

NO. 35422-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

RICHARD CHICO,

Appellant.

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COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON
BY: [Signature]

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 05-1-00520-1

BRIEF OF RESPONDENT

RUSSELL D. HAUGE
Prosecuting Attorney

RANDALL AVERY SUTTON
Deputy Prosecuting Attorney

614 Division Street
Port Orchard, WA 98366
(360) 337-7174

SERVICE

Lise Ellner
P.O. Box 2711
Vashon, WA 98070

This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED July 2, 2007, Port Orchard, WA [Signature]
Original AND ONE COPY filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the victim's testimony that Chico penetrated her vagina with both his fingers and his penis and that at the time she repeatedly told, and then begged, him not to, is sufficient evidence to support his conviction of third-degree rape?

2. Whether the State properly commented in closing argument on Chico's credibility as a witness and Dr. Welch's qualifications as an expert, and properly referred to the sexual assault as a "rape"?

3. Whether Chico has shown cumulative error warranting reversal?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Richard Chico was charged by information filed in Kitsap County Superior Court with third-degree rape. CP 26. The State also alleged that the crime was one of domestic violence and that the aggravating circumstance of particularly vulnerable victim applied. CP 27.

The trial court declined to present the aggravating circumstance to the jury. SRP 579. After trial the jury found Chico guilty of rape, CP 46, but found that Chico and his victim was not members of the same household for the purposes of the domestic violence allegation. CP 47.

B. FACTS

EMB was on disability for physical and mental problems. 2RP 106. Met Chico in April 2004. 2RP 107. He was the father of her goddaughter and the goddaughter's brother. 2RP 108. The girl was five and the boy six or seven. 2RP 108. She had known the girl since she was a baby. 2RP 108. EMB was good friends with their mother. 2RP 109. The mother moved away and Chico got custody. 2RP 110.

After Chico got custody of the children, he contacted EMB to see if she wanted to visit with them. 2RP 108. In their initial phone call, Chico asked EMB about her illness and medications, and she told him. 2RP 111. He said he would get back to her about the visit. 2RP 111.

In the next conversation, he vacillated about the visit, and stated that they should get to know each other first, since they were his children. 2RP 112. She told him that she had been in the girl's life for three years and was just starting to get to know the boy. 2RP 112. He responded that he would let her see them, he just wanted to get to know her better. 2RP 113. He never did let her see the children. 2RP 116. She asked all the time, especially on holidays. 2RP 116. He kept telling her, "We'll see," and promised that she would get to see them. 2RP 116.

As things progressed, EMB and Chico became friends, and ultimately the relationship became sexual. 2RP 113. The first time they had sex was

late summer or early fall of 2003. 2RP 113. They had consensual sex on three occasions. 2RP 114. The used either KY jelly or he performed oral sex on her before intercourse to lubricate her. 2RP 114. They never had intercourse without some kind of lubrication. 2RP 114. It made her more comfortable. 2RP 115.

Chico often gave EMB back rubs, usually in her bedroom. 2RP 115. The back rubs did not result in sexual activity. 2RP 115. They would also talk and watch TV in the bedroom. 2RP 116. Chico also occasionally initiated sexual conversations on the phone. 2RP 116. She usually tried to steer the conversation back to the children. 2RP 117. None of their sexual encounters involved "rough sex." 2RP 117. She experienced a little discomfort, but then they just used more lubrication. 2RP 117. She never experienced any pain or discomfort afterward. 2RP 117. She never experienced any pain urinating, sitting or walking. 2RP 118. Her vaginal area did not hurt after the encounters. 2RP 118.

On February 9, 2005, EMB "accepted Jesus Christ into [her] life." 2RP 118-19. As a part of that change in her life she decided not to have sexual relations outside of marriage. 2RP 119. She told Chico about this decision either that day or the following one. 2RP 119. She told them their relationship would have to be limited to their being friends or her being the godmother to Chico's daughter. 2RP 119. Chico seemed to accept the

change and said, "That's great." 2RP 119. She told him she would not proselytize him, they would not be having sex. 2RP 119.

