

No. 39078-7-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

APPEALS
DIVISION II
COMM. OF 11:17
STATE OF WASHINGTON
DEPUTY

STATE OF WASHINGTON,

Respondent,

vs.

BARRY DRAGGOO
Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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STATEMENT OF THE CASE

Unless otherwise discussed and cited below, and without waiving the right to challenge the facts as presented by Appellant, his statement of the case is adequate for purposes of responding to this appeal.

ARGUMENT

A. DRAGGOO'S TRIAL COUNSEL WAS NOT INEFFECTIVE.

Draggoo claims his trial counsel was ineffective for failing to request that the juror be excused for bias, and for failing to object to the testimony of Draggoo's former cellmate regarding admissions Draggoo made to him. As discussed below, these arguments are without merit.

A defendant demonstrates ineffective assistance of counsel by showing (1) that counsel's representation fell below an objective and reasonable standard; and (2) that counsel's errors were serious enough to deprive the defendant of a fair trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Jeffries, 105 Wn.2d 398, 418, 717 P.2d 722 (1986). A defendant's counsel is ineffective if there is a reasonable probability that, absent counsel's errors, the outcome of the trial would have been different. Strickland, 466 U.S. at 687-88; In the

Matter of the Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." State v. Cienfuegos, 144 Wn.2d 222, 229, 25 P.3d 1011 (2001) (citing Strickland, 446 U.S. at 694, 100 S.Ct. 1945. To show that his counsel was constitutionally deficient, the defendant bears the burden of showing his attorney's performance fell below an objective standard of reasonableness and that the deficiency prejudiced him. State v. McFarland, 127 Wn.2d 322, 334-35, 889 P.2d 1251 (1995). It is the defendant's burden to prove ineffective assistance of counsel. McFarland, 127 Wn.2d at 335.

When reviewing claims of ineffective assistance of counsel, a reviewing court gives great deference to trial counsel's performance and begins the analysis with a strong presumption that counsel was effective. Strickland, 466 U.S. at 689; McFarland, 127 Wn.2d at 337. In other words, exceptional deference must be given when evaluating counsel's strategic decisions. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). Competency of counsel is not measured by the result. State v. Early, 70 Wn.App. 452, 461, 853 P.2d 964(1993), *review denied*, 123 Wn.2d 1004 (1994). Furthermore, the reviewing "court must make every effort

to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy." In re Pers. Restraint of Rice, 118 Wn.2d 876, 888-89, 828 P.2d 1086, *cert. denied*, 506 U.S. 958 (1992). Mere differences of opinion regarding trial strategy or tactics cannot support an ineffective assistance of counsel claim. State v. Hendrickson, 129 Wn.2d at 77-78. Decisions by trial counsel as to when or whether to object are trial tactics. State v. Madison, 53 Wn.App. at 763.; State v. Neidigh, 78 Wn.App. 71, 77, 895 P.2d 423 (1995) (failure to object is not ineffective assistance of counsel if it could have been a legitimate trial strategy). Counsel does not render ineffective assistance by refusing to pursue strategies that reasonably appear unlikely to succeed. McFarland, 127 Wn. 2d 322, 334 n.2, 899 P.2d 12451 (1995).

In the instant case, Draggoo claims that his counsel was ineffective because he did not move to disqualify a juror, and when he failed to object "when the state elicited evidence that was more prejudicial than probative." Brief of Appellant 156. The State disagrees.

First off, to show his counsel was ineffective for failing to move to exclude the juror, Draggoo would have to show that the

trial court would have granted his motion to remove the juror (or would have sustained his objection to the juror's presence on the jury). After all, counsel does not render ineffective assistance by refusing to pursue strategies that reasonably appear unlikely to succeed. State v. McFarland, 127 Wn.2d 322, 334 n.2, 899 P.2d 12451 (1995). Furthermore, a juror's acquaintance with a witness, by itself, is not sufficient to challenge the juror for implied bias. CrR 6.4(c)(2); RCW 4.44.180. See also State v. Tingdale, 117 Wn.2d 595, 601, 817 P.2d 850 (1991)(juror's acquaintance with a party is not sufficient to imply bias to the juror). A judge does have a duty to excuse a juror who, in the opinion of the judge, "has manifested unfitness as a juror by reason of bias [or] prejudice." RCW 2.36.110. On the other hand, if bias is not implied, a juror will be removed for cause only if the party challenging the juror shows by a preponderance of the evidence that the challenged juror cannot try the case impartially. RCW 4.44.170(2); Ottis v. Stevenson-Carson School Dist. No. 303, 61 Wn.App. 747, 754, 812 P.2d 133 (1991). Put another way, a judge must excuse a juror if the judge believes that grounds for a challenge for cause are present. CrR 6.4(c)(1). A juror may be disqualified for cause when that juror is biased. RCW 4.44.170(1)(2). A juror is biased if she has a state of mind

