

80-82-1108
PM 1-28-08

NO. 36131-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JARED NATHANIEL METCALF,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
09 JAN 31 PM 1:21
STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

BRIEF OF APPELLANT

LISA E. TABBUT/WSBA #21344
Attorney for Appellant

P. O. Box 1396
Longview, WA 98632
(360) 425-8155

TABLE OF CONTENTS

	Page
I. SUMMARY OF CASE	1
II. ASSIGNMENTS OF ERROR	2
1. THE PROSECUTOR COMMITTED MISCONDUCT BY ARGUING FACTS NOT IN EVIDENCE DURING CLOSING ARGUMENT.	2
2. THE PROSECUTOR COMMITTED MISCONDUCT IN CLOSING ARGUMENT BY PRESENTING ARGUMENT WHICH WAS AN IMPROPER APPEAL TO THE PASSIONS AND PREJUDICES OF THE JURY.	2
3. THE TRIAL COURT ERRED IN OVERRULING THE OBJECTION TO THE PROSECUTOR ARGUING FACTS NOT IN EVIDENCE DURING CLOSING ARGUMENT.	2
4. CUMULATIVE ERROR DEPRIVED METCALF OF HIS RIGHT TO A FAIR TRIAL.	2
5. THE TRIAL COURT ERRED BY TREATING A JUVENILE SECOND DEGREE BURGLARY ADJUDICATION AS AN ADULT CONVICTION WHEN CALCULATING METCALF'S OFFENDER SCORE.	2
6. THE TRIAL COURT ERRED IN SENTENCING METCALF TO A SENTENCE THAT EXCEEDED HIS STANDARD RANGE.	3
III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	3
1. IS IT PROSECUTORIAL MISCONDUCT FOR A PROSECUTOR TO ARGUE THAT A VICTIM WAS THREATENED TO BE RAPED WHERE THERE IS NO	

EVIDENCE IN THE RECORD TO SUPPORT SUCH AN ARGUMENT?	3
2. IS IT PROSECUTORIAL MISCONDUCT TO ARGUE IN A MANNER THAT IS DESIGNED TO INFLAME THE PASSIONS AND PREJUDICES OF THE JURY?	3
3. DOES A TRIAL COURT ERR IN OVERRULING AN OBJECTION TO THE PROSECUTOR ARGUING FACTS NOT IN EVIDENCE WHERE THERE WERE NOT SUFFICIENT FACTS IN THE RECORD TO SUPPORT THE PROSECUTOR'S ARGUMENT?	3
4. HAS CUMULATIVE ERROR DEPRIVED METCALF OF HIS RIGHT TO A FAIR TRIAL WHERE THE PROSECUTOR MADE INFLAMMATORY AND BASELESS ARGUMENTS AND THE TRIAL COURT OVERRULED OBJECTION TO THE ARGUMENT ON UNTENABLE GROUNDS?.....	3
5. IN METCALF'S CASE, HIS PRIOR ADULT CONVICTIONS SCORE AS 1 POINT IN HIS OFFENDER SCORE CALCULATION AND HIS JUVENILE CONVICTIONS SCORE A ½ POINT. YET, THE TRIAL COURT SCORED A JUVENILE CONVICTION AS A 1 FULL POINT THAN AS A ½ POINT RESULTING IN AN OFFENDER SCORE BASED ON "5" POINTS RATHER THAN ON "4" POINTS. IS METCALF'S OFFENDER SCORE WRONG?.....	3
IV. STATEMENT OF THE CASE	4
(a) Procedural History.....	4
(b) Trial testimony	5
V. ARGUMENT.....	9
1. The prosecutor committed misconduct and violated Metcalf's right to a fair trial by presenting argument not supported by evidence and which was an improper appeal to the passions and prejudices of the jury.	9

A.	There was no evidence in the record to establish that Wilson was “potentially raped” or had to poop in his pants to avoid being raped.....	13
B.	There was no evidence in the record to establish that Wilson’s act of defecating in his pants was done for any reason other than he thought it would be funny.....	14
C.	The prosecutor’s argument caused the jury to consider inappropriate matters in rendering its verdict and it is a substantial likelihood that the prosecutor’s improper argument affected the jury.	15
D.	The prosecutor’s argument was an improper appeal to the passions and prejudice of the jury.....	17
2.	THE TRIAL COURT ABUSED ITS DISCRETION IN OVERRULING METCALF’S OBJECTION TO THE IMPROPER CLOSING ARGUMENT OF THE PROSECUTOR.....	18
3.	CUMULATIVE TRIAL ERROR DEPRIVED METCALF OF HIS RIGHT TO A FAIR TRIAL WHERE THE STATE MADE INFLAMMATORY AND BASELESS ARGUMENTS AND THE TRIAL COURT OVERRULED OBJECTION TO THE ARGUMENT ON UNTENABLE GROUNDS.....	20
4.	METCALF’S SENTENCE EXCEEDS HIS STANDARD RANGE.....	21
VI.	CONCLUSION.....	23

