

NO. 49116-8-II

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

STATE OF WASHINGTON, Respondent

v.

CHRISTOPHER NICHOLAS JACKIN, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.15-1-01319-0

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. Jackin had the benefit of effective assistance of counsel.**
- II. The prosecutor did not commit misconduct.**
- III. The trial court properly admitted evidence of Ms. Kirkland's prior inconsistent statements.**
- IV. Trial counsel was not ineffective.**
- V. The trial court properly denied giving WPIC 6.41.**
- VI. Cumulative error did not deny Jackin of a fair trial.**
- VII. The State does not intend to seek a cost bill.**

STATEMENT OF THE CASE

Christopher Nicholas Jackin (hereafter 'Jackin') was charged by information with indecent liberties without forcible compulsion for an incident that occurred on July 11, 2015. CP 2. The case proceeded to a jury trial on May 23 and 24, 2016 wherein Jackin was convicted as charged. CP 84. The trial court ordered a presentence investigation and then sentenced Jackin to a standard range sentence on June 22, 2016. CP 85, 108-34. This appeal follows.

At trial, the evidence showed that Jackin put his hand down his fiancée's sister's pants and rubbed her vagina while she was asleep. The victim, J.M., testified that she was 29 years old and lived in Battle Ground, Washington. RP 178. She has an older sister, Acacia Kirkland, who dated

and lived with Jackin. RP 179-80. Ms. Kirkland and Jackin had four children together and lived in Spokane, Washington. RP 180.

In July 2015, Ms. Kirkland, Jackin, and their children arrived at J.M.'s house in Battle Ground. RP 181. They had pre-arranged that J.M. would take care of Ms. Kirkland's and Jackin's children while Ms. Kirkland and Jackin went to Denver, Colorado for a vacation. RP 181. Ms. Kirkland, Jackin, and their children arrived at J.M.'s house in the afternoon, and the two families had a barbeque and spent time together. RP 183. All the adults consumed some alcohol, and the family ate ribs and other typical barbeque side dishes. RP 184-89.

That evening, J.M. fell asleep in the rocking chair in the living room. RP 192. At the time she fell asleep her son, I., was in the living room watching TV. RP 192. J.M. was awakened by the feeling of someone's hand up her shorts touching and rubbing her clitoris. RP 195. J.M. fully woke up and saw Jackin next to her. RP 195. J.M. asked Jackin what he was doing and he told her he "was just wanting to get a piece." RP 196. Jackin then apologized. RP 196. J.M. then stood up and scolded Jackin, asking him how he could do that, what was he doing, etc. RP 199. J.M. then woke her sister, Ms. Kirkland, up and told her what happened. RP 200. Ms. Kirkland started crying. RP 200. J.M. then went into the back bedroom to tell her fiancé, Daniel Nelson, what had happened. RP 201.

The four adults then congregated in the living room where a heated discussion occurred between Mr. Nelson and Jackin, and it was decided that Jackin would sleep the rest of the night in his car. RP 204-05. During the conversation Jackin repeatedly apologized, but then also attempted to justify his behavior by saying that they did not understand his and Ms. Kirkland's relationship. RP 205.

Later in the morning, J.M. drove Jackin and Ms. Kirkland to the airport where they flew to Denver, Colorado for their pre-scheduled vacation. RP 208. In the next couple of days, J.M. and her fiancé, Mr. Nelson, discussed calling the police and J.M. reluctantly agreed to do so. RP 208-09. A sheriff's deputy investigated, and J.M. agreed to let the deputy know when she was picking Jackin and Ms. Kirkland up from the airport so that the deputy could meet them at her home to arrest Jackin. RP 209-10. The police did meet them at J.M.'s house and arrested Jackin. RP 210.

Since the arrest, J.M.'s relationship with her sister, Ms. Kirkland has suffered. RP 211. They used to be close, but now J.M. cannot often get her sister on the phone so they do not generally speak anymore. RP 211. The impact on her life and family from reporting this matter to police has been negative. RP 212.

Ms. Kirkland testified at trial that she lives in Spokane with Jackin and that they have four children together. RP 427-28. She and her family visited her sister, J.M. in July 2015, and the night they arrived Ms. Kirkland fell asleep on the couch in the living room. RP 433. Her sister was on the recliner near the couch. RP 433. At some point in the night, J.M. woke Ms. Kirkland up and was yelling and screaming, obviously very upset. RP 434-35. J.M. was angry at Jackin, saying he had touched her on her vagina. RP 435. Ms. Kirkland was upset and cried. RP 436. After a conversation, Ms. Kirkland suggested that Jackin go sleep in their car for the rest of the night. RP 436. Ms. Kirkland testified that while J.M. was angrily yelling at Jackin that Jackin remained quiet and did not speak. RP 437.