toward the defendant that prevents her from impartially trying the issue. State v. Noltie, 116 Wn.2d 831, 837, 809 P.2d 190(1991). But a juror need not be disqualified if she can set aside her preconceived ideas. Id. 116 Wn.2d at 838-40. Furthermore, a party challenging the juror must show more than the mere possibility of bias. Id. And, because the trial judge is in the best position to judge the juror's demeanor and conduct, including such factors as the juror's frankness or hesitation in answering, unless the trial court's decision to keep the juror on the panel very clearly appears to be erroneous, the trial court's decision on the fitness of the juror will be sustained. Noltie, 116 Wn.2d at 839, quoting 14 L.Orland & K. Teglund, *Wash. Prac. Trial Practice*, § 203, at 332 (4th ed. 1986); State v. Grenning, 142 Wn.App. 518, 540, 174 P.3d 706, 717 (2008).

In this case, Draggoo alleges that juror number 10 was biased because she was familiar with the mother of, and two siblings of, one of the victims in this case. Draggoo's argument is not persuasive. Here, the trial court properly examined the juror in the presence of the defendant and all counsel. During the court's examination of her, juror number 10 explained that she had worked for an elementary school in different capacities for a number of

years, and that in that capacity she was familiar with the sister and the parents of one of the victims in this case. RP 131-135. The juror further explained that she did not realize she knew them until she saw the pictures in Exhibits 2,3, and 4. RP 132. However, the juror said that she had only had contact with the mother one time, and that was through an interpreter because the mother spoke Spanish. RP 133, 134. The juror said that she knew the sister from when she was a student in a computer lab the juror was in charge of, and from seeing the sister on the playground. RP 132.

The trial court specifically inquired of the juror as follows:

COURT: So you know [the sister].

JUROR: Mm-hmm.

COURT: Do you know any of the other children?

JUROR: No.

COURT: ...with regard to the parents, would you recognize them by sight?

JUROR: ...yeah, I recognized them on the way out.

COURT: ...have you ever had conversation with the mother?

JUROR: She speaks Spanish so we --I have not spoken to her. I have asked an interpreter to ask what she needs. She will come and ask us a question. . . . I believe the student is Fabion that goes to our school currently and it would be like he's going

to be a pickup or take a bus home or what time are you getting out of school, those kinds of questions. But I go through an interpreter.

COURT: How frequent have those contacts been and over what period of time have those contacts been with the mother?

JUROR: The mother, probably in the last week.

COURT: All right. And it didn't happen before this last week? Or that was the most --last week was the most recent?

JUROR: Yes.

COURT: And how long has that been going on? How long have you - -

JUROR: That's the first time I've ever spoken to her or had contact with her. I didn't speak to her directly. I went through an interpreter.

COURT: So it was just the one time?

JUROR: I believe so, yes.

COURT: All right. Is there anything about that contact that gives you--or has any impact on your sitting here and hearing this case?

JUROR: I believe I can be fair and I don't think that would influence me.

COURT: All right.

JUROR: Is that what you're asking?

COURT: Yes, all right.

JUROR: I'm in a position of having a lot of confidential material, I'm secretary and in the office. I'm in that position because I think I'm trusted.

COURT: All right. [Prosecutor], any questions?

PROSECUTOR: No.

COURT: Mr. Blair? [Defense counsel?]

MR. BLAIR: Just briefly. Did her sister--do you know if her sister went to Fords Prairie Elementary?

JUROR: If she did, I did not have contact with her.

MR. BLAIR: Okay. Okay.

JUROR: I did not recognize the name when the names went up [sic]. But today when Minerva was mentioned and Fabion and then Alondra, I didn't know if I needed to raise my hand right away. That's why I mentioned it.

COURT: Okay, anything else, Mr. Blair?

MR. BLAIR: And how long have you been at Fords Prairie Elementary?

JUROR: Since '95.

MR. BLAIR: Okay.

JUROR: But in many different capacities.

MR. BLAIR: Okay. Thank you. Nothing.

COURT: Anything else?

[PROSECUTOR] No.

COURT: All right. That's all for right now. You can step back to the jury room for a few minutes.