TABLE OF AUTHORITIES

Page

Cases

<i>Grandmaster Sheng-Yen Lu v. King County</i> , 110 Wn. App. 92, 38 P.3d 1040 (2002).....	19
<i>State v. Anderson</i> , 92 Wn. App. 54, 960 P.2d 975 (1998), <i>review denied</i> , 137 Wn.2d 1016 (1999)	22
<i>State v. Brett</i> , 126 Wn.2d 136, 892 P.2d (1995), <i>cert. denied</i> , 516 U.S. 1121, 116 S.Ct. 8931, 133 L.Ed.2d 858 (1996).....	9, 18
<i>State v. Buttry</i> , 199 Wash 228, 90 P.2d 1026 (1939).....	10
<i>State v. Carter</i> , 5 Wn. App. 802, 490 P.2d 1346 (1971), <i>review denied</i> , 80 Wn.2d 1004 (1972).....	20
<i>State v. Charlton</i> , 90 Wn.2d 657, 585 P.2d 142 (1978).....	9
<i>State v. Coles</i> , 28 Wn. App. 563, 625 P.2d 713, <i>review denied</i> , 95 Wn.2d 1024 (1981)	9
<i>State v. Dhaliwal</i> , 150 Wn.2d 559, 79 P.3d 432 (2003).....	18
<i>State v. Echevarria</i> , 71 Wn. App. 595, 860 P.2d 420 (1993)	17
<i>State v. Elledge</i> , 144 Wn.2d 62, 26 P.3d 217 (2001) (citations omitted)	18
<i>State v. Hoffman</i> , 116 Wn.2d 51, 804 P.2d 577 (1991).....	17
<i>State v. Hutton</i> , 7 Wn. App. 726, 502 P.2d 1037 (1972)	19
<i>State v. Mendoza</i> , 139 Wn. App. 693, 162 P.3d 439 (2007)	21
<i>State v. Miles</i> , 139 Wn. App. 879, 162 P.3d 1169 (2007)	16

<i>State v. O'Neal</i> , 126 Wn. App. 395, 109 P.3d 429 (2005) (internal citations omitted), <i>affirmed</i> , 159 Wn.2d 500, 150 P.3d 1121 (2007)	10
<i>State v. Perez-Mejia</i> , 134 Wn. App. 907, 143 P.3d 838 (2006).....	17
<i>State v. Roche</i> , 75 Wn. App. 500, 878 P.2d 497 (1994).....	21, 22
<i>State v. Rooth</i> , 129 Wn. App. 761, 121 P.3d 755 (2005)	21
<i>State v. Russell</i> , 125 Wn.2d 24, 882 P.2d 747 (1994).....	17
<i>State v. Snider</i> , 70 Wn.2d 326, 422 P.2d 816 (1967)	19
<i>State v. Stevens</i> , 58 Wn. App. 478, 794 P.2d 38, <i>review denied</i> , 115 Wn.2d 1025, 802 P.2d 128 (1990).....	21
<i>State v. Stover</i> , 67 Wn. App. 228, 834 P.2d 671 (1992), <i>review denied</i> , 120 Wn.2d 1025, 847 P.2d 480 (1993)	10
<i>State v. Yoakum</i> , 37 Wn.2d 137, 222 P.2d 181 (1950)	16

Statutes

RCW 9.94A.525.....	23
RCW 9.95A.510, .515, .525.....	23

Other Authorities

Article I, Section 22 of the Washington State Constitution	9
United States Constitution Sixth Amendment.....	9

I. SUMMARY OF CASE

Jared Metcalf and Jeremy Bono were tried jointly for the first degree assault of Garrett Wilson. Bono invited Wilson to take a drive with he and Metcalf. During the drive, which ended off a logging road in a rural part of Pierce County, Metcalf put Wilson in a sleeper hold and hit him repeatedly with his fists and a plastic bottle. Wilson defecated in his pants. Metcalf also cussed at Wilson using vulgar words some of which were "possibly sexual" words. Bono, Metcalf, and Wilson got out of the truck on the logging road. Metcalf and Wilson tussled and fell on the ground causing Wilson to hit his head on a rock. After they got off of the ground, Metcalf told Wilson to take off all of his clothes and to run away. Wilson complied and was hit with two rocks while running. Wilson hid in the bushes and waited for Metcalf and Bono to leave. After they left, he dressed, made to it a main road, and ultimately ended up at a Tacoma hospital where his injuries were diagnosed as a skull fracture, a nasal fracture, and lacerations to the face and head.

From that testimony alone, the State repeatedly argued over defense objection during closing argument that Bono and Metcalf

took Wilson to the woods to rape him or have him raped by another man.

The jury convicted both Bono and Metcalf as charged.

At Metcalf's sentencing, the trial court sentenced him as having an offender score of five based upon prior juvenile and adult criminal history. However, Metcalf never agreed to the criminal history and the State never proved it.

