

NO. 37290-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

ROBERT ARSENEAU,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 07-1-01527-1

BRIEF OF RESPONDENT

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether, as all three divisions of this Court have held, the trial court properly sentenced Arseneau to a term of community custody upon his conviction for failing to register as a sex offender?

2. Whether evidence that Arseneau had moved out either a week or a month before he was arrested was sufficient to show that he had changed his residence without notifying the police?

3. Whether the trial prosecutor's closing argument was so flagrant and ill-intentioned that it may be raised as an issue for the first time on appeal where he merely commented on the lack of evidence tending to show that the State's witnesses were not credible?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Robert Arseneau was charged by information filed in Kitsap County Superior Court with failure to register as a sex offender. CP 1. The jury found him guilty as charged. CP 28. As part of his sentence, the trial court imposed a term of community custody. CP 30.

B. FACTS

Michael Kelly had met Arseneau through Arseneau's daughter-in-law four or five years earlier. RP (1/15) 8. Kelly and Arseneau were good

friends. RP (1/15) 12. Kelly lived in Bremerton at 2461 Snyder Avenue, Apartment 3. RP (1/15) 8.

In October 2007, Kelly moved from Apartment 4 at that address to Apartment 3. RP (1/15) 8. Apartment 4 was a “sleeper”: it had only one room and a bath. RP (1/15) 8. Apartment 3 was a full apartment with a bedroom and a kitchen. RP (1/15) 9.

Kelly testified that he and Arseneau lived in Apartment 4 for almost a year. RP (1/15) 9. Only Kelly’s name was on the lease. RP (1/15) 10. All the bills were in Kelly’s name as well. RP (1/15) 10. Kelly moved out of Apartment 4 in October 2007.

Kelly denied that he told a police officer on October 23, 2007, that Arseneau had moved out a week earlier. RP (1/15) 10. He said that Arseneau had been in the hospital for a month and that in the meantime, Kelly had started moving out. RP (1/15) 10. When Arseneau got out of the hospital, Kelly was in the process of moving, so Arseneau was only there part time. RP (1/15) 10.

Kelly stated that he showed the officer the items Arseneau had in the apartment. RP (1/15) 11. He had some tools, a sleeping bag and some clothes. RP (1/15) 11. He did not have much there. RP (1/15) 11.

Kelly asserted that the next day, on October 24, he spoke with a

plainclothes officer, and told him that Arseneau was still there. RP (1/15) 11.

Kelly showed the officer his new apartment, and showed him Apartment 4 and Arseneau's things. RP (1/15) 11. Other than that he was not sure what he told them. RP (1/15) 11.

Kelly denied telling the officer that Arseneau had moved out a month earlier. RP (1/15) 11. He stated that he told him that Arseneau had been in the hospital for a month, and that he was in the apartment only "periodically" because he was recovering from surgery. RP (1/15) 11. By periodically, Kelly meant that Arseneau "spent a few nights every now and then" because it was hard for him to climb the stairs. RP (1/15) 12.

Kelly believed that Arseneau was staying with his wife and another friend when he was not staying with Kelly. RP (1/15) 12. Kelly denied telling the officer that none of the items in either of the Snyder apartments belonged to Arseneau, and claimed that he showed the officer the things that belonged to him. RP (1/15) 12.

On cross-examination Kelly testified that Arseneau was staying with Kelly because Arseneau's step-daughter was staying with Arseneau's wife at the time, and Arseneau was not permitted to be with the step-daughter. RP (1/15) 14. Arseneau kept most of his other stuff in his car because there was not much room in the apartment and because he was going to jail soon

anyway. RP (1/15) 16.

On October 23, 2007, Bremerton Police Patrol Officer Kent Mayfield investigated a report that Arseneau was not living at his registered address. RP (1/15) 19-20. Around 10:44 p.m., he went to 2136 East 21st Street. RP (1/15) 20. There, he contacted Lori Brown, who told him that Arseneau was not there. RP (1/15) 20. Brown declined to allow Mayfield to enter the house to look for Arseneau. RP (1/15) 21.