COURT: Based on those questions, those answers, Mr. Hayes [Prosecutor], do you have any objection to her continuing on as a juror in this case?

MR. HAYES: No, your honor.

MR. BLAIR: No.

COURT: All right.

RP 131-135. This exchange between the juror, the court, and the court and the attorneys, shows that (a) the juror was not aware that she knew anyone related to any witness in the trial until she saw pictures admitted in the case [RP 132, 135]; (b) the juror had one, very limited conversation with the mother of one of the victims--and that was through an interpreter in a school office setting [RP 133]; (c) the juror also knew a sister and a brother from that same family, also in a school setting, first in a classroom and then just from seeing the children on the school playground [RP 132-133]. Mere acquaintance with a witness does not mean the juror is impliedly biased. Tingdale, supra.

Furthermore, this exchange also shows that juror number ten understood her duty as a juror when she told the court: "I believe I can be fair and I don't think that it [being familiar with the

family] would influence me." RP 134. A trial court is not required to excuse a juror who indicates that she can be fair and decide a case based on the evidence. State v. Brett, 126 Wn.2d 136, 158, 892 P.2d 29 (1995). Here, Draggoo's counsel was given the opportunity to ask the juror additional questions, which he did, but he then said that he had no objection to the juror remaining on the panel. RP 135. This was not ineffective assistance of counsel.

The facts here are similar to those of State v. Rempel, 53 Wn.App. at 804, 770 P.2d 1058. In Rempel a juror denied knowing the victim in a burglary and rape prosecution, but when that witness appeared in court to testify, the juror realized that she did in fact know the witness. The juror immediately told the court of their acquaintance, and the court heard the matter. After questioning the juror, the court found that the juror could be impartial. The appellate court did not disturb the trial court's decision to allow the juror to continue. Id.

The circumstances present here are similar to those in Rempel, which further shows that even if Draggoo's attorney had asked the trial court to remove the juror, the trial court would have denied the request. The mere *possibility* of bias, is not enough to show that a juror is unfit to continue. Noltie, supra. Here, after

hearing juror number ten's responses to the court's and defense counsel's questions, defense counsel was obviously satisfied that juror number ten would be able to be fair and impartial. And Draggoo has not presented any valid reasons for us to second-guess his trial counsel's decision now. Because Draggoo has not met his burden to show that had he objected to the juror's continuing, the trial court would have sustained his objection, he cannot show prejudice. Accordingly, his ineffective assistance of counsel claim for failure to object to juror number ten fails.

Failure to Object to Former Cellmate's Testimony

Draggoo also complains that his counsel was ineffective for not objecting to Draggoo's former cellmate's testimony about statements Draggoo made to him. But, similar to the juror issue, Draggoo cannot meet his burden to show that *even if* his counsel had objected to this evidence that the trial court would have sustained the objection. Counsel does not render ineffective assistance by refusing to pursue strategies that reasonably appear unlikely to succeed. State v. McFarland, 127 Wn.2d 322, 334 n.2, 899 P.2d 12451 (1995). Decisions by trial counsel as to when or whether to object are trial tactics. State v. Madison, 53 Wn.App. at 763.; State v. Neidigh, 78 Wn.App. 71, 77, 895 P.2d 423 (1995)

(failure to object is not ineffective assistance of counsel if it could have been a legitimate trial strategy).

Draggoo's trial counsel quite likely did not object to the allegedly "prejudicial" testimony because he knew that an objection would be futile because the statements made by Draggoo to his former cellmate Mr. Huggins were surely admissible as "admissions by a party opponent." ER 801(d)(2). "Incriminating statements given by a defendant to fellow cellmates are admissible where the cellmates are neither acting under government instruction nor as a government agent when the incriminating statements were made." State v. Manthie, 39 Wn.App. 815, 822, 696 P.2d 33 (1985), *citing*, United States v. Calder, 641 F.2d 76 (2nd Cir.), *cert. denied*, 451 U.S. 912, 101 S.Ct. 1984, 68 L.Ed.2d 302 (1981). But according to Draggoo's argument, his statements to Huggins should not have been admitted because they were more prejudicial than probative. Arguably, under Draggoo's theory, a defendant's confession would never be admissible--because it is, after all, totally "prejudicial." Obviously, Draggoo's reasoning on this issue is off-base.

