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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the defendant met his burden to prove prosecutorial misconduct?
2. Whether the trial court properly denied the defendant's motion to sever the witness tampering charge from the child molestation and rape of a child charges?
3. Whether the trial court properly denied the defendant's motion for a mistrial following a motion in limine violation?
4. Whether the defendant has demonstrated cumulative, prejudicial error?

B. STATEMENT OF THE CASE.

1. Procedure

On November 5, 2009, the Pierce County Prosecuting Attorney's Office (the State), charged Anthony Johnson, Jr., (the defendant) with two counts of child molestation in the first degree and two counts of rape of a child in the first degree. CP 1-2. On June 11, 2010, the state filed an amended information, adding one count of tampering with a witness. CP 16-18. The State filed a second amended information on July 14, 2010, adding an alternate tampering with a witness charge. CP 67-69.

Prior to trial, the defendant filed a motion to sever the witness tampering charge from the remaining charges for trial. CP 40-47; RP 40. The trial court reserved ruling on the issue until it could review the redacted transcript of a jail telephone call between the defendant and Mya Ailep that formed the basis for the witness tampering charge. RP 49. After reviewing the phone call transcript, the trial court denied the motion to sever. RP 281-283.

The case proceeded to jury trial in front of the Honorable Kitty-Ann van Doorninck on July 14, 2010. RP 195. After hearing the evidence and deliberating on it, the jury found the defendant guilty as charged. CP 135, 137, 139-141. On August 27, 2010, the court sentenced the defendant to a high end sentence of 198 months on each child molestation charge, 318 months on each rape of a child charge, and 16 months on the witness tampering charge, to run concurrent with each other. CP 160-176. This resulted in a total confinement period of 318 months. *Id.* From entry of this judgment and sentence the defendant filed this timely notice of appeal. RP 210-224.

2. Facts

Mya Ailep met the defendant when Ailep's daughter, L.A., was six months old. RP 605. Soon after meeting, Ailep and the defendant began a romantic relationship and moved in together at the Winthrop Apartments

(Winthrop). RP 240. While living at Winthrop, the defendant and Ailep had three children together. *Id.* Ailep worked as the sole provider for the family while the defendant stayed home and cared for L.A. and the couple's three children. RP 243, 247.

L.A. testified at trial that while the family lived at the Winthrop, the defendant made L.A. perform oral sex on him. RP 205. Around this same time, Ailep became concerned about the relationship between L.A. and the defendant. RP 258. When Ailep spoke to L.A. about her concerns, L.A. said the defendant had touched her in her "private area." *Id.*

Approximately one month after L.A. told Ailep about the sexual abuse, Ailep moved with her children to the West Side Estates apartment complex (West Side Estates). RP 112. The defendant did not live with Ailep and the children for several months after the move. RP 259, 334. Eventually the defendant moved into West Side Estates with Ailep and the children. RP 259. After the defendant moved in, the four children slept together in one room while Ailep and the defendant shared the second bedroom. RP 240-241.

One night after the defendant moved in, he left the room he shared with Ailep and went to the living room. RP 261. When he did not return to the bedroom, Ailep went to check on the defendant. RP 261. She

found the defendant in the children's room standing over L.A. in his boxer shorts with his penis exposed. RP 209-210, 262. Ailep spoke with the defendant about what happened and agreed to give the defendant one more chance. RP 263.

On August 31, 2009, when Ailep returned home from work, L.A. told Ailep the defendant touched her again. RP 264. Ailep immediately took her children and went to her aunt's house. RP 265. Ailep's aunt notified the police. RP 266.

On September 2, 2009, Ailep took L.A. to Saint Peter Hospital Sexual Assault Clinic for a trauma examination. RP 376, 393. Dr. Hall performed a pelvic examination of L.A. and noted an irregularly narrow hymen rim with less hymen tissue than normal for an eight year old child. RP 393. Part of the vaginal tissue appeared "raw," indicating bleeding under the skin. RP 394. Dr. Hall also noticed tissue consistent with healed scars. *Id.* Dr. Hall testified each of these findings were consistent with penetrating trauma. RP 407.

