

**NO. 45733-4-II**

**IN THE COURT OF APPEALS OF THE STATE OF  
WASHINGTON,**

**DIVISION II**

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**DAVID LEE NEASE,**

**Appellant.**

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**BRIEF OF RESPONDENT**

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**AMIE MATUSKO  
W.S.B.A # 31375  
Deputy Prosecuting Attorney for  
Respondent**

**Hall of Justice  
312 SW First  
Kelso, WA 98626  
(360) 577-3080**

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- I. STATE'S RESPONSE TO ASSIGNMENTS OF ERROR**
- A. THE STATE DID NOT COMMIT PROSECUTORIAL MISCONDUCT AS THE ARGUMENT TO USE ONE'S HEAD, HEART, AND GUT IS APPROPRIATE UNDER STATE V. CURTISS, 161 WN. APP. 673, 250 P.3D 496 (DIV 2, 2011).**
- B. THE STATE CORRECTLY STATED THE DEFENDANT'S BURDEN OF PROOF FOR HIS AFFIRMATIVE DEFENSE GIVEN THE FACTS PRESENTED TO THE JURY AND DEFENSE COUNSEL'S ARGUMENT.**
- C. THE STATE DID NOT DISPARAGE DEFENSE COUNSEL. SHOULD THE COURT FIND THE STATE DID DISPARAGE DEFENSE COUNSEL, ANY MISSTATEMENT WAS HARMLESS IN LIGHT OF THE ENTIRE ARGUMENT AND TRIAL.**
- D. THE DEFENDANT FAILS TO PROVE INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO OBJECT AS THERE WAS NO MISCONDUCT.**
- E. THE DEFENDANT FAILS TO PROVE INEFFECTIVE ASSISTANCE OF COUNSEL AS THEY CANNOT SHOW THE OUTCOME OF TRIAL WOULD HAVE BEEN DIFFERENT OR THAT A CURATIVE INSTRUCTION WOULD BE INEFFECTIVE.**
- F. THE USE OF SIDEBAR TO CONDUCT PEREMPTORY CHALLENGES DOES NOT AMOUNT TO A CLOSURE OF THE COURTROOM NOR IMPLICATE THE PUBLIC TRIAL RIGHT.**
- G. THE STATE CONCEEDS THE COURT ERRED WHEN IT PROHIBITED THE DEFENDANT FROM POSSESSING OR USING ALCOHOL.**

**H. THE STATE CONCEEDS THE TRIAL COURT ERRO  
IN ALLOWING THE COMMUNITY CORRECTIONS  
OFFICER TO DETERMINE WHEN TO DIRECT  
PLETHYSMOGRAPH TESTS.**

**II. ISSUES PERTAINING TO THE STATE'S RESPONSE TO  
THE ASSIGNMENTS OF ERROR**

- A. Did the State commit prosecutorial misconduct by using a simplified analysis to the jury of abiding belief language to use their head, hearts, and head?
- B. Did the State commit prosecutorial misconduct when it argued under the evidence presented and argument by defense counsel, the defendant could not prove the affirmative defense the victim was awake and hence did not have a reasonable belief she was not physically helpless?
- C. Is it disparagement of defense counsel to question counsel's and defendant's language choice and use the same language defense counsel used of being "upfront" with the jury?
- D. Do the terms "red herring" and "misdirection" used by the State in talking about evidence and argument imply wrong doing and hence disparage defense counsel?
- E. Can the Defendant prove ineffective assistance of counsel for failing to object to alleged misconduct, when there is no evidence of prejudice to the defendant in light of the entire case and strong confession evidence and a curative instruction would eliminate any possible prejudice?
- F. Whether recording peremptory challenges in writing in open court, but not contemporaneously stated on the record is a courtroom closure?
- G. Does the public have a right to hear who made peremptory challenges against particular jurors?
- H. Whether holding the peremptory challenge process in writing in open court is a violation of the public trial right?

### III. STATEMENT OF FACTS

The State charged the defendant with one count of Rape in the second degree and one count of Indecent Liberties under a theory of mental incapacitation or physically helpless. CP 1-2.

At trial, the State presented testimony from Toni Vossen. 3RP 8.<sup>1</sup> Ms. Vossen told the jury she and defendant were friends for the past ten years and their relationship was never anything more than friends. 3RP 9. On April 15, 2012, Vossen was homeless and the defendant offered to give her a ride to his residence where she was to work for the Butlers to pay for a car.<sup>2</sup> 2RP 88-89, 3RP 10-11. It was about 2:30-3:00 am and Defendant picked her up from a motel. 3RP 11-12. Prior to leaving, Vossen put on clean white pants and underwear. 3RP 12.

The drive took at most ten minutes and when Vossen arrived at the residence she felt very sleepy. 3RP 13. This struck Vossen as odd. 3rp 29. She earlier took a drug that should have kept her awake and was worried in the short drive Nease may have slipped a drug into her soda. 3RP 29-30. Defendant told her to lay down on his bed and she did, fully clothed. 3RP 13-14. Upon laying down, Ms. Vossen passed out. 3RP 14. At some point later, Vossen woke to find her pants and underwear were removed and laying on the floor. 3RP 14-15. She saw Nease at the end of the bed and

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<sup>1</sup> The State concurs with the Defendant's numbering of the Report of Proceedings. 1RP – 11/5/13 (jury voir dire); 2RP – 11/5/13 (pretrial/trial) 3RP – one volume consisting of 11/6/13 and 12/9/11.

<sup>2</sup> The Defendant lived in a shop on the same property of the Butlers. 2RP 88-89.

asked him where her clothes were. 3RP 15. Nease responded “I didn’t do anything.” 3RP 15. Vossen couldn’t tell what time it was, but there was a light on in the room. 3RP 15. She put her clothing back on, but was still not able to stay awake. 3RP 16, 26. The next thing she remembered she was awake with a sore neck and under a bunch of sleeping bags. 3RP 16. She stated she felt dizzy and foggy and her body felt numb. 3RP 17. She stayed in bed for a bit to clear her head, then got up to use the bathroom at Russ Butler’s residence. 3RP 17.

At Butler’s home, Vossen spoke to Russell Butler. 3RP 18. She asked him to look at her neck as it was red and irritated. 2RP 91, 93; 3RP 18. She then used the bathroom, and noticed her previously clean white pants were now dirty and there was red on both the inside and outside of the zipper. 3RP 18. She felt in shock and was trying to think about the previous night. 3RP 19. She texted her friend Roy to pick her up. 3RP 20. Later that day, Vossen went to the Family Health Center. 3RP 20-21.

Matthew Oxiles, a nurse practitioner at the Family Health Center, testified he saw Toni Vossen on April 16, 2012 at noon for a complaint of swollen glands and rape. 2RP 75-77. Vossen told him she went someplace to drink and woken up 24 hours after, not remembering anything. 2RP 77. Oxiles described Vossen as appearing anxious and distraught. 2RP 78. Vossen explained to Nurse Oxiles that on the night she was raped she woke up at 10:30 and fell asleep again and she had no clothing on her lower half. 2RP 78. Vossen complained she had a sore neck and it was painful to talk.

