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Court of Appeals
Division I
State of Washington

74663-4

NO. 74663-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

CORTNEY STAHL,

Appellant.

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

The Honorable Jim Rodgers, Judge
The Honorable William Bowman, Judge
The Honorable Catherine Shaffer, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court violated the appellant's right to a unanimous jury verdict as to his fourth degree assault conviction.

2. The prosecutor's incurably prejudicial misconduct in closing argument denied the appellant a fair trial on two of the remaining counts.

3. Defense counsel provided ineffective assistance by failing to object to the prosecutor's misconduct.

Issues Pertaining to Assignments of Error

1. The State presented evidence suggesting that the appellant assaulted a complainant on two occasions. The prosecutor did not elect which act constituted the single charged assault, and the trial court did not give a unanimity instruction, violating the appellant's right to a unanimous verdict. Where the State cannot show the resulting error was harmless, should the appellant's fourth degree assault conviction be reversed?

2. The appellant's defense at trial was that two complainants' heroin use provided a motive for them to fabricate the allegations against him and also affected the witnesses' perception of the events. In rebuttal, however, the prosecutor asserted that the defense had emphasized the women's heroin use in attempt to "dehumanize" them and to suggest they did not deserve the protection of the law. Correspondingly, the prosecutor

also urged jurors to convict, in the interest of protecting such marginalized individuals. Did the State's argument, designed to appeal to the jurors' sympathies and prejudices, constitute incurably prejudicial misconduct, denying the appellant a fair trial as to counts 1 and 5?

3. Where, in rebuttal, the prosecutor also vouched for the "honest[y]" of each of the complaining witnesses, did prosecutorial misconduct deny the appellant a fair trial?

4. Was counsel ineffective for failing to object to the foregoing misconduct?

B. STATEMENT OF THE CASE¹

1. Charges, verdicts, and sentence

The State charged Cortney Stahl with second degree rape and indecent liberties by forcible compulsion as to complainant J.S. (counts 1 and 2). Based on an incident occurring the same day, the State also charged Stahl with assaulting José León (third degree assault) and Alicia Nickerson (fourth degree assault) (counts 3 and 4). The State also charged Stahl with indecent liberties by forcible compulsion as to N.W. (count 5).

¹ This brief refers to the verbatim reports as follows: 1RP – 10/6/15; 2RP – 10/13/15; 3RP – 11/24/15; 4RP – 11/25/15; 5RP – 11/30/15; 6RP – 12/1/15; 7RP – 12/2/15; 8RP – 12/3/15; 9RP – 12/7/15; 10RP – 12/8/15 (morning); 11RP – 12/8/15 (afternoon); 12RP – 12/9/15; 13RP – 12/18/15; and 14RP – 1/29/16.

CP 1-8, 12-16, 38-39. Each of the four named complainants was homeless and lived in, or frequented, the same north Seattle greenbelt encampment where Stahl resided.

The jury convicted Stahl as charged. CP 74-75. But the court vacated count 2, indecent liberties as to J.S., because the conviction violated the prohibition against double jeopardy. CP 105; 14RP 42.

After the verdicts, Stahl moved to discharge his attorney² in order to file, pro se, a motion for a new trial. 13RP 3; CP 77-85 (motion and supporting declaration). The court advised Stahl that it would not appoint an attorney for sentencing if the motion was denied. 13RP 14. The court granted Stahl's motion to represent himself. However, the court allowed Stahl's trial attorney, Mark Flora, to remain as standby counsel. 13RP 11.

The day of the sentencing hearing, the judge permitted Flora to withdraw as standby counsel because Stahl had raised a claim of ineffective assistance in the motion for a new trial. 14RP 4.³ Jesse Dubow, who had been appointed by the local department of public defense, appeared at the hearing. The court was reluctant to appoint a new

² Stahl had also moved to discharge his attorney before trial. 1RP 6-7; 2RP 14-16.

³ See also CP 86-89 (Stahl's letter, filed 15 days before the sentencing hearing, informing trial judge that Flora had stated he was withdrawing and was declining to assist Stahl as standby counsel).

attorney because Stahl was raising a pro se motion. The court stated, however, that it would allow Dubow to argue Stahl's motion for new trial. 14RP 8. When Dubow declined, the court stated it would only appoint Dubow if Stahl withdrew his motion. 14RP 7. Stahl elected to proceed with the motion, which the court then denied. 14RP 14, 17-21.

The court also denied Stahl's request to continue the sentencing hearing⁴ so Stahl could be evaluated for a Special Sex Offender Sentencing Alternative (SSOSA).⁵ 14RP 9, 28-29. The court that noted it would not, in any event, grant a SSOSA, based in part on the nature of the offenses. 14RP 30.

