practitioner Barbara Haner examined B.C. the morning of August 19 about two hours after police were called. 4RP 453. B.C. reported slight genital discomfort. 4RP 460. Haner noticed B.C.'s hymen was swollen and exhibited what appeared to be petechiae, or pinpoint bruising, which was consistent with sexual trauma. 4RP 471-72. B.C.'s symptoms were also consistent with consensual sex. 4RP 450-51, 481.

Baker's fiancée, Comeshia Davis, testified that on August 17, 2007, she and her friend Denise Mills went for a drink at Shotze's and unexpectedly ran into Baker, who was talking to a young woman at the bar. 5RP 620-25. After Baker went outside to join his friend "G," the woman followed. 5RP 625. Davis was not jealous because Baker was a musician and often socialized to promote his new album. 5RP 625-29. Mills identified the woman at Shotze's as B.C. 5RP 674-75.

Martin "Ray" Curtis met Baker when the two worked together during the spring of 2007 and they later collaborated musically. 5RP 635-39. Curtis twice saw Baker in the community during the summer of 2007. Each time, Baker was with B.C. 5RP 640-52. After Baker was asked to

identify B.C. from a photo array, he realized he also recognized B.C. from the McDonald's near his friend's home.³ 5RP 649, 653.

Baker testified he met B.C. at a concert at the Tulalip casino a month before the incident. 5RP 707. Baker and his children performed on stage during a pre-concert ticket giveaway competition, and B.C. was one of many audience members to congratulate them afterward. 5RP 703-04. About a week later, B.C. recognized Baker in the parking lot near the McDonald's on 128th Street. 5RP 708-09. The two made small talk and walked together for a few minutes. 5RP 709.

Baker saw B.C. a third time at a Seven-11 off Casino Road. 5RP 711. Baker was with his friend G, a drug dealer, who met B.C. to sell her marijuana. 5RP 711. B.C. walked with Baker and G while they smoked a marijuana cigarette ("joint"). B.C. and Baker discussed possibly "hooking up" in the future. 5RP 711-12. Baker also saw Curtis at the Seven-11 that night. 5RP 712.

Baker met B.C. a fourth time while walking down 112th Street, and the two walked together so B.C. could buy marijuana from G or another acquaintance of Baker's. 5RP 715. They saw Curtis at a gas station, but he was too busy to offer a ride. 5RP 716. After smoking a

³ In closing, the State argued Martin was describing a different McDonald's, but it appears from his description it was the same restaurant. 5RP 649, 653; 6RP 832-33, 869.

joint together, B.C. and Baker parted ways. 5RP 716. They made no plans to meet again because each knew the other was in a relationship. 5RP 716.

About a week before the incident, Baker again saw B.C. at Shotze's while he was there to promote his upcoming record release party. 5RP 718-19. Baker guessed B.C. was 18 or 19 years old, but he was not surprised to see her there because Shotze's tended to look the other way regarding young women. 5RP 719-20. In contrast, Baker's friend G remained outside in his car drinking and smoking marijuana because he was not yet 21. 5RP 719-21. B.C. and Baker spent time in G's car and made plans to "hook up" romantically later that night, but their plans were thwarted when Davis arrived unexpectedly. 5RP 720.

The morning of August 19, Baker was driving home from a residence off Casino Road, having attended a party the night before with G and some friends. Baker fell asleep at the party and did not awaken until the next morning. 5RP 723-24. He took an indirect route home in order to stay with traffic because he had no license and did not want police to stop him. 5RP 724-25.

While driving north on Fourth Avenue, Baker saw B.C. walking and stopped to say hello. 5RP 727. Baker then left his car on 124th Street and approached B.C. on foot. 6RP 776. The car belonged to Davis and he

did not want to show her disrespect by inviting another woman into the car. 5RP 729-30; 6RP 775-76, 789. Baker waited for B.C. near the wall surrounding the apartment complex. 5RP 730. They hugged and sought shelter under the carport to avoid the rain while they discussed Baker's upcoming record release. 5RP 736.

Baker took B.C.'s hand, complimented her looks, and began to kiss her. 5RP 736. B.C. then rubbed Baker's crotch, and Baker reciprocated. 5RP 736. The two began to undress, but Baker decided it was unwise to remain in the carport because an apartment resident might approach at any time. 5RP 736-37. The two moved outside the carport and B.C. spread her jacket on the ground. 5RP 741-42. Baker got on top of B.C., who helped guide Baker's penis into her vagina. 5RP 743-44.

When they finished, Baker helped B.C. to her feet and told B.C., "That was some cool shit." B.C. agreed. Baker asked B.C. if she was "good" and B.C. replied, "I'm good now." 5RP 745. When B.C. asked for Baker's phone number, however, Baker declined to provide it, explaining he had a girlfriend. 5RP 746. This displeased B.C. 5RP 746. Baker returned to his car and went home. 5RP 747-48.