2RP 78. Oxiles noted Vossen's voice was raspy and her neck was tender to the touch. 2RP 78-79. Oxiles recommended Vossen go the Emergency Room to be checked for sexually transmitted diseases as he was not trained to provide medical treatment for rape victims. 2RP 79-80, 86.

Vossen testified that she didn't immediately go to the Emergency Room because she was scared. 3RP 21. She ended up at the Women's Shelter three weeks later and then decided to report the rape to the police and a couple weeks later go to the ER. 3RP 21, 31. Deputy Hammer with the Cowlitz County Sheriff's Office contacted Vossen. 3RP 22. She gave him the white pants she wore at Nease's that night. 3RP 23.

Vossen testified that snapshots of the evening started coming back to her. 3RP 23-24. She remembered asking defendant where her pants were and why they were off. 3RP 24. Another snippet was the defendant on top her and then licking her vagina. 3RP 24, 34. She also remembered telling him no and don't. 3RP 24. While he was licking her, she passed back out and next remembered waking up and defendant was on top of her. 3RP 24, 27. She felt pressure on her neck and something on top of her. 3RP 24. She passed back out again. 3RP 24.

Vossen said she was awake at the points she remembered, but not fully awake. 3RP 24. She described it as being aware but not awake. 3RP 28. In her own words, she was groggy, "you can kind of hear what's going on, you open your eyes and you see something but you're not able to be

awake.” 3RP 28. She said she never gave Nease permission to perform oral sex on her or do anything else to her. 3RP 24. She testified Nease has already started performing oral sex on her prior to her waking up. 3RP 34.

Russell Butler testified he had an agreement with Vossen to do work in exchange for a car. 2RP 90. On April 15, 2012, Butler noted Vossen was complaining about neck pain and a rash. 2RP 91, 93. Russell testified he saw Vossen get picked up by friend. 2RP 92. Russell’s timing was questionable as he testified he had no windows or clock in his room and guessed it was about 2:30-3:00 am, although later admitted in his police statement he wrote it was 10:00 am. 2RP 92, 96-97.

Deputy Hammer testified when he met with Toni Vossen on April 22, 2012 she was agitated and nervous. 3RP 39. He collected a 4-5 page written statement from her, the white pants, and showed her a photo montage, containing a photo of Nease. 3RP 39, 41. When Vossen saw defendant’s photo she became very upset, she got out of her chair and went into a corner of the room, shaking and crying. 3RP 40.

Deputy Hammer submitted the pants to the crime laboratory for testing for the presence of male DNA. 3RP 43-44. Prior to obtaining the results, Hammer spoke with the Defendant. 3RP 45. Although Deputy Hammer did not tell Nease why he wanted to meet with him, Nease told him he knew why Hammer wanted to talk. 3RP 45, 48. Nease said he heard from a bartender that Vossen accused him of drugging her and raping her.

3RP 48. Nease told Hammer he and Vossen were long-time friends, with no sexual or romantic relationship. 3RP 48. Nease explained to Hammer on April 15, 2012 he saw Vossen out and about and spoke with her. 3RP 49. He knew she was homeless and wanted to offer her a place to stay. 3RP 49. He picked her up at a motel and she agreed to come back to his place. 3RP 50. It was about a ten minute drive to his house and he said Vossen was intoxicated. 3RP 51. When they got to his place, they watched a little TV and Vossen fell asleep on his bed. 3RP 51. He covered her with a blanket and he laid on the couch. 3RP 51. In the morning he tried to wake her up, she mumbled something and he left to go babysit at the house. 3RP 51.

When he returned at 3:00 pm she was still sleeping. 3RP 51. At 6:00 pm she was awake, distant towards him, and complaining of pain in her neck 3RP 52. When Vossen asked Defendant what he did to her and if he choked her out, Nease responded he didn't do anything to her. 3RP 52. Nease said they played videogames for a few hours and she left. 3RP 52.

After the meeting with Nease, the crime laboratory contacted Hammer and per their request he obtained a reference DNA sample from Nease. 3RP 53. The results from the DNA testing on the white pants came back in September 2012. 3RP 55. Stephanie Winter-Sermeno from the Washington State Patrol Crime Lab testified the red staining on the fly area was presumptive positive for blood and matched the DNA of Nease. 3RP 77-78. She did not find any semen on the pants. 3RP 78-79.

Deputy Hammer met with Nease after finding out the results. 3RP 55-56. He told Nease that Nease's DNA was found on Vossen's pants and it was unlikely it would be there just from sleeping in his bed. 3RP 57-58. Nease then change his story. 3RP 58. Nease said in the morning when he got up to babysit, he climbed into bed with Vossen, removed her panties and performed oral sex on her. 3RP 58. He did not talk to Vossen about having sex prior to this and he did not cuddle or hold her prior to removing her clothing. 3RP 59-60. Nease explained Vossen moaned when he was performing oral sex, she did not protest, and he felt she was enjoying it. 3RP 59, 61. His impression from this was the sex was consensual. 3RP 59. Nease said he was unsure if Vossen was awake or asleep when he removed her pants and underwear. 3RP 59. He was also unsure if she was awake or asleep when he started performing oral sex. 3RP 59-60.

Hammer asked Nease why Nease lied to Hammer previously about having sex with Vossen. 3RP 61. Nease explained, "he had heard from people that Ms. Vossen was accusing him of shooting her up with drugs and then raping her. He felt that if he admitted to the oral sex that meant he was admitting to drugging her and choking her out and raping her." 3RP 61. Hammer clarified for the jury he never asked Nease if Nease drugged Vossen or choked her out, but just told him Vossen accused him of sexual assault. 3RP 61-62. The defendant provided a written statement to Deputy Hammer in line with Hammer's testimony and this was an exhibit at trial. 3RP 66, Ex. 4. On the second page, the Defendant wrote he "misinformed"

Hammer the first time he spoke to him and understood that he should have been completely honest. Ex. 4. The Defendant did not testify at trial. 3RP 87.

In closing, the only issue for the jury was whether Vossen was mentally incapacitated or physically helpless. 3RP 111, 112. The court instructed the jury as to the definition of mental incapacity and physically helpless. CP 21. It also instructed as to the affirmative defense the defendant would have to prove by a preponderance of the evidence that at the time of the acts the defendant reasonably believed Toni Vossen was not mentally incapacitated and/or physically helpless. CP 29.

The State heavily argued Nease's confession in closing. The prosecutor included the defendant's language in his written statement, highlighting use of the word "misinformed," and arguing his language tried to minimize his actions. 3RP 124. Additionally, the prosecutor encouraged the jury to look at the other language of the written statement, keeping in mind the defendant's mindset to minimize his behavior. 3RP 124. The State then addressed the affirmative defense, arguing the defendant's statements that he believed the act was consensual because she moaned and "didn't say no" were unreasonable. 3RP 124-125.

