

NO. 35422-5II

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

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STATE OF WASHINGTON,

Respondent,

v.

RICHARD A. CHICO,

Appellant.

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STATE OF WASHINGTON  
BY [Signature]  
DEED

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

The Honorable Karlynn Haberly, Judge

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BRIEF OF APPELLANT

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LISE ELLNER  
Attorney for Appellant

LAW OFFICES OF LISE ELLNER  
Post Office Box 2711  
Vashon, WA 98070  
(206) 930-1090  
WSB #20955

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A. ASSIGNMENTS OF ERROR

1. There was insufficient evidence of lack of consent to uphold a conviction for rape in the third degree.

2. The prosecutor committed multiple instances of misconduct in closing argument.

Issues Presented on Appeal

1. 3. Was the evidence sufficient to prove beyond a reasonable doubt that the complainant did not consent to the sex act?

2. Did the prosecutor commit misconduct in closing argument when she told the jury Mr. Chico committed rape, told the jury that Dr. Welch was not an expert and opined that Mr. Chico used his constitutional right to confront witnesses to craft a better story?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

By amended information Richard Chico was charged with rape in the third degree domestic violence contrary to RCW 9A.44.060(1)(a). CP 26-28. Mr. Chico was convicted of third degree rape, the honorable Judge Karlynn Haberly presiding. CP 46. The jury did not find that the matter was domestic violence. CP 47. This timely appeal follows. CP 80.

2. SUBSTANTIVE FACTS

Ella Burfield admitted that she suffers from numerous mental and health disorders and takes over 10 different medications for her illnesses: some of which are psychotropic. RP 236-37, 477-81. Ms. Burfield went to Harrison Hospital on March 22, 2005 after having sex with Richard Chico. RP 107, 135. Ms. Burfield was not sure that she was raped. RP 134. The nurse at the hospital Kris Buffam performed a Sexual Assault Nurse Examination (“SANE”) the same day. Ms. Buffam made a diagram of alleged injuries to Ms. Burfield’s genital area and took colposcopic pictures. The pictures were of bad quality, perhaps because Ms. Buffam is not a women’s health care specialist and because she rushed to finish the exam. RP 218, 222-224, 318, 349.

Jane Schupay, a nurse practitioner supervises Ms. Buffam and was responsible for reviewing the SANE exam of Ms. Burfield and she was also responsible for preparing a report. RP 288, 332, 367. Ms. Schumway opined that there was “extensive evidence of penetrating tissue trauma”. RP 340. Ms. Schupay also testified that she has only seen injuries as extensive as Ms. Burfield’s on three other occasions. RP 358. According to Ms. Schupay, the injuries included a very small tear near the entrance to the vagina, some bruising or rubbing type burn in the pelvic area and a small Tear the hymen. Ex 3-12.

Ms. Burfield reported that even though Ms. Burfield reported biting and scratching, there were no exterior injuries and no bite or scratch marks. RP 254-55. Ms. Burfield told Ms. Buffam that Mr. Chico was “getting frisky” so she kissed him because she thought he would be satisfied with that, but instead, Mr. Chico pinned her down with his body and penetrated her with his penis after she said “no”. RP 233-34. Ms. Burfield testified that she had consensual sex with Mr. Chico on at least three occasions and the sex was never rough. RP 117. On February 9, 2005, Ms. Burfield became a born again Christian and decided that she did not want to have sex until she was married. RP 118-119. She informed Mr. Chico of this and HE seemed to be fine with just being friends with Ms. Burfield. RP Id. Mr. Chico and Ms. Burfield did have sexual telephone conversations after February 9, 2005. RP 120.

On March 22, 2005, Ms. Burfield invited Mr. Chico to come to her apartment to give her a back and leg rub because she was uncomfortable from moving boxes. RP 121. Ms. Burfield testified that she answered the door in pajama bottoms, a tee shirt and socks and proceeded to take Mr. Chico into her bedroom where he began to rub her back and legs. RP 123-24. Ms. Burfield told the detective who interviewed her regarding this case that she was only wearing socks, underwear and a tee-shirt when she answered the door. RP 436.