The court sentenced Stahl to a mid-range indeterminate sentence of 129 months on count 1. CP 91, 94; RCW 9.94A.507. The court ran the remaining felony sentences and the misdemeanor assault sentence concurrent to the count 1 term. CP 94.

Stahl timely appeals. CP 109.

2. Trial testimony

The afternoon of July 9, 2015, Seattle police responded to a report of a disturbance at a homeless encampment in a greenbelt south of 125th

⁴ Stahl initially requested a sentencing continuance in his January 14, 2016 letter to the court, requesting an opportunity to meet with a "mitigation specialist." No action was taken regarding this request. CP 88.

⁵ RCW 9.94A.670.

Street North and one block east of Aurora Avenue North. 7RP 120-22; 8RP 17-18. The greenbelt consisted of a flat area and a hill leading up to a residential neighborhood. 7RP 123. Improvised structures sheltered a number of residents. 7RP 123.

Police spoke with Alicia Nickerson and José León. 8RP 20. León resided in the encampment. 8RP 99-102. His friend Nickerson had been staying with him because the motor home in which she resided had been towed. 8RP 106-08.

León and Nickerson showed police injuries they had suffered, which the police photographed. 8RP 20-24. Nickerson had a red mark on her leg. León had a bloody nose as well as a cut on his finger. 8RP 20. Nickerson and León reported that Stahl, a friend of León, had inflicted the injuries. 8RP 25. Police searched the area for Stahl and found him sleeping in a nearby cemetery. 8RP 25-26. Stahl was arrested. 8RP 27.

Albert Coffin, who lived in a home adjacent to the greenbelt, had contacted the police that day. 8RP 43. He heard rustling noises from the encampment and heard a woman yell, “[D]on’t hit me, . . . [g]et off me.” 8RP 43. Coffin peered over his fence and saw a woman, a Hispanic man,⁶ and a white man “engaged” with each other. 8RP 43-44. The white man

⁶ Coffin had spoken with the Hispanic man a few days earlier and thought his name was “Alberto.” Coffin, however, identified León. 8RP 41-42.

appeared to be striking and pushing the Hispanic man. 8RP 44, 50. Coffin acknowledged that bushes blocked portions of the altercation from his view. 8RP 43.

The woman ran up the hill and through some bushes into Coffin's yard. Upset, the woman told Coffin, "[H]e's beating us up." 8RP 47. Coffin reassured the woman that the police were on their way, and he urged her to remain in his yard. But she eventually left, explaining that she was worried her wallet had been stolen. 8RP 47-48.

José León testified through an interpreter. 8RP 98. The day of the incident, he went to the store, leaving Nickerson at the camp. 8RP 109. When he returned 30 or 40 minutes later, Stahl was present and Nickerson told León that Stahl had tried to "manhandle" her. 8RP 110, 114.

León approached Stahl and asked why Stahl had done that. 8RP 115. The men fought briefly, but León was able to calm Stahl, who then left the area. 8RP 115-17. But Stahl returned 20 or 30 minutes later and began throwing items around the camp. 8RP 116, 118, 127. León grabbed a rock and Stahl picked up a two-by-four. 8RP 119. León, believing he had convinced Stahl to calm down, eventually set down his rock. Stahl then hit León with the board. 8RP 120-21.

Meanwhile, Stahl also struck Nickerson, and he took her purse and wallet. 8RP 121. León convinced Nickerson to flee, and she ran up the

hill. 8RP 122. According to León, Stahl left the area when he saw the police approaching. 8RP 122.

A police detective unsuccessfully attempted to locate Nickerson during the trial. She did not testify. 9RP 243.

J.S. was also living in the greenbelt encampment on the day of the incident described by León. 9RP 174. A frequent heroin user, J.S. testified that she consumed between \$10 and \$50 worth of heroin per day. 9RP 175. J.S. said she got the money from her parents or her friends. 9RP 210.

The day before the incident, Stahl offered J.S. \$20 worth of heroin and said she could pay him back. 9RP 180. J.S. later learned he had taken the heroin from N.W., a woman who visited the camp on occasion but did not live there. 9RP 181-82.

That night, J.S. slept on a mattress in a shelter that belonged to another camp resident, Vinnie. 9RP 183-84, 204, 228. It was dark out when she fell asleep, but people were still gathered in the shelter. 9RP 184. J.S. acknowledged she may have ingested heroin before falling asleep. 9RP 203-04.

When she awoke, however, the sun had risen, and the others were gone. 9RP 185. Stahl, who had not been in the shelter the previous night,

was attempting to put his penis in her mouth. 9RP 186, 211. His penis touched her teeth. 9RP 187.