Indeed, "[a]lmost all evidence is prejudicial in the sense that it is used to convince the trier of fact to reach one decision rather than another." State v. Rice, 48 Wn.App. 7, 13-14, 737 P.2d 726

(1987). "In almost any instance, a defendant can complain that the admission of potentially incriminating evidence is prejudicial in that it may contribute to proving beyond a reasonable doubt he committed the crime with which he is charged." State v. Bernson, 40 Wn.App. 729, 736, 700 P.2d 758, *review denied*, 104 Wn.2d 1016 (1985). Thus, "the linchpin word is unfair" when determining whether ER 403 excludes evidence. Rice 48 Wn.App. at 13 (internal quotation marks omitted). Generally, "unfair prejudice is caused by evidence that is likely to arouse an emotional response rather than a rational decision among the jurors." Id. On the other hand, nothing in ER 403 authorizes exclusion of evidence because it is "too probative." "The addition of the word 'unfair' in ER 403 'obligates the court to weigh the evidence in the context of the trial itself, bearing in mind fairness to both the State and defendant.'" State v. Stackhouse, 90 Wn.App. 344, 356-357, 957 P.2d 218 (1998), *quoting State v. Bernson*, 40 Wn.App. at 736.

In this case, Draggoo quite simply cannot overcome the well-entrenched rule that we must begin this analysis with the strong presumption that his trial counsel was competent. Strickland, supra, McFarland, supra. Draggoo's trial counsel was an

experienced trial attorney¹ who consequently would know that objecting to the allegedly inadmissible evidence would be futile because Draggoo's statements to his former cellmate were relevant and admissible as admissions by a party opponent under ER 801. As such, Draggoo cannot show that even if his trial counsel had objected, that the trial court would have sustained the objection. Thus, he cannot show that the outcome of the trial was affected by his attorney's failure to object to such evidence, and consequently cannot show prejudice. In re Pirtle, supra. Furthermore, decisions on whether or when to object are a matter of sound trial tactics or strategy, and cannot be a basis for an ineffective assistance of counsel claim. State v. Madison, supra.

Draggoo has not met his burden to show his trial counsel was ineffective or that his trial counsel's allegedly deficient performance substantially affected the verdict. His arguments to the contrary are not persuasive, and this Court should agree.

¹ Attorney Donald Blair, WSBA # 24637, admitted to the Washington State Bar in 1995.

B. THERE WAS NO ERROR IN THE "UNANIMITY INSTRUCTION."

Draggoo also claims that the unanimity instruction given in this case was defective. But, like his other arguments in this appeal, this argument, too, is without merit.

The adequacy of a jury instruction is reviewed *de novo*. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995), *rev'd on other grounds in Pirtle v. Morgan*, 313 F.3d 1160 (9th Cir. 2002). The instruction at issue here is known as the "unanimity", or "Petrich" instruction. State v. Bobenhouse, 166 Wn.2d 881, 893, 214 P.3d 907 (2009); *citing State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). This instruction comes into play "[w]hen the State alleges multiple acts, any of which could independently prove a charged count, the State must either elect the act upon which it will rely for conviction or the court must instruct the jury that it must unanimously agree that one particular act was proved beyond a reasonable doubt." State v. Moultrie, 143 Wn.App. 387, 392, 177 P.3d 776 (2008). Failure to give a Petrich instruction in a multiple acts case is constitutional error--but such error is subject to the constitutional harmless error analysis. Id. Thus, "if the State fails to elect which [act]. . . or the trial court fails to instruct that all jurors must agree that the same . . . act has been proved beyond a

reasonable doubt, the error will be . . . harmless only if no rational trier of fact could have a reasonable doubt as to any one of the incidents alleged." 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 4.25 (3d Ed)(2008)(emphasis added), citing State v. Newman, 63 Wn.App. 841, 822 P.2d 308 (1992); State v. Kitchen, 110 Wn.2d 403, 409, 411, 756 P.2d 105 (1988); State v. Hepton, 113 Wn.App. 673, 684, 54 P.3d 233 (2002).

In the present case, a Petrich instruction was given. CP 111. In that instruction the trial court instructed the jury that it had to be unanimous as to which act was proven as to each count. The instruction stated that:

The State alleged that the defendant committed acts of Child Molestation in the First Degree on multiple occasions. To convict the defendant on any count of Child Molestation in the First Degree, one particular act of Child Molestation in the First Degree must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of Child Molestation in the First Degree.