They did not have any sexual contact between then and March 22. 2RP 120. Before then they had not had sex since November or December. 2RP 120. They still talked on the phone after February. 2RP 120. Chico would occasional try to talk about sex, but she told him that was no longer part of their relationship. 2RP 120. She talked to him on the phone on the evening of March 21, and said that her back, legs and feet were aching. 2RP 121. He called her back in the morning and offered to come over and rub her back and feet. 2RP 121. She said that that would be great, but reminded him that there would be no sex. 2RP 121. He agreed that that was the situation. 2RP 121.

EMB's apartment was very cluttered. 2RP 121. The couch and chair in the living room were covered with boxes, so the only free space to sit was in the bedroom. 2RP 121. She was a "pack rat." 2RP 122. There were boxes and stuff everywhere. 2RP 123. The bed was really the only free space in the whole apartment. 2RP 123.

When Chico arrived, they sat on the bed, and he rubbed her feet. 2RP 123. She was wearing pajamas with underwear and a T-shirt under them. 2RP 124. He began to rub her back, which was when he "started getting

fresh, trying” and tried to touch her breasts. 2RP 123. She reminded him that she had told there would be no sex. 2RP 124. She said that if could not do it without trying to touch her like that “then it’s over.” 2RP 124.

He started to rub her back again, and she suggested he rub her feet and legs. 2RP 124. He said it would be easier to rub her legs if she took the pajama pants off. 2RP 124. She was wearing underwear under them, but still asked him if he could control himself if she did. 2RP 124. He said yes, and she asked him again if he was positive. 2RP 124. He said he was, so she took the pajama bottoms off. 2RP 124. When he got to the top of her legs, he leaned forward and she thought he wanted a hug , so she hugged him. 2RP 125. Then he tried to kiss her. 2RP 125. She said, “No, no, no, no. No sex. None. No kissing, no hugging, nothing. You promised.” 2RP 125. But Chico kept advancing and pressing his body against EMB. 2RP 125.

Chico pinned her body to the bed. 2RP 125. She asked what he was doing, and told him to get off of her. 2RP 125. He said, “It’s okay. It’s okay.” 2RP 125. She told him that it was not, and that he needed to stop, but he kept trying to kiss her. 2RP 125. Then he started toughing her genital area, and she began to feel panicked. 2RP 126. He undid his pants and started trying to penetrate her. 2RP 126. She kept telling him to stop, but he just kept saying it would be O.K. 2RP 126. He was wearing button-fly jeans, and the metal buttons were digging into her as he pressing against her. 2RP

126. She kept telling him to stop and that he was hurting her, but he did not. 2RP 126. Then he pulled her head and tried to press his penis against her mouth. 2RP 127. Then she thought that maybe if she performed oral sex on him, he would leave, so she opened her mouth. 2RP 127. She performed oral sex on in hope that he would stop at that. 2RP 127.

After a few minutes, he let go of her head and pushed her back down on the bed. 2RP 128. He pinned her down with his upper body and kept trying to kiss her. 2RP 18. Her legs were pressed together, but he jabbed at her with his penis. He had his fingernails in her vagina and was trying to push his penis into her, but kept missing. 2RP 128. The jabs were very painful, “like someone taking a hot poker and just shoving it right in your crotch.” 2RP 129. She kept telling him he was hurting her and begged him to stop. 2RP 129. He did not use any lubricant and did not perform oral sex on her. 2RP 129. She begged him not to penetrate her, but he just kept going and did. 2RP 130.

During the process, he kept losing his erection, and then regaining it. 2RP 130. She never tried to help him penetrate her. 2RP 131. He was able to eventually succeed in penetrating her. 2RP 131. She did not know if he ever ejaculated. 2RP 131. She still had her underwear on, but he just pulled them aside with the hand he had on his penis. 2RP 132. Throughout the ordeal, she was squirming and trying to get away. 2RP 132.