The prosecutor argued the defendant could not prove by a preponderance of the evidence that he at any time reasonably believed Vossen was not physically helpless. 3RP 125. The State argued he could

not show she was awake because Vossen testified she was asleep, he said she was asleep, then he took off her underwear, performed oral sex, and she moaned. 3RP 125. It was unreasonable to believe that she moaned prior to that happening and because the moan was after he started, he could not believe she was awake. 3RP 125. The State concluded this part of the argument saying a reasonable person would not believe she was awake and it was not more probable than not that she was awake than asleep. 3RP 125.

The prosecution also warned the jury not to get caught up in the idea Vossen was drugged. 3RP 125. It called the concern a “red herring” as the State was not required to prove mental incapacitation, but could prove physically helpless, and didn’t have to prove why she was unconscious or asleep, just that she was physically helpless. 3RP 125-126.

In the defendant’s closing, counsel immediately addresses Nease not being “forthright” with Deputy Hammer. 3RP 126. He goes on to say the truth only comes forward “after a little bit of extrication” of the importance of telling the truth and admits defendant was not “upfront” with the deputy. 3RP 127-128. He argues Nease finally sees the virtue of being upfront and it was a mistake to withhold the truth. 3RP 128. Counsel then says the mistake is consistent with either innocence or guilt. 3RP 128.

Defense counsel then argues the State did not prove Vossen was incapable of giving consent and the Defendant could reasonably believe she was capable of giving consent. 3RP 128-129. Counsel highlighted Vossen

did not obtain a blood test to determine if she was drugged. 3RP 130. Counsel also argued Deputy Hammer did not try to corroborate Nease's statement about playing video games with Vossen by asking Vossen. 3RP 133-134.

Counsel focuses on the State's burden and encourages the jury not to be misled by the affirmative defense. 3RP 138. Counsel then tells the jury they should start the discussion about where there is doubt and then "unless you can hear that person out and ultimate think about it and shake your head and look at them and say to that man or woman you just are not be reasonable," ...or when no one has a doubt to express, they cannot convict. 3RP 139.

Shortly after defense counsel makes the argument about reasonable doubt, the State addresses the reasonable doubt jury instruction in rebuttal. 3RP 140. The State argues the jury should consult three things – their head, heart and gut to determine if they have an abiding belief in the truth of the charge. 3RP 140.

The State then talks about the defendant's language and defense counsel's argument concerning the defendant's lie to Deputy Hammer. 3RP 141. The State points out counsel argued defendant was misguided or mistaken when he lied to Hammer. 3RP 141. However, a mistake does not mean the same thing as a lie as a lie is not accidental or inadvertent. 3RP 141. A lie is an intentional act. 3RP 141. The prosecutor argues the

defendant's intentional lie to Hammer should tell them a lot about the defendant and defense counsel's argument. 3RP 141. If the defendant is telling the jury that his lie was a mistake, they shouldn't believe what he says because the defendant is not being upfront. 3RP 141. Additionally by using the term "misinformed", the defendant is minimizing his actions, and what else did he minimize. 3RP 141-142. Defense counsel objected as he felt there was a comment impugning his credibility as far as representation. 3RP 149-150. Defense counsel admitted the comment was not that bad, but was tripped up by the use of the pronoun "he." 3RP 150. He purposefully did not seek a curative instruction, but looked to see if the court heard anything inappropriate and if so seek an admonition. 3RP 150. The court did not find there was any comment on credibility. 3RP 150. The court pointed out there wasn't a specific objection made by defense counsel, nor a request for a curative instruction. 3RP 150. The State then proceeded to argue about the defendant's minimizing language. 3RP 142.

The State also re-addressed the concern raised in defense closing whether Vossen was drugged. 3RP 144. The State reminded the jury they did not have to prove Vossen was drugged, and to not get off-track. 3 RP 144. The State warns the jury not to get caught up in counsel's argument about a deficient police investigation. 3RP 145. The State argued it would be meaningless to follow up on the defendant's statement about playing games with Vossen, after he just confessed to raping her. 3RP 145-146. The jury had Vossen's answer to the question because of her testimony and

pointing out the supposed irrelevant piece was a misdirection to take the focus off the confession. 3RP 145-146.

The jury found the defendant guilty of both counts. CP 32-33. The court sentenced Nease to a condition he submit to a plethysmograph as directed by his corrections officer or treatment provider. CP 54. The court also sentenced the defendant not to “use/possess/consume alcohol.” CP 59.

## **VI. ARGUMENT**

### **A. THE STATE DID NOT COMMIT PROSECUTORIAL MISCONDUCT.**

The Defendant argues the State committed prosecutorial misconduct in closing argument by encouraging the jury to reach a verdict by improper means, misstating the burden of proof, and denigrating defense counsel. The State’s closing argument was appropriate under existing law, correctly stated the law as to the affirmative defense and applied the facts to the law, and did not denigrate counsel. Defendant argues if he fails to meet his burden of proof for prosecutorial misconduct, defense counsel was ineffective for failing to object and seek a curative instruction. Defendant fails to meet the burden of proof for ineffective assistance of counsel as the State did not commit misconduct and should the court find any error, the defendant cannot show deficient conduct nor prejudice.

**i. Standard of Review.**

When a defendant alleges prosecutorial misconduct, it is the defendant's burden to establish the impropriety of the comments as well as their prejudicial effect. State v. Anderson, 153 Wn. App. 417, 427, 220 P.3d 1273 (Div 2, 2009); State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (Div 2, 2005) citing State v. Dhaliwal, 150 Wn. 2d 559, 578, 79 P.3d 432 (2003). The court reviews alleged improper 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." Anderson, at 427, citing State v. Russell, 125 Wn. 2d 24, 85-86, 882 P.2d 747 (1994). If the statements are improper and an objection was made, the court considers whether there was a substantial likelihood the statements affected the jury. Id. If the defendant failed to object or request a curative instruction, the defendant waives the issue, unless the comment was so flagrant or ill-intentioned that an instruction could not have cured the prejudice. Id. Moreover, the failure to object to a prosecutor's statement "suggests that it was of little moment in the trial." State v. Curtiss, 161 Wn. App. 673, 699, 250 P.3d 496 (Div 2, 2011) citing State v. Rogers, 70 Wn. App. 626, 631, 855 P.2d 294 (Div 2, 1993) *rev. denied* 123 Wn. 2d 1004, 868 P.2d 871 (1994).

**ii. The prosecutor’s statement to the jury to use their “head, heart, and gut” to determine an abiding belief was appropriate argument.**

The Defendant argues the state urged the jury to use other than rational thought in coming to a verdict when the State put a question to the jury about what it means to have an abiding belief. Def. Brf at 9.

The State is afforded great latitude in making arguments to the jury and reasonable inferences from the evidence. State v. Anderson, 153 Wn. App. 417, 427, 220 P.3d 1273 (Div 2, 2009) citing State v. Gregory, 158 Wn. 2d 759, 860, 147 P.3d 1201 (2006).