CP 111 (emphasis added). This instruction complies with Petrich and its progeny. This instruction properly told the jury that it had to unanimously agree as to which particular act was proven beyond a reasonable doubt--and Draggoo's argument that this instruction was in error is not persuasive. This instruction is in substantially

the same form as WPIC 4.25--the unanimity instruction recommended for use in the 2008 version of the WPICS-- and this instruction was approved in State v. Moultrie, 143 Wn.App. at 392-94; 11 Wash.Prac. Pattern Jury Instr. Crim. WPIC 4.25 (3d Ed. 2008).

Still, Draggoo complains that it was apparent in this case that the jury was "confused" about the instruction because it sent out a note that said:

Can we get a description of what events are included with the counts one and two? We recall the kitchen incident, the incident on the chair when Kristie was in the bathroom and the pool incident. Which incident goes with which count?

CP 123 (emphasis added). According to Draggoo, this note from the jury shows that the jury was utterly confused about the unanimity issue. Brief of Appellant 27. However, this note also shows that the jury was certainly paying attention to the evidence because it correctly heard that there were three separate acts--and the wording of the unanimity instruction in turn clearly told the jurors they had to be unanimous as to one of these three acts (the kitchen, the bathroom, or the pool) **for each count** alleged--and that the particular act had to have been proven a reasonable doubt. CP 111. This instruction is an accurate statement of the law, and

furthermore, it certainly is no great leap to surmise that once the jury discerned that there were three separate acts, that they would then re-read the instruction and see that so long as they unanimously agreed that the State had proven two of those acts beyond a reasonable doubt (one for each count)--that they could convict Draggoo as charged in those two counts. The unanimity instruction was correct, and this Court should so find.

But Draggoo goes on to propose an awkwardly-worded "answer" he says the court should have given the jury after it sent out the note--but Draggoo cites no authority approving the wording of such a response by the court on this issue. Brief of Appellant 27. Arguments not supported by relevant citation of authority need not be considered by this court. State v. Hoffman 116 Wash.2d 51, 71, 804 P.2d 577, 588 (Wash., 1991), *citing* Smith v. King, 106 Wash.2d 443, 451-52, 722 P.2d 796 (1986); State v. Giffing, 45 Wash.App. 369, 376, 725 P.2d 445, *review denied*, 107 Wash.2d 1015 (1986).

Similarly, Draggoo argues that the problems with the unanimity instruction could have been remedied by changing the wording of the "to convict" instruction. Brief of Appellant 26. Draggoo then again goes on to propose his version of what the "to convict" instruction "should have stated.". Id. But again Draggoo

cites no authority approving his version of the to-convict instruction.

Id. Accordingly, his argument need not be considered by this Court. Hoffman, supra.

To be sure, the State has found out the hard way that one plays a risky game by toying with the wording of "tried-and-true" jury instructions, a point made by the authors of the Washington Pattern Jury Instructions in a comment to a unanimity instruction: "[c]aution [is] needed when more specifically identifying the elected act. If the instruction needs to more specifically identify the particular occurrence, then care should be taken to make sure that the instruction does not constitute a comment on the evidence." 11 Wash. Prac. Pattern Jury Instr. Crim., *Comment to WPIC 4.26*(3d Ed. 2008)(emphasis added), *citing State v. Eaker*, 113 Wn.App. 111, 117-20, 53 P.3d 37 (2002), *review denied*, 149 Wn.2d 1003, 67 P.3d 1096 (2008). The State does not care to trip along such a reversible-error minefield, and instead prefers to use the pattern instructions--binding authority or not. It did so here, with a unanimity instruction substantively patterned after WPIC 4.25--the wording of which has not been found to be in error so far as the State knows. See e.g., State v. Moulton, supra. In sum, the

unanimity instruction given in this case was correct, and this court should so find.

C. THE PROSECUTOR DID NOT COMMIT MISCONDUCT.

Draggoo also claims that the prosecutor committed misconduct in closing argument when he referred to the testimony of Draggoo's former cellmate, who testified to what Draggoo said about raping a young neighbor girl several years before. This argument is without merit.