Ailep left underwear and a skirt belonging to L.A. at the clinic for forensic testing. RP 297, 497. Black light testing indicated fluids were present on both articles of clothing. RP 522. At trial, the parties stipulated that semen was found on L.A.'s skirt. RP 532-533. DNA from the semen originated from the defendant. *Id.*

Before trial, L.A. spoke with Kimberly Brune, a child interviewer with the Pierce County Prosecuting Attorney's Office, and detailed the sexual abuse between L.A. and the defendant. RP 421. According to L.A. the abuse occurred approximately between the ages of six to eight. RP 419.

Ailep maintained contact with the defendant after his arrest. RP 268. Not wanting the defendant to end up in jail, Ailep contacted Grant Blinn, with the Pierce County Prosecuting Attorney's Office, and claimed L.A. lied about what happened. RP 272-273. When Mr. Blinn informed Ailep the State would not drop the charges, Ailep agreed to meet with defense investigator Nancy Austring. RP 273-274.

Ailep instructed L.A. to tell Austring that L.A. made up the allegations against the defendant. RP 275. During an interview between Austring and L.A., L.A. followed her mother's instructions and said she made up the allegations about the defendant. RP 558. L.A. also claimed a friend, Topanga, told her what to say to police and medical examiners. RP 566.

After the interview with Austring, Ailep spoke to the defendant over the phone. RP 280. During Ailep's testimony, Ailep and the State relied on a redacted transcript to relay the details of the phone conversation to the jury. RP 280-288. During the phone conversation, the

defendant said L.A. and Ailep needed to continue saying L.A. made up the original allegations. RP 301, 303. The defendant told Ailep that if she did not stick with the recantation, Child Protective Services would take Ailep's children from her. RP 304.

The defendant also told Ailep to "shake this spot," meaning leave Tacoma so she would not have to testify. RP 316, 322, 327. The defendant suggested Ailep do this by taking her children to her mother's house in Florida. RP 324. Before ending the phone call, the defendant asked Ailep, "Can I count on you to help me out? Can I count on the little one to help me out?" RP 323.

The defendant testified on his own behalf. RP 605. The defendant denied having a sexual relationship with L.A. RP 613. He also claimed he did not attempt to alter Ailep's testimony or encourage her to leave Tacoma during the phone conversation between the two. RP 625.

C. ARGUMENT.

1. THE PROSECUTOR MADE PROPER ARGUMENTS DURING CLOSING AND REBUTTAL CLOSING ARGUMENTS.

In order to establish prosecutorial misconduct, a defendant must prove that the prosecutor's conduct was improper and that it prejudiced his right to a fair trial. *State v. Carver*, 122 Wn. App. 300, 306, 93 P.3d 947

(2004) (citing *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003)). A defendant can establish prejudice only if there is a substantial likelihood that the misconduct affected the jury's verdict. *Carver*, 122 Wn. App. at 306.

If defense counsel fails to object to alleged misconduct at the trial court level, any challenge to the prosecutor's conduct is waived on appeal unless the challenged action is "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice incurable by a jury instruction." *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (citing *State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006)).

A prosecutor's comments during closing argument are reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *Id.* In evaluating whether prejudice has occurred, a court must examine the context in which the statements were made, including defense counsel's argument. Therefore, defense counsel's conduct, as well as the prosecutor's response, is relevant. *State v. Ramirez*, 49 Wn. App. 332, 337, 742 P.2d 726 (1987).

Even if improper, a prosecutor's remarks that are in direct response to a defense argument are not grounds for reversal as long as the remarks do not "go beyond what is necessary to respond to the defense and must not bring before the jury matters not in the record, or be so prejudicial that

an instruction cannot cure them.” *State v. Dykstra*, 127 Wn. App. 1, 8, 110 P.3d 758 (2005).

Here, the defendant argues the prosecutor made improper arguments during closing and rebuttal closing argument that: commented on the defendant’s right to remain silent; expressed improper opinions about witness’ credibility; shifted the burden of proof to the defendant; and inflamed the passions and prejudices of the jury. Brief of Appellant at 10. Defense counsel objected to each of the allegedly improper comments below. RP 730, 732, 737, 742, 768, 770, 771, 785, 786.