She did not want to have sexual intercourse with Chico that day. 2RP 132-133. She was “[a]bsolutely positively sure” that she communicated to Chico that she did not want to have sexual intercourse with him that day. 2RP 133.

The assault ended when there was a knock on EMB’s door. 2RP 133. Chico jumped up, and EMB ran to the door. It was a maintenance person, so she went back to the bedroom and told Chico that he had to leave. 2RP 133. He left. 2RP 133.

After the assault, EMB experienced pain in her vagina. 2RP 136. It felt very raw, walking, sitting, urinating, even wearing clothing was painful. 2RP 137. Afterwards, she never returned to stay in her apartment. 2RP 137. She could not even bring herself to enter the unit, and eventually moved out. 2RP 137.

After Chico left, EMB was in a state of shock. 2RP 134. She tried to call her mother, but the line was busy, so she called the Kitsap Sexual Assault Line. 2RP 134. They advised her to go to the hospital, which she did that day. 2RP 135.

She was examined by Sexual Assault Nurse Examiner Kris Buffum. 2RP 136. SANE examiner Kris Buffum examined EMB, who was very nervous when she came in. 2RP 232. She gave a history that consistent all

significant respects with her trial testimony. 2RP 233-34. The physical examination revealed a two tears on her labia minora. 2RP 240. There was redness in the entire area. 2RP 241. The nurse was unable to visualize her hymen because she was unable to tolerate it due to pain. 2RP 241. She also could not do an internal speculum examination for the same reason. 2RP 242. Buffum's observations of the condition of EMB's genitalia were consistent with the account of the assault she related. 2RP 252. The lacerations would not normally occur in consensual sex, even with excessive dryness. 2RP 259. They would have come from blunt-force trauma. 2RP 260. Due to a computer malfunction, Buffum was unable to review the pictures she took. 2RP 243. SANE Nurse Jane Schupay subsequently reviewed the photos. 2RP 243.

Schupay noted that in addition to the lacerations there were also bruises and excoriation, which is similar to "rug burn." 3RP 310-13. EMB's genitalia where generally red and swollen. 3RP 316. The injuries were fresh. 3RP 318. Some of the injuries were consistent with the skin being pulled apart. 3RP 322. One of the laceration was cause by something sharp like a fingernail, definitely not by a penis. 3RP 322. The injury to the hymen was consistent with penetration. 3RP 325. The injuries were consistent with have occurred earlier in the same day the examination was done. 3RP 325. The injuries were consistent with penetration in a "very forceful manner." 3RP

326. The injuries did not appear to be from mere dryness. 3RP 326.

In particular, one of them, the fissure, was so deep Schupay would describe it as “a brutal injury,” far worse than those she typically saw in sexual assault cases. 3RP 326. It would have caused a lot of pain. 3RP 327.

The injury near her urethra was caused by something being placed forcefully against it. 3RP 327. Nor would the bruising have been caused by dryness. 3RP 328. The injuries were “very consistent” with EMB’s report of sexual assault. 3RP 328. Schupay would call it an “extensive injury.” 3RP 329.

Schupay had reviewed hundreds of cases involving adult sexual assault victims. 3RP 372. Since December 2003, she had only seen two other cases with injuries as severe as EMB’s. 3RP 372.

EMB filed a police report the next day or the day after. 2RP 136. She hesitated to file it because she was afraid what Chico would say. 2RP 136. At the police station, EMB talked to Detective Sue Shultz. 3RP 394. EMB was very nervous and upset and came across as childlike in her mannerisms. 3RP 395.

After the interview Shultz contacted Chico on March 28, at his home. 3RP 407. Chico admitted knowing EMB. 3RP 412. Chico said EMB was an acquaintance. 3RP 412. He asserted that they had never had sex. 3RP 412.