II. ASSIGNMENTS OF ERROR

- 1. THE PROSECUTOR COMMITTED MISCONDUCT BY ARGUING FACTS NOT IN EVIDENCE DURING CLOSING ARGUMENT.**
- 2. THE PROSECUTOR COMMITTED MISCONDUCT IN CLOSING ARGUMENT BY PRESENTING ARGUMENT WHICH WAS AN IMPROPER APPEAL TO THE PASSIONS AND PREJUDICES OF THE JURY.**
- 3. THE TRIAL COURT ERRED IN OVERRULING THE OBJECTION TO THE PROSECUTOR ARGUING FACTS NOT IN EVIDENCE DURING CLOSING ARGUMENT.**
- 4. CUMULATIVE ERROR DEPRIVED METCALF OF HIS RIGHT TO A FAIR TRIAL.**
- 5. THE TRIAL COURT ERRED BY TREATING A JUVENILE SECOND DEGREE BURGLARY ADJUDICATION AS AN ADULT CONVICTION WHEN CALCULATING METCALF'S OFFENDER SCORE.**

6. THE TRIAL COURT ERRED IN SENTENCING METCALF TO A SENTENCE THAT EXCEEDED HIS STANDARD RANGE.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. IS IT PROSECUTORIAL MISCONDUCT FOR A PROSECUTOR TO ARGUE THAT A VICTIM WAS THREATENED TO BE RAPED WHERE THERE IS NO EVIDENCE IN THE RECORD TO SUPPORT SUCH AN ARGUMENT?
2. IS IT PROSECUTORIAL MISCONDUCT TO ARGUE IN A MANNER THAT IS DESIGNED TO INFLAME THE PASSIONS AND PREJUDICES OF THE JURY?
3. DOES A TRIAL COURT ERR IN OVERRULING AN OBJECTION TO THE PROSECUTOR ARGUING FACTS NOT IN EVIDENCE WHERE THERE WERE NOT SUFFICIENT FACTS IN THE RECORD TO SUPPORT THE PROSECUTOR'S ARGUMENT?
4. HAS CUMULATIVE ERROR DEPRIVED METCALF OF HIS RIGHT TO A FAIR TRIAL WHERE THE PROSECUTOR MADE INFLAMMATORY AND BASELESS ARGUMENTS AND THE TRIAL COURT OVERRULED OBJECTION TO THE ARGUMENT ON UNTENABLE GROUNDS?
5. IN METCALF'S CASE, HIS PRIOR ADULT CONVICTIONS SCORE AS 1 POINT IN HIS OFFENDER SCORE CALCULATION AND HIS JUVENILE CONVICTIONS SCORE A ½ POINT. YET, THE TRIAL COURT SCORED A JUVENILE CONVICTION AS A 1 FULL POINT THAN AS A ½ POINT RESULTING IN AN OFFENDER SCORE BASED ON "5" POINTS RATHER THAN ON "4" POINTS. IS METCALF'S OFFENDER SCORE WRONG?

IV. STATEMENT OF THE CASE

(a) Procedural History

On October 25, 2005, Jared Nathaniel Metcalf was charged with a single count of assault in the first degree while armed with a deadly weapon other than a firearm. CP 1-2. The information named Garrett T. Wilson as the victim. CP 1-2.

Metcalf was tried to a jury trial in mid-February 2007, and was tried jointly with Jeremy James Bono. RP 1-615.¹ The Honorable Brian Tollefson presided. RP 1-615. Metcalf's defended the charges in the alternative: he wasn't involved at all or, alternatively, he was involved but was only guilty of the lesser included second degree assault. RP 549-70 (closing argument).

Based on nothing, the prosecutor during closing argument repeatedly suggested, implied, and flat out argued that Bono and Metcalf had planned to rape Wilson but were foiled by Wilson defecating on himself. RP 536, 546-47, 591, 598.

The jury found Metcalf guilty as charged. CP 118, 120.

Sentencing was held on March 23, 2007. RP Sentencing 9. Metcalf received a total sentence of 200 months: 176 months for

¹ There are eight volumes with consecutive page numbers throughout the volumes.

the assault and an additional 24 months for the deadly weapon enhancement. RP Sentencing 9.

Metcalf filed his Notice of Appeal on April 20, 2007. CP 136-149.

(b) Trial testimony

On October 12, 2005, Jeremy Bono and Jared Metcalf drove to Tracy Vasquez's trailer.² RP 169. Garrett Wilson³ was staying with Vasquez. RP 167-68. Vasquez, a heavy methamphetamine user, knew Bono as a drug associate. RP 166, 227. Wilson, also a heavy methamphetamine user, knew Bono as the brother of his ex-girlfriend. RP 317. Neither Vasquez nor Wilson knew Metcalf. RP 166, 317. Bono told Wilson that he needed to come for a ride with them. RP 172. Wilson willingly walked out to Bono's gray truck and got in between Bono, the driver, and Metcalf. RP 172, 177, 323. The truck had only traveled a few blocks when Metcalf grabbed Wilson and put him in a "sleeper hold." RP 324. Metcalf began hitting Wilson with his fists and a liquor bottle. RP 324, 327, 329. Wilson testified that it was an almost-empty plastic liquor bottle. RP 329.