The trial court sustained the defendant’s objections to each challenged argument the defendant now labels as comments on his right to remain silent and improper opinions about witness credibility. RP 730, 732, 737, 786; Brief of Appellant at 10-18. When sustaining each of these objections, the trial court instructed the jury to disregard the prosecutor’s challenged statements. *Id.* By sustaining the objections and striking the comments from the record, the trial court erased the potential for prejudice to flow from the arguments. *State v. Warren*, 165 Wn.2d 17, 28, 195 P.3d 940 (2008).

In addition to the court’s oral instructions to ignore the stricken comments, the court instructed the jury that:

If evidence was not admitted or was stricken from the record then you are not to consider it in reaching your verdict...if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

CP 101-132, Jury Instruction No. 1. The court further instructed the jury, “[t]he law is contained in my instructions to you. You must disregard any statement, or argument that is not supported by the evidence or the law in my instructions.” *Id.*

Therefore, assuming arguendo, that the stricken arguments were actually improper,¹ the defendant cannot show any resulting prejudice. *See State v. Warren*, 165 Wn.2d 17, 28, 195 P.3d 940 (2008) (Prosecutor’s multiple improper arguments would have warranted reversal had court not stricken the arguments from the record and properly instructed the jury). In the defendant’s case, defense counsel immediately objected to the arguments, the trial court sustained the objections, the arguments were stricken from the record, and the trial court properly instructed the jury as to the law. A jury is presumed to follow a court’s instructions. *State v. Yates*, 161 Wn.2d 714, 763, 168 P.3d 359 (2007). As the defendant has failed to show any prejudice from these arguments, he cannot succeed on a prosecutorial misconduct challenge.

¹ While recognizing the court’s ruling below, the State does not concede that the stricken arguments were actually improper.

In addition to the statements discussed above, the defendant challenges other arguments made by the prosecutor during closing argument. The defendant classifies the remaining arguments into two categories: those that improperly shifted the burden of proof and arguments that improperly inflamed the passions and prejudices of the jury. Brief of Appellant at 18-25.

Once again, the defendant objected to each of the challenged arguments below. RP 742, 768, 770, 771. The trial court overruled objections to the argument in these two categories. The defendant fails to show how these overruled arguments were either improper or prejudicial.

a. The State did not shift the burden to the defendant.

Below, defense counsel objected to several of the prosecutor's arguments discussing "abiding belief." RP 768, 771. On appeal, the defendant argues the prosecutor's statement improperly shifted the burden of proof to the defendant. The trial court overruled each of these objections and stated the jury had the law in their instruction packets. *Id.*

The prosecutor's arguments were not improper. In explaining reasonable doubt to the jury, the prosecutor stated:

I want to start with reasonable doubt. Do you have an abiding belief in the truth of these charges?... You are given an instruction about what the burden of proof is. If after

such consideration you have an abiding belief in the truth of the charge, you are then --

RP 768. At this point, defense counsel objected to the argument. *Id.*

Later in closing argument, the prosecutor stated:

Yes, [L.A.] is not a hundred percent consistent in absolutely everything, but she doesn't need to be, as long as you have an abiding belief that L.A. was sexually molested and raped by her father.

RP 770-771. Once again, defense counsel objected and the trial court overruled the objections. *Id.* The prosecutor's arguments do not shift the burden of proof to the defendant.

In discussing "abiding belief," the prosecutor merely reiterated the court's instructions to the jury. The trial court instructed the jury:

The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt...A reasonable doubt is one for which a reason exists...If...you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 105, Jury Instruction No. 2. The prosecutor's arguments merely mirrored this language and informed the jury that if they had an abiding belief in the truth of the charges, then the charges were proved beyond a reasonable doubt. The defendant fails to show how this argument is improper.

Even if relying on the language in the jury instructions is improper, the argument did not prejudice the defendant. The prosecutor made it

very clear during her closing argument that the State maintained the burden of proving the charges beyond a reasonable doubt. RP 715, 735, 742, 767, 768. In particular, the prosecutor told the jury:

Abiding belief in the truth of the charge beyond a reasonable doubt. It is the State's burden; the defendant has to prove nothing. It is the State's burden to prove each and every element of each and every crime beyond a reasonable doubt. That State has met its burden of proof. We've embraced that burden of proof.

RP 742.