Mayfield then proceeded to 2461 Snyder Avenue. RP (1/15) 21. Arseneau was not there. RP (1/15) 21. He contacted Ms. Flynn in Apartment 1, and Kelly, in Apartment 3. RP (1/15) 22.

Kelly told him that Arseneau had been staying there but was not living there now. RP (1/15) 22. Kelly stated that Arseneau had moved. RP (1/15) 22. Arseneau had gone to the hospital and then had gone to stay with his wife, who was taking care of him. RP (1/15) 22. Kelly said it had been about a month since Arseneau had been there. RP (1/15) 22. Kelly told Mayfield that Arseneau had moved out. RP (1/15) 22. Kelly stated that Arseneau did not have any personal property in Apartment 3. RP (1/15) 22. Mayfield did not enter Apartment 3. Mayfield did not have any difficulty understanding Kelly. RP (1/15) 22.

Mayfield checked the ILEADS computer database and it had

Arseneau associated with Brown's address. He was not registered at that address. RP (1/15) 23. Mayfield then turned the case over to the detectives. RP (1/15) 23.

Bremerton Police Detective Kenny Davis received a report from Mayfield on October 23, 2007. RP (1/15) 27. Davis contacted the Sheriff's Office to determine Arseneau's current registration status. RP (1/15) 28. Arseneau was registered as living at 2461 Snyder Avenue, Apartment 4. RP (1/15) 28.

The next day, Davis proceeded to the registration address. RP (1/15) 28. There were five apartments at the location. Apartment 2 was vacant. RP (1/15) 28. Davis proceeded to Apartment 4 and then to Apartment 3. RP (1/15) 32. There, he found Kelly sleeping on the floor. RP (1/15) 28.

Davis asked Kelly if Arseneau still lived there. RP (1/15) 28. Kelly told Davis that he did not. RP (1/15) 29. Kelly stated that he had been Arseneau's roommate in Apartment 4 and that Arseneau had moved out about a month earlier. RP (1/15) 29. Davis had no problem understanding Kelly. RP (1/15) 32.

Davis asked if he could look at Apartment 4 to see if Arseneau still had any belongings there. RP (1/15) 29. Kelly let him into the apartment. RP (1/15) 29. Kelly was in the process of moving into Apartment 3. RP

(1/15) 29. Apartment 4 was in a bit of a disarray as a result. RP (1/15) 29. The only items of Arseneau's that Kelly identified were a small toolbox and maybe a fishing pole. RP (1/15) 29. Kelly claimed the other items in the apartment as his own. RP (1/15) 33. Davis did not see any clothes or toiletries in Apartment 4 that would indicate that Arseneau was living there. RP (1/15) 29. Nor did he find any paperwork, bills, or anything like that that would indicate that Arseneau was living in Apartment 4.

Kelly also showed Davis Apartment 3, but indicated that nothing of Arseneau's was in that apartment. RP (1/15) 30.

Davis then went to the 21st Street address, but there was no answer at the door. RP (1/15) 30.

Davis returned to his office and prepared an application for a warrant to arrest Arseneau for failing to register as a sex offender. RP (1/15) 30. Arseneau was arrested October 26 at 2136 East 21st Street in Bremerton. RP (1/15) 31, 34.

Charlene Flynn lived in Apartment 1 from March 2007 until the end of October 2007. RP (1/15) 36. She knew Arseneau as a friend of her neighbor, Kelly. RP (1/15) 36. Kelly lived in Apartment 3. RP (1/15) 36.

Flynn did not see Arseneau move out of the building in October 2007. RP (1/15) 36. She never saw him move in. RP (1/15) 36. She did not have

the impression that Arseneau lived there. RP (1/15) 37. He was not always there. RP (1/15) 37. He would leave stuff and come and go. RP (1/15) 37. They never told her that Arseneau was living there. RP (1/15) 37.

Arseneau stipulated that he had previously been convicted of a Class B sex offense, and that at the time of the charging period was required to register as a sex offender. RP (1/15) 51. The State also introduced, without objection, documents showing Arseneau's prior and subsequent registrations. RP (1/15) 6-7.