Ms. Kirkland testified that while in Denver with Jackin, they did not have much time to talk about the incident that had happened at her sister's house. RP 440. Upon their return to J.M.'s house at the end of their Denver trip, police arrested Jackin. RP 441. Ms. Kirkland testified this upset her. RP 441. Ms. Kirkland further testified that she spoke to the investigating deputy and answered his questions. RP 441. Defense counsel objected to the prosecutor's questioning on this subject on hearsay grounds. RP 442. The trial court overruled the objection and Ms. Kirkland testified that she did not recall telling the deputy that Jackin told her on

vacation that he had indeed touched J.M. RP 442. Ms. Kirkland also testified that Jackin did not tell her any such thing while on their vacation in Denver. RP 442. In fact, Ms. Kirkland's testimony was that Jackin had only ever told her he did not touch J.M. that way. RP 442-43.

Ms. Kirkland further testified that she and Jackin are still together, still live together in Spokane, and traveled to court in Clark County together for the trial. RP 444.

Deputy Brown testified that he interviewed Ms. Kirkland after Jackin was arrested and that during his interview with her she told him that Jackin had told her he had touched J.M. RP 457-58.

Daniel Nelson also testified at trial. RP 259. He is J.M.'s fiancé and they share a child together. RP 259. Mr. Nelson recalled being awoken in the middle of the night on the night that Jackin and Ms. Kirkland came to stay at their house in July 2015. RP 267. J.M. woke Mr. Nelson up and was acting unusual; she appeared uneasy and upset. RP 268. Mr. Nelson was very concerned because of how she was acting. RP 268. J.M. then told him that Jackin had touched her while she was asleep and she had woken up to him touching her inappropriately. RP 268. Mr. Nelson was upset and angry upon hearing this. RP 270. He went to speak to Jackin with J.M. RP 272. J.M. "chewed [Jackin] out" for a bit until Jackin responded. RP 273. Jackin said something to the effect of: "I don't

really want to hear this from you because you don't understand what's happened in our relationship, so – you just don't – you don't get it.” RP 273. J.M. again told Jackin how bad what he did was, and at some point during this conversation Jackin left and went to sleep in his car. RP 273-74. Later that morning Jackin and Ms. Kirkland left for their vacation in Denver. RP 274.

While Jackin and Ms. Kirkland were in California, Mr. Nelson urged J.M. to call the police. RP 275. J.M. was reluctant to do so because she did not want to ruin her sister's birthday vacation. RP 275.

Jackin testified in his defense. RP 299. He indicated that on the night he and his family were at J.M.'s house in July 2015, that he was asleep in the living room as were Ms. Kirkland and J.M. RP 308-09. Jackin woke up to get a glass of water from the kitchen when J.M. woke up and asked him what he was doing. RP 309-10. Jackin told her he got a glass of water, at which point J.M. got up from the chair she was sleeping in and woke Ms. Kirkland up and started yelling about Jackin touching her. RP 311-13. Jackin testified that J.M. and Mr. Nelson screamed at Jackin about this allegation, and it was decided Jackin would sleep in the car for the rest of the night. RP 316. At no point during his testimony did Jackin indicate he had any physical contact with J.M. and he denied touching her on her vagina. RP 299-338.

Prior to closing arguments, Jackin requested the trial court give the jury an instruction pursuant to WPIC 6.41 instructing the jury to give as much weight to the alleged out-of-court statements of the defendant as they saw fit. RP RP 253; CP 42. The trial court found the instruction was not appropriate pursuant to *State v. Smith*, 36 Wn.App. 133, 672 P.2d 759 (1983) and did not give the jury this proposed instruction. RP 253-55.

The jury found Jackin guilty of indecent liberties without forcible compulsion as charged in the information. RP 384; CP 84.

ARGUMENT

I. Jackin had the benefit of effective assistance of counsel.

Jackin alleges his trial counsel was ineffective for failing to request a lesser included instruction on Assault in the Fourth Degree. In order for Jackin to sustain his burden of showing he did not receive effective assistance of counsel, Jackin must show that the trial court would have given the instruction had it been requested, and that his attorney's decision not to request said instruction could not have been a legitimate trial strategy. Jackin has not shown that a lesser included instruction would have been appropriate in his case, nor that the trial court could have properly given such an instruction to the jury. Furthermore, even if it would have been proper for the trial court to give such an instruction, trial

counsel's decision not to request such an instruction was a legitimate trial strategy. Jackin's claim of ineffective assistance of counsel fails.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right of a criminal defendant to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). In *Strickland*, the United States Supreme Court set forth the prevailing standard under the Sixth Amendment for reversal of criminal convictions based on ineffective assistance of counsel. *Id.* Under *Strickland*, ineffective assistance is a two-pronged inquiry:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable.

Thomas, 109 Wn.2d at 225-26 (quoting *Strickland*, 466 U.S. at 687); *see also State v. Cienfuegos*, 144 Wn.2d 222, 226, 25 P.3d 1011 (2011) (stating Washington had adopted the *Strickland* test to determine whether counsel was ineffective).