Once in the bedroom, Mr. Chico started rubbing Ms. Burfield's feet and back while she lay on her bed. Mr. Chico became aroused and fondled her breasts. According to Ms. Burfield she told Mr. Chico to control himself and said that she did not want to have sex, but she proceeded to take off her pajamas so that Mr. Chico could rub on her. Mr. Chico lay on top of Ms. Burfield and starting pushing his body on hers and touched her vaginal area with his fingers. Ms. Burfield said stop because his button fly jeans were hurting her. Mr. Chico stopped and Ms. Burfield voluntarily performed oral sex on Mr. Chico thinking that this would satisfy him. RP 125-127. Ms. Burfield also kissed Mr. Chico during this incident, but failed to report that to the detective. RP 148,

After the oral sex, Mr. Chico tried to penetrate Ms. Burfield with his penis but had trouble keeping an erection and kept missing. RP 128-30. Ms. Burfield unsuccessfully squirmed to get out from underneath Mr. Chico. RP 132. After a minute or two a maintenance person knocked at the door and Mr. Chico jumped off of Ms. Burfield and got dressed. When Ms. Burfield answered the door, no one was there. The maintenance person knocked a second time and when Ms. Burfield answered the door, the person came in. According to Ms. Burfield's testimony, she then told Mr. Chico to leave and he did. RP 133. Ms. Burfield however told the Detective that Mr. Chico left

on his own accord after the first knock. RP 439-40. RP 179-180. Ms. Burfield was upset that she was unable to see Mr. Chico's children, especially Chessie whom she was very attached to. RP 204.

Detective Schultz interviewed Ms. Burfield regarding this incident. Detective Schultz has no training in psychology, personality disorders or any other training related to interviewing adults. Nonetheless, over the objections of the defense that Detective Schultz was not qualified to render expert opinion, the court allowed her to testify that Ms. Burfield was "child-like" in her mannerisms. RP 395-402.

Mr. Chico is 34 years old. He has two children, Chesserare age 5 and Richard age 7. RP 522- 523. Mr. Chico did not let Ms. Burfield see his children because he was uncomfortable with her self-disclosed Bi-Polar and schizophrenia disorders. RP 526, 530. . Mr. Chico testified that he and Ms. Burfield had sex between August and March 2005. Some time in February 2005, Ms. Burfield said that she did not want to have sex until she got married, but she continued to have sex with Mr. Chico. RP 529- 531

On March 22, 2005, Mr. Chico went to Ms. Burfield's house. At the door they hugged and kissed and Mr. Chico began rubbing Ms. Burfield's back while they were standing near the door. Ms. Burfield was in her underwear and a tee shirt and socks. RP 533. Ms. Burfield led Mr. Chico into

the bedroom and they both sat on the bed. Mr. Chico kissed Ms. Burfield's neck and Ms. Burfield giggled and took off her shirt as Mr. Chico continued to rub her back. RP 534-35. Mr. Chico rubbed her breasts and turned Ms. Burfield over to lie on the bed. At this point the interactions were sexual. RP 536-37.

Mr. Chico continued to rub Ms. Burfield's legs, thighs and breasts. Ms. Burfield assisted Mr. Chico with taking off her underwear. Mr. Chico and Ms. Burfield kissed each other and Mr. Chico was sexually excited. RP 539-40. Mr. Chico was on top of Ms. Burfield and his button fly jeans were hurting her so he unbuttoned his jeans and Ms. Burfield took his penis out. Mr. Chico rubbed his penis on Ms. Burfield's clitoris. Mr. Chico then performed oral sex on Ms. Burfield. Ms. Burfield then voluntarily performed oral sex on Mr. Chico and thereafter he penetrated her vagina. RP 528, 540-541. After a few "pumps". There was a knock at the door but no one was there. Chico went limp and got himself dressed and left. RP 541-543. Ms. Burfield yelled at the maintenance person because she had not called or scheduled a maintenance visit. Ms. Burfield asked Mr. Chico to call her. RP 543-545.