Kelly was also called by the defense and testified that he never told Flynn that Arseneau lived there. RP (1/15) 52. They did not want the landlord to know. RP (1/15) 53. Kelly also never told her Arseneau was a sex offender until after he was arrested on the current charges. RP (1/15) 53.

Lori Brown was Arseneau's wife. RP (1/15) 56. They got married in February 2007. RP (1/15) 55. Brown had several convictions for crimes of dishonesty: once in 2007 for falsification of insurance documents, and one in 1999 for theft. RP (1/15) 71.

She had lived at 2136 East 21st Street for about two years. RP (1/15) 55. She lived there with her parents. RP (1/15) 55. Arseneau received his mail at the 21st Street house. RP (1/15) 70. But according to Brown, Arseneau had never lived with her at that address because her mother was

embarrassed by the registration requirement. RP (1/15) 56. They never lived together during the time they were married. RP (1/15) 67.

Brown conceded that Mayfield asked her to have Arseneau contact him. RP (1/15) 70. She told Arseneau that the police wanted to talk to him. RP (1/15) 70. Arseneau did not contact them. RP (1/15) 70.

Brown testified that she had known Kelly for three or four years. RP (1/15) 57. She also discussed the current case with Kelly before trial. RP (1/15) 70. Arseneau began living with Kelly in February or March of 2007. RP (1/15) 58. They expected it to be temporary because he was facing a prison sentence in a Yakima County case. RP (1/15) 58-59.

That sentencing was postponed by surgeries in June and then another during the first week in September. RP (1/15) 59-61. Due to complications, he was not released until September 29. RP (1/15) 61. He had difficulty with the stairs at the Snyder address, so Brown convinced her mother to let him stay with them for a few days. RP (1/15) 62. She would only allow him to stay for three days. RP (1/15) 62.

Then, according to Brown, he went back to Kelly's. RP (1/15) 62. Most of Arseneau's things were in storage. RP (1/15) 63. This was because he was anticipating having to go to jail. RP (1/15) 64. What possession he had that were not in storage were at Kelly's. RP (1/15) 64.

Toward the end of October he spent a few nights at the home of a friend in Bainbridge Island who was a nurse, because he was ill. RP (1/15) 64. On October 26, he changed his registration to the other apartment. RP (1/15) 65. That was the day Arseneau received a phone call from a detective at her mother's house. RP (1/15) 65. Then the detective came over and arrested him. RP (1/15) 66.

III. ARGUMENT

A. AS ALL THREE DIVISIONS OF THIS COURT HAVE HELD, THE TRIAL COURT PROPERLY SENTENCED ARSENEAU TO A TERM OF COMMUNITY CUSTODY UPON HIS CONVICTION FOR FAILING TO REGISTER AS A SEX OFFENDER.

Arseneau argues that the trial court erred in imposing a term of community custody. This claim is without merit because the crime of failure to register as a sex offender is only excluded from the definition of "sex offense" under the relevant statutes due to an inadvertent numbering error that occurred when the legislature amended the Sentencing Reform Act.

The same contention as that presented here was recently rejected by this Division of the Court in *State v. Albright*, ___ Wn. App. ___, 183 P.3d 1094 (2008), and by Division III in *State v. Castillo*, ___ Wn. App. ___ 183

P.3d 355, ¶ 15 *et seq.* (2008).¹ The Court concluded that the numbering error produced the absurd result of defining the failure to register as a kidnapper a sex offense while failure to register as a sex offender is not. *Albright*, 183 P.3d at ¶ 16. The literal reading also undermined the statute’s sole purpose. *Id.*, at ¶ 17. The Court was therefore obliged to read the statute to carry out the legislative purpose:

[W]e have the imperative to remedy RCW 9.94A.030(42)(a)(i) to retain the definition of sex offense the legislature intended. To do this we must correct the numbering error in RCW 9.94A.030(42)(a)(i) as follows: “A felony that is a violation of chapter 9A.44 RCW other than RCW 9A.44.130(12).”

Albright, 183 P.3d at ¶ 18.

In addition to the arguments rejected in *Albright*,² Arsenault also purports to divine legislative intent from language appearing in RCW 9.94A.712, the “determinate plus” sentencing scheme that applies a partially indeterminate sentence to most sex offenses. This argument is illogical.