Baker denied raping B.C. or threatening her with a box cutter. 5RP 748, 751. He also denied leaving a box cutter in the sand. 5RP 751. Baker acknowledged lying to the detectives about residing with Davis,

because she would lose her housing benefits if it were known they resided together, and about driving, because he had no license. 6RP 757. Baker acknowledged the detectives asked him about a sexual encounter with a girl on Fourth Avenue, but insisted his memory was not triggered because he was asked if he pulled a girl into the bushes and raped her. 6RP 770-71.

C. ARGUMENT

1. MULTIPLE INSTANCES OF PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT DEPRIVED BAKER OF HIS RIGHT TO A FAIR TRIAL.

A prosecuting attorney's misconduct during closing argument can deny an accused his right to a fair trial as guaranteed by the Sixth Amendment and Const. art. I, § 22 (amend. 10). State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). A prosecutor is a quasi-judicial officer, obligated to seek verdicts free of prejudice and based on reason. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978); State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969).

Consistent with their duties, prosecutors must not urge guilty verdicts on improper grounds. A prosecutor must always refrain from making statements that are not supported by the evidence. Belgarde, 110

Wn.2d at 507-08; State v. Gibson, 75 Wn.2d 174, 176, 449 P.2d 692 (1969), cert. denied, 396 U.S. 1019 (1970).

The prosecutor here repeatedly violated these prohibitions. Four separate instances of prosecutorial misconduct in closing argument denied Baker a fair trial, and this Court should reverse his conviction.

a. The Prosecutor Committed Misconduct by Improperly Invoking the Missing Witness Doctrine in Closing Argument over Defense Objection.

“Generally, a prosecutor cannot comment on the lack of defense evidence because the defense has no duty to present evidence.” State v. Cheatam, 150 Wn.2d 626, 652, 81 P.3d 830 (2003). Under the missing witness doctrine, however, when a party fails to call a witness to provide testimony that would properly be part of the case and is within the control of the party, the jury may draw an inference that the testimony would have been unfavorable to that party. Id.

Nonetheless, certain factors prohibit application of the doctrine against a criminal defendant. State v. Montgomery, 163 Wn.2d 577, 598, 183 P.3d 267 (2008). Where the witness’s absence is explained, no such instruction or argument is permitted. For example, the doctrine does not apply if the potential testimony would be immaterial and cumulative and if the missing witness is not particularly under the control of the defendant. The doctrine may also not be applied if it would infringe on a criminal

defendant's right to silence or shift the burden of proof. Finally, the doctrine does not apply if the witness is incompetent or where, as here, the witness's testimony would incriminate him. Id. at 589-99.

In closing, the prosecutor argued:

Who and where is G? You've heard about G, the one person who can actually put the two of these together. And what I mean by that, the defendant Brittany in an unambiguous fashion. I sold weed to her, she bought from me and I was with these people on several occasions when marijuana was purchased and they smoked. No doubt in my mind this is someone I've sold to? Where is he?

6RP 834-35. Defense counsel objected. The court sustained the objection, but “[only] to the extent that the prosecuting attorney is suggesting that [Baker] has a duty to produce evidence.” 6RP 835. The State continued, “Okay, the defendant has no burden of putting anything on. But wouldn't it have been interesting to hear from G?” 6RP 835.

This was improper under Montgomery; G was not available because he would have incriminated himself if he had testified he had seen Baker with B.C. when he sold and smoked marijuana. And the prosecutor's misconduct was not cured by the trial court's ruling on Baker's objection to the missing witness argument. Although this Court generally presumes juries follow the court's instructions to disregard improper argument, State v. Warren, 165 Wn.2d 17, 28, 195 P.3d 940

(2008), the presumption is unwarranted here because two factors undercut the court's admonition that Baker had no burden to present evidence.

First, the court qualified its admonition by repeatedly stating it sustained the objection "only to the extent" the prosecutor suggested Baker had a duty to produce evidence. The effect was thus not condemnation of the State's improper argument, but rather ambivalence. Jurors are presumed to be "sensible and intelligent." State v. Smails, 63 Wash. 172, 183, 115 P. 82 (1911). While the court mentioned the general rule that Baker had no burden to produce witnesses, the jury could only be left with the impression that the State's argument was otherwise proper.

Second, the State seized on the court's implication by positing, "[W]ouldn't it have been interesting to hear from G?" 6RP 835. This and the previous statement left the jury with the impression G's testimony would not have been favorable. Cheatam, 150 Wn.2d at 652. This is precisely the argument the Supreme Court prohibits.

The prosecutor's misconduct prejudiced Baker. The parties presented the jury with two versions of the events occurring the morning of August 19, 2007. According to Baker's version, corroborated by two witnesses, Baker and B.C. knew each other. The State's suggestion Baker should have produced G, and the corresponding inference he did not because G would not have testified favorably, likely affected the jury's

evaluation of the parties' competing versions of events. See State v. Padilla, 69 Wn. App. 295, 302, 846 P.2d 564 (1993) (where a case essentially becomes a swearing contest, the likelihood of the verdict being affected by prosecutorial misconduct is substantial).