Michelle Adams, Mr. Chico's former attorney interviewed Ms. Burfield related to this incident and Ms. Burfield informed her that Mr. Chico

left after the first knock at the door before the maintenance person actually entered her apartment. RP 518.

Dr Phillip Welch a gynecologist with over 25 years of experience reviewed the colposcopic pictures taken by Ms. Buffam and reviewed her entire report. RP 470-75. Dr. Welch has seen approximately 75 acute sexual assault cases in his career, even though this is not his main professional focus. RP 475. Dr. Welch is also very experienced in the use of a colposcope. RP 498. Dr. Welch reviewed the list of medications that Ms. Burfield takes and testified at length about the effect of Lupron, particularly the fact that it simulates menopause. RP 479-81.

Lupron is significant because it causes excessive vaginal drying and turns thick elastic vaginal tissue into delicate thin tissue. RP 481-82. This information is important in interpreting a SANE exam, because a woman having consensual sex with menopausal like symptoms would suffer the precise injuries shown in Ms. Burfield's SANE exam. RP 482. Ms. Schupay agreed that even though she was unaware that Ms. Burfield was experiencing Menopause symptoms including excessive dryness, she too would have analyzed a SANE exam from a woman with menopause symptoms differently . RP 345-46.

Dr. Welch has been a gynecologist since 1982 and a physician since

1978. RP 471. He has over 25 years of experience examining women for gynecological disorders and for injury suffered from trauma. RP 502. He, unlike the nurses who testified is not an expert at collecting evidence, but Dr. Welch unlike the nurses is expert in the proper use of the colposcope. RP 498-99. The court qualified Dr. Welch as an expert. RP 476.

Dr. Welch indicated that regular consensual intercourse could produce the injuries visible on Ms. Burfield's colposcopic pictures. RP 483. HE also testified that the injuries were fairly subtle and the trauma was "minimal". RP 484, 505. Dr. Welch indicated that for Ms. Burfield to suffer any breaks in her vaginal tissue over a very short time period, her skin must be extremely fragile. RP 485. Based on the entire SANE report DR. Welch testified that it was not possible for anyone to determine whether the minimal injuries were caused by consensual or nonconsensual sex. RP 505.

a. Misconduct During Closing Argument

During closing argument the prosecutor repeatedly told the jury that Mr. Chico committed rape. Defense counsel objected and the court simply noted the objection and overruled the objection. RP 591. The prosecutor in closing also told the jury, over the objection of counsel that Mr. Chico used his right to attend trial to craft a better story for the jury having had the opportunity to listen to all of the witnesses. RP 603. The defense also

objected to Ms. Burfield sitting in the court room during closing argument with a case slung over her chair crying. RP 610. The court overruled the objections. Id. The prosecutor's offending argument is as follows:

MS. BARHAM [prosecutor]: I have a better story now. He's the one, he's the only one that gets to sit here and listen to everybody testify. He gets to hear all of the witnesses, and then he testified. . . .

He's the one who sits here and listens to all of the witnesses testify, and he's the one, the one with the motive here. And you are the sole judges of credibility and you are to decide who has the motive and who doesn't. He's the one with the motive here. He's had a year and a half to come up with the story he told you in court last week, and that's a far different story than what he told detective Schultz.

MR. MORRISON [defense counsel]: Objection, Your Honor. You already recognized him as an expert. That's ridiculous.

COURT: Sustained.

RP 603

What do we really know about Dr. Welch's testimony, the defense expert? Is he really an expert, an expert in sexual assault and dealing with sexual assault victims and detecting injuries to sexual assault victims? He's not an expert. . . . He's not an expert. He is a gynecologist. He sees women for yearly pap smears, breast exams and those sorts of things. He's not an expert.

RP 601.

C. ARGUMENT

1. THE STATE FAILED TO PROVE LACK OF CONSENT BEYOND A REASONABLE DOUBT, DEPRIVING MR. CHICO OF HIS RIGHT TO DUE PROCESS.

(i) Due Process Requires the State to Prove All Essential Elements of the Crime Beyond a Reasonable Doubt.