Surprised, J.S. attempted to get up to leave. 9RP 188. She testified that, somehow, Stahl and J.S.'s positions switched, and Stahl ended up lying on the mattress, with J.S. sitting on the ground with her back toward the mattress. 9RP 188, 212-13. Stahl masturbated with one hand and rubbed J.S.'s mouth, neck, and breasts with his other hand. 9RP 191. J.S. feared Stahl would hurt her if she tried to get up. 9RP 217. Stahl eventually ejaculated onto J.S.'s ear. 9RP 192.

Afterward, J.S. gathered her purse and clothing and left the shelter. 9RP 193. But Stahl followed, whipping J.S. with his T-shirt. 9RP 196. Stahl shoved J.S. 9RP 195. She fell, bruising her knee on a rock. 9RP 193, 195.

J.S. did not contact the police immediately after the incident. 9RP 197-98. But she saw police officers in the greenbelt about eight hours later and told them what occurred.⁷ 9RP 198-99. An officer collected a sample of ejaculate from J.S.'s ear. 9RP 202. Testing of the sample revealed a DNA profile that matched a cheek swab submitted by Stahl. 8RP 7-8; 9RP 154-56, 240.

⁷ J.S. did not recall what she did during the eight hours between the incident and her conversation with police. 9RP 216.

Over defense objection, J.S. testified that she did not want to get Stahl in trouble and that she had not “press[ed] charges.” 9RP 218. Rather, she wanted Stahl to get help. 9RP 218.

N.W., the count 5 complainant, also testified. She had been homeless about three years and stayed in the greenbelt encampment on occasion. 8RP 54; 9RP 178. N.W. knew Stahl, who frequented the area. 8RP 61.

Like J.S., N.W. acknowledged she was a regular heroin user, and she testified that she consumed about \$10 to \$20 worth of heroin per day. 8RP 55. She bought her heroin or got it from friends. 8RP 79. On direct examination, N.W. acknowledged she had been convicted of theft on a number of occasions, and that her criminal activity supported her drug use. 8RP 60-61, 77-78.

N.W. remembered the day the police came to the greenbelt but did not know the date. 8RP 65, 90. A few days earlier, N.W.’s supply of heroin had been stolen while she was sleeping. 8RP 62. She later overheard Stahl bragging about stealing the heroin and giving it to others. 8RP 62-63.

The day the police arrived, N.W. was sleeping in a low structure built from boards located under some bushes. Stahl came in and woke N.W. 8RP 59, 65, 90. N.W. was unsure of the time but testified that it

was “still light out.” 8RP 66. Once in the structure, Stahl claimed he had beat up six people and stolen their money. 8RP 65. Noticing a syringe cap on the ground, Stahl berated N.W. about syringes being left around the camp. 8RP 68. For emphasis, Stahl threw the contents of N.W.’s purse at her. 8RP 69.

N.W. attempted to crawl past Stahl in order to leave the structure. As she did so, Stahl first grabbed N.W. by the leg, then grabbed her crotch. According to N.W., it felt as if Stahl was attempting to put his finger in her vagina through her pants. 8RP 70-71. N.W. kicked at Stahl until he let go. 8RP 72.

N.W. did not contact the police that day even though she knew police were in the camp and that Stahl had been arrested. 8RP 72-73, 91. N.W. decided to contact the police after learning that “there were other girls.” 8RP 74, 76. Upon defense objection, the court instructed the jury that this testimony could only be used to evaluate N.W.’s state of mind, rather than for the truth of its contents. 8RP 74.

3. Closing arguments

In closing, the prosecutor argued that homeless individuals living in the greenbelt had formed a community, and that Stahl had bullied and threatened members of his own community. 10RP 268-69. Moreover, although many of the witnesses led difficult lives and were unable to

remember certain details, the emotions they showed during their testimony indicated that their testimony should be believed. 10RP 297-99. Regarding witness bias, the State argued jurors should reject any argument by the defense that the witnesses fabricated the charges simply because Stahl stole N.W.'s heroin. 10RP 299.

In closing, defense counsel argued, in part, that J.S. fabricated the allegation against Stahl after he humiliated her following their consensual sexual encounter. 10RP 308-10. Defense counsel pointed out that J.S. did not contact police until eight hours after the alleged rape. 10RP 307. N.W. also fabricated her allegation. She too was angry with Stahl. He had stolen her heroin and then bragged about it. Contrary to N.W.'s testimony, which downplayed her anger over the theft,⁸ it was clear that heroin was very important to N.W. 10RP 315.

In rebuttal, the prosecutor argued that there were a number of reasons a sexual assault victim, particularly a homeless person, might not report an incident immediately. 10RP 324-25. Moreover, the complainants in the case were "pretty honest . . . that they weren't here trying to get Mr. Stahl into trouble." 10RP 324.

The State concluded its rebuttal as follows:

⁸ E.g. 8RP 83.