Then he admitted that they had sex once, about a year earlier. 3RP 413. He also subsequently admitted going to EMB's house on March 22. 3RP 414. He said he went there to give her a back rub. 3RP 414. He said he had not seen her for over a year at that point. 3RP 415.

He was aware that EMB was bipolar, and described her as being "out there." 3RP 415. After initially denying having had sex with EMB on March 22, he then admitted it. 3RP 416. He also asserted that he told EMB that he was there to rub her back and was not going to have sex with her. 3RP 416.

After the detective told him about the SANE report, Chico admitted that he had initially rubbed his penis on her, but could not maintain an erection. 3RP 416-17, 466.

Chico also admitted that he had probably taken advantage of EMB because of her interest in his daughter. 3RP 417. Chico also conceded that he was aware of EMB's mental issues and was aware that she did not want to have sex on March 22. 3RP 418.

The detective specifically used the term "forced" in describing the sex, and Chico did not deny that it was forced. 3RP 419. Chico ultimately admitted that they had intercourse and that he was aware EMB did not want to have sex. 3RP 419.

The defense called Phillip Welch, a gynecologist in private practice

with no forensic sexual assault experience who essentially testified that he thought EMB's injuries reflected only that she had had sex, and nothing

Chico testified on his own behalf and described a consensual encounter to which EMB never objected that was interrupted after "a few pumps" by a knock on the door. 4RP 534-342. Then she performed oral sex on him which was interrupted by a second knock on the door. 4RP 543. Chico got dressed and left. 4RP 544. She was upset that he was leaving and sighed. 4RP 545. He promised he would call her and left. 4RP 545. Chico did admit on cross that he knew the only reason EMB was having sex was because she wanted to see the children. 4RP 551.

III. ARGUMENT

A. THE VICTIM'S TESTIMONY THAT CHICO PENETRATED HER VAGINA WITH BOTH HIS FINGERS AND HIS PENIS AND THAT AT THE TIME SHE REPEATEDLY TOLD, AND THEN BEGGED, HIM NOT TO, IS SUFFICIENT EVIDENCE TO SUPPORT HIS CONVICTION OF THIRD-DEGREE RAPE.

Chico argues that the evidence is insufficient to prove third-degree rape. This claim is utterly without merit.

It is a basic principle of law that the finder of fact at trial is the sole and exclusive judge of the evidence, and if the verdict is supported by substantial competent evidence it shall be upheld. *State v. Basford*, 76 Wn.2d

522, 530-31, 457 P.2d 1010 (1969). The appellate court is not free to weigh the evidence and decide whether it preponderates in favor of the verdict, even if the appellate court might have resolved the issues of fact differently. *Basford*, 76 Wn.2d at 530-31.

In reviewing the sufficiency of the evidence, an appellate court examines whether, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find that the essential elements of the charged crime have been proven beyond a reasonable doubt. *See State v. Green*, 94 Wn.2d 216, 220, 616 P.2d 628 (1980). The truth of the prosecution's evidence is admitted, and all of the evidence must be interpreted most strongly against the defendant. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385 (1980). Further, circumstantial evidence is no less reliable than direct evidence. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). Finally, the appellate courts must defer to the trier of fact on issues involving "conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence." *State v. Hernandez*, 85 Wn. App. 672, 675, 935 P.2d 623 (1997).

RCW 9A.44.060(1) provides:

A person is guilty of rape in the third degree when, under circumstances not constituting rape in the first or second degrees, such person engages in sexual intercourse with another person, not married to the perpetrator:

(a) Where the victim did not consent as defined in RCW 9A.44.010(7), to sexual intercourse with the perpetrator and such lack of consent was clearly expressed by the victim's words or conduct.

Further, "Consent" means "that at the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact." RCW 9A.44.010(7).

Here, EMB testified that Chico penetrated her vagina with both his fingers and his penis and that at the time she repeatedly told, and then begged, him not to. Although he spends numerous pages in his brief arguing why the evidence was insufficient, Chico has apparently mistaken this Court for a jury. The jury has already rejected his defense, however. As this Court is well aware, it not this Court's role to second-guess that determination. This contention should be rejected.