² Vasquez was a very reluctant witness and only testified after being arrested on a material witness warrant.

³ Wilson was also a very reluctant witness. He too had to be arrested on a material witness warrant.

Bono drove for about 20 minutes until he reached rural Wilkeson. RP 330. During the drive, Metcalf repeatedly hit Wilson. RP 327. Also during the drive, Metcalf used what Wilson described as "very rude language and " obscenities, cuss words". RP 331. Per Wilson, and in direct response to the prosecutor's question, the words were "possibly" of a sexual nature.⁴ RP 331. Bono pulled off on a logging road. RP 332. Bono, Wilson, and Metcalf got out of the truck. RP 330-32. Although Metcalf did not hit Wilson once they were outside of the truck, they did topple to the ground together where Wilson hit his head on a rock. RP 332-37 . Bono stood by and watched. RP 336. Metcalf ordered Wilson to take off all of his clothes and to run away. RP 334. Wilson complied. RP 334. While he was running away, he was hit by two rocks: one on the back of his head and one his back. RP 335, 342. Wilson hid in the bushes. RP 341. After Bono and Metcalf drove away, he returned to reclaim his clothes and get dressed. RP 334-35. Missing from the clothing pile were his shoes, his wallet, and his lighter. RP 345. Wilson got dressed and walked out of the woods. RP 344. Wilson chose not to put his underwear on. RP 346. Instead, he chose to leave them in the woods as a point of

⁴ The words were never shared with the jury.

hygiene. RP 346. Apparently, while being held by Metcalf in the sleeper hold, Wilson defecated in his pants because he thought that would be funny. RP 338.

Wilson walked to a main road and was picked up by a passing motorist. RP 348. The motorist took Wilson to the nearby Wilkeson Fire Department. RP 348. Someone called 911. RP 348. Paramedics soon arrived to take Wilson to Tacoma's St. Joseph's Hospital. RP 349. Pierce County Sheriff Deputy Curtis Filleau was dispatched to investigate the reported assault. RP 429, 449.

Wilson arrived at the hospital conscious but agitated. RP 279, 283. His loss of bowel function was apparent. RP 286. His face and neck were bloody. RP 282. The attending physician's assistant diagnosed Wilson with a basal skull fracture⁵, a non-displaced nasal fracture, and multiple lacerations to the head and face. RP 287-88. The lacerations were stitched as needed. RP 289. Both fractures would heal on their own. RP 289. Wilson was released after two days of observation with directions to have his stitches removed in a week. RP 292.

⁵ "basal" meaning at the base of the skull

Wilson did have the stitches removed. RP 366. Some scarring remained. He experienced infrequent bouts of dizziness. RP 366.

Deputy Filleau attempted to interview Wilson shortly after Wilson's admission to the hospital. RP 449-61. Wilson was not particularly cooperative. RP 452. Wilson acknowledged having been assaulted. RP 452. Deputy Filleau suggested to Wilson that his assailants were Bono and Metcalf. RP 453, 463. Wilson agreed. RP 453. Wilson said that Metcalf hit him while Bono stood by and watched. RP 453. Wilson believed that the assault was retribution for an argument he had with Bono's father. RP 455. Wilson was fearful of being assaulted again. RP 452.

After his arrest, Metcalf called Vasquez frequently. RP 185. Prior to his arrest, Metcalf had only hung out with Vasquez once in December 2005. RP 184. In his phone calls, Metcalf offered Vasquez money in return for a statement that would help him. RP 188. Vasquez did sign a statement under the penalty of perjury saying that while he was at Walmart, he saw who really assaulted Wilson.⁶ RP 193.

⁶ The implication of the statement was that the person Vasquez saw was someone other than Metcalf.

V. ARGUMENT

- 1. The prosecutor committed misconduct and violated Metcalf's right to a fair trial by presenting argument not supported by evidence and which was an improper appeal to the passions and prejudices of the jury.**

The United States Constitution Sixth Amendment and Article I, Section 22 of the Washington State Constitution guarantee jury trial rights to a criminal defendant. But, "Only a fair trial is a constitutional trial." *State v. Coles*, 28 Wn. App. 563, 573, 625 P.2d 713, *review denied*, 95 Wn.2d 1024 (1981). Prosecutorial misconduct can make a trial an unfair trial and thereby violate a defendant's due process right to a fair trial. *State v. Charlton*, 90 Wn.2d 657, 664, 585 P.2d 142 (1978). When arguing error premised on prosecutorial misconduct in seeking a reversal of a conviction, the defendant must show that the prosecutor's conduct was improper and that the conduct had a prejudicial effect. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d (1995), *cert. denied*, 516 U.S. 1121, 116 S.Ct. 8931, 133 L.Ed.2d 858 (1996). Prejudicial effect means that the conduct likely had a substantial effect on the verdict. *Brett*, 126 Wn.2d at 175.