In the context of the entire trial and argument, the state presented the abiding belief argument in response to defense counsel’s argument on reasonable doubt. 3RP 138-139. Defense counsel asked the jurors to confront each other and ask the question whether the juror, not the doubt, was reasonable. 3RP 138-139. The State told the jury this interpretation was incorrect as it was not contained in the instructions. 3RP 140. The State asked the jury what it meant to have an abiding belief and did not merely suggest using either their heart or gut, but to use every single faculty at hand, head, heart, gut to determine an abiding belief. 3RP 140. The State then linked this argument directly to the reasonable doubt instruction and held it up in opposition to the defendant’s interpretation of reasonable doubt. 3PR 140-141.

If one were to look up the definition of “belief” available to most jurors, Merriam Webster’s dictionary defines “belief” as

- 1) a state or habit of mind in which trust or confidence is placed in some person or thing
- 2) something believed; *especially* : a tenet or body of tenets held by a group
- 3) conviction of the truth of some statement or the reality of some being or phenomenon especially when based on examination of evidence

MERRIAM WEBSTER DICTIONARY, *belief* (visited September 30, 2014) <http://www.merriam-webster.com/dictionary/belief>.

Dictionary.com defines belief as:

1. something believed; an opinion or conviction: *a belief that the earth is flat.*
2. confidence in the truth or existence of something not immediately susceptible to rigorous proof: *a statement unworthy of belief.*
3. confidence; faith; trust: *a child's belief in his parents.*
4. a religious tenet or tenets; religious creed or faith: *the Christian belief.*

DICTIONARY.COM, *belief* (visited September 30, 2013)

<http://dictionary.reference.com/browse/belief?s=t>. The State is not saying belief should not be based upon evidence and reason, however, when approaching a jury with the common understanding of belief as defined in terms of conviction, confidence, and faith, it is not misconduct to encourage a jury to use all their faculties to reach such confidence. In reality, the State did not lighten its burden of proof.

The Defendant has cited a number of case from other jurisdictions in his argument. However, there is a case from Washington directly addressing when a prosecutor urges a jury to use their heart and gut to determine guilt. In State v. Curtiss, 161 Wn. App. 673, 699, 250 P.3d 496 (Div 2, 2011), the prosecution charged Curtiss with first degree murder.

The Defendant alleged the State committed multiple acts of prosecutorial misconduct during closing argument when it analogized the burden of proof to putting a puzzle together and urged the jury to trust its heart and gut and to search for and speak the truth. Id. at 698.<sup>3</sup> The Defendant did not object to either argument. Id.

The first argument by the State analogized the reasonable doubt standard to putting together a puzzle. Id. at 700. The State told the jury that at some point when putting a puzzle together, even if there are missing pieces, a person could say with some certainty, beyond a reasonable doubt what the puzzle shows. Id. The court found the analogy used did not shift the burden of proof, but described the relationship between circumstantial evidence, direct evidence, and the burden of proof.<sup>4</sup> Additionally, the court found the arguments were not flagrant or ill intentioned, and the defendant failed to show prejudice in light of the jury instruction that lawyers' statements are not evidence and to disregard any not supported by the evidence or the law. Id.

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<sup>3</sup> The Washington Supreme Court subsequently determined telling the jury its job is to "speak the truth," misstates the burden of proof. State v. Lindsay, 180 Wn.2d 423, 437, 326 P.3d 125 (2014).

<sup>4</sup> The court in Lindsay agreed with the Curtiss distinction concerning puzzle arguments. A general reference to being able to discern the subject of a puzzle with some missing pieces is proper argument. However, when a puzzle analogy quantifies the standard of proof it is improper. State v. Lindsay, 180 Wn.2d 423, 437, 326 P.3d 125 (2014).

The second argument challenged by Curtiss is remarkably similar to that challenged by Nease. During closing argument, the Prosecutor in Curtiss stated:

This trial is a search for the truth and a search for justice, and the evidence in this case is overwhelming. [Curtiss] is guilty of Murder in the First Degree as an accomplice. Consider all the evidence as a whole. Do you know in your gut—do you know in your heart that Renee Curtiss is guilty as an accomplice to murder? The answer is yes.

We are asking you to return a verdict that you know is just, a verdict of guilty to Murder in the First Degree.

Id. at 701.

Division Two held while the State's gut and heart arguments were arguably overly simplistic, they were not misconduct. Id. at 702. The court rejected the defendant's argument that appealing to the heart and gut were emotional appeals. Id. The court again pointed out the jury instructions told the jury to reach a decision "based on the facts proved to you and the law given to you, not on sympathy, prejudice, or personal preference." Id. The court assumed the jury followed the instructions. Id. Lastly, Curtiss could not show prejudice stemming from the argument and failed to show that the alleged errors to which she did not object could not be cured with an instruction. Id.

In the present case, the State used nearly the same language as that in Curtiss. Additionally, the court instructed the jury in exactly the same way as Curtiss. CP 138. Under the facts of Curtiss, the State did not commit flagrant or ill-intentioned misconduct. Additionally given the court's

instruction that as jurors they must not let their emotions overcome their rational thought process and not decide the case on sympathy, prejudice, or personal preferences, it is highly unlikely there was a substantial likelihood the statements affected the jury. CP 12; State v. Anderson, 153 Wn. App. 417, 427, 220 P.3d 1273 (Div 2, 2009). Since the courts of appeals presume the jury follows the instructions, the defendant cannot show prejudice. Curtiss, 161 Wn. App. 673, 702, State v. Kirkman, 159 Wn. 2d 918, 928, 937, 155 P.3d 125 (2007). Lastly Nease, just like *Curtiss*, fails to show that any potential errors could not be cured with an additional instruction. *Id.* Even when a prosecutor's remarks can potentially confuse the jury about its role and the burden of proof, remarks are not per se incurable simply because they touch upon a defendant's constitutional rights. State v. Emery, 174 Wn. 2d 741, 763, 278 P.3d 653 (2012). A reviewing court should look at what would likely have happened if the defendant had timely objected. *Id.* The criterion is, "has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial." *Id.* at 762. In the present instant, the Defendant fails to show how a curative instruction and/or reiteration of the burden of proof would not cure any possible prejudice, nor does he prove a feeling of prejudice.

**iii. The State correctly stated the Defendant's burden of proof under his affirmative defense given the facts presented to the jury and defense counsel's argument.**

The Defendant argues the State committed prosecutorial misconduct by misstating the defendant's burden to prove his affirmative defense for

the charges of Rape and Indecent Liberties. The State's argument was appropriate given the facts presented to the jury. The State did not add an element to the defense, but rather used common sense to explain to a jury the opposite of being unconscious is awake.