B. THE STATE PROPERLY COMMENTED IN CLOSING ARGUMENT ON CHICO'S CREDIBILITY AS A WITNESS AND DR. WELCH'S QUALIFICATIONS AS AN EXPERT, AND PROPERLY REFERRED TO THE SEXUAL ASSAULT AS A "RAPE."

Chico next claims that the prosecutor improperly commented on Chico's exercise of his constitutional right to attend and testify at trial and improperly offered her own opinion of the evidence. This claim is without merit because when the defendant chooses testify, he subjects himself to the

same standards of credibility as any other witness, and because the prosecutor's remarks that Chico alleges were her opinion were fair comment on the evidence.

Where improper prosecutorial argument is alleged, the defendant bears the burden of establishing (1) the impropriety of the remarks and (2) their prejudicial effect. *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). The prosecutor has "wide latitude" to draw and argue reasonable inferences from the evidence. *State v. Mak*, 105 Wn.2d 692, 726, 718 P.2d 407 (1986). Chico fails to show either improper comments or prejudicial effect.

1. The prosecutor properly commented on Chico's opportunity to tailor his testimony to the trial evidence.

Chico claims that the prosecutor committed misconduct by commenting on Chico's credibility as a witness. As he himself admits, however, the United States Supreme Court has held that when a defendant chooses to take the stand, his testimony will be subject to the same scrutiny as any other witness, including the fact that by sitting through trial, the defendant has had the opportunity to tailor his testimony to the evidence:

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 the central function of the trial, which is to discover the truth.

Portuondo v. Agard, 529 U.S. 61, 73, 120 S. Ct. 1119, 146 L.Ed.2d 47 (2000).

Chico argues that unlike a in *State v. Miller*, 110 Wn. App. 283, 40 P.3d 692, *review denied*, 147 Wn.2d 1011 (2002), the prosecutor did not point to the fact that the defendant had had 18 months to examine the discovery. Brief of Appellant at 16. *Miller*, however, contains no such limitation. Indeed, the Court's holding was not based on such a narrow ground but upon the rationale that the United States Supreme Court in *Agard* had "overrule[d] *Johnson* and *Smith* insofar as they state a different rule. *Miller* has offered no reason for characterizing the argument as misconduct in his case except for the rationale rejected" by the Supreme Court. *Miller*, 110 Wn. App. at 285.

Significantly *Miller* quoted the offending (and now proper) argument that was in made *Johnson*: "that a defendant has had a 'unique opportunity to be present at trial and hear all the testimony against him.'" *Miller*, 110 Wn. App. at 284 (*quoting State v. Johnson*, 80 Wn. App. 337, 341, 908 P.2d 900 (1996)). Moreover, *Miller* noted that in *Smith*, this Court "limited the reach of *Johnson* by clarifying that the State may properly argue that the defendant has manufactured 'an exculpatory story consistent with the available facts,'

so long as the focus of such questioning or argument is not upon the exercise of the constitutional right itself.” *Miller*, 110 Wn. App. at 284 (quoting *State v. Smith*, 82 Wn. App. 327, 335, 917 P.2d 1108 (1996)). Clearly *Miller* contains no limitation in its holding that *Smith* and *Johnson* were overruled by *Agard*.

Such a limitation would nonetheless be directly contrary to the Court’s opinion in *Agard*. The Court specifically rejected the contention that “that the prosecutor’s comments were impermissible because they were ‘generic’ rather than based upon any specific indication of tailoring.” *Agard*, 529 U.S. at 70.