A prosecutor has wide latitude in closing argument to draw and express reasonable inferences from the evidence. State v. Hoffman, 116 Wn.2d 51, 95, 804 P.2d 577 (1991). And to prove prosecutorial misconduct, the defendant must show that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial; State v. Hughes, 118 Wn.App. 713, 727, 77 P.3d 681 (2003); State v. Gregory, 158 Wn.2d 759, 809, 147 P.3d 1201 (2006), citing State v. Kwan Fai Mak, 105 Wn.2d 692, 726, 718 P.2d 407 (1986). The bar for determining the probability of prejudice is high, and a defendant claiming prosecutorial misconduct bears this burden. State v. Brown 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

Moreover, prosecutorial misconduct is reversible error only when there is "a substantial likelihood that the alleged prosecutorial misconduct affected the verdict." State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 757 (1994). Showing that there is merely a possibility of an impact upon a verdict is insufficient, as are indefinite, conclusory and unsupported assertions of prejudice. State v. Perez-Arellano, 60 Wn.App 781, 786, 807 P.2d 898 (1991). However, if there was no proper objection, a request for a curative instruction, or a motion for a mistrial, the issue of a prosecutor's misconduct cannot be raised on appeal unless the misconduct was so flagrant and ill-intentioned that no curative instruction could have prevented the resulting prejudice. State v. Swan, 114 Wn.2d 613, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046, 111 S.Ct. 752, 112 L.Ed.2d 772 (1991); State v. Padilla, 69 Wn.App. 295, 846 P.2d 564 (1993).

A prosecutor's remarks "must be reviewed 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." State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied* 523 U.S. 1007 (1998). Claims of prosecutorial misconduct are also subject to a harmless error analysis. A harmless error under the

constitutional standard occurs if the reviewing "court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1996).

In this case, the allegedly-improper remarks by the prosecutor in closing argument were references to the testimony of Draggoo's former cellmate--who testified that Draggoo had told him he had raped a neighbor girl during the time that the acts herein were committed, and who was around the same age as one of the victims in this case. RP 349-351. As previously discussed, that testimony by Draggoo's former cellmate was properly admitted as admissions of a party opponent, under ER 801(d)(2). That being the case, it becomes apparent that all the prosecutor did in closing argument here was to make reasonable inferences from that admissible evidence. . RP 286-288; RP 349-351. This was not misconduct, because prosecutors are allowed "wide latitude" in making inferences from the evidence. Hoffman, 116 Wn.2d at 95. And, while Draggoo's trial counsel did object to the prosecutor's remarks, he objected on the grounds that the prosecutor was "arguing facts not in evidence." RP 350. This was not a correct

objection, because the facts referred to by the prosecutor in the allegedly-offensive remarks were "in evidence" because Draggoo's former cellmate Mr. Huggins testified as to the statements made by Draggoo. RP 288, 289. There was no request for a limiting instruction or motion for a mistrial. See e.g., State v. Swan, supra. In short, Draggoo has not met the high standard of prejudice that must be shown to succeed on a claim of prosecutorial misconduct. State v. Brown 132 Wn.2d at 561.

The cases cited by Draggoo in support of his argument that the prosecutor in this case committed misconduct are distinguishable. In both of the cases cited by Draggoo, the prosecutor violated a court order by referring to matters that the court had ruled were inadmissible and could not be mentioned. Brief of Appellant 28, 32, citing State v. Gregory, 158 Wn.2d 759, 147 P.3d 1201 (2006)(prosecutor violated his own motion in limine); State v. Pogue, 108 Wn.2d 981, 17 P.3d 1272 (2001)(prosecutor disobeyed the court's order to limit its inquiry). The prosecutor did no such thing here. There was no order limiting or suppressing the testimony referred to by the prosecutor in this case. Instead, what the prosecutor did here was to argue inferences from unobjected-to

evidence that had been properly admitted. This was not misconduct.

In sum, when considering the prosecutor's remarks in this case in the context of the entire trial, Draggoo cannot show a "substantial likelihood" that the prosecutor's remarks affected the verdict. State v. Russell, supra. As such, his misconduct argument fails. On the other hand, if for some reason this Court decides the prosecutor's remarks were in any way improper, any error should be found harmless, and Draggoo's convictions should be affirmed.

CONCLUSION

For all of the foregoing reasons, this Court should affirm Draggoo's convictions in all respects.

DATED THIS 20th day of November, 2009.

MICHAEL GOLDEN
LEWIS COUNTY PROSECUTING ATTORNEY

by



LORI SMITH, WSBA 27961
Deputy Prosecuting Attorney

COURT OF APPEALS
STATE OF WASHINGTON
NOVEMBER 20 4:11:17
BY DEPUTY

DECLARATION OF SERVICE BY MAIL

The undersigned declares under penalty of perjury under the laws of the State of Washington that a copy of the document to which this declaration is attached was served upon the Appellant by placing a copy of said document in the United States mail, postage prepaid, addressed to Appellant's Attorney, John Hays, at his address in Longview, Washington. Dated this 20th day of November, 2009, at Chehalis, WA.



Lori Smith, WSBA 27961