In looking at the challenged arguments in the context of the entire argument, the court, the court's instructions, and the prosecutor made the burden of proof very clear. The jury was therefore not prejudiced by the prosecutor's arguments about "abiding belief." The defendant fails to show any prejudice flowing from these arguments and can therefore not succeed on a prosecutorial misconduct claim as to these challenged statements.

b. The State did not inflame the passions and prejudices of the jury.

It is improper to make comments "calculated to appeal to the jury's passion and prejudice," thereby encouraging a verdict based on facts not in evidence. *State v. Stith*, 71 Wn. App. 14, 18, 856 P.2d 415 (1993). On

appeal, the defendant argues the prosecutor impermissibly appealed to the passions and prejudices of the jury by arguing:

Benjamin Cardozo was a Unites States Supreme Court Justice and he said something that I think is very poignant. He said, justice that is due the accused is due the accuser as well. Justice in this case is justice for [L.A.]...Justice for [L.A.], ladies and gentlemen of the jury, is to find the defendant guilty as charged.

Brief of Appellant at 23; RP 742.

The defendant also claims the prosecutor appealed to the passions and prejudices of the jury by arguing that the defendant self-identified himself as a sex offender. Brief of Appellant at 23; RP 735. Neither of these arguments were improper or prejudicial.

i. Justice for L.A.

In summing up her closing argument, the prosecutor told jurors that “justice in this case is justice for L.A.” RP 742. This is not an improper argument meant to inflame the passions and prejudices of the jury. By making this argument, the prosecutor did not suggest the jury find the defendant guilty based on facts not in evidence. See *Stith*, 71 Wn. App. at 18. Rather the prosecutor summed up her argument by reminding the jurors about the crime committed against the victim and asking the jurors to return a guilty verdict.

The prosecutor's argument in the defendant's case is similar to the argument made in *State v. Brown*, 132 Wn.2d 529, 563, 940 P.2d 546 (1997). In *Brown*, the prosecutor stated during closing argument:

I've sort of lived with Holly over the last two years or so preparing for this case, and perhaps I've personalized her a little bit. Maybe by the time this trial is over, you will know enough about her that maybe you'll personalize her a little bit. The one thing I do hope though is that justice can be done by the end of this trial and we can put Holly Washa to rest.

Id. The Washington Supreme Court found this argument to be neither improper nor prejudicial to the defendant's case. *Id.*

Just like the prosecutor in *Brown*, the prosecutor in the defendant's case merely attempted to bring the jury's attention back to the victim. This does not amount to an improper argument.

ii. The defendant's reference to sex offenders.

The defendant also argues the prosecutor committed misconduct by saying, "[the defendant] talks about seeing [Ailep's] uncle's face in the newspaper and says, 'he's one of them, too.' And what is Mya Ailep's uncle? A sex offender. He's identifying himself with Mya's uncle." RP 785. The trial court sustained the defendant's objection. *Id.* As discussed *supra* at 7-9, by sustaining the defendant's objection below, the trial court negated any potential prejudice from the challenged argument.

However, even if the court had not sustained the objection, the argument was proper. A prosecutor has latitude in closing arguments to draw reasonable inferences from the evidence and to express such inferences to the jury. *State v. Hoffman*, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991). The State presented evidence that during the phone conversation between the defendant and Ailep, the defendant said, "I seen your uncle's face in the newspaper and you know why he was there? He's one of them too." RP 326. Ailep testified her uncle is a sex offender. *Id.*

It is reasonable to infer from the defendant's statements that he was identifying himself with Ailep's sex offender uncle. As this inference goes to consciousness of guilt, it was not necessarily improper for the prosecutor to draw and argue such inferences for the jury.

Given the evidence supporting the prosecutor's argument and the trial court's decision to sustain the defendant's objection below, the defendant cannot show this argument was improper or prejudicial. Looking at the totality of the arguments made by the prosecutor in closing and rebuttal closing argument, the evidence presented in the case, and the trial court's rulings below, the defendant fails to meet his burden to prove prosecutorial misconduct as to any of the challenged arguments.