Likewise, Chico’s citation to *State v. Gregory*, 158 Wn.2d 759, 147 P.3d 1201 (2006), and *State v. Jones*, 71 Wn. App. 798, 811-12, 863 P.2d 85 (1993), is misplaced. *Gregory* cases specifically cites to both *Miller* and *Agard* with approval. *Gregory*, 158 Wn.2d at 806 (“However, both the United States Supreme Court and Washington courts have recognized that not all arguments touching upon a defendant’s constitutional rights are impermissible comments on the exercise of those rights.”). The Court goes on to point out that the relevant issue is whether the prosecutor manifestly intended the remarks to be a comment on that right. *Gregory*, 158 Wn.2d at 806. 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. *Id.*

The holding in *Gregory* is entirely consonant with *Agard*, which is instructive. There the Court rejected comparisons with comments on the exercise of the right to *not* testify at trial, which tend to suggest that guilt be inferred from silence, and which thus are a direct comment on the exercise of that right. In the present situation, however, the prosecutor comments were discussing the defendant's "credibility as a witness, and were therefore in accord with our longstanding rule that when a defendant takes the stand, 'his credibility may be impeached and his testimony assailed like that of any other witness.'" *Agard*, 529 U.S. at 70 (*quoting Brown v. United States*, 356 U.S. 148, 154, 78 S.Ct. 622, 2 L.Ed.2d 589 (1958)).

Furthermore, when placed in context, the prosecutor clearly *was* relating Chico's opportunity to tailor to his own testimony and the other evidence at trial.¹ Chico has been selective in his presentation of the prosecutor's argument. He omits the following passages which precede and follow the argument of which he complains:

Now, the defendant took the stand and he testified. He didn't have to. Defense didn't have to put on any defense whatsoever. They can just sit there. It's up to the state to prove this case beyond a reasonable doubt, but the defendant did testify. Why did he testify? Well, he had to explain the

¹ Indeed, Chico's trial counsel invited Chico to comment on the testimony of both EMB and Detective Shultz during his testimony. 4RP 529-530, 547.

confession that he gave to Detective Shultz a year and a half ago. What does he do? He puts the victim on trial here. That's what he did. "She pursued me. She wanted to have sex with me. We had been having sex for a year. Heck, she had sex with me the first time I saw her," so he says. Let's put the victim on trial.

That's not what he told Detective Shultz a year and a half ago. That's not what he told her at all. Having sex for a year. When asked about it he said initially, "We had sex one time, but it was quite some time ago." Now he wants you to believe something different. He doesn't want you to believe all of those statements. "It never happened. 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 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 motive here. And you are the sole judges of credibility and you are to decide who has motive and who doesn't. He's the one with 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 Shultz.

Now during that interview, that happened about a week after the sexual assault, and Detective Shultz described that as a laid-back interview. This wasn't some hostile interview where she is tricking him and putting words in his mouth. She asked questions and answered them. She said it was really that simple. This was not a hostile-type interview.

Now, the difference between what he said that day and what he said in court last week, there is a difference, and he was taken by surprise that day. He didn't have time to come up with a story. And what's he say? He initially tries to talk his way out of it, but when he's confronted with evidence to the contrary and when he's confronted with issues, his story changes, and his story changes throughout that interview until he does -- he says exactly what happened. He makes very incriminating statements.

What does he first say when asked about this

relationship? “We’re just acquaintances. We talk on the phone from time to time.” The detective then says, “Well, did you ever have sexual intercourse, ever have sex with [EMB]?” and he says, “Once, but that was quite some time ago.” Now this is six days after this rape, six days after they had sexual intercourse, six days after, and he’s saying, “I had sex with her one time, but it was quite some time ago.” If this was indeed consensual sex, why is he hiding that fact from the detective? Ask yourselves that. Why not be up front about it? “Yeah, once quite some time ago”? Ask yourselves why he says that.

5RP 602-04. The State was clearly properly discussing Chico’s credibility just as it would any other witness. It was in no way manifestly commenting on his right to attend trial or his right to testify. And indeed, even were the discredited standard that Chico advocates still the law, argument related the change in story to the time he had to reflect and his consideration of the police reports and testimony he heard. This contention should be rejected.