There is thus a substantial likelihood the prosecutor's misconduct affected the verdict. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009).

b. The Prosecutor Committed Misconduct by Improperly Expressing his Personal Opinion about a Key Defense Witness's Credibility and by Arguing Facts not in Evidence to Undermine that Witness's Credibility.

The jury alone must determine issues of witness credibility. State v. Jungers, 125 Wn. App. 895, 901, 106 P.3d 827 (2005). Whether a prosecutor's opinion of guilt is expressed directly or through inference, such opinion is improper and inadmissible because it invades the jury's province. Id. Moreover, a prosecutor improperly comments when he or she encourages a jury to render a verdict on facts not in evidence. State v. Stover, 67 Wn. App. 228, 230-31, 834 P.2d 671 (1992), review denied, 120 Wn.2d 1025 (1993).

Here, the prosecutor argued:

Ray Curtis struck me as an individual who as best he could tried to tell the truth. I did not get the sense when he was up there that he was lying through his hat. But I hope you were paying attention when he described how it

was that he [picked B.C.] from this photo montage, [Ex.] 89. And there were two things that Mr. Curtis said that, quite frankly, caught my ear, and I hope they caught yours, is that when we were going through the photographs, kind of describing essentially all of the beat-up women, that none of them looked like the person that he described, he gets to photograph No. 5 here, he says I was going to pick her. Do you remember that? Why were you going to pick her? Well, she's got the bruises and the black eyes. You knew Larry was in jail for rape, so you kind of assumed this is the woman he was involved with? Yeah.

And then it's the next picture that you've got with [B.C.] in her McDonald's uniform, and then Mr. Curtis goes, I see the uniform and I put it all together and this is the gal that I saw with Larry over a year ago.

Did you remember which McDonald's he was talking about, though? It was the one on 128th heading east where it turns into 132nd and 35th, which is north of Mill Creek, south Everett. It's the wrong McDonald's, folks. He wasn't talking about the McDonald's that [B.C.] works at. It's the wrong place. It's the wrong girl.

6RP 832-33.

This argument is improper for two reasons. First, it amounts to the prosecutor opining Curtis's identification of B.C. in the montage was not accurate. Second, the prosecutor asserted Curtis was referring to a different McDonald's and was therefore mistaken for that reason as well. This assertion is unsupported by the evidence. Curtis's testimony established he was referring to the same McDonald's that employed B.C. 5RP 649, 653.

Baker did not object to this misconduct. But even absent objection, reversal is required when a prosecutor's remarks are so flagrant

and ill intentioned they could not have been cured by an instruction. Belgarde, 110 Wn.2d at 507; State v. Echevarria, 71 Wn. App. 595, 597-98, 860 P.2d 420 (1993). When taken in the context of the other misconduct, it is unlikely a curative instruction could have diminished the prejudicial effect of the prosecutor's unfair attack on the credibility of key defense witness Curtis. See Fisher, 165 Wn App. at 747 (improper comments are considered in the context of the entire argument).

c. The Prosecutor Improperly Disparaged Defense Counsel By Arguing Defense Counsel's Arguments were "BS" and that Counsel "Knew Better" Than to Make Them.

Disparaging defense counsel may also constitute reversible misconduct. Bruno v. Rushen, 721 F.2d 1193, 1195 (9th Cir. 1983); Walker v. State, 790 A.2d 1214, 1220 (Del. 2002). "[A]bsent specific evidence in the record, no particular defense counsel can be maligned." Bruno, 721 F.2d at 1195. Though such expressions of the prosecutor's beliefs are often primarily intended to impute guilt to the accused, "not only are they invalid for that purpose, they also severely damage an accused's opportunity to present his case before the jury." Id.

"In our adversarial system, defense counsel is not only permitted but is expected to be a zealous advocate for the defendant." Walker, 790 A.2d at 1218. "Accusations of deception and trickery by defense counsel serve no purpose except to prejudice the jury." People v. Thompson, 313

Ill.App.3d 510, 514, 730 N.E.2d 118 (Ill. App. 2000). It is improper to argue defense counsel is intentionally misleading jurors and witnesses. State v. Negrete, 72 Wn. App. 62, 66-67, 863 P.2d 137 (1993), review denied, 123 Wn.2d 1030 (1994); United States v. McLain, 823 F.2d 1457, 1462 (11th Cir. 1987), overruled on other grounds, United States v. Watson, 866 F.2d 381, 385 n.3 (11th Cir. 1989).

While a prosecutor's remarks in response to defense argument are not always grounds for reversal, such remarks "may not go beyond what is necessary to respond to the defense and must not bring before the jury matters not in the record, or be so prejudicial that an instruction cannot cure them." State v. Dykstra, 127 Wn. App. 1, 8, 110 P. 3d 756 (2005), review denied, 156 Wn.2d 1004 (2006). Improper remarks provoked by defense counsel are thus grounds for reversal if the remarks are not a pertinent reply. State v. Jones, 144 Wn. App. 284, 299, 183 P.3d 307, 316 (2008); see also State v. Davenport, 100 Wn. 2d 757, 760, 675 P.2d 1213 (1984) (response was improper because it exceeded scope of the provocation by misstating the law). In other word's, the State's response must be fair. State v. Gregory, 158 Wn.2d 759, 842-43, 147 P.3d 1201 (2006).