The standard of review for a sufficiency of the evidence claim is whether, after viewing evidence in the light most favorable to the State, any rational trier of fact could have found essential elements of crime beyond a reasonable doubt. State v. Smith, 155 Wn.2d 496, 501, 120 P.3d 559 (2005); State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn there from. Smith, 155 Wn.2d at 501; Salinas, 119 Wn.2d at 201.

A reviewing court will reverse a conviction for insufficient evidence where no rational trier of fact could find that all elements of the crime were proved beyond a reasonable doubt. Smith, 155 Wn.2d at 501; Salinas, 119 Wn.2d at 201. The reviewing court "may infer criminal intent from conduct, and circumstantial evidence as well as direct evidence carries equal weight." State v. Varga, 151 Wn.2d 179, 201, 86 P.3d 139 (2004) (citing State v.

Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980)). Credibility determinations are for the trier of fact and are not subject to review. State v. Jackson, 129 Wn. App. 95, 109, 117 P.3d 1182 (2005), review denied, 156 Wn.2d 1029, 133 P.3d 474 (1996); State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

A challenge to the sufficiency of the evidence is reviewed in the light most favorable to the State. State v. Tilton, 149 Wn.2d 775, 786, 72 P.3d 735 (2003). The Washington State Supreme Court has held that rape in the third degree expressly includes lack of consent as an essential element of rape. State v. Ciskie, 110 Wn.2d 263, 751 P.2d 1165 (1988).

The evidence in the instant case of lack of consent was not overwhelming. Ms. Burfield wanted Mr. Chico to rub her back and legs. She greeted him at the door while scantily clad and voluntarily removed her shirt so that he could have better access to her body for her rub. When Mr. Chico became aroused, Ms. Burfield did not stop the encounter, rather she asked him to behave himself and told him that she did not want to have intercourse. After telling Ms. Chico that she did not want intercourse, she allowed Mr. Chico to fondle her breasts, she let him kiss her and she kissed him back and she also voluntarily performed oral sex on him. Ms. Burfield testified that she

performed oral sex on Mr. Chico thinking that that would satisfy Mr. Chico and not lead to intercourse. Ms. Burfield did not communicate this to Mr. Chico. Ms. Burfield testified during the encounter she told Mr. Chico to stop and that she did not want him to penetrate her.

The forensic evidence was also weak. Dr. Welch, the only physician and gynecologist to testify, stated that the injuries were minimal and could have come from consensual sex, in part because Ms. Burfield had extremely thin vaginal tissue due to the medication Lurpon. Reviewing the evidence in the light most favorable to the state, the jury could not have found the element of lack of consent beyond a reasonable doubt. Smith, 155 Wn.2d at 501; Salinas, 119 Wn.2d at 201.

Reversal is required. The state's failure to prove beyond a reasonable doubt the essential element of lack of consent is a "grievous constitutional failure". State v. Mc Henry, 88 Wn.2d 211, 214, 558 P.2d 188 (1977). Mr. Chico's conviction should be reversed and dismissed because the State failed to prove lack of consent beyond a reasonable doubt.

2. PROSECUTORIAL MISCONDUCT  
DENIED MR. CHICO HIS  
CONSTITUTIONAL RIGHT TO A FAIR  
TRIAL REQUIRING REVERSAL.
- (i) Prosecutor impermissibly opined  
During Closing Argument that Mr.

Chico's entire testimony was not credible simply because he exercised his right to be present during the trial.

Excerpt from prosecutor's closing argument:

I have a better story now. He's the one, he's the only one that gets to sit here and listen to everybody testify. He gets to hear all of the witnesses, and then he testified. . . .

He's the one who sits here and listens to all of the witnesses testify, and he's the one, the one with the motive here. And you are the sole judges of credibility and you are to decide who has the motive and who doesn't. He's the one with the motive here. He's had a year and a half to come up with the story he told you in court last week, and that's a far different story than what he told detective Schultz.

RP 603.