To establish prosecutorial misconduct, a party must show that the prosecutor's improper conduct caused prejudice in the context of the entire record and circumstances at trial. A

prosecutor improperly comments when he or she encourages a jury to render a verdict on facts not in evidence. A party establishes prejudice if there is a substantial likelihood that the misconduct affected the verdict.

State v. O'Neal, 126 Wn. App. 395, 421, 109 P.3d 429 (2005) (internal citations omitted), *affirmed*, 159 Wn.2d 500, 150 P.3d 1121 (2007). Comments that encourage a jury to render a verdict on facts not in evidence are improper. *State v. Stover*, 67 Wn. App. 228, 230-31, 834 P.2d 671 (1992), *review denied*, 120 Wn.2d 1025, 847 P.2d 480 (1993). Remarks by counsel require reversal when they influence the jury, and cause the jury to consider inappropriate matters in rendering a verdict. *State v. Buttry*, 199 Wash 228, 251, 90 P.2d 1026 (1939).

During closing argument, the prosecutor repeatedly invited the jury to render a verdict based not on facts, or even logical inferences from the record, but on passion and prejudice. The prosecutor aggressively argued his wild, unfounded theory that Metcalf and Bono took Wilson to the woods to rape him or to watch another man rape him. And that Wilson, to prevent that humiliation, defecated on himself.

The prosecutor set out his theme in the first paragraph of his closing argument:

MR GREER:⁷

And I want to basically reiterate what I said at the beginning of this case a few days ago, that this event, of course, happened on October 12th, 2005, on the outskirts of Pierce County. It is a case about the humiliation and degradation and severe harm that was inflicted on another human being, on another member of your community. These two individuals, acting as thugs, decided to take this person up to the woods and on route during the process just beat him mercilessly, humiliate him in the truck, telling him that they were going to perform – or somebody was going to perform sexual acts on him, another male, and then once out of the truck basically an attempt to follow through with the threats.

RP 536.

...

The prosecutor's nonsense continued:

MR. GREER:

Mr. Metcalf's intent was to cause great bodily harm to Mr. Wilson, and probably other crimes, other acts such as rape. But as Mr. Wilson at one point said, he pooped on himself – he didn't use that word but I'm going to use it – in order to dissuade these two individuals from further humiliating him.

MR. SILVERTHORN:⁸ Objection, assuming facts not in evidence.

THE COURT: This is closing arguments.

MR. SILVERTHORN: Thank you, Your Honor.

⁷ Mr. Greer is the deputy prosecutor

⁸ Mr. Silverthorn is Metcalf's attorney.

THE COURT: Objection's overruled.

RP 546-47.

...

The Prosecutor gets bolder:

MR. GREER: The State believes that based on what Mr. Wilson's testimony and past statements have been that when it's told to him during this brutal situation that sexual acts are going to be done on him and he says he therefore defecates in order to prevent that, coupled with the facts that he's out of the truck, he's ordered to take his clothes off, all of his clothes, socks, shoes, all of his clothes, a reasonable person could conclude that but for the fact that he did that to himself he may have been in that situation.

RP 547

...

And bolder still:

MR. GREER: And despite Mr. Wilson's desire that they not be prosecuted, either because, as I said, he accepts the apology or the financial gain that he could get from this, or he doesn't want to come before you and talk about the fact that he potentially was raped and had to poop all over himself to prevent –

MR. UNDERWOOD:⁹ Objection, there's no evidence of that.

⁹ Mr. Underwood is Bono's attorney.

THE COURT: Jury gets to decide the facts. That's my ruling.

RP 591.

...
And one more time for good measure in rebuttal:

MR. GREER: The last thing factually I think that it's important in understanding and the State's position in this case that it was just brutal, senseless degradation and humiliation and it could have been worse but for frankly this defecation issue[.]

RP 598.

- A. There was no evidence in the record to establish that Wilson was "potentially raped" or had to poop in his pants to avoid being raped.**

According to the testimony of physician's assistant Brocksmith, who treated Wilson at St. Joseph's Hospital, all of Wilson's injuries were on his head and there was no evidence that he had been sexually assaulted. RP 279-293. Wilson never indicated that he had been sexually assaulted. In fact, Wilson never felt threatened sexually by either Bono or Metcalf. RP 368.

The only reference in the record that might possibly support an inference that there was any intent to rape Wilson came from Wilson's testimony that Metcalf said some abusive and obscene cuss words during the ride to Wilkeson. It was during this

testimony that the prosecutor asked Wilson if these words were of a sexual nature (RP 331) and Wilson replied “possibly.” Wilson got out of the truck, Metcalf said a few more “vulgars” and then told Wilson to get naked and to run away. RP 334, 337. There is no record of what these “possibly” sexual words were as the prosecutor did not ask Wilson to tell the words to the jury. Thus it is pure speculation that these words could possibly be interpreted – as the prosecutor does time and time again in closing - to mean that Bono or Metcalf, or Bono and Metcalf, or a male acquaintance of Bono and/or Metcalf planned to rape Wilson.