Here the prosecutor argued:

The clear suggestion by [defense counsel] is that police planted that knife. . . .

. . . .

One thing that strikes me as curious, when [defense counsel] is going on and on and on about all of the injustice that has been done to Mr. Baker and he talks about the fact that he asked [police to bring to court all B.C.'s] clothing, that the police deliberately did not bring the panties in, do you remember that? Well, folks, the panties are right here in the rape kit. They've been here from the get-go. . . . They're in evidence.

So a suggestion that the police are hiding things from you or planting evidence is BS, and [defense counsel] knows better than to make those kind of arguments.

6RP 875-76.

In State v. Guizzotti, the prosecutor's characterization of defense counsel's argument as "smoke" and "an attempt to confuse the evidence" was permitted because it was made in response to defense argument that was unfounded. 60 Wn. App. 289, 298, 803 P.2d 808 (1991). Here, in contrast, defense counsel pointed to evidence from which the jury could have found police planted the box cutter, including the condition of the ground, the box cutter's position upon discovery, the failure to photograph the site before Martin's search, and the fact Martin somehow avoided cutting his hand on the exposed blade. 3RP 390-411; 6RP 854-58 (defense's closing argument); Exs. 19-22. Defense counsel's argument was, therefore, arguably supported by evidence, and the prosecutor

exceeded the bounds of proper response by arguing defense counsel should have known better than to proffer such “BS.”

This Court should, moreover, reject any suggestion the prosecutor’s argument was complimentary to defense counsel because it suggested such arguments were beneath him. Even though the prosecutor rhetorically couched the argument as a backhanded compliment, the remark was not, in fact, complimentary. Instead, it effectively disparaged not only counsel’s arguments but also defense counsel for making such arguments. This tactical, personal disparagement of counsel prejudiced Baker, denying him a fair trial. Bruno, 721 F.2d at 1195. When considered with the other instances of misconduct, it is likely any curative instruction would have been futile. Fisher, 165 Wn App. at 747; Echevarria, 71 Wn. App. at 597-98.

d. The Prosecutor Improperly Disparaged the Defense Counsel’s Role and Appealed to the Passions of Jurors by Encouraging Them to Put Themselves in the Victim’s Shoes and to Imagine being Grilled by Defense Counsel.

"A trial in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial." State v. Miles, 73 Wn.2d 67, 70, 436 P.2d 198 (1968). The prosecutor is therefore forbidden from appealing to the passions of the jury and thereby encouraging it to render a verdict based on emotion rather

than properly admitted evidence. Viereck v. United States, 318 U.S. 236, 247-78, 63 S. Ct. 561, 87 L. Ed. 734 (1943); Belgarde, 110 Wn.2d at 507-08.

Statements that are unfairly “calculated to align the jury with the prosecutor and against the [accused]” may violate this prohibition. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). Moreover, comments that urge jurors to sympathize with the victim and otherwise distract jurors from determining whether the State has proven each element of the crime are improper. People v. Littlejohn, 144 Ill.App.3d 813, 827, 494 N.E.2d 677 (Ill. App. 1986); see also State v. Mills, 748 A.2d 318, 323-24 (Conn. App. 2000) (improper for prosecutor to tell jury not to victimize the victim again).

Here, the prosecutor argued:

The question before you is very simple and it's very clear, and ultimately should be pretty easy. Who do you find more credible, [B.C.] or the defendant?

He's right in regards the fact that when I come before you and say [B.C.] may not know exactly where things happened in that [apartment] breezeway because it probably was pretty traumatic for a 17-year-old kid to have this guy essentially jump out of the bushes at you and put a razor blade knife to your throat. I can't imagine as a child of that age anything more traumatic. And now the defense has the chutzpah [sic] [to] come in here and say she's not accurate enough about where various things happened, where she put her clothes or where she was laid down in the dirt when she was raped, well, I'll leave that up to you whether that's reasonable or not.

But I would suggest to you that when you go back there, you put yourself in her shoes. You put yourself in the position of being a 17-year-old girl walking to work at that time of day and somebody puts a razor blade to your throat and then a year and a half later have somebody just grill you and grill you and grill you about details, insignificant details and significant details, but just going after you, and when you get something either incorrect or inconsistent, say, ah-ha, you're lying. Think about that when you are deciding how you want to go with this case.

6RP 880-81.

Whether a victim has been treated fairly by defense counsel is irrelevant to whether the defendant committed the alleged offense. Walker, 790 A.2d at 1218. Inviting the jurors to put themselves in B.C.'s shoes and imagine having someone "grill you and grill you and grill you" about "details" was a direct invitation to decide the case based on sympathy for B.C. rather than to rationally evaluate her credibility. "A prosecutor may not properly invite the jury to decide any case based on emotional appeals." In re Det. of Gaff, 90 Wn. App. 834, 841, 954 P.2d 943 (1998). Urging jurors to align themselves with an alleged victim because defense counsel had the temerity to cross-examine her on "details" is such an appeal.