There was a lot of talk about — you know what phrase I heard a lot in Mr. Flora’s closing was heroin addict, right, not calling [J.S.] by her name, but a heroin addict, a homeless heroin addict. Maybe even worse, you know, [N.W.], a heroin addict, they’ve chosen heroin over everything else. *Designed to dehumanize them, so you think of them as just homeless addicts, people who don’t deserve your consideration, people who don’t deserve the protection of the law.* Well, that’s not who they are. They are people. They told you about how they ended up in this situation, about their families, about their community, and they are people just as deserving of the protection of the law as anyone else. We talked a lot in voir dire about the difficulties of being homeless, how they’re susceptible to victimization and how they deserve and how they need the very same protections that we all deserve. These are the people that Mr. Stahl bullied and assaulted. . . . Mr. Stahl is guilty of these crimes.

12RP 325-26 (emphasis added). Defense counsel did not object.

C. ARGUMENT

1. STAHL’S RIGHT TO A UNANIMOUS JURY VERDICT WAS VIOLATED BECAUSE THE STATE DID NOT ELECT WHICH ACT CONSTITUTED THE COUNT 4 ASSAULT, THE TRIAL COURT FAILED TO GIVE A UNANIMITY INSTRUCTION, AND THE ERROR WAS NOT HARMLESS.

The court violated Stahl’s right to a unanimous jury verdict on count 4, the charge involving Alicia Nickerson. The evidence described at least two possible assaults. The State did not elect which act it was relying on. The court did not instruct the jury it must unanimously agree on the act constituting the charged crime. Finally, these omissions were

not harmless beyond a reasonable doubt. As a result, the conviction should be reversed.

a. Introduction to applicable law

A person is guilty of fourth degree assault when he, “under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, . . . assaults another.” RCW 9A.36.041(1); CP 66-67 (jury instructions in this case)

Assault was defined, in part, at common law as

an intentional touching, striking, cutting, or shooting of another person, with unlawful force, that is harmful or offensive regardless of whether any physical injury is done to the person. A touching, striking, cutting, or shooting is offensive, if the touching, striking, cutting, or shooting would offend an ordinary person who is not unduly sensitive.

State v. Smith, 159 Wn.2d 778, 781-82, 154 P.3d 873 (2007) (defining “battery,” one of three ways of committing assault). Here, the jury was given this definition, although the definition was limited to touching or striking. CP 68 (instruction 25).

Criminal defendants in Washington have a right to a unanimous jury verdict. CONST. ART. I, § 21. When the State presents evidence of multiple acts that could constitute a charged crime, “the State must tell the jury which act to rely on in its deliberations or the [trial] court must instruct the jury to agree on a specific criminal act.” State v. Kitchen, 110 Wn.2d 403, 409, 756

P.2d 105 (1988); State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984), overruled on other grounds by Kitchen, 110 Wn.2d 403. The State's failure to elect the act, coupled with the court's failure to instruct the jury on unanimity, is constitutional error. Kitchen, 110 Wn.2d at 411. "The error stems from the possibility that some jurors may have relied on one act or incident and some another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction." Id.

Such an error may be raised for the first time on appeal, moreover, because a trial court's failure to give a unanimity instruction is a manifest error affecting a constitutional right. State v. Holland, 77 Wn. App. 420, 424, 891 P.2d 49 (1995).

The State need not elect, and the court need not give a unanimity instruction, however, if the evidence shows the accused was engaged in a "continuing course of conduct." State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). Courts have considered various factors in determining whether a continuing course of conduct exists in a particular case. Evidence that the charged conduct occurred at different times and places tends to show that several distinct acts occurred rather than a continuing course of conduct. Id. In contrast, evidence that an offense involves a single victim, or that an accused engages in a series of acts toward the same objective, supports the characterization of those acts as a continuing course of conduct. Id.

Four cases are instructive. In Handran, defendant was charged with first degree burglary based on intent to commit assault against his ex-wife. He argued that the court failed to instruct the jury that it must be unanimous as to which act alleged constituted the “assault” element of first degree burglary. Id. The Supreme Court held that the arguably assaultive acts occurring in quick succession did not require a unanimity instruction because they were part of a course of conduct intended to secure sex with a single victim. Id. In State v. Fiallo-Lopez, the defendant argued that the trial court should have given a unanimity instruction on the charge of delivery of cocaine. 78 Wn. App. 717, 723, 899 P.2d 1294 (1995). He argued the evidence showed two discrete acts of delivering cocaine, delivery of a “sample” to a restaurant and a later delivery of baggies of cocaine at a second location. Id. at 725. This Court disagreed, holding the two deliveries of cocaine were a continuing course of conduct, i.e., one continuous delivery of drugs by Fiallo to the same recipient. Id. at 725-26.