Under both charges of Rape in the second degree and indecent liberties, the State had to prove Toni Vossen was incapable of consent by reason of being physically helpless or mentally incapacitated. RCW 9A.44.050(1)(b) (2014), 9A.44.100(1)(b) (2014). It is a defense to both charges that the Defendant must prove by a preponderance of the evidence, that at the time of the offense the defendant reasonably believed that the victim was not mentally incapacitated or physically helpless. RCW 9A.44.030(1) (2014); Cf. State v. Mohamed, 175 Wn. App. 45, 301 P.3d 504 (Div 1, 2013). The jury was instructed correctly as to this defense. CP 29.

Keeping in mind a court reviews a claim for prosecutorial misconduct in the context of the issues in the case, the total argument, the evidence addressed in the argument and the jury instructions, the Defendant cannot meet his burden to show the comment was flagrant and ill-intentioned misconduct that no curative jury instruction could have corrected. State v. Curtiss, 161 Wn. App. 673 (Div 2, 1999) citing to State v. Gentry, 12 Wn. 2d 570, 640, 888 P.2d 1105, cert denied, 516 U.S. 843, 116 S.Ct 131, 133 L.Ed.2d 79 (1995), State v. Dhaliwal, 150 Wn. 2d 559, 578, 79 P.3d 432 (2003). Moreover, "[d]uring closing argument, a

prosecutor has ‘wide latitude’ in drawing and expressing reasonable inference from the evidence.” Id. citing State v. Hoffman, 116 Wn. 2d 51, 94-95, 804 P.2d 577 (1991). Finally, closing argument cannot be likened to instructional error[,] [b]ecause jurors are directed to disregard any argument that is not supported by the law and the court’s instructions....” State v. Emery, 174 Wn. 2d 741, 759, 278 P.3d 653 (2012).

In the present case, the prosecutor argued the defendant could not prove by a preponderance of the evidence that he at any time reasonably believed Vossen was not physically helpless. 3RP 125. The State argued he could not show she was awake because Vossen testified she was asleep, he said she was asleep, then he took off her underwear, performed oral sex, and she moaned. It was unreasonable to believe that she moaned prior to the oral sex and because the moan was after he started, therefore he could not believe she was awake. 3RP 125. The State concluded this part of the argument saying a reasonable person would not believe she was awake and it was not more probable than not that she was awake than asleep. 3RP 125.

The prosecution also warned the jury not to get caught up in the idea Vossen was drugged. 3RP 125. It called the concern a “red herring” as the State was not required to prove mental incapacitation, but could prove physically helpless, and didn’t have to prove why she was unconscious or asleep, just that she was physically helpless. 3RP 125-126.

When taken as a whole argument and considering the evidence presented, the comments about being awake are in reference to whether the defendant could reasonably believe Vossen was asleep. The prosecutor referred to specific testimony and pointed to facts from the defendant's oral and written statements to argue Vossen was asleep at the time of the offense and Nease therefore could not reasonably believe she was awake. The Court should look at the statements in context. The State made one reference to the defendant's reasonable belief prior to the statement Defendant alleges is misconduct and two references to reasonable belief after. 3RP 125.

The argument that Nease had to prove Vossen was awake, while maybe simplistic, was reasonable in light of Nease's confession that Vossen was asleep at the time he removed her clothing and started oral sex. The definition of physically helpless includes when a person is unconscious, hence when they are asleep. The antonym of asleep is awake. The entirety of the State's argument was Nease's reasonable belief must be based upon the actions occurring at the time. Because Nease could not show Vossen was awake at the time of the touching or sex, his statement she moaned didn't make it reasonable for him to believe she was awake. The Defendant's argument wants the court to take the statement and isolate it from the rest of the argument. This is not what the case law states. Moreover, the jury was correctly instructed as to the defense and jurors are deemed to follow the instructions. CP 29; State v. Stein, 144 Wn. 2d 236, 247, 27 P.3d 184 (2001).

Lastly, Defense counsel did not object, imparting confidence the argument was of no important and seemed appropriate at the time. State v. Curtiss, 161 Wn. App. 673, 699, 250 P.3d 496 (Div 2, 2011). Without objection, the Defendant must show the misconduct was flagrant and ill-intentioned and could not be cured with an instruction. State v. Anderson, 153 Wn. App. 417, 427, 220 P.3d 1273 (Div 2, 2009). This is not proven in light of the entire argument and the State making at least three references that it is the defendant's reasonable belief in issue. 3RP 125. Additionally, defendant cannot show that a curative instruction as to the burden of proof would not have corrected any possible prejudice.

**iv. The State did not disparage defense counsel and there was no misconduct.**

The Defendant alleges the State disparaged defense counsel when it argued the defendant and defense counsel's use of the term mistake was improper and inconsistent with the facts. The Defendant made a non-specific objection, and the trial court did not find there was any misconduct.

The trial court's ruling on an objection for prosecutorial misconduct is reviewed for abuse of discretion. State v. Russell, 125 Wn. 2d 24, 86, 882 P.2d 747 (1994). A prosecutor is not allowed to impugn the role or integrity of defense counsel. State v. Lindsay, 180 Wn. 2d 423, 431-32, 326 P.3d 125 (2014). Courts have ruled in the past that unprofessional exchanges alone will not rise to the level of prosecutorial misconduct. Id. at 433. However, comments that a "defense counsel is paid to twist words

of a witness” (State v. Negrete, 72 Wn. App. 62, 67, 863 P.2d 137 (1993)), that a prosecutor’s role is to serve justice in opposition to defense counsel’s duty to a client (State v. Gonzales, 111 Wn. App. 276, 283, 45 P.3d 205 (2002)); defense counsel is paid to lie and distort the facts (Bruno v. Rushen, 721 F.2d 1193, 1195 (9<sup>th</sup> Cir 1983)); calling defense counsel’s argument a “crook” or accusing them of “sleight of hand,” are all examples of impugning (State v. Lindsay, 180 Wn. 2d 423, 433-34; State v. Thorgerson, 172 Wn. 2d 438, 451-52, 258 P.3d 43 (2011)). It appears from the cases that comments that either accuse defense counsel of lying for money or wrongful deception are improper. However, inflammatory remarks do not rise to the level of prosecutorial misconduct. In State v. Russell, 125 Wn. 2d 24, 92, 882 P.2d 747 (1994), the court found statements that defense counsel “stooped to new lows” while inflammatory, were a fair response supported by specific evidence and were provoked by defense counsel. “Remarks by a prosecutor, even if improper, are not grounds for reversal if they were invited or provoked by defense counsel and in reply to their acts or statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective.” Id.

In the present case, Defendant alleges the State accused defense counsel of trying to “hoodwink” the jury when it said both the defendant and defense counsel’s argument was not upfront when it characterized the defendant’s lie as a mistake. Def. Brf at 17. Again, the State’s argument

must be looked at as a whole, in light of all the argument, the evidence and jury instructions.