2. THE TRIAL COURT PROPERLY DENIED THE DEFENDANTS MOTION TO SEVER CHARGES.

A motion to sever joined offenses shall be granted if severing charges would “promote a fair determination of the defendant’s guilt or innocence of each offense.” CrR 4.4(b). A defendant seeking severance has the burden of demonstrating to the court that the prejudice in keeping offenses joined outweighs concern for judicial economy. *State v. Bythrow*, 114 Wn.2d 713, 717, 790 P.2d 154 (1990). If counts are otherwise properly joined, a refusal to sever will be reversed only for a manifest abuse of discretion. *Id.*

When considering whether different counts are properly joined for trial, appellate courts look to (1) the jury’s ability to compartmentalize the evidence; (2) the strength of the State’s evidence on each count; (3) the cross admissibility of evidence between the separate counts; and (4) whether the trial court can successfully instruct the jury to decide each count separately. *State v. MacDonald*, 122 Wn. App, 804, 814-815, 95 P.3d 1248 (2004). As to the last consideration, severance is not necessarily required where evidence of separate counts would not be cross admissible. *State v. Markle*, 118 Wn.2d 424, 439, 823 P.2d 1101 (1992).

On appeal, the defendant argues the trial court erred in denying the defendant’s motion to sever the witness tampering charge from the child

rape and child molestation charges. Brief of Appellant at 26. The trial court did not abuse its discretion in denying the defendant's motion to sever.

First, the State's case was strong for all charges. L.A. testified to the abuse she endured at the defendant's hands. RP 77-97. Further supporting the rape charge, the State presented medical testimony that corroborated L.A.'s version of events and DNA evidence identifying semen found on L.A.'s clothing as originating from the defendant. RP 393-407, 532-533. To support the witness tampering charge, the State presented a redacted transcript of the phone conversation between the defendant and Ailep detailing exactly how the defendant tampered with Ailep.

Second, the defendant was not frustrated in his ability to present separate defenses. The defendant denied culpability in both charges. RP 613, 625. At trial the defendant testified he never touched L.A. in an inappropriate manner. RP 613. The defendant also denied tampering with Ailep and attempted to provide the jury with alternate explanations for the conversation between himself and Ailep. RP 625. By denying all allegations the defendant did not run the risk of embarrassing his defense for any charge.

Furthermore, in regards to the cross admissibility of the evidence, the mere existence of the rape charge was relevant to the witness tampering to show why the tampering occurred. *State v. Sanders*, 66 Wn. App. 878, 885, 833 P.2d 452 (1992). Conversely, evidence from the witness tampering charge was admissible on the rape charge as circumstantial evidence of guilt. *Id.* The defendant's attempt to induce Ailep to absent herself from Pierce County during the trial, and to testify falsely, demonstrates an attempt to avoid trial on the rape charges. This can reasonably be considered as consistent with guilty knowledge. *Id.* The two charges were properly joined for trial.

In addition to the evidentiary factors, the trial court instructed the jury that, "a separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on the other counts." CP 109, Jury Instruction No. 6. By providing this instruction to the jury, the court made it clear the jury was to give each count separate scrutiny.

The defendant's case is analogous to the circumstances in *Sanders*. In that case, the State charged Sanders with three counts of statutory rape and two counts of witness tampering. *Sanders*, 66 Wn. App. at 880. Before trial, Sanders moved to sever the witness tampering charges from the rape charges. *Id.* The trial court denied the motion. *Id.* The court in

Sanders held that given the strength of the evidence supporting the charges, the defendant's denial of culpability for all the charges, and the cross admissibility of the evidence for witness tampering and statutory rape, the trial court did not abuse its discretion in denying the motion to sever. *Id.* at 886.

In the case at hand, the defendant faced similar charges as in *Sanders*, and denied culpability for all the charges. Furthermore, for the same reasons cited in *Sanders*, evidence supporting the defendant's witness tampering charge was admissible in proving the rape charges and vice versa.

Given the cross admissibility of the evidence for the defendant's charges, the strength of the evidence supporting each individual charge, the court's instructions to the jury and the ease in compartmentalizing the evidence, joining the charges did not prejudice the defendant's case. The trial court therefore did not abuse its discretion in denying the defendant's motion to sever.

3. THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION FOR A MISTRIAL.

A trial court's denial of a motion for mistrial is reviewed for an abuse of discretion. *State v. Essex*, 57 Wn. App. 411, 415, 788 P.2d 589 (1990). When the motion is based on the introduction of evidence

precluded from admission by a motion in limine, the test is not whether the remark was deliberate or inadvertent but whether the defendant was denied a fair trial. *State v. Weber*, 99 Wn.2d 158, 165, 659 P.2s 1102 (1983) (citing *State v. Gilcrist*, 91 Wn.2d 603, 612, 590 P.2d 809 (1979)).

The trial court has discretion to take whatever remedial action necessary to neutralize the effect of errors at trial. *State v. Mak*, 105 Wn.2d 692, 718 P.2d 407 (1986). A mistrial should be granted only when a defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly. *State v. McMurray*, 40 Wn. App. 872, 700 P.2d 1203 (1985).

In determining whether a trial irregularity warrants a new trial, the reviewing court considers the seriousness of the irregularity, whether the statement was cumulative of other evidence, and whether the irregularity could have been cured by a jury instruction. *State v. Escalona*, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). The trial court is in the best position to determine prejudice. *State v. Weber*. 99 Wn.2d 158, 166, 659 P.2d 1102 (1983).

On appeal, the defendant argues the trial court abused its discretion in denying the defendant's motion for a mistrial after Ailep inadvertently mentioned a lie detector test. Brief of Appellant at 27. Before trial commenced, the trial court suppressed any reference to the defendant

taking and passing a polygraph test. RP 74. When Ailep mentioned a polygraph test, the defendant immediately objected to the statement and the trial court instructed the prosecutor to ask a new question. RP 273.

Specifically, the parties stated below:

The State: Did Mr. Blinn do anything after you put that into e-mail and left him voice messages?

Ailep: Actually, he said, he told me that [the defendant] could take a lie detector test or something.

Defense Counsel: Your Honor –

The Court: I want you to ask another question.

The State: Sure. Did he agree to dismiss the charges?

Ailep: No.

RP 273.

During a colloquy with the court, defense counsel argued Ailep's statement created an inference that the defendant could have taken a polygraph test but did not. RP 278. The trial court disagreed, stating "No. What she said was Mr. Blinn said something about a lie detector, and that's all, then it stopped. That's all we got. We don't have anything else." *Id.* The trial court subsequently denied the defendant's motion for a mistrial. RP 286.

In addition to instructing the prosecutor to move past the polygraph issue, the court instructed the jury that, "you heard testimony referencing a

polygraph or lie detector test. Such tests are not admissible in the State of Washington because they are not reliable and you are to not consider this testimony for any purpose.” CP 108, Jury Instruction No. 5. This was the same instruction proposed by the defendant. CP 82, Defendant’s Proposed # 1.

The mere fact that a jury is informed of a lie detector test is not necessarily prejudicial if no inference as to the result is raised or if an inference raised as to the result is not prejudicial. *State v. Descoteaux*, 94 Wn.2d 31, 38, 614 P.2d 179 (1980), *overruled on other grounds*, *State v. Danforth*, 97 Wn.2d 255, 643 P.2d 882 (1982). As the trial court noted, in the defendant’s case, Ailep merely stated that when she was attempting to convince the State to drop the charges against the defendant, she could have asked the defendant to take a polygraph test. RP 273.

Ailep’s comment was inadvertent and harmless. No evidence suggested a polygraph test was actually offered to the defendant. As the jury did not know whether or not the defendant had an opportunity to take a polygraph test, they could not infer one way or the other as to the defendant’s willingness to take such a test or his results had he taken one. Given Ailep eventually testified against the defendant, it is reasonable the jury inferred Ailep decided to cooperate with the State and did not pursue the polygraph option. Ailep’s comment was not a direct statement about

the polygraph test actually taken by the defendant. Rather, it was a mere reference to a hypothetical opportunity to take a polygraph test.

Importantly, the trial court immediately moved the testimony to a different topic and instructed the jury to disregard any mention of a polygraph. RP 273. The trial court further instructed the jury in its jury instruction packet, “[d]o not speculate whether the [inadmissible] evidence would have favored one party or the other.” CP 102, Jury Instruction No. 1. The jury is presumed to obey the court’s rulings and disregard remarks that are stricken. *State v. Swan*, 114 Wn.2d 613, 661-62, 790 P.2d 610 (1990).