In State v. King, however, this Court held that failure to give unanimity instruction was reversible error where State’s evidence tended to show two distinct episodes of cocaine possession occurring at different times, in different places, and involving two different containers. 75 Wn. App. 899, 903-04, 878 P.2d 466 (1994). In Petrich, the Court similarly rejected the State’s continuing course of conduct argument. Petrich was charged with one

count of indecent liberties and one count of second degree statutory rape. 101 Wn.2d 566. Each incident occurred at a separate time and place. The only connection between the incidents was the victim. Id. at 571. The acts did not constitute a continuing course of conduct. And because the Court could not find the error harmless, it reversed. Id. at 573.

- b. The court failed to instruct the jury on unanimity, the reported assaults did not constitute a continuing course of conduct, and the error was not harmless beyond a reasonable doubt.

Here, the court did not instruct the jurors that they must agree on the act constituting the charged assault. Such an instruction was required because the acts did not constitute a continuing course of conduct. Moreover, the prosecutor did not elect which act it was relying on. Finally, based on the strength of the evidence as to each possible assault, the error was not harmless beyond a reasonable doubt.

First, the acts did not form a continuing course of conduct. This case is more like Petrich and King than Handran or Fiallo-Lopez. The trial testimony described two possible assaults on Nickerson, separated in time by at least an hour. The testimony also established that, between these incidents, Stahl had calmed down and left the scene. Thus, the potential assaults did not constitute a continuing course of conduct. Compare 8RP 110, 114 (León's testimony reporting that Nickerson said

Stahl had tried to “manhandle” her, suggesting an assault, while León was at the store) with 8RP 121 (León’s testimony that Stahl struck Nickerson during the second altercation between León and Stahl, which occurred after Stahl had calmed down, left camp, and returned).

The State may elect act it is relying on via verbal statement, as long as the State clearly identifies the act upon which the charge is based. State v. Carson, 184 Wn.2d 207, 227-28, 357 P.3d 1064 (2015). But here, the State never elected the act constituting the count 4 assault. Indeed, the State discussed both possible assaults in closing argument. 10RP 289 (discussing separate incidents in first partial paragraph and first full paragraph of transcribed argument). While the State discussed both possible assaults, it elected neither.

Finally, the failure to give a unanimity instruction in a multiple acts case is of constitutional magnitude and will be deemed harmless only if no rational trier of fact could have a reasonable doubt as to whether each incident established the crime beyond a reasonable doubt. State v. Hanson, 59 Wn. App. 651, 659, 800 P.2d 1124 (1990).

The error here was not harmless. A rational trier of fact could have had a reasonable doubt as to the first assault. For example, Nickerson did not testify. Thus the evidence of that assault was introduced only via León’s testimony that Nickerson (who was apparently distraught for a

number of reasons) had reported that Stahl tried to “manhandle” her while León was away from the camp. León also testified Nickerson said Stahl had touched her neck and back. 8RP 114. There was, therefore, *some* evidence from which the jury could have found that an assault had occurred, but it was based on hearsay, vague, and by no means overwhelming. In contrast, the evidence of the second assault was much stronger. For example, León testified that he had actually witnessed that assault.

Because a unanimity instruction was required but not given in this case, and because the State cannot meet its burden to show the error was harmless, count 4 must be reversed. Hanson, 59 Wn. App. at 660.

2. STAHL WAS DENIED A FAIR TRIAL AS TO COUNTS 1 AND 5 BECAUSE THE STATE COMMITTED INCURABLY PREJUDICIAL MISCONDUCT IN CLOSING ARGUMENT.

The prosecutor committed misconduct on two occasions in rebuttal argument. First, the prosecutor mischaracterized the defense argument and, in doing so, improperly appealed to the sympathies and prejudices of jurors rather than focusing on the evidence. Although there was no objection, based on the nature and timing of the remarks, the comments were incurably prejudicial. Second, the prosecutor also improperly vouched for the credibility of each of the State’s civilian witnesses.

Because the first type of misconduct focused only the complainants as to the sex crimes, the cumulative misconduct likely affected the verdicts on those counts. As a result, this Court should reverse Stahl's convictions on counts 1 and 5.

- a. The State misrepresented the defense argument and, in the process, improperly appealed to jurors' sympathies and prejudices, in its rebuttal argument.

"A prosecutor must enforce the law by prosecuting those who have violated the peace and dignity of the state by breaking the law." State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). At the same time, a prosecutor "functions as the representative of the people in a quasijudicial capacity in a search for justice." Id. A prosecutor fulfills neither role by securing a conviction based on proceedings that violate a defendant's right to a fair trial. Rather, such convictions undermine the integrity of the criminal justice system as a whole. State v. Walker, 182 Wn.2d 463, 476, 341 P.3d 976 (2015). When a prosecutor commits misconduct, he may deny the accused a fair trial. Id. at 518; U.S. CONST. AMEND. 14; CONST. ART. 1, § 3.