In the closing argument, the State argued the defendant used minimizing language when he put in his written statement that he “misinformed” the deputy. 3RP 124-25. In defense closing, counsel acknowledged the problem in his case was the defendant’s lie to the police, he couched it as the following:

His second statement to Deputy Hammer was after a little bit of extrication, shall we say, about exactly the importance of telling the truth, he finally did come out with the truth,...It’s as consistent with somebody being innocent as it is with them being guilty that they would feel absolute fear about the police getting corroboration from their own statement about something that they had been hearing rumors about around town....Mr. Nease finally saw the virtue of being **upfront** with law enforcement if you’re going to talk with them....his not having been **upfront** with the deputy the first time that he talked to them, which was a mistake, is just as consistent with the mistake that an innocent person who’s scared to death of rumors going around would make as with a guilty person.”

3RP 127-128.

It was only after defense counsel used the term “upfront,” did the state use the term. The State also turned the very language defense counsel used to describe the defendant’s behavior against the defendant and counsel’s argument. The Defendant argues the State clearly disparaged defense counsel, but the record does not support the accusation the State was referring to defense counsel not being upfront. Even defense counsel later admitted he was unsure because of the pronoun usage and didn’t think anything that bad. 3RP 150. Defense counsel did not make a specific

objection or ask for a curative instruction. 3RP 150. Given the ambiguity and defense counsel's own statements about the defendant's not being "upfront" with the police, the argument was reasonable and not misconduct. Moreover, the Defendant cannot prove the trial court abused its discretion.

The Defendant also argues the state impugned defense counsel when it referred to "red herrings" and "misdirection." There is nothing about the State's use of either term that implies wrongful deception or lying. There is no case cited by the Defendant to indicate pointing out evidence that doesn't deserve focus is wrong. Additionally there is nothing improper in saying the defendant's argument focuses on the wrong evidence or theory. Even from Defendant's own definition of "red herring" there is nothing that implies dishonesty, but merely distraction from the real issue. Def. Brf. at 18. This is also true for the term misdirection.

It is also important to note the State's use of the term red herring comes prior to any defense argument. The State asks the jury not to focus on the issue of drug use as the State is not required to show Vossen was drugged. 3RP 125. This is an appropriate use of the term in explaining the State is not required to prove Vossen was drugged. The State never uses it to question the defense cross-examination of Vossen as intimated in the Defendant's briefing. Def. Brf at 18. The State does later in rebuttal tell the jury not to get caught up in the issue of drugging as the State doesn't have to prove it. 3RP 144. It asked the jury not to follow the defense argument because the State doesn't have to prove the evidence of drugging.

3RP 144. The State did then address the credibility issues the defense raised about Vossen and the reliability of her drugging fear when she didn't go to the hospital. 3RP 144. It is clear from the argument the State distinguishes whether they have to prove Vossen was drugged as an element of mentally incapacitated or physically helpless, versus credibility.

It is unreasonable to couch the terms "red herring" and misdirection as prosecutorial misconduct. The Defendant's asks the court to hamstring the State from calling into question any argument of defense that focuses on unnecessary evidence or testimony.

Lastly, the defendant cannot show prejudice from the arguments and that an instruction could not cure such possible prejudice. In State v. Warren, 165 Wn. 2d 17, 29-30, 195 P.3d 940 (2008), the Supreme Court held comments by a prosecutor that defense counsel was twisting words to their own benefit and saying there were mischaracterizations in defense argument and "these served as an example of what people go through with defense attorneys," while improper, were not flagrant nor ill-intentioned that no instruction could have cured and not prejudicial. In the present case there was strong evidence the defendant committed the crime based upon the victim's testimony, Nease's confession and lying to the police. With this in mind the State's comments, in light of Warren, did not rise to the level where defendant can show prejudice.

v. **Counsel was not ineffective for failing to object to the alleged misconduct and the defendant cannot prove any deficiency prejudiced the defendant.**

The test for determining effective counsel is whether: “[a]fter considering the entire record, can it be said that the accused was afforded an effective representation and a fair and impartial trial?” *Id.* citing *State v. Myers*, 86 Wn. 2d 419, 424, 545 P.2d 538 (1976). “This test places a weighty burden on the defendant to prove two things: first, considering the entire record, that he was denied effective representation, and second, that he was prejudiced thereby.” *Id.* at 263. The first prong of this two-part test requires the defendant to show “that his . . . lawyer failed to exercise the customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances.” *State v. Visitacion*, 55 Wn. App. 166, 173, 776 P.2d 986, 990 (Div 1, 1989) citing *State v. Sardinia*, 42 Wn. App. 533, 539, 713 P.2d 122 (Div 2, 1986). The second prong requires the defendant to show “that there is a reasonable probability that, but for the counsel’s errors, the result of the proceeding would have been different.” *Id.* A court begins any ineffective analysis with the strong presumption that counsel was effective. *State v. Curtiss*, 161 Wn. App. 673, 702, 250 P.3d 496 (Div 2, 2011).

To establish ineffective assistance for failure to object, Nease must show (1) an absence of legitimate strategic or tactical reasons supporting the challenged conduct; (2) that an objection to the evidence would likely have been sustained; and (3) that the result of the trial would have been

different had the evidence not been admitted. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (Div 2, 1998), citing State v. McFarland, 127 Wn. 2d 322, 336 and 337 n. 4, 899 P.2d 1251 (1995), and State v. Hendrickson, 129 Wn. 2d 61, 80, 917 P.2d 563 (1996).

The Defendant begins his argument with the presumption prosecutorial misconduct occurred and hence counsel was deficient. Def. Brf at 27-28. If the appellate court disagrees, the defendant fails to meet his burden and the court need go no further in its analysis.

Should the court determine counsel was deficient because there was misconduct, the defendant fails to show the result of trial would have been different. The Defendant's opinion of the evidence was the State had less than overwhelming evidence. Def. Brf at 28. However, this does not account for the defendant's confession to Deputy Hammer that he removed Vossen's underwear and pants and started oral sex with her before she moaned. This admission in combination with Vossen's testimony clearly supported a finding of guilt as to both counts and does not lead to the conclusion the outcome would be different.

**B. THE USE OF SIDEBAR TO CONDUCT PEREMPTORY CHALLENGES DOES NOT AMOUNT TO A CLOSURE OF THE COURTROOM AND DOES NOT IMPLICATE THE PUBLIC TRIAL RIGHT.**

The Defendant alleges that conducting peremptory challenges in open court at a sidebar constitutes a closure of the courtroom. However, the practice complained of did not amount to a closure of the courtroom, factually or legally. As such, this Court should reject any claim of error.