B. There was no evidence in the record to establish that Wilson’s act of defecating in his pants was done for any reason other than he thought it would be funny.

At trial, the only evidence introduced as to why Wilson defecated in his pants was Wilson’s testimony that he had done so voluntarily because he thought it would be funny. RP 338. There was no evidence whatsoever in the record that Wilson had relieved himself in an attempt to avoid being raped, as suggested by the prosecutor in closing argument.

C. The prosecutor's argument caused the jury to consider inappropriate matters in rendering its verdict and it is a substantial likelihood that the prosecutor's improper argument affected the jury.

Here, despite no evidence to support the argument, the prosecutor repeatedly argued to the jury that Wilson was "potentially raped" and defecated in his pants to avoid being raped. The prosecutor then argued to the jury that Wilson's failure to testify in a manner which supported the prosecutor's version of events was due to Wilson being embarrassed by the "humiliating" and "degrading" acts done to Wilson by the defendants. In effect, the prosecutor made an argument with no basis in the record and then supported the argument with the allegations that the lack of evidence was due to Metcalf's and/or Bono's actions in attempting to rape Wilson. This evidence prejudiced the jury against Metcalf in that the prosecutor accused Metcalf of participating in a crime which the prosecutor had no evidence occurred. And it wasn't just any crime. It was a homosexual rape – a man forcing himself on another man – while at least one other man watched. Should the words "possibility of a sexual nature" really allow the prosecutor to conjure up this image?

“ A person being tried on a criminal charge can be convicted only by evidence, not by innuendo. *State v. Yoakum*, 37 Wn.2d 137, 144, 222 P.2d 181 (1950).; *State v. Miles*, 139 Wn. App. 879, 885, 162 P.3d 1169 (2007). Here, the prosecutor’s improper closing argument was a blatant attempt to prejudice the jury against Metcalf based not on evidence but on the innuendo that Bono and Metcalf had threatened to rape Wilson or have another man rape Wilson. The act of intentionally defecating in one’s own pants in an act that nearly all jurors would find so offensive that the jurors would not believe the act was done simply because Wilson thought it would be funny, even though Wilson testified that was his motivation. The jury would naturally seek to find a more logical explanation such as Wilson’s soiled himself to protect himself from a threatened rape. Yet, there was absolutely no evidence in the record to suggest that any threat was made to rape Wilson.

The prosecutor sought to exploit the jury’s natural repulsion from the thought that Wilson defecated on himself for fun by turning the jury’s disgust towards such an act into prejudice against Metcalf. In essence, the prosecutor turned Wilson’s decision to soil himself from one of poor taste to one of self defense against a crime for which there was absolutely no evidence. This argument

was an improper argument designed to have the jury convict Metcalf on innuendo and suggestion rather than on the evidence the State was able to put before the jury. The argument prejudiced the jury against Metcalf leading to the guilty verdict.

D. The prosecutor's argument was an improper appeal to the passions and prejudice of the jury.

Prosecutors have a duty to seek verdict free from appeals to passion or prejudice. *State v. Perez-Mejia*, 134 Wn. App. 907, 915-16, 143 P.3d 838 (2006). While a prosecuting attorney has wide latitude to draw and express reasonable inferences from the evidence in closing argument, a prosecutor commits misconduct if his argument appeals to the jury's passion and prejudice and invites them to decide the case on a basis other than the evidence. *State v. Russell*, 125 Wn.2d 24, 89, 882 P.2d 747 (1994); *State v. Hoffman*, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991); *State v. Echevarria*, 71 Wn. App. 595, 860 P.2d 420 (1993).

"Arguments that courts characterize as improper appeals to passion or prejudice include arguments intended to 'incite feelings of fear, anger, and a desire for revenge' and arguments that are 'irrelevant, irrational, and inflammatory . . . that prevent calm and

dispassionate appraisal of the evidence.” *State v. Elledge*, 144 Wn.2d 62, 85, 26 P.3d 217 (2001) (citations omitted).

As discussed above, there was no factual basis to support the prosecutor’s argument that Bono or Metcalf threatened to rape Wilson and the Wilson soiled himself to avoid being raped. However, this argument would appeal to the juror’s natural disgust of the idea that a person would defecate on themselves for fun. This argument was simply an inflammatory argument made to incite feelings of anger and a desire for revenge in the jurors and which prevented a calm and dispassionate appraisal of the evidence.

2. THE TRIAL COURT ABUSED ITS DISCRETION IN OVERRULING METCALF’S OBJECTION TO THE IMPROPER CLOSING ARGUMENT OF THE PROSECUTOR.