The State's argument was, moreover, an improper "golden rule" argument. "Urging the jurors to place themselves in the position of one of the parties to the litigation, or to grant a party the recovery they would

wish themselves if they were in the same position," is an improper argument because it "encourages jurors to depart from neutrality and decide the case on the basis of personal interest rather than on the evidence." Adkins v. Aluminum Co. of Am., 110 Wn.2d 128, 139, 750 P.2d 1257 (1988). The prosecutor's "golden rule" comment encouraged the jury to rely upon their personal interests and sympathies rather than the evidence.

The Supreme Court in State v. Borboa⁴ stated in footnoted dictum that it was "not convinced that the prohibition on 'golden rule' arguments applies in the criminal context," suggesting the more appropriate way to frame the argument is by contending the prosecutor improperly appealed to the sympathy and passions of the jury. The golden rule admonition is thus perhaps best viewed as "a subset of the general rule that the prosecutor should not appeal to the jury's emotions and sympathy for the victim of a crime." Tyree v. United States, 942 A.2d 629, 643 (D.C. 2008). In any event, other jurisdictions recognize the impropriety of using golden rule arguments in criminal cases. See, e.g., Johnson v. Bell, 525 F.3d 466, 484 (6th Cir. 2008); Lee v. State, 950 A.2d 125, 138-39 (Md. 2008). Division Two of this Court has done so as well. State v. Thach, 126 Wn. App. 297, 317, 106 P.3d 782 (2005).

⁴ 157 Wn.2d 108, 124 n.5, 135 P.3d 469 (2006).

Finally, this Court should reject a claim defense counsel provoked such argument by challenging the credibility of the complaining witness. Defense counsel's role is that of a zealous advocate for the accused. Walker, 790 A.2d at 1218. “[L]awyers in criminal cases are necessities not luxuries.” Bruno, 721 F.2d at 1194 (quoting Gideon v. Wainwright, 372 U.S. 335, 344, 83 S. Ct. 792, 796, 9 L. Ed. 2d 799 (1963)). Improper remarks are, moreover, grounds for reversal if the remarks are not a pertinent reply. Jones, 144 Wn. App. at 299. The prosecutor's flagrant appeal to the jury's passion and prejudice violated Baker's right to a fair trial. Echevarria, 71 Wn. App. at 597-98.

e. A New Trial is Warranted Because of the Cumulative Effects of the Repeated Instances of Misconduct.

At least two of the four instances of misconduct alone warrant reversal. If this Court disagrees, however, the four instances challenged here combined to deny Baker a fair trial, and this Court should reverse based on the combined effects of the misconduct. State v. Alexander, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992).

2. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO REQUEST INFERIOR DEGREE OFFENSE INSTRUCTIONS.

A criminal defendant is constitutionally guaranteed the right to the effective assistance of counsel. U.S. Const. amend. VI; Wash. Const. art.

I, § 22; Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P. 2d 816 (1987). Defense counsel is ineffective where (1) counsel's performance was deficient and (2) the deficiency prejudiced the defendant. Thomas, 109 Wn.2d at 225-26. Deficient performance is that which falls below an objective standard of reasonableness. Id. at 226. Prejudice results from a reasonable probability that the result would have been different but for counsel's performance. Id. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

Defense counsel was ineffective for failing to request inferior degree offense instructions, contrary to his own expressed tactical judgment and despite the State's concession Baker was entitled to the instructions. Because there is a reasonable probability the jury would have convicted Baker of second or third degree rape, his conviction should be reversed.

a. Baker Was Entitled To Second Degree and Third Degree Rape Instructions.

Defendants are entitled to jury instructions not only on the charged offense, but also on all inferior degree offenses. RCW 10.61.003. A defendant is entitled to such instructions if:

- (1) the statutes for . . . the charged offense and the proposed inferior degree offense "proscribe but one

offense;” (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence that the defendant committed only the inferior offense.

State v. Fernandez-Medina, 141 Wn.2d 448, 454, 6 P.3d 1150, 1153 (2000) (quoting State v. Peterson, 133 Wn.2d 885, 891, 948 P.2d 381 (1997)). Such evidence need not be produced by the defense’s own witnesses; instead, a court may consider all evidence presented at trial. Fernandez-Medina, 141 Wn.2d at 456. To warrant an inferior degree instruction, the evidence need not be consistent with the accused’s primary defense. Id. at 457-60.

To convict a person of first degree rape, the State must prove beyond a reasonable doubt that the person (1) engaged in sexual intercourse (2) by forcible compulsion and (3) under one of four possible aggravating circumstances. RCW 9A.44.040(1). Here, the alleged aggravating circumstance was that Baker used or threatened to use a deadly weapon or what appeared to be a deadly weapon. RCW 9A.44.040(1)(a).