The prosecutor commented on the defendant's right to be present at trial in a manner that explicitly informed the jury that Mr. Chico used this right to "craft a better story" for the jury. This comment, like the commenting on an accused's constitutional right to remain silent was misconduct because it infringed on the defendant's exercise of a constitutional right and amounted to the prosecutor's expression of her personal opinion. Doyle v. Ohio, 426 U.S. 610, 617, 96 S.Ct. 2240 (1976); Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965). Constitutional error concerning comment on a

defendant's right to exercise a constitutional privilege may be raised for the first time on appeal. State v. Guitierrez, 50 Wn. App. 583, 588 n. 1, 749 P.2d 213 (1988); RAP 2.5(a). Similarly, where the conduct is flagrant and ill-intentioned that no curative instruction can cure the error, the issue of misconduct may be raised for the first time on appeal. State v. Belgard, 90 Wn.2d 504, 507, 755 P.2d 174 (1986); ); State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991).

The Supreme Court of Washington has recognized that "[t]he State can take no action which will unnecessarily 'chill' or penalize the assertion of a constitutional right and the State may not draw adverse inferences from the exercise of a constitutional right." State v. Gregory, 158 Wn.2d 759, 147 P.3d 1201 (2006), quoting, State v. Rupe, 101 Wn.2d 664, 705, 683, 683 P.2d 571 (1984). Specifically, the State may not invite the jury to draw a negative inference from the defendant's exercise of a constitutional right. Gregory, 158 Wn.2d at 759, citing, State v. Jones, 71 Wn. App. 798, 811-12, 863 P.2d 85 (1993) (impermissible to draw negative inference on defendant's right to cross-examine witnesses).

Recently, the United States Supreme Court and the Washington courts have decided that a prosecutor may touch upon a defendant's exercise of

constitutional right as long as the prosecutor does not “manifestly intend[] the remarks to be a comment on that right.” Gregory, 158 Wn.2d at 806, citing, State v., Crane, 116 Wn.2d 315, 331, 804 P.2d 10 (1991). “These cases suggest that so long as the focus of the questioning or argument ‘is not upon the exercise of the constitutional right itself,’ the inquiry or argument does not infringe upon a constitutional right.” Gregory, 158 Wn.2d at 808, quoting, State v. Miller, 110 Wn. App. 283, 284, 40 P.3d 692, review denied, 147 Wn.2d 1011, 56 P.3d 565 (2002). Miller, relied on Portuondo v. Agard, 529 U.S. 61, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000) for this conclusion.

In Portuondo v. Agard, *supra*, the U.S. Supreme Court specifically addressed whether a prosecutor committed misconduct by pointing out that the defendant had the advantage of hearing the other witnesses testify. The Court emphasized that a defendant who testifies is not entitled to special consideration and the prosecutor is entitled to treat the defendant as he would treat any other witness:

...we see no reason to depart from the practice of treating testifying defendants the same as other witnesses. A witness's ability to hear prior testimony and to tailor his account accordingly, and the threat that ability presents to the integrity of the trial, are no different when it is the defendant doing the listening. Allowing comment upon the fact that a defendant's presence in

the courtroom provides him a unique opportunity to tailor his testimony is appropriate--and indeed, given the inability to sequester the defendant, sometimes essential--to [\*26] the central function of the trial, which is to discover the truth.

Portuondo, 529 U.S. at 73.

In Miller, the Court of Appeals followed Portuondo and held the prosecutor did not violate the defendant's constitutional rights by arguing that the defendant "had the opportunity to read this discovery for 18 months, that he had the opportunity to hear what every witness said, and that he had the opportunity to tailor his story to fit the evidence after he heard it all." Miller, 110 Wn. App. at 284. The core of these decisions holds that a prosecutor may use evidence available at trial to impeach a defendant as it would any other witness. *Id.*

Miller is distinguishable. In the instant case, the prosecutor could not point to any discovery the defendant had access to. Rather she impermissibly attacked Mr. Chico's right to be present at trial instead of relying on the evidence presented at trial. This essentially directed the jury to believe that all of Mr. Chico's testimony was fabricated. This was an impermissible attempt

to impeachment Mr. Chico based on the exercise of a constitutional right. Neither Miller nor Portuondo sanction this conduct.