2. *The prosecutor properly commented on the defense expert’s qualifications by discussing record evidence.*

Chico argues that while it is proper for a prosecutor to comment on a witness’s credibility by drawing inferences from the evidence it is improper to offer an opinion on the subject. Brief of Appellant at 18. He further argues that she offered her opinion in her discussion of Dr. Welch’s qualifications as an expert during closing argument. An examination of the argument in context shows that she was discussing the evidence, not offering an opinion.

In his brief, Chico has edited the prosecutors argument to remove it from its context. Taken in context, it is apparent was merely discussing the evidence regarding Dr. Welch's qualifications that was presented at trial:

What do we 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. *What did he tell you? Well, he talked about that the victim reported to being on Lupron and that this is a medication that can put a woman in a menopausal state. What does that mean? It can reduce the elasticity, it can cause vaginal dryness. Well, it can cause vaginal dryness. Do we know whether [EMB] experienced that side effect to a significant degree, or to any degree? No. We don't know that. It's speculation. We don't know that. And even if she did, wouldn't that make it more reasonable for her to use lubrication, that it would be painful if she didn't use lubrication? This is not --* He's not an expert. He is a gynecologist. He sees women for yearly exams, pap smears, breast exams, those sorts of things. He's not an expert.

5RP 600-01 (portion of argument omitted by Chico italicized). After an objection by Chico was sustained, the prosecutor continued to discuss Dr.

Welch's qualifications. This discussion is again omitted by Chico:

What is his experience? He talked to you about his experience. He's never once conducted a forensic sexual assault exam. Not once. He doesn't deal with that in his practice. He doesn't have training outside of the residency, the brief training that he had right after med. school 20 years ago. That's it. Since then, no training whatsoever in dealing with sexual assault victims. None.

What's the gist of his testimony? "Well, in my practice I have seen patients who have come in saying they had consensual sex who had these kind of injuries." So what? We don't know anything about those cases, nothing about

them at all. And how many of them has he seen? We don't know whether they were having forceful sex, rough sex, whether there was lubrication used. We don't know anything about that. These were women -- What we do know? They were women that were coming in with a problem because of it saying, "Gee, this is causing me pain. Something happened and I am still worried I might be injured. Could you check me out." These aren't women in [EMB]'s situation that immediately called a rape crisis hotline after this to report a rape, to report nonconsensual sex.

Dr. Welch's clinical interests are special procedures, sports medicine, menopause, minimally invasive surgery, infertility. Those are his interests.

5RP 601.

The prosecutor did indeed call into question Dr. Welch's qualifications as an expert in the forensic sexual assault arena. She was not offering an improper personal opinion. Rather, her argument was fully supported by the evidence, and was nothing more than a proper and reasonable inference therefrom.

Notably all the points the prosecutor was arguing came directly from Dr. Welch's testimony. Dr. Welch testified he had no specific training in the area of forensic sexual assault examinations, except briefly as part of his residency some 20 years earlier. 4RP 473. He had had none since then. 4RP 473-74. He had never conducted a forensic sexual assault examination. 4RP 474. His clinical interests and special procedures listed on the website for Swedish Medical Center, where he practiced, were infertility, menopause,

minimally invasive surgery and sports medicine. 4RP 474-75. He conceded that the proper procedure that he follows when a patient presents with an acute sexual assault is to refer the patient for an actual forensic examination. 4RP 475.

Further, he conceded that he did not deal with sexual assault in his day-to-day practice. 4RP 496. He testified that he had a woman report sexual assault maybe twice a year. 4RP 497. When that happened, if the assault was recent, Dr. Welch would refer her to an entity like the SANE program. 4RP 496, 498. Notably, the former head of the Kitsap SANE program testified that assessing injuries in a sexual assault victim was a highly specialized area of medical practice. 3RP 289.

It is entirely proper for the State to argue that a defense expert's opinion is not credible. *State v. Furman*, 122 Wn.2d 440, 455, 858 P.2d 1092 (1993). That is all the prosecutor did here.