A person commits second degree rape when, under circumstances not constituting first degree rape, he engages in sexual intercourse with another person by forcible compulsion. RCW 9A.44.050(1)(a). A person commits third degree rape when, under circumstances not constituting first

or second degree rape, that person engages in sexual intercourse with another person who does not consent and the lack of consent is clearly expressed by his or her words or conduct. RCW 9A.44.060.

Baker satisfies the first two prongs of the three-pronged "inferior degree" test. Both second and third degree rape are inferior degrees of first degree rape, and each of the degrees proscribe one offense. State v. Bright, 129 Wn.2d 257, 269, 916 P.2d 922 (1996); State v. Jeremia, 78 Wn. App. 746, 753, 899 P.2d 16 (1995), review denied, 128 Wn.2d 1009 (1996).

As for the third inquiry, the evidence in the light most favorable to the defense must raise an inference that only the inferior degree offenses were committed, to the exclusion of the charged offense. Fernandez-Medina, 141 Wn.2d at 455. As the State conceded in the trial court, Baker meets that requirement as well.

First, the jury could have found Baker engaged in intercourse by forcible compulsion but did not threaten B.C. with a box cutter and was therefore guilty of second degree rape. As discussed above, Baker's theory was that the physical evidence supported an inference the detectives planted the box cutter. 3RP 395-407; 6RP 854-58. Likewise, Baker testified he had no box cutter. 5RP 751. The jury was free to believe Baker in that respect but disbelieve his testimony B.C. consented

to intercourse. Fernandez-Medina, 141 Wn.2d at 457-60. Even B.C. testified that she may have had sex with Baker even if he had no box cutter. Moreover, B.C. testified she lost track of the box cutter before submitting to intercourse. 2RP 194, 202-03.

There was also evidence supporting third degree rape. Considered in the light most favorable to Baker, B.C. verbally expressed her lack of consent when she attempted to discourage him by telling him she never had sex before and was on her period. 2RP 195-96; see Fernandez-Medina, 141 Wn. App. at 456 (evidence supporting inferior degree crime need not be produced by defense witnesses). Second and third degree rape instructions were therefore legally and factually warranted.

b. Defense Counsel's Failure to Request Lesser Degree Instructions Constituted Deficient Performance.

The lesser offense rule "affords the jury a less drastic alternative than the choice between conviction of the offense charged and acquittal." Beck v. Alabama, 447 U.S. 625, 633, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980). "Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction." State v. Pittman, 134 Wn. App. 376, 388, 166 P.3d 720 (2006) (quoting Keeble v. United States, 412 U.S. 205, 250, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973)). This result is

avoided when the jury is given the option of finding a defendant guilty of a lesser included offense, thereby giving "the defendant the full benefit of the reasonable-doubt standard." Beck, 447 U.S. at 633.

Only legitimate trial strategy constitutes reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). Counsel's decision to pursue an all-or-nothing strategy must be measured against the likelihood that the jury, faced with evidence that the accused committed some crime, was likely to resolve doubts in favor of conviction rather than acquittal. Baker's case compares favorably to others where counsel was ineffective in failing to request instructions on a lesser offense.

In Pittman, this Court held counsel was ineffective for failing to request a lesser-included offense instruction on first degree attempted criminal trespass where the defendant was convicted of attempted residential burglary. Pittman, 134 Wn. App. at 379, 390. Pittman's defense was that he never intended to commit a crime once he was inside the victim's home. Id. at 388. This was a risky defense because Pittman clearly committed a crime, but the jury had no option other than to convict or acquit. Id. In addition, the penalties for the lesser and greater offenses varied significantly – nine to 10 1/2 months for attempted residential burglary versus a maximum of 90 days for attempted first degree trespass. Id. at 388-89.

In State v. Ward,⁵ the defendant was convicted of second degree assault but this Court held counsel was ineffective for failing to request a lesser included instruction on unlawful display of a weapon. This was not a legitimate trial strategy because there was a significant difference in penalties between the lesser and greater offenses, Ward's defense was the same for both the lesser and greater offenses, and there was an inherent risk in relying solely on Ward's claim of self-defense because of credibility problems. Id. at 249-50.

In State v. Grier,⁶ the defendant was convicted of second degree murder for shooting a guest in her home. On appeal, the Court held counsel was ineffective for failing to request manslaughter instructions. The Court found the penalties for murder and manslaughter varied significantly and an “all-or-nothing” tactic was too risky given the overwhelming evidence Grier was guilty of some offense. Id. at 642-44.

Pittman, Ward, and Grier support reversal in Baker’s case. As in each of those cases, there is a significant difference in penalties between the charged crime and the lesser offenses. Based on an offender score of zero, first degree rape carries a minimum standard range of 93-123 months including 60 months of “flat time,” i.e., incarceration that may not be

⁵ 125 Wn. App. 243, 246, 249-50, 104 P.3d 670 (2004).