**i. Standard of Review**

“A public trial claim may be raised for the first time on appeal and does not require an objection at trial to preserve the error.” State v. Njonge, No. 86072-6, slip op at 7-9 (Wa Sup. Ct September 25, 2014). In evaluating a claim of closure a defendant must first show a closure occurred. Id. at 9 citing to State v. Jasper, 174 Wn. 2d 96, 121-24, 271 P.3d 876 (2012). If a defendant proves a closure occurred, the court must then determine whether the proceeding implicates the public trial right. State v. Smith, No. 85809-8, slip op at 6 (Wa Sup Ct, September 25, 2014). “Not every interaction between the court, counsel, and defendants will implicate the right to a public trial, or constitute a closure if closed to the public.” State v. Wilson, 174 Wn. App. 328, 335, 298 P.3d 148 (Div 2, 2013) citing State v. Sublett, 176 Wn. 2d 58, 71, 292 P.3d 715 (2012). Additionally, a defendant does not, “have a right to a public hearing on purely ministerial or legal issues that do not require the resolution of disputed facts.” State v. Sadler, 147 Wn. App. 97, 114, 193 P.3d 1108 (Div 2, 2008). Upon the inquiry of whether there is a public trial right, a court should ask, “[d]oes the proceeding fall within a specific category of trial proceedings that our Supreme Court has already established implicates the public trial right? Lastly, if the proceeding does not fall within such a specific category, does the proceeding satisfy Sublett’s ‘experience and logic’ test?” Id.

The experience and logic test asks 1) “whether the place and process have historically been open to the press and general public;” and 2)

“whether public access plays a significant positive role in the functioning of the particular process in question.” State v. Smith, No. 85809-08, slip op at 6 (Wa Sup Ct., September 25, 2014).

**ii. The defendant fails to show there was a closure of the courtroom.**

The Defendant makes a general implication there was a courtroom closure and private dealings because the transcript indicates there was a “pause in the proceedings.” 1RP 150. The Defendant fails to prove the courtroom was closed during this process or that anything happened in the courtroom that was recordable or happening. The video recording of the event shows the parties standing at the clerk’s bench and writing on the struck juror list. Appendix A at 2:08-2:15 pm. There is no talking or voices to record. The Defendant finds fault with the trial court for failing to put on the record in open court which party had removed which potential jurors as part of the process. Def. Brf at 29. However, notes that this information would be readily available in paper in the form of the struck juror list. CP 80.

In State v. Njonge, Njonge contended the courtroom was closed because not all spectators could watch the proceedings due to a lack of space. The record indicated the court was doing the best it could to accommodate the seating restrictions, it did not exclude anyone from watching, and there was nothing showing spectators were excluded entirely or there were any objections. Njonge, slip op at 2-3, 10. The Supreme Court held a partial or incomplete record will not sustain or support the

finding of a closure. Id. at 9-11. The court requires a better factual record to find a violation of this magnitude. Id. at 12.

In State v. Koss, No. 85306-1, slip op at 9 (Wa. Sup Ct, September 25, 2014), the Court rejected Koss' allegation there was a discussion of a jury question in chambers because Koss had nothing in the record to document this occurred. See also State v. Slert, No. 87844-7, slip op at 11-12 (Wa. Sup. Ct, September 25, 2014). The court was very clear the parties could supplement the record to "make a record" if they wished, but Koss did not and it was his burden. Id. at 10, 12.

In the present case, Nease cannot support a claim of closure. There is nothing in the record supporting this claim and the State's supplemental video evidence shows the parties conducted the peremptory challenges at the clerk's desk in open court. Appendix A at 2:08-2:15 pm. When there is insufficient evidence to support the claim, a court analyzes "the case as a matter of courtroom operations where the trial court judge possesses broad discretion." Id. at 12. Nease does not cite to any instance to indicate the actions of the parties in writing for the purposes of peremptory challenges is an abuse of discretion.

**iii. Engaging in a Sidebar Conference Does Not Constitute a "Closure" of the Courtroom.**

The State disputes the appellant's claim that the courtroom was closed by the attorneys conducting peremptory challenges in written form and in silence. Instead, this was merely a form of sidebar conference, while

the actual courtroom remained open to the public. If there was no closure of the courtroom, the cases cited by the appellant have no application.

In State v. Gregory, 158 Wn. 2d 759, 147 P.3d 1201 (2006), the Supreme Court noted there was a distinction between full closures of a courtroom, which require an analysis under State v. Bone-Club, 128 Wn.2d 254, 900 P.2d 235 (1995), and acts by the trial court that do not amount to a full closure. The court held that because the action at issue, the exclusion of one person from the courtroom, was not a full closure, Bone-Club did not apply and the defendant's right to a public trial was not violated. Gregory, 158 Wn.2d at 816.

Additionally, a closure of the courtroom occurs when the public does not have access to the room in which the proceedings occur. State v. Wise, 176 Wn. 2d 1, 12, 288 P.3d 1113 (2012). It does not matter if the court removes the proceedings to another location or the public is removed from the room, it is the removal that makes it a closure. Id., State v. Leyle, 158 Wn. App. 474, 483, 242 P.3d 921 (Div 2, 2010).

The Defendant does not cite to any persuasive authority for the proposition that actions occurring inside the open courtroom in full view of the public, but without running commentary constitute closures. As such, the defendant fails to meet his burden that a closure occurred.

**iv. Sidebar conferences do not implicate the public trial right.**

The Supreme Court just last week determined under the experience and logic test that sidebar conferences do not implicate the public trial right. State v. Smith, No 85809-8 (Wa. Sup Ct, September 25, 2014). In the Smith case, sidebar conferences took place in a hallway outside of the courtroom, but were recorded and part of the record available to the public. Id. at 3-4. The court held under the experience test sidebar conferences have historically occurred outside the view of the public. Id. at 7. Additionally since the “public trial right is among other things, a prophylactic measure allowing the public to observe the process and weigh the defendant’s guilt or innocence,” the public access to sidebars would not aid the public in assessing a defendant’s guilt. Id. at 11. Lastly, since the sidebars were recorded, the public had the ability to discover what happened. Id.

The Smith Court also examined sidebars under the logic prong. The Court found it difficult to conceive any public interest served by ensuring that the public is privy to a sidebar. Id. at 12. Additionally that nothing positive was served “by allowing the public to intrude on the huddle at the bench in real time.” Id.

The Supreme Court has also held that the pre-voir-dire in-chambers discussion of jurors’ answers and dismissal of prospective jurors did not violate the public trial right. State v. Slert, No. 87844-7 (Wa. Sup. Ct., September 25, 2014). The court pointed out that the mere label of

proceedings as voir dire is not determinative of a public trial right. Id. at 7. The court could not find any examples to suggest examination of jury questionnaires is traditionally performed before the public. Id. at 8. Moreover, held that public access would have little role, either positive or negative, on review of questionnaires. Id. at 10. The court discussed that open public review could have a devastating effect to a right to a fair trial. Id.

Divisions Two and Three have directly decided the issue at hand. In State v. Love, 176 Wn. App. 911, 913-14, 309 P3d 1209 (Div 3, 2013), the trial judge invited the attorneys to the bench to discuss challenges for cause at the end of voir dire. Defense counsel struck two jurors for cause and the parties assented to the trial judge's suggestion to two alternates. Id. At that point, the transcript indicated "(Peremptory challenge process is being conducted.\*)" and the record of jurors showed who made peremptory challenges. Id. at 914. However, there was no other record of the proceedings for peremptory challenges. Id.