A prosecutor's latitude in closing argument is limited to arguments "based only on probative evidence and sound reason." In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 704, 286 P.3d 673 (2012) (quoting State v. Casteneda-Perez, 61 Wn. App. 354, 363, 810 P.2d 74

(1991)). The tactic of misrepresenting defense counsel’s argument in rebuttal, effectively creating a straw man, does not comport with the prosecutor’s duty to ““seek convictions based only on probative evidence and sound reason.”” State v. Thierry, 190 Wn. App. 680, 694, 360 P.3d 940 (2015) (quoting Casteneda-Perez, 61 Wn. App. at 363), review denied, 185 Wn.2d 1015 (2016). “Because the jury will normally place great confidence in the faithful execution of the obligations of a prosecuting attorney, [a prosecutor’s] improper insinuations or suggestions are apt to carry more weight against a defendant.” United States v. Solivan, 937 F.2d 1146, 1150 (6th Cir. 1991).

Here, in rebuttal, the prosecutor misrepresented the defense argument and, in doing so, urged the jury to convict Stahl of counts 1, 2,⁹ and 5 (involving complainants J.S. and N.W.) on improper grounds. First, the prosecutor claimed that defense counsel’s emphasis on the women’s heroin use was designed to dehumanize them. This premise is false. The defense emphasis on the complainants’ heroin use was designed to (1) establish the women had a motive for to fabricate their allegations and (2) suggest there was confusion about what occurred (J.S., in particular). See 10RP 306-09, 314-15 (Stahl’s closing argument).

⁹ The Court vacated count 2 based on double jeopardy.

The theory that the defense propounded in closing was supported by the evidence introduced at trial, evidence which the court explicitly found relevant and admissible. 3RP 23-26; 7RP 112-14. As for N.W., the testimony indicated that Stahl had stolen her heroin and then bragged about it, providing a clear motive for bias against Stahl. 8RP 62-63. As for J.S., the defense established through cross-examination that she had used heroin relatively close in time to the incident, increasing the likelihood that her memory of events upon waking was inaccurate. 9RP 203-04 (cross-examination of J.S.); 9RP 230-31 (cross-examination of detective regarding his interactions with J.S. after he woke her on another occasion). Stahl also used the fact of J.S.'s heroin dependency to argue that she felt indebted to Stahl for supplying her with heroin, which supported an argument that J.S. consented. E.g. 9RP 181 (cross-examination of J.S.); 10RP 306, 310 (defense closing argument). In light of this, Stahl's counsel reasonably emphasized the women's heroin use in closing argument. Indeed, given the defense theory, counsel would have been ineffective if he had failed to emphasize such evidence. The State seriously mischaracterized defense counsel's closing argument in this respect.

The State did not stop with mischaracterization of defense counsel's argument. After suggesting that Stahl was merely attempting to

dehumanize the complaining witnesses, the prosecutor then went a step further, arguing that to accept the defense theory was to accept the notion that homeless individuals or drug addicts were less deserving of the society's protection. See 10RP 326 ("Designed to dehumanize them, so you think of them as just homeless addicts, people who don't deserve your consideration, people who don't deserve the protection of the law. . . . [T]hey are people just as deserving of the protection of the law as anyone else.").

But, as discussed above, the premise that the defense was merely attempting to dehumanize N.W. and J.S. was a false one. Stahl's counsel was not attempting to dissuade the jury from convicting Stahl because the complainants lived at society's margins, and therefore did not deserve protection. Rather, Stahl's attorney was emphasizing the women's heroin use in order to focus the jury on issues of witness credibility and bias.

Instead of marshalling the facts and the law to urge conviction, the State used its mischaracterization in a manner similar to the "send a message" arguments that Washington courts have routinely condemned.

In State v. Bautista-Caldera, for example, this Court held that an argument that "exhorts the jury to send a message to society about the general problem of child sex abuse" constitutes an improper emotional appeal. 56 Wn. App. 186, 195, 783 P.2d 116 (1989).

Likewise, in State v. Ramos, this Court determined the prosecutor's argument "that the jury should convict in order to protect the community from drug dealing" was an improper appeal to the jury's passions and prejudices. 164 Wn. App. 327, 338, 263 P.3d 1268 (2011).

Similar to the misconduct in Bautista-Caldera, the prosecutor here exhorted the jury to convict Stahl to avoid succumbing to defense counsel's (and by extension, Stahl's) "dehumaniz[ing]" attitudes. This argument was calculated to prejudice the jury against Stahl. The argument was also intended to invoke a sense of societal shame and guilt among the jurors, encouraging them to render a verdict on their emotions rather than the evidence. See Thierry, 190 Wn. App. at 691 (State's argument that if the jury did not believe the child's complainant's testimony "then the State may as well just give up prosecuting these cases, and the law might as well say that [t]he word of a child is not enough," improperly invited jury to decide the case on emotional basis rather than the merits).