As Arsenault correctly notes, RCW 9.94A.712 specifically excludes the crime of failure to register from its ambit:

(1) An offender who is not a persistent offender shall be sentenced under this section if the offender:

¹ Both *Albright* and *Castillo* were filed after Arsenault’s brief.

² *Albright* found that Division I’s decision in *State v. King*, 111 Wn. App. 430, 436, 45 P.3d 221 (2002), which Arsenault purports to distinguish, was decided “[i]n a nearly identical context.” *Albright*, 183 P.3d at ¶ 16.

* * *

(b) Has a prior conviction for an offense listed in RCW 9.94A.030(33)(b),^[3] and is convicted of any sex offense which was committed after September 1, 2001.

For purposes of this subsection (1)(b), failure to register is not a sex offense.

The consequences of this exclusion, however, cannot be that failure to register can never be a sex offense. To the contrary, if failure to register were not included within RCW 9.94A.030's definition of a sex offense, there would be no need to exclude the offense from subsection (1)(b). Moreover, the terms of the exclusion itself show the flaw in Arsenault's argument: it is specifically limited to RCW 9.94A.712

Nor is this, unlike the reading Arseneau proposes, *see Albright*, an absurd result. Offenders subject to RCW 9.94A.712 are sentenced to a minimum term of confinement. Unlike other sentences under the SRA, there is no specified term to be served once the minimum term is reached. Instead the offender is to be held either until the offender has served the statutory maximum for the offense or until the Review Board determines it is safe to release the offender into the community. RCW 9.95.110(2), RCW 9.95.420-

³ Indeed, if Arsenault's logic were followed, this entire provision would be ineffective because at the time this language was included in the section, RCW 9.94A.030(33)(b) referred to "two-strike" persistent offenders. *See* Laws 2005, ch. 436, §§ 1 & 2. Now however RCW 9.94A.030(33), which currently defines "partial confinement" does not even have a paragraph (b), and the definition of a so-called two-strike "persistent offender" is found at RCW 9.94A.030(35)(b).

440. Sex offender registration is essentially a prophylactic measure. Unlike other sex-related offenses, violation of the registration requirements does not *per se* involve a victim. It would not be absurd for the legislature to determine that an ordinary determinate sentence would be appropriate for such a violation while the more restrictive sentencing under RCW 9.94A.712 was necessary for sex offenses against persons.

Arseneau also suggests that the Legislature's failure to amend the statute after the *King* decision also indicates that it intended the meaning he urges. While it may not have acted immediately, the Legislature *has* since acted to realign the definitions. *See* Laws 2008, ch. 7, § 1, ch. 230, § 2, ch. 231, § 23, ch. 276, § 309. This point is thus meritless also. This claim should be rejected.

B. EVIDENCE THAT ARSENEAU HAD MOVED OUT EITHER A WEEK OR A MONTH BEFORE HE WAS ARRESTED WAS SUFFICIENT TO SHOW THAT HE HAD CHANGED HIS RESIDENCE WITHOUT NOTIFYING THE POLICE.

Arseneau next claims that the evidenced was insufficient to support his conviction because the State failed to prove that he actually changed his address. This claim is without merit because evidence, if accepted by the jury, showed that Arseneau had moved out either a week or a month before he was arrested for failing to notify the Sheriff within 72 hours that he had

changed his residence.

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).

Here, the jury instructions required the jury to find the following facts to convict Arseneau:⁴

To convict the defendant of the crime of Failure to Register as a Sex Offender, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That the Defendant has previously been convicted of a sex offense that requires registration as a sex offender;
- (2) That on or between October 15, 2007, and October 26, 2007, the defendant was required to register as a sex offender;
- (3) That on or between October 15, 2007, and October 26, 2007, the defendant knowingly failed to comply with the following requirements of sex offender registration:
 - (a) the requirement to provide written notice to the county sheriff's office within 72 hours of moving to a new location within the county.
- (4) That any of these acts occurred in the State of Washington.

CP 25. Arseneau disputes only whether the State proved that he moved.