Given the court’s instructions to the jury, the harmless nature of the comment, and the relatively small amount of exposure the jury received to the comment, the trial court did not abuse its discretion in denying the defendant’s motion for a mistrial.

4. THE TRIAL COURT DID NOT COMMIT CUMULATIVE ERROR.

The doctrine of cumulative error recognizes that sometimes numerous errors, each of which standing alone might have been harmless error, can combine to deny a defendant a fair trial. *See In re Lord*, 123 Wn.2d 296, 868 P.2d 835 (1994). Reversals for cumulative error are reserved for truly egregious circumstances where a defendant is truly

denied a fair trial. This could be because of the enormity of the errors *see e.g., State v. Badda*, 63 Wn.2d 176, 385 P.2d 859 (1963), or because the errors centered around a key issue. *See e.g., State v. Coe*, 101 Wn.2d 772, 684 P.2d 668 (1984). Cumulative errors must also be prejudicial. *State v. Stevens*, 58 Wn. App. 478, 795 P.2d 38 (1990).

In the present case, the defendant identifies no great weight or pattern of small or particular errors committed, nor how they prejudiced him. As it pertains to the alleged prosecutorial misconduct, the trial court cured any potential prejudice below by striking the challenged comments from the record. Those challenged arguments not stricken from the record were not improper and therefore did not prejudice the defense. Additionally, as discussed above the trial court's decision denying the defendant's motion to sever and motion for mistrial did not prejudice the defendant.

Errors that do not prejudice the defendant cannot result in cumulative error as there has been no accumulation of prejudice. Even assuming *arguendo* prejudicial errors occurred below, there was no enormity of errors that denied the defendant a fair trial. No error raised by the defendant on appeal touches on a constitutional right. Furthermore, the State presented substantial evidence of the defendant's guilt.

The jury heard a detailed description of the event from L.A. both during L.A.'s testimony and while watching L.A.'s taped interview. RP 195-238, 424. Ailep testified to catching the defendant sexually assaulting L.A. RP 209-210. In addition to eye witness testimony, the State presented evidence from medical experts detailing the injuries discovered and irregularities noted during L.A.'s pelvic exam. Dr. Hall testified to finding scar tissue and raw tissue, both consistent with penetrating trauma. RP 393-407. Finally, the State presented DNA evidence linking the defendant to sperm found on L.A.'s clothing. RP 532-533.

The State's evidence against the defendant was so compelling the trial judge told the defendant during sentencing, "Let me first start out by telling you that I don't have any doubt with the jury's verdict. I sat, I listened to [L.A.]. I absolutely believed her and it's clear the jury did too." RP 810. Given the strength of the evidence against the defendant, he cannot show how any alleged errors prejudiced him in any way.

The defendant identifies no great weight or pattern of small or particular errors committed, nor how they resulted in an accumulation of prejudice. The trial court did not commit cumulative error.

D. CONCLUSION.

For the reasons discussed above, the State respectfully asks this court to affirm the defendant's judgment and sentence below.

DATED: MAY 3, 2011

MARK LINDQUIST
Pierce County
Prosecuting Attorney

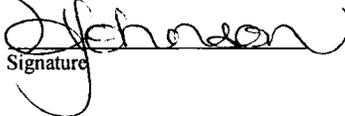


THOMAS ROBERTS
Deputy Prosecuting Attorney
WSB # 17442

Amanda Kunzi
Rule 9

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

5/3/11 
Date Signature

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STATE OF WASHINGTON
BY _____
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APPENDIX “A”

Jury Instruction #2

INSTRUCTION NO. 2

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

APPENDIX “B”

Jury Instruction #5

INSTRUCTION NO. 5

You heard testimony referencing a polygraph or lie detector test. Such tests are not admissible in the State of Washington because they are not reliable and you are to not consider this testimony for any purpose.

APPENDIX “C”

Defendant’s Proposed Jury Instruction #1

INSTRUCTION NO. 1

You heard testimony referencing a polygraph or lie detector test. Such tests are not admissible in the State of Washington because they are not reliable and you are to not consider this testimony for any purpose.