Where defense counsel fails to object, prosecutorial misconduct is, nonetheless, reversible error when the misconduct is incurable by corrective instruction. State v. Walker, 164 Wn. App. 724, 730, 736, 265 P.3d 191, as amended (Nov. 18, 2011). In this respect, a reviewing court's analysis of the prejudicial impact of misconduct does not rely on a review of *sufficiency* of the State's evidence. Walker, 182 Wn.2d at 479.

Here, the State committed incurably prejudicial misconduct by mischaracterizing the defense argument in such a way as to invoke jurors' sympathies toward the complainants, and to provoke their prejudices against Stahl. It then relied on this mischaracterization to make a familiar, yet routinely condemned, "send a message" argument, urging conviction in order to protect vulnerable individuals. The prosecutor's argument was of a type that has been held to be incurably prejudicial. See State v. Powell, 62 Wn. App. 914, 816 P.2d 86 (1991) (reversing, despite lack of objection, to State's improper "send a message" argument in child molestation case).

In addition, when the State frames its improper remarks as a response to defense counsel's argument, the prejudice flowing from the misconduct is exacerbated. See Thierry, 190 Wn. App. at 694 (condemning prosecutor's mischaracterization of defense argument as "children can't be believed," where defense counsel had, instead, emphasized the complaining witness's inconsistent statements and motive to lie).

Moreover, the prosecutor's remarks were the last thing the jury heard before commencing deliberations. Comments made at the end of a prosecutor's rebuttal argument are more likely to cause prejudice. State v. Lindsay, 180 Wn.2d 423, 443, 326 P.3d 125 (2014) (citing United States

v. Sanchez, 659 F.3d 1252, 1259 (9th Cir. 2011) (finding it significant that prosecutor made improper statement “at the end of his closing rebuttal argument, after which the jury commenced its deliberations”); United States v. Carter, 236 F.3d 777, 788 (6th Cir. 2001) (finding it significant that “prosecutor’s improper comments occurred during his rebuttal argument and therefore were the last words from an attorney that were heard by the jury before deliberations”).

For the foregoing reasons, the prosecutor’s remarks were improper. Based on the character and timing of the remarks, they were incurably prejudicial. This Court should therefore reverse the convictions related to N.W. and J.S.

- b. The State also committed misconduct by improperly vouching for the honesty of the complaining witnesses.

In addition to the misconduct described above, the prosecutor improperly vouched for each of the civilian witnesses’ credibility by expressing a personal opinion that their testimony was “honest.”

Closing argument provides an opportunity to draw the jury's attention to the evidence presented, but it does not give a prosecutor the right to express personal opinions on the defendant's guilt. Walker, 182 Wn.2d at 478 (quoting Glasmann, 175 Wn.2d at 706-07); State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). Indeed, RPC 3.4(e) expressly

prohibits an attorney from vouching for any witness's credibility or stating a personal opinion "on the guilt or innocence of an accused."

In addition to the improper argument described above, the prosecutor argued in rebuttal that each of the complainants were "pretty honest . . . that they weren't here trying to get Mr. Stahl into trouble." 10RP 324. This suggested to jurors that the balance of the witnesses' testimony was "honest" as well.

Thus, the prosecutor, to whom the jury was more likely to attribute honorable motives, responded to the defense argument by vouching for the witnesses' honesty. He then went on to misrepresent the defense theory and then to use the mischaracterization to urge conviction in order to protect vulnerable individuals. Taken in conjunction with the first form of misconduct described above, the prosecutor's improper vouching therefore denied Stahl a fair trial. For this reason as well, counts 1 and 5 should be reversed.

3. COUNSEL ALSO PROVIDED INEFFECTIVE ASSISTANCE BY FAILING TO OBJECT TO THE PROSECUTOR'S MISCONDUCT, THEREBY DENYING STAHL A FAIR TRIAL.

In addition, defense counsel provided ineffective assistance by failing to object to the misconduct detailed above.

Every accused person is guaranteed the right to the effective assistance of counsel under the Sixth Amendment and Article I, Section 22 of the state constitution. 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).

A person asserting ineffective assistance must show (1) his counsel's performance fell below an objective standard of reasonableness and, if so, (2) that counsel's poor performance prejudiced him. State v. A.N.J., 168 Wn.2d 91, 109, 225 P.3d 956 (2010) (citing Strickland, 466 U.S. at 686; State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)). This Court reviews claims of ineffective assistance de novo, as they present mixed questions of law and fact. A.N.J., 168 Wn.2d at 109.

With respect to the deficient performance prong, “[t]here is a strong presumption that defense counsel’s conduct is not deficient,” but an accused rebuts that presumption if “no conceivable legitimate tactic explain[s] counsel’s performance.” State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

To meet the prejudice prong, an accused person must show a reasonable probability “based on the record developed in the trial court, that the result of the proceeding would have been different but for counsel’s deficient representation.” McFarland, 127 Wn.2d at 337.