⁶ 150 Wn. App. 619, 622-23, 208 P.3d 1221 (2009).

reduced by “good time” credits, and a possible maximum sentence of lifetime incarceration. RCW 9.94A.510, .515, .540; Former RCW 9.94A.712. In contrast, second degree rape carries a minimum standard range of 78-102 months and no “flat time.” RCW 9.94A.510, .515, .540; Former RCW 9.94A.712. Third degree rape carries a maximum standard range of six to 12 months of confinement. RCW 9.94A.510, .515.

Second, as in Ward and Grier, Baker’s main defense, consent, applied equally to each degree of crime.

Third, as in Pittman, Ward, and Grier, considering the totality of the evidence presented at trial, counsel’s exclusive reliance on a consent defense for acquittal was extremely risky. The defense theorized B.C. knew Baker and became disgruntled after having sex with him because he refused to provide his phone number. 5RP 746. But this theory failed to explain why, if B.C.’s aim was to avenge a slight, she failed to identify Baker to the police.

As in Pittman, Ward, and Grier, therefore, counsel was deficient because the failure to request inferior degree instructions was not a legitimate strategic choice.

c. There is a Reasonable Probability Counsel's Deficient Performance Affected the Verdict.

Reversal is required when a defendant is entitled to instruction on a lesser charge but does not receive it. See State v. Parker, 102 Wn.2d 161, 163-64, 166, 683 P.2d 189 (1984) (where defendant has right to lesser offense instruction, appellate court barred from holding defendant not prejudiced by failure to submit instruction to jury). Because Baker was entitled to instructions on second degree and third degree rape, counsel's failure to request the instructions resulted in prejudice.

d. The Doctrine Of Invited Error Does Not Preclude Review Because Counsel Was Ineffective In Setting Up The Error.

Defense counsel initially proposed instructions for second and third degree rape and the State agreed the court should instruct the jury on these offenses. 6RP 812-13. However, defense counsel then withdrew the instructions, informing the court Baker did not wish the instructions to be given. 6RP 813. The court engaged in a colloquy with Baker regarding the risks and benefits of such a decision, and concluded:

I'll find . . . the defendant is going against the advice of his attorney and is asking the court not to give a lesser included offense of either second or third degree rape, which are against his interests, and he's doing that on his own, and he's making a free, intelligent, decision to do so.

6RP 815.

The doctrine of invited error "prohibits a party from setting up an error at trial and then complaining of it on appeal." State v. Wakefield, 130 Wn.2d 464, 475, 925 P.2d 183 (1996). But the doctrine does not preclude review where, as here, defense counsel was ineffective in inviting the error. Aho, 137 Wn.2d at 745.

"Generally, the client decides the goals of litigation and whether to exercise some specific constitutional rights, and the attorney determines the means." State v. Cross, 156 Wn.2d 580, 606-07, 132 P.3d 80 (2006). The defendant thus has authority to make certain fundamental decisions, such as whether to plead guilty, waive the right to a jury, or testify at trial. Id.; In re Personal Restraint of Jeffries, 110 Wn.2d 326, 333-34, 752 P.2d 1338, cert. denied, 488 U.S. 948 (1988); RPC 1.2(a).

However, "the choice of trial tactics, the action to be taken or avoided, and the methodology to be employed must rest in the attorney's judgment." In re Pers. Restraint of Stenson, 142 Wn.2d 710, 735, 16 P.3d 1 (2001) (citation omitted). Whether to seek lesser offense instructions is a classic matter of trial strategy. Ward, 125 Wn. App. at 249-50; Pittman, 134 Wn. App. at 387-90; State v. King, 24 Wn. App. 495, 501, 601 P.2d 982 (1979). Deliberate tactical choices may constitute ineffective assistance of counsel if they fall outside the wide range of professionally competent assistance. Grier, 150 Wn. App. at 640.

The decision whether or not to propose lesser degree instructions was counsel's decision to make, and counsel alone bears responsibility for failing to request the instructions. A defendant lacks both the skill and knowledge to adequately prepare her defense and therefore needs "the guiding hand of counsel" at every step of the proceeding. Powell v. Alabama, 287 U.S. 45, 69, 53 S. Ct. 55, 77 L. Ed. 158 (1932). In this respect, trial counsel and the trial court, which encouraged counsel to cede his decision to Baker, failed Baker. Baker is therefore entitled to a new trial aided by constitutionally adequate counsel.

3. THE TRIAL COURT ERRED IN IMPOSING TWO ILLEGAL COMMUNITY CUSTODY CONDITIONS.

Baker's judgment and sentence contains two illegal community custody conditions that must be stricken on remand.

a. The Condition Prohibiting Possession of Pornography is Unconstitutionally Vague and must be Stricken.