Chico's contention that the comments were improper because the trial court accepted Dr. Welch as an expert is also without basis. As the trial court noted at the time Welch's testimony was allowed, "The objection goes to the weight of his opinion, and the court will allow him to testify as an expert." 4RP 476. Certainly, if his qualifications go to the weight of the doctor's testimony, the prosecutor is entitled to argue those qualifications, or the lack

thereof, to the jury. Indeed, the jury was specifically instructed on the use of expert testimony:

A witness who has special training, education or experience in a particular science, profession or calling, may be allowed to express an opinion in addition to giving testimony as to facts. You are not bound, however, by such an opinion. *In determining the credibility and weight to be given such opinion evidence, you may consider, among other things, the education, training, experience, knowledge and ability of that witness, the reasons given for the opinion, the sources of the witness' information, together with the factors already given you for evaluating the testimony of any other witness.*

CP 37 (emphasis supplied).² All the prosecutor did was properly comment, based on the evidence adduced through the witness's own testimony, on the very factors the jury was explicitly told it could consider: Dr. Welch's "education, training, experience [and] knowledge" in and of forensic sexual examinations, the very subject upon which he professed to offer an expert opinion. There was no impropriety.

3. *It was proper for the prosecutor to refer to Chico's crime as rape because the argument was supported by the evidence.*

Chico's final complaint is that the prosecutor improperly offered her own opinion by referring to Chico's assault on EMB as a rape. Even setting aside that taken in context the prosecutor's comment cannot seriously be construed as offering an opinion, this claim is without merit. The prosecutor

stated:

Let's look at the facts. What do the facts show us in this trial? We know that the defendant went over that day saying that he was just going over to give her a back rub. Well, it went beyond that. It went beyond that. That's what [EMB] is thinking. He had no intention at stopping at a back rub. Maybe it started and he was hoping to talk her into it, "Let me get a little closer," those sorts of things, but when he wasn't getting the response that he wanted, he continued on. He continued on and she ends up underneath him. She is pinned by his body weight. She tries to scoot out from underneath him and ends up pinned on the bed by his legs, by his body weight. She is telling him no, she is telling him no penetration. "No. I don't want this. Please get off of me. Stop." This is not consent. And she doesn't say it once, she says it multiple times. Multiple times. She is not consenting to this.

Now, [EMB] told you that, yes, she did perform oral sex on the defendant, and *this was prior to the rape*. And she talked about that.

5RP 590-91 (emphasis added).

In *State v. McKenzie*, 157 Wn.2d 44, 57, 134 P.3d 221 (2006), the Supreme Court rejected the contention that "the deputy prosecutor committed misconduct by disparaging McKenzie as a 'rapist.'" The Court noted that it had repeatedly held that if the evidence indicated that the defendant was a murderer or killer, it was not prejudicial to call him one. It follows that if the evidence showed Chico's act was a rape it was proper to call it one. Here, as discussed at Point A, *supra*, there was evidence from which it could be

² The instruction is verbatim from WPIC 6.51.

concluded that Chico's sexual act upon EMB was a rape.

**C. CHICO FAILS TO SHOW CUMULATIVE
ERROR WARRANTING REVERSAL.**

Chico lastly claims that the cumulative error doctrine warrants reversal in this case. The application of that doctrine is limited to instances when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Here, Chico has not established any error at all, and certainly even if he has, none of it combined is of the magnitude that would justify reversal as cumulative error. *Greiff*, 141 Wn.2d at 929

IV. CONCLUSION

For the foregoing reasons, Chico's conviction and sentence should be affirmed.

DATED July 2, 2007.

Respectfully submitted,

RUSSELL D. HAUGE
Prosecuting Attorney

A handwritten signature in black ink, appearing to read 'RAS', with a long horizontal flourish extending to the right.

RANDALL AVERY SUTTON
WSBA No. 27858
Deputy Prosecuting Attorney