When a prosecutor resorts to improper argument, defense counsel has a duty to interpose a contemporaneous objection “to give the court an opportunity to correct counsel, and to caution the jurors against being influenced by such remarks.” State v. Emery, 174 Wn.2d 741, 761-62, 278 P.3d 653 (2012) (quoting 13 WASHINGTON PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 4505, at 295 (3d ed. 2004)).

Counsel’s failure to preserve error constitutes ineffective assistance and justifies examining the error on appeal. State v. Ermert, 94 Wn.2d 839, 848, 621 P.2d 121 (1980). If objections are necessary to preserve error, no reasonable strategy or tactic explains failure to object on the record. Even if declining to object is a reasonable tactic, in order to avoid drawing attention to the misconduct, defense counsel may still object to misconduct outside the presence of the jury, after arguments have concluded. See Lindsay, 180 Wn.2d at 441 (adopting exception to contemporaneous objection rule in prosecutorial misconduct cases to avoid repeated interruptions to closing arguments). Here, counsel rendered ineffective assistance by failing to object to the prosecutor’s vouching and improper “send a message” arguments. No tactic explains counsel’s failure to preserve the error.

Defense counsel’s failure to object to each instance of prosecutorial misconduct prejudiced Stahl. The defense was able to argue

that N.W. and J.S. had clear motives to fabricate the allegations against Stahl. The women's heroin addiction also supplied a reason to doubt the women's perception of events. But the prosecutor, to whom the jury was more likely to attribute honorable motives, responded by vouching for the witnesses' honesty. The prosecutor then went on to mischaracterize the defense theory and to use the mischaracterization to urge the jury to protect those at the margins of society by convicting Stahl. This was particularly prejudicial because it turned Stahl into a scapegoat for serious social problems related to homelessness and drug addiction. As emphasized above, these remarks were the very last words the jury heard from either party before deliberations. In summary, and as argued above, the State's improper argument was likely to have a substantial effect on the jury's verdict.

Because Stahl has demonstrated both deficient performance and prejudice, counsel's ineffective assistance denied Stahl a fair trial on counts 1 and 5. For this reason as well, those convictions should be reversed.

4. THIS COURT SHOULD NOT AWARD THE COSTS OF APPEAL

As a final matter, if Stahl does not prevail on appeal, he asks that no costs of appeal be authorized under title 14 of the Rules of Appellate

Procedure. This Court has ample discretion to deny the State's request for costs. For example, RCW 10.73.160(1) states the "court of appeals . . . *may* require an adult . . . to pay appellate costs." (Emphasis added.) "[T]he word 'may' has a permissive or discretionary meaning." Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000).

Trial courts must make individualized findings of current and future ability to pay before they impose legal financial obligations (LFOs). State v. Blazina, 182 Wn2d 827, 834, 344 P.3d (2015). Only by conducting such a "case-by-case analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." Id.

The existing record establishes that any award of appellate costs would be unwarranted in this case. The record is replete with evidence of Stahl's homelessness. He is, moreover, facing a potentially lengthy sentence, which will greatly impede his ability to pay the costs of his appeal. CP 94 (imposing indeterminate sentence).

Moreover, at sentencing, the court imposed only mandatory fines, waiving other costs. CP 92. The trial court then found Stahl to be indigent and found that he could not contribute anything to the costs of appellate review. CP 107-08 (Order of Indigency); see also Supp. CP ____ (sub no. 87, Motion and Declaration for an Order to Proceed in Forma Pauperis on Appeal). Indigence is presumed to continue

throughout the appeal. State v. Sinclair, 192 Wn. App. 380, 393, 367 P.3d 612 (2016) (citing RAP 15.2(f)).

In summary, in the event that Stahl does not substantially prevail on appeal, this Court should not assess appellate costs against him. Provided that this Court believes there is insufficient information in the record to make such a determination, however, this Court should remand for the superior court, a fact-finding court, to consider the matter.

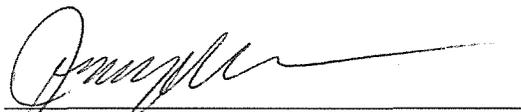
D. CONCLUSION

This Court should reverse count 4 because it violates the appellant's right to a unanimous jury verdict. This Court should also reverse counts 1 and 5 because the State's misconduct in rebuttal denied Stahl a fair trial on those counts. For similar reasons, defense counsel provided ineffective assistance by failing to object to the State's improper and prejudicial rebuttal argument. Should Stahl not prevail on appeal, however, this Court should decline to award the costs of appeal based on Stahl's indigence.

DATED this 26th day of August, 2016.

Respectfully submitted,

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