Division Three used the experience and logic test outlined in Sublett. Division Three assumed a courtroom closure, leaving the issue of whether such sidebars done in open court are closures for another day. Id. at 916-17. Instead, Division Three found there was no authority suggesting that challenges for cause are normally made in public and challenges typically present solely a legal issue. Id. at 917-18. Moreover, peremptory challenges were not historically made public. Id. at 919. Division Three

went back to the 1976 case of State v. Thomas, 16 Wn. App 1, 553 P.2d 1357 (Div 1, 1976), for the position that peremptory challenges are often conducted in private and there was no prejudice to the defendant. Id. at 918, State v. Thomas, 16 Wn. App 1, 13, 553 P.2d 1357 (Div 1, 1976) (there is no right to peremptory challenges and the number and manner of exercise rests exclusively with the legislature and the courts, subject only to the requirement of a fair and impartial jury). As such, the history confirmed there was little evidence of the public exercise of challenges and some evidence they are conducted privately. Id.

Mr. Love's challenge also failed under the logic test. Division Three found the purpose of the public trial right "to ensure a fair trial, remind the officers of the court of the importance of their functions and to encourage witnesses to come forward and discourage perjury" were not served by public challenges. Id. at 919-920. The court found peremptory challenges presented no question of public oversight and for-cause challenged presented issues of law for the judge to decide. Id. The court relied on the presence of a written record to satisfy the public interest and ruled the record need not be in public earshot. The court ultimately found Mr. Love did not meet his burden and the sidebar did not close the courtroom. Id.

Division Two adopted the logic of Division Three in State v. Dunn, 180 Wn. App. 570, 575, 321 P.3d 1283 (Div 2, 2014) and State v. Webb, No. 43179-3, slip op at 4 (Div 2, August 26, 2014).

In the present case, the parties went to the clerk's bench to do the peremptory challenges. Any basis for challenge was elicited in open court and was recorded. IRP 14-149. The challenges were recorded on the Juror struck list and any decision by the court was a legal one. Under the authority of State v. Love, the defendant fails under both the experience and the logic prong. These challenges are not historically ones done in open court, and public challenges do not assist in the public trial right.

Moreover, in the present case the process adopted by the trial court for peremptory challenges served the values inherent in the constitutional provision for the open administration of justice. The record of peremptory challenges is important open administration of justice to assess whether there is a pattern of race-based challenges. See Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); State v. Sadler, 147 Wn.App. 97, 114-118, 193 P.3d 1108 (Div 2, 2008). Peremptory challenges are generally left to the discretion of the attorney making the challenge, unless there is a pattern of racial motivation to the challenges. State v. Vreen, 99 Wn. App. 662, 669, 994 P.2d 905 (Div 3, 2000). When a Batson challenge is made, a court must make a factual determination if there is a racially motivated basis for such challenge. Because there is a factual determination, courts have held that Batson hearings must be open to the public. Sadler, 147 Wn.App. 97, 115. However, when there is no Batson challenge, and when a record is made about how the peremptory challenges were exercised, the openness required for a public trial is met.

Additionally, the present case is analogous to both Smith and Slert. Counsel does not point to a case or instance where the peremptory challenge stage of voir dire is historically open to the public and how it is necessary to not only allow the public access, but to put written information in oral form at the time of occurrence.<sup>5</sup> Under the rationale of Slert, this could actually have a negative effect on the trial, as typically parties fear jurors finding out they were struck by a particular party as it could affect how the seated jurors view the parties. Moreover, there is no reason to believe the public hearing who struck jurors would have an effect on the public's decision as to guilt or innocence and allowing them into the huddle at the bench is not reasonable.

Because sidebar conferences and particularly peremptory challenges are not a public trial right, there was no violation.

**v. Bone-Club analysis**

The Defendant argues the conviction must be reversed because the court did not justify a closure with a Bone-Club analysis. Much like the analysis in State v. Smith, No. 85809-8, slip op at 14 (Wa. Sup. Ct.,

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<sup>5</sup> The Defendant cites to State v. Wilson, 174 Wn.App 326, 298 P.3d 148 (2013) for the proposition that exercise of peremptory challenges is covered by the public trial right. Def. Brf at 33. The Court in Wilson actually pointed out Wilson could not provide a case to show the excusal of two sick jurors prior to voir dire was historically open to the public. Wilson. at 342. It cited to State v. Slert, which has now been decided by the Washington Supreme Court as not within the public trial right. State v. Slert, No. 87844-7 (Wa. Sup. Ct., September 25, 2014).

September 25, 2014), the court need not conduct this analysis as sidebar conference do not implicate the public trial right.

**C. THE STATE CONCEDES THE COURT ERRED WHEN IT PROHIBITED THE DEFENDANT FROM POSSESSING OR USING ALCOHOL.**

The Defendant argues and the State concedes the trial court exceeded its authority when it prohibited the Defendant from possessing or using alcohol as there was no evidence alcohol was involved in the offense and it is not a crime related prohibition. The Court did have the authority to prohibit the defendant from consuming alcohol under RCW 9.94A.703(3)(e), and State v. Jones, 118 Wn. App. 199, 207, 76 P.3d 258 (Div 2, 2003).

The Court should remand the matter back to the trial court to strike the condition only as it reads to possession or use of alcohol.

**D. THE TRIAL COURT ERRED WHEN IT AUTHORIZED THE COMMUNITY CORRECTIONS OFFICER TO ORDER PLETHYSMOGRAPH TESTING.**

The Defendant argues and the State concedes the trial court exceeded its authority to authorize the community corrections officer to order plethysmograph testing as such testing is only reasonable when it requested by a treatment provider. State v. Riles, 135 Wn. 2d 326, 344-45, 957 P.2d 655 (1998). The Court should remand the matter back to the trial court to strike the condition only as it reads the Community Custody officer can authorize the testing.

**V. CONCLUSION**

For the foregoing reasons and arguments the court should affirm the conviction. However, the court should remand the matter back to the trial court for amendment to the conditions of community custody as addressed above.

Respectfully submitted this 3rd day of October, 2014.

SUSAN I. BAUR  
Prosecuting Attorney

By:

  
AMIEL L. MATUSKO/WSBA # 31375  
Deputy Prosecuting Attorney  
Representing Respondent

**CERTIFICATE OF SERVICE**

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

Mr. Eric J. Nielsen  
Attorney at Law  
Nielsen Broman & Koch, PLLC  
1908 E. Madison Street  
Seattle, WA 98122-2842  
nielsene@nwattorney.net  
sloanej@nwattorney.net  
grannisc@nwattorney.net

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on October 3<sup>rd</sup>, 2014.

Michelle Sasser  
Michelle Sasser

# COWLITZ COUNTY PROSECUTOR

**October 03, 2014 - 11:45 AM**

## Transmittal Letter

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Court of Appeals Case Number: 45733-4

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A copy of this document has been emailed to the following addresses:

[sloanej@nwattorney.net](mailto:sloanej@nwattorney.net)  
[grannisc@nwattorney.net](mailto:grannisc@nwattorney.net)  
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