A trial court’s ruling regarding prosecutorial misconduct is reviewed for abuse of discretion. *Brett*, 126 Wn.2d at 174. A defendant bears the burden of establishing first, prosecutorial misconduct, and second, its prejudicial effect. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

A trial court abuses its discretion when its decision is “manifestly unreasonable or based on untenable grounds.”

Grandmaster Sheng-Yen Lu v. King County, 110 Wn. App. 92, 99, 38 P.3d 1040 (2002). A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reason if it is based on an incorrect standard or the facts do not meet the requirement of the correct standard. *Grandmaster Cheng-Yen Lu*, 110 Wn. App. at 99.

As discussed above, the prosecutor's argument regarding the reason why Wilson soiled himself was both misconduct and prejudicial. When Metcalf's counsel objected to the State's argument on grounds that it was not supported by evidence in the record, the trial court overruled the objection merely by holding that, "This is closing arguments." RP 591.

It is the jury's function to weigh evidence, determine witness credibility, and decide disputed evidence in the record. *State v. Snider*, 70 Wn.2d 326, 327, 422 P.2d 816 (1967).

Substantial evidence is evidence that would "convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed." *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). The existence of a fact cannot rest upon guess,

speculation or conjecture. *State v. Carter*, 5 Wn. App. 802, 807, 490 P.2d 1346 (1971), *review denied*, 80 Wn.2d 1004 (1972).

The trial court was correct, it is was closing argument and wide latitude in given for making inferences from the evidence, but the trial court failed to acknowledge that there was no basis in the record to support the State's argument. And because a jury's findings must be supported by substantial evidence in the record, the trial court based its denial of Metcalf's objection on untenable grounds. There was not substantial evidence in the record for the jury to find that Bono and Metcalf had threatened to rape Wilson or that Wilson defecated in his pants to prevent the rape. The trial court abused its discretion in overruling the objection to the State's improper argument.

3. CUMULATIVE TRIAL ERROR DEPRIVED METCALF OF HIS RIGHT TO A FAIR TRIAL WHERE THE STATE MADE INFLAMMATORY AND BASELESS ARGUMENTS AND THE TRIAL COURT OVERRULED OBJECTION TO THE ARGUMENT ON UNTENABLE GROUNDS.

Where multiple errors occurred at the trial level, a defendant may be entitled to a new trial if cumulative errors result in a trial that was fundamentally unfair. Courts apply the cumulative error doctrine when several errors occurred at the trial court level, but

one error alone warrants reversal. Rather, the combined errors effectively denied the defendant a fair trial. *State v. Rooth*, 129 Wn. App. 761, 775, 121 P.3d 755 (2005).

Where the defendant cannot show prejudicial error occurred, cumulative error cannot be said to have deprived the defendant of a fair trial. *State v. Stevens*, 58 Wn. App. 478, 498, 794 P.2d 38, review denied, 115 Wn.2d 1025, 802 P.2d 128 (1990).

Here, as discussed above, the prosecutor made improper inflammatory argument based on facts not contained in the record before the court and the trial court abused its discretion in overruling Metcalf's objection to the argument. Should this court find that the errors discussed above do not individually warrant reversal of Metcalf's conviction, the court should find that the cumulative prejudicial effect of the errors warrants reversal and remand.

4. METCALF'S SENTENCE EXCEEDS HIS STANDARD RANGE.

Offender score computations are reviewed de novo. *State v. Mendoza*, 139 Wn. App. 693, 698, 162 P.3d 439 (2007); *State v. Roche*, 75 Wn. App. 500, 513, 878 P.2d 497 (1994). "It is axiomatic that a sentencing court acts without statutory authority

when it imposes a sentence based on a miscalculated offender score.” *Roche*, 75 Wn. App. at 513. A challenge to an offender score calculation is sentencing error that may be raised for the first time on appeal. *Id.* at 513; *State v. Anderson*, 92 Wn. App. 54, 61, 960 P.2d 975 (1998), *review denied*, 137 Wn.2d 1016 (1999).

Here, the trial court scored Metcalf as a “5” based upon the following criminal history stipulated to by Metcalf. CP 121.

CRIME	COUNTY/STATE Adult/Juvenile	DATE OF CRIME	DATE OF SENTENC E
Theft 1	Pierce County, WA Juvenile	02/01/91	03/01/99
Attempt to Elude	Pierce County, WA Juvenile	02/01/99	03/01/99
Burglary 2	Pierce County, WA Adult	12/05/95	04/24/96
Burglary 2	Pierce County, WA Adult	12/22/99	02/15/00
UPCS	Pierce County, WA Adult	06/19/02	07/09/02
Attempt UPCS	Pierce County, WA Adult	07/21/03	08/21/03

To arrive at the calculation, the court scored each felony designated as an adult offense as “1” point and each felony designated as a juvenile offense as “½ “point“. Those numbers added together do equal “5”. But the characterization the 1995 second degree burglary (above in bold) is an adult felony is wrong.