Arseneau's argument, however, misapprehends the standard of review. On October 23, Officer Mayfield testified that Kelly told him that Arseneau had moved out a week earlier. Detective Davis testified that Kelly said it was a month earlier. Either way, by October 26, when Arseneau reportedly changed his registration (after being arrested), more than 72 hours

⁴ This instruction is probably broader than what the State actually has to prove. *State v. Peterson*, ___ Wn. App. ___, 186 P.3d 1179, ¶ 12 (2008).

had passed since he had moved without him having informed the Sheriff.⁵

This evidence alone, if believed by the jury, met the State's burden. This evidence was further supported by the neighbor's testimony that Arseneau did not appear to live there during the nine months she had been living there, that his supposed roommate stated that he only lived there "periodically," that the police did not observe any belongings of Arseneau's at the apartment other than a tool box and a fishing pole, and the fact that Arseneau received his mail at his wife's house, where he just happened to be when he was arrested. Any conflicts between this evidence and other testimony adduced at trial was for the jury to resolve. The jurors resolved the conflicts in the State's favor. It is not this Court's role to reweigh that evidence. This claim should be rejected.

⁵ Although the testimony of both officers might arguably be hearsay, it was admitted without objection or limiting instruction, and its admissibility is not now contested. Nor could it be. RAP 2.5(a); *State v. Davis*, 141 Wn.2d 798, 850, 10 P.3d 977 (2000); *see also State v. Clark*, 139 Wn.2d 152, 156-57, 985 P.2d 377 (1999). Moreover, because Arseneau did not request an instruction limiting the jury's use of this testimony, the jury was free to use this testimony as substantive evidence of Arseneau's guilt. *State v. Barber*, 38 Wn. App. 758, 771-772, 689 P.2d 1099 (1984), *review denied*, 103 Wn.2d 1013 (1985).

C. THE PROSECUTOR'S CLOSING ARGUMENT WAS NOT SO FLAGRANT AND ILL-INTENTIONED THAT IT MAY BE RAISED AS AN ISSUE FOR THE FIRST TIME ON APPEAL WHERE HE MERELY COMMENTED ON THE LACK OF EVIDENCE TENDING TO SHOW THAT THE STATE'S WITNESSES WERE NOT CREDIBLE.

Arseneau next claims that the trial prosecutor improperly argued that the jury had to believe its witnesses were lying to acquit. A review of the argument shows that the prosecutor did nothing of the kind, but instead merely, and properly, argued that there was no evidence that State's prime witnesses were not credible.

A defendant claiming prosecutorial misconduct "bears the burden of establishing the impropriety of the prosecuting attorney's comments and their prejudicial effect." *State v. McKenzie*, 157 Wn.2d 44, ¶ 13, 134 P.3d 221, (2006). Comments will be deemed prejudicial only where "there is a *substantial likelihood* the misconduct affected the jury's verdict." *Id.* (emphasis the Court's). The prejudicial effect of a prosecutor's improper comments is not determined by looking at the comments in isolation but by placing the remarks "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." *Id.* Where the defense fails to object to an improper comment, the error is considered waived "unless the comment is so flagrant and ill-

intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.” *Id.* Arseneau did not object below.

The essence of the misconduct Newton alleges is the giving of the jurors “a false choice.” *State v. Miles*, 139 Wn. App. 879, ¶ 26, 162 P.3d 1169 (2007). The “false choice” that is condemned in *Miles* and like cases is telling the jury that it had to believe the defendant’s testimony in order to acquit him. The choice is false because the jury does not need to believe the defendant to acquit, or believe that the State’s witnesses are lying, it need only have a reasonable doubt as to the defendant’s guilt. *Id.*

Here, on the other hand, the prosecutor did not make such an argument. He only pointed out that there was no evidence that the officers had any reason to make up their testimony. But that was not an improper “false choice” argument. It is entirely proper for a prosecutor to argue that the evidence does not support the defense theory. *State v. Russell*, 125 Wash.2d 24, 87, 882 P.2d 747 (1994).