State v. Jones is on point. Therein, the Court determined that the prosecutor's comments in closing that the defendant stared at the victim in an intimidating manner "amounted to an improper comment on the defendant's right to confront his accuser.". Gregory, 158 Wn.2d at 807, citing, Jones, 71 Wn. App. at 811-12. In the instant case as in Jones, the prosecutor directly attacked Mr. Chico's constitutional right to be present at trial by telling the jury that he used this right to "craft a better story". This was a direct violation of the prosecutor's duty as a quasi-judicial officer to act impartially and to seek a verdict free from prejudice and based on reason. State v. Echeverria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993).

Prosecutorial misconduct requires a showing that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and circumstances at trial. State v. Hughes, 118 Wn. App. 713, 727, 77 P.3d 681 (2003). The defendant bears the burden of showing both prongs of prosecutorial misconduct. Hughes, 118 Wn. App. at 727.

"[I]f the misconduct cannot be remedied and is material to the outcome of the trial, the defendant has been denied his due process right to a

fair trial.” State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994), citing, State v. Davenport, 100 Wn.2d 757, 762-63, 675 P.2d 1213 (1984). In the instant case, the misconduct was objected to. Mr. Chico has established both misconduct and prejudice from the offending remarks. Reversal and remand for a new trial is the remedy. Id.

(ii) Prosecutor impermissibly opined During Closing Argument that Dr. Welch was unqualified to Render Expert Opinion

Excerpt from prosecutor’s closing argument:

What do we really know about Dr. Welch’s testimony, the defense expert? Is he really an expert, an expert in sexual assault and dealing with sexual assault victims and detecting injuries to sexual assault victims? He’s not an expert. . . . He’s not an expert. He is a gynecologist. He sees women for yearly pap smears, breast exams and those sorts of things. He’s not an expert.

RP 601.

Unlike analyzing the apparent credibility of witnesses during closing argument, it is misconduct for the prosecutor to express her personal opinion as to the credibility of a witness. State v. Allen, 57 Wn. App. 134, 142, 788 P.2d 1084 (1990); State v. Papadopoulos, 34 Wn. App. 397, 400, 662 P.2d 59, review denied, 100 Wn.2d 1003 (1983). The prosecutor may argue inferences from the evidence, but she may not express her personal opinion.

State v. Price, 126 Wn. App. 617, 654, 109 P.3d 27, review denied, 155 Wn.2d 1018, 124 P.3d 659 (2005) (prosecutor expressed her opinion regarding defendant's guilt); Papadopoulos, 34 Wn. App. at 400. The Court reviews a prosecutor's closing remarks in the context of the total argument. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007, 118 S. Ct. 1192, 140 L. Ed. 2d 322 (1998).

It is improper for a prosecutor to introduce evidence of a witness's experiences that are not probative of truthfulness or expertise in an attempt to bolster the witness's credibility by appealing to a jury's passions or prejudices. State v. Smith, 67 Wn. App. 838, 842-44, 841 P.2d 76 (1992). "Opinion testimony" is based on one's belief or idea rather than on direct knowledge of facts at issue. State v. Demery, 144 Wn.2d 753, 757-60, 30 P.3d 1278 (2001). Because no witness may give an opinion about another witness's credibility, it is improper to adduce such evidence. State v. Jerrels, 83 Wn. App. 503, 507, 925 P.2d 209 (1996).

It is also improper for a prosecutor to introduce evidence of a witness's experiences that are not probative of truthfulness or expertise in an attempt to bolster the witness's credibility by appealing to a jury's passions or prejudices. State v. Smith, 67 Wn. App. 838, 842-44, 841 P.2d 76 (1992).

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In State v. Reed, 102 Wn.2d 140, 143-45, 684 P.2d 699 (1984), the Supreme Court remanded for a new trial for prosecutorial misconduct, even though the trial court sustained defense objections to the offending remarks during trial. The prosecutor not only expressed his personal opinion that the defendant was a liar, but also impugned the defense witnesses as being unbelievable because they were from out of town and drove fancy cars. Reed, at 143-45.