In December 1995, Metcalf (DOB: 03/30/81) was 14 years old and a juvenile. CP 125. As such, he should have only received "1/2" point in his offender score calculation making the total calculation "4.5" points. RCW 9.95A.510, .515, .525. Because half points are rounded down to the nearest whole point, Metcalf should have actually been scored as an "4" instead of a "5". 9.94A.525.

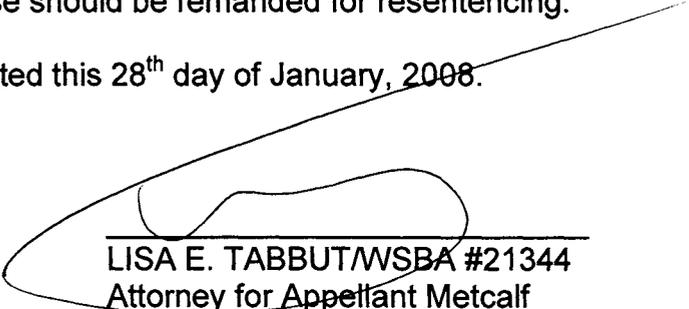
As a five, Metcalf's standard range without the 24-month enhancement is 138-184 months. With the correct offender score of "4", Metcalf's offender score is 129-171 months. The trial court sentenced Metcalf to 176 months plus 24 additional months for the weapon enhancement. As such, his base sentence exceeded the maximum 171 months in his standard range. Remand is necessary to correct the erroneous sentence.

VI. CONCLUSION

Metcalf was deprived of his right to a fair trial by the prosecutor's improper and inflammatory closing argument. The trial court compounded the problem by overruling Metcalf's objection to the argument and failing to give a limiting instruction. The errors both separately and combined deprived Metcalf of his right to a fair trial. This court should vacate Metcalf's conviction and remand for

a new trial. Alternatively, as Metcalf's standard range sentence was miscalculated, his case should be remanded for resentencing.

Respectfully submitted this 28th day of January, 2008.



LISA E. TABBUT/WSBA #21344
Attorney for Appellant Metcalf

FILED
COURT OF APPEALS
DIVISION II

09 JAN 31 PM 1:21

STATE OF WASHINGTON
BY _____
DEPUTY

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

STATE OF WASHINGTON,)	Court of Appeals No. 36131-1-II
)	
Respondent,)	
)	AFFIDAVIT OF MAILING
vs.)	
)	
JARED NATHANIEL METCALF,)	
)	
Appellant.)	

LISA E. TABBUT, being sworn on oath, states that on the 28th day of January
2008, affiant deposited in the mails of the United States of America, a properly stamped
envelope directed to:

Kathleen Proctor
Pierce County Prosecuting Attorney's Office
930 Tacoma Ave. S. Rm. 946
Tacoma, WA 98402-2171
Fax (253) 798-6636

Sheri L. Arnold
Attorney at Law
P.O. Box 7718
Tacoma, WA 98417
Fax (801) 838-6140

AFFIDAVIT OF MAILING - 1 -

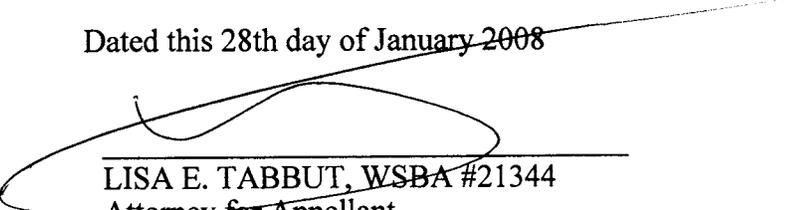
LISA E. TABBUT
ATTORNEY AT LAW
P.O. Box 1396 • Longview, WA 98632
Phone: (360) 425-8155 • Fax: (360) 425-9011

1
2
3 Jared Metcalf/DOC# 806876
4 Washington State Penitentiary
5 1313 N. 13th Avenue
6 Walla Walla, WA 99362-1065

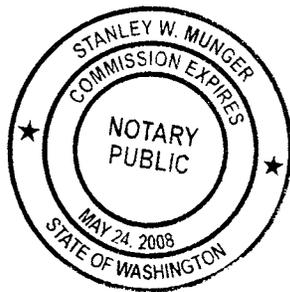
7
8 and that said envelope contained the following:

- 9 (1) APPELLANT'S BRIEF
10 (2) AFFIDAVIT OF MAILING

11 Dated this 28th day of January 2008

12
13 
14 LISA E. TABBUT, WSBA #21344
15 Attorney for Appellant

16 SUBSCRIBED AND SWORN to before me this 28th day of January 2008.




Stanley W. Munger
Notary Public in and for the
State of Washington
Residing at: Longview, WA 98632
My commission expires: 05/24/08

AFFIDAVIT OF MAILING - 2 -

LISA E. TABBUT
ATTORNEY AT LAW

P.O. Box 1396 • Longview, WA 98632
Phone: (360) 425-8155 • Fax: (360) 425-9011