Baker was sentenced under Former RCW 9.94A.712 (1)(a)(i). That statute provides that when a defendant is convicted of certain crimes including first degree rape, the trial court must impose a minimum term within the standard sentencing range as well as a maximum term equal to the statutory maximum. The statute also requires the trial court to impose community custody for any time the defendant is released before the expiration of the maximum sentence. Some conditions of release are

mandatory, while the trial court has discretion in imposing other conditions. Under Former RCW 9.94A.712(6)(a),⁷ the trial court may order the defendant to “perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community.” Under former RCW 9.94A.700(5)(e),⁸ the trial court may also order the defendant to “comply with any crime-related prohibitions.” See also RCW 9.94A.703(3) (current provision listing the conditions of community custody a court may impose).

The sentencing court ordered Baker to “not possess or access pornographic materials, as directed by the supervising [CCO].” CP 25 (condition 7).

This condition is, however, illegal. The due process vagueness doctrine under the Fourteenth Amendment and article I, section 3 of the

⁷ Former RCW 9.94A.712 (6)(a)(i) states

Unless a condition is waived by the court, the conditions of community custody shall include those provided for in RCW 9.94A.700(4). The conditions may also include those provided for in RCW 9.94A.700(5). The court may also order the offender to participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community, and the department and the board shall enforce such conditions pursuant to RCW 9.94A.713, 9.95.425, and 9.95.430.

⁸ Former RCW 9.94A.700 was recodified as RCW 9.94B.050 by Laws of 2008, chapter 231, § 56.

state constitution requires that citizens have fair warning of proscribed conduct. State v. Bahl, 164 Wn.2d 739, 752, 193 P.3d 678 (2008). The vagueness doctrine serves two main purposes. First, it provides citizens with fair warning of what conduct they must avoid. Second, it protects them from arbitrary, ad hoc or discriminatory enforcement. State v. Halstien, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993). A prohibition is void for vagueness if either: (1) it does not define the offense with sufficient definiteness such that ordinary people can understand what conduct is prohibited; or (2) it does not provide ascertainable standards of guilt to protect against arbitrary enforcement. State v. Sullivan, 143 Wn.2d 162, 181-82, 19 P.3d 1012 (2001).

In State v. Sansone, 127 Wn. App. 630, 111 P.3d 1251 (2005), this Court held that the following condition of community placement was unconstitutionally vague:

[The defendant shall] not possess or peruse pornographic materials unless given prior approval by [his] sexual deviancy treatment specialist and/or [CCO]. Pornographic materials are to be defined by the therapist and/or Community Corrections Officer.

Sansone, 127 Wn. App. at 634-35.

In Bahl, the Supreme Court found a pre-enforcement challenge to a similar condition was properly raised. 164 Wn.2d at 745-52. The unlawful condition in that case stated, “Do not possess or access

pornographic materials, as directed by the supervising [CCO].” Id. at 743. Bahl found the condition was still invalid even if it specified a third party defined what fell within the condition. As did Sansone, the Bahl Court noted such a condition “only makes the vagueness problem more apparent, since it virtually acknowledges that on its face it does not provide ascertainable standards for enforcement.” Bahl, 164 Wn.2d at 758.

Constitutional vagueness challenges to community custody conditions may be raised for the first time on appeal and are ripe for review. Id. at 744, 761. Because the condition prohibiting possessing or accessing “pornographic materials” is unconstitutionally vague, the prohibition should be stricken. Sansone, 127 Wn. App. at 642 (remanding for trial court to impose a condition containing necessary specificity).

b. The Condition Prohibiting Possession of Sexual Stimulus Material is Unconstitutionally Vague and Likewise must be Stricken.

The sentencing court also ordered Baker to “not possess or control sexual stimulus material for your particular deviancy as defined by the supervising [CCO] and therapist except as provided for therapeutic purposes.” CP 25 (condition 8).

In Bahl, the Supreme Court held this condition was likewise unconstitutionally vague. As the Court explained, “The condition cannot identify materials that might be sexually stimulating for a deviancy when

no deviancy has been diagnosed Accordingly, the condition is utterly lacking in any notice of what behavior would violate it.” Id. at 761.

As in Bahl, no “deviancy” has been diagnosed in Baker’s case. This Court should order the prohibition stricken on remand. Sansone, 127 Wn. App. at 642.

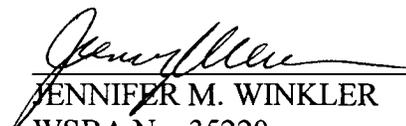
D. CONCLUSION

This Court should reverse Baker’s conviction. The prosecutor’s repeated misconduct denied Baker a fair trial, as did defense counsel’s failure to request inferior degree instructions. In any event, remand for correction of the two illegal community custody conditions is required.

DATED this 31st day of August, 2009.

Respectfully submitted,

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Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 63158-6-I
)	
LARRY BAKER,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31ST DAY OF AUGUST 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE
3000 ROCKEFELLER AVENUE
EVERETT, WA 98201

- [X] LARRY BAKER
DOC NO. 326950
AIRWAY HEIGHTS CORRECTIONS CENTER
P.O. BOX 2049
AIRWAY HEIGHTS, WA 99001

SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF AUGUST 2009.

x *Patrick Mayovsky*

CLERK OF COURT
STATE OF WASHINGTON
2009 AUG 31 PM 4:31