In the instant case, the prosecutor used her position of power to express her personal opinion that Dr. Welch was not qualified. This was prejudicial misconduct that could not have been cured by any curative instruction. The prosecutor was not a witness and is not entitled to express opinion regarding an expert's qualifications. Moreover, the trial court previously qualified Dr. Welch as an expert. Dr. Welch was in fact the most qualified witness to testify at trial. He offered almost 30 years of practice as a medical doctor specializing in gynecological exams including multiple sexual

assault exams annually. He was also, unlike the nurses who testified far more trained in the use of the colposcope. RP\_471-505. As in Reed, the prosecutor's comments were an expression of personal opinion that impugned Dr. Welch's credibility and attacked Mr. Chico for exercising his constitutional right to be present for trial. The misconduct deprived Mr. Chico his right to a fair trial. Remand for a new trial is in order.

(iii) Misconduct to Tell Jury Chico Committed Rape.

A prosecutor cannot offer a personal opinion. State v. Neidigh, 78 Wash. App. 71, 74, 895 P.2d 423 (1995). A prosecutor's offered opinion becomes prejudicial error when "it is clear that the prosecutor is not arguing an inference from the evidence." State v. Swan, 114 Wash. 2d 613, 664, 790 P.2d 610 (1990)).

The rule is universal: no witness may state an opinion as to guilt. State v. Madison, 53 Wn. App. 754, 760, 770 P.2d 662, review denied, 113 Wn.2d 1002, 777 P.2d 1050 (1989). Whether an opinion is expressed directly or through inference, it is equally improper and equally inadmissible if it invades the province of the jury. State v. Haga, 8 Wn. App. 481, 492, 507 P.2d 159, review denied, 82 Wn.2d 1006 (1973). Prosecutor's are not

witnesses, yet like the state's witnesses, prosecutors are expressly forbidden from expressing personal opinions. Reed, at 143-45.

When the state through its prosecutor or a witness expresses an opinion regarding guilt or credibility, such an opinion invades the province of the jury. State v. Chavez, 76 Wn. App. 293, 299, 884 P.2d 624 (1994), review denied, 126 Wn.2d 1012, 892 P.2d 1089 (1995). Impermissible opinion testimony violates a defendant's constitutional right to a jury trial, including the independent determination of the facts by the jury. State v. Demery, 144 Wn.2d at 759.

The prosecutor committed misconduct by telling the jury that Mr. Chico committed a rape rather than directing them to review the evidence to make this determination on their own. The prosecutor's argument that Mr. Chico committed rape violated her duty not to express her personal opinion. Demery, 144 Wn.2d at 757-60; Reed, 102 Wn.2d at 143-45; Price, 126 Wn. App. at 654.

(iv) Cumulative Error Requires Reversal.

The multiple acts of prosecutorial misconduct require reversal because the danger is that the misconduct "may deprive the defendant of a fair trial. And only a fair trial is a constitutional trial." State v. Charlton, 90

Wn.2d 657, 665, 585 P.2d 142 (1978), citing, State v. Case, 49 Wn.2d 66, 298 P.2d 500 (1956). Though individual errors may not alone be sufficient to warrant reversal, the cumulative effect of several errors may deprive the defendant of a fair trial. Jerrels, 83 Wn. App. at 508. Even though the comments of the prosecutor were objected to, counsel did not request a curative instruction. Reversal is still required because the misconduct rises to the level of flagrant and ill-intentioned, that no jury instruction could have cured the remarks. State v. Belgard, 110 Wn.2d 504, 507, 510-12, 755 P.2d 174 (1986).

In the instant case, the prosecutor's closing remarks encouraged the jury to believe her opinion over that of the evidence, encouraged the jurors to disregard the court's qualification of Dr. Welch as an expert and informed the jury that Mr. Chico was a liar because his exercise of his constitutional right to confront his accuser was used to his advantage. These remarks were flagrant and ill-intentioned and constituted prejudicial misconduct. Reversal and remand for a new trial is the remedy. *Id.*

#### D. CONCLUSION

Mr. Chico respectfully requests this Court reverse his conviction for insufficient evidence and dismiss with prejudice. In the alternative, Mr. Chico requests a reversal of his conviction and remand for a new trial free from