Here, the defense theory was that the officers supposedly misunderstood what Kelly told them because of his “voicebox.” RP (1/16) 11-12. The prosecutor argued that Kelly was not difficult to understand based on his performance in court, and both officers testified that they had no

difficulty understanding Kelly. RP (1/16) 8; RP (1/15) 23, 32. Moreover, Defense counsel also directly argued that the police account of what Kelly told them was unbelievable: “according to what the officers told you, *they would have you believe* that Mike Kelly told him something different.” RP (1/16) 13. He further argued that “that doesn’t make any sense that Mike Kelly would have told [Officer Mayfield] that.” RP (1/16) 13. Counsel specifically questioned Davis’s testimony as well: “Detective Davis *would have you believe* that -- as I understand it, basically his testimony was that he hadn’t seen him in a month, and he didn’t have any stuff there.” RP (1/16) 14. Arseneau also suggested that the police were just looking for evidence to convict him, rather than trying to find out if there even had been a crime:

Davis had already made up his mind. He had a tip. He had officer Mayfield’s observations that he wasn’t living there anymore. He didn’t see Robert Arseneau. It’s a failure to register as a sex offender case.

* * *

Mr. Cure had you believe that these officers have no bias, and they are professionals. They are not -- I am not saying that they are not telling you the truth here, but specifically Detective Davis already had information that he believed that Robert Arseneau is not registering. He was just there to find information, basically, for a probable cause statement.

RP (1/16) 14-15.

In this context, the credibility of these witnesses was clearly in issue.

The prosecutor did not, as the tenor of Arseneau’s brief suggests, go on a

rampage of improper argument. Notably, he fails to place the comments into any context.

The prosecutor began his argument with a discussion of the charges and the evidence. RP (1/16) 3-5. Given that who to believe was a primary issue in the case, he then properly turned to a discussion of Instruction 1, which tracked WPIC 1.02, CP 16, reminding the jurors that they were the sole judges of credibility. RP (1/16) 5-6. He then discussed why the *evidence* showed that Arseneau's wife, Lori Brown, and long-time friend and putative roommate, Michael Kelly, were not credible. RP (1/16) 6-8.

The prosecutor then turned to the officers, pointing out that there was no evidence that showed any reason for them to be biased:

You might be asking yourself: why did Mike Kelly say these things to the cops? Ask yourself instead: why would the cops make this up? *Why would the cops say that Mr. Kelly made these statements to them if he didn't?* These are two law enforcement officers that have over 50 years of experience combined. They have been around for a long time. They don't play games like that. In fact, they have been around that long because they don't play games like that. *What bias, what motivation did the cops have to sell Mr. Arseneau down the river? There is none. There is none at all.*" RP (1/16) 8.

As discussed above, pointing out the lack of evidence is proper.⁶

⁶ Although it is not mentioned by the Arsenault in his brief, and does not support his "false choice" argument, the State would concede that the "playing games" comment is an improper reference to facts not in evidence. However, especially in light of Arseneau's equally unfactual claim that he police were only looking to support their preconceived notions, and in light of the brevity of the comment in an otherwise proper argument, this comment could easily have been cured by an admonition from the court had one been requested.

The only other comment that Arseneau cites, which came in rebuttal, was also proper in context:

Ask yourself why the cops would make this up, especially if Mr. Arseneau is going away for the next couple of years, apparently.^[7]

RP (1/16) 23-24. Nothing in this argument requires the jury to disbelieve the police to acquit. But the fact is that the State's case was indeed unsupportable if the police witnesses were not believed. The defense argued strenuously that they should not be believed. It was entirely proper for the prosecutor to point out that there was simply no reason *in the evidence* for the police to have made up their testimony.

Arseneau fails to show that the trial prosecutor's closing was even an improper "false choice" argument, much less that it was so flagrant and ill-intentioned that that could not have been neutralized by a timely request for a curative instruction from the trial judge. This claim should be rejected.

⁷ Part of the defense was that the reason Arseneau did not have any belongings at the apartment was because most of his things were in storage because he was about to be sent to prison on an unrelated charge out of Yakima County. RP (1/14) 5.

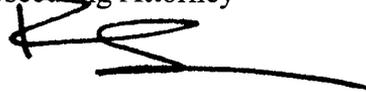
IV. CONCLUSION

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

DATED July 31, 2008.

Respectfully submitted,

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