Under this standard, trial counsel's performance is deficient if it falls "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The threshold for the deficient performance prong is high, given the deference afforded to decisions of defense counsel in the course of representation. To prevail on an ineffective assistance claim, a defendant alleging ineffective assistance must overcome "a strong presumption that counsel's performance was reasonable." *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Accordingly, the defendant bears the burden of establishing deficient performance. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A defense attorney's performance is not deficient if his conduct can be characterized as legitimate trial strategy or tactics. *Kylo*, 166 Wn.2d at 863; *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) (holding that it is not ineffective assistance of counsel if the actions complained of go to the theory of the case or trial tactics) (citing *State v. Renfro*, 96 Wn.2d 902, 909, 639 P.2d 737 (1982)).

A defendant can rebut the presumption of reasonable performance of defense counsel by demonstrating that "there is no conceivable legitimate tactic explaining counsel's performance." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999). Not all strategies or tactics on the part of

defense counsel are immune from attack. “The relevant question is not whether counsel's choices were strategic, but whether they were reasonable.” *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable).

To satisfy the second prong of the *Strickland* test, the prejudice prong, the defendant must establish, within reasonable probability, that “but for counsel's deficient performance, the outcome of the proceedings would have been different.” *Kyllo*, 166 Wn.2d at 862. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694; *Thomas*, 109 Wn.2d at 266; *Garrett*, 124 Wn.2d at 519. In determining whether the defendant has been prejudiced, the reviewing court should presume that the judge or jury acted according to the law. *Strickland*, 466 U.S. at 694-95. The reviewing court should also exclude the possibility that the judge or jury acted arbitrarily, with whimsy, caprice or nullified, or anything of the like. *Id.*

Also, in making a determination on whether defense counsel was ineffective, the reviewing court must attempt to eliminate the “distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from the counsel’s perspective at the time.” *Id.* at 689. The reviewing courts should be highly

deferential to trial counsel's decisions. *State v. Michael*, 160 Wn. App. 522, 526, 247 P.3d 842 (2011). A strategic or tactical decision is not a basis for finding error in counsel's performance *Strickland*, 466 U.S. at 689-91.

In certain instances, it may be appropriate for a trial court to instruct the jury on a lesser included offense. A defendant is entitled to an instruction on a lesser included offense if (1) each of the elements of the lesser offense are elements of the offense charged; and (2) the evidence supports an inference that the lesser crime was committed. *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). If it is possible to commit the greater offense without committing the lesser offense, then the latter is not a lesser included crime. *State v. Bishop*, 90 Wn.2d 185, 191, 580 P.2d 259 (1978) (citing *State v. Roybal*, 82 Wn.2d 577, 583, 512 P.2d 718 (1973)).

In *State v. Bluford*, 195 Wn.App. 570, 379 P.3d 163 (2016), *reversed on other grounds*, ___ Wn.2d ___, ___ P.3d ___, 2017 WL 1788744 (May 4, 2017), Division I of this Court found that assault in the fourth degree is a lesser included offense of indecent liberties. *Bluford*, 195 Wn.App. at 585. Thus, based on this precedent, the first prong of the *Workman* test is satisfied in the case at bar. As the State had charged Jackin with indecent liberties, an assault in the fourth degree lesser

instruction could have been appropriate if the second, factual, prong of the *Workman* test was also met.

In order to instruct the jury on a lesser included offense, the trial court must be satisfied that, factually, the evidence affirmatively supports that the lesser crime was committed. To satisfy this second prong of the lesser included *Workman* rule, “the evidence must affirmatively establish the defendant’s theory of the case—it is not enough that the jury might disbelieve the evidence pointing to guilt.” *State v. Fernandez-Medina*, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000) (citing *State v. Fowler*, 114 Wn.2d 59, 67, 785 P.2d 808 (1990), *overruled on other grounds by State v. Blair*, 117 Wn.2d 479, 816 P.2d 718 (1991)). While the legal prong of the *Workman* rule is reviewed *de novo*, an appellate court will “review a trial court’s decision regarding the second prong of the *Workman* rule for abuse of discretion.” *State v. Henderson*, 182 Wn.2d 734, 743, 344 P.3d 1207 (2015) (citing *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1992)).

“[I]f there is no testimony tending to prove the commission of any of the lesser crimes charged, the court is not required to submit such lesser crimes to the jury, and commits no error in its refusal so to do.” *McPhail*, 39 Wn. at 206. Of course, “[i]t would be error to give an instruction not supported by the evidence.” *State v. Berlin*, 133 Wn.2d 541, 947 P.2d 700

(1997) (citing *State v. Benn*, 120 Wn.2d 631, 654, 845 P.2d 289 (1993)). Moreover, to instruct the jury on a lesser included offense requires a “factual showing that is more particularized than that required for other jury instructions. Specifically ... the evidence must raise an inference that only the lesser included/inferior degree offense was committed to the exclusion of the charged offense.” *Id.* at 455 (citing as examples, *State v. Bowerman*, 115 Wn.2d 794, 805, 802 P.2d 116 (1990) (lesser included offense instruction); *State v. Peterson* 133 Wn.2d 885, 889, 948 P.2d 381 (1997) (inferior offense instruction)). “[T]here must be some rational basis for the lesser charge; otherwise it is merely a device for [a] defendant to invoke the mercy-dispensing prerogative of the jury, and that is not by itself a permissible basis to require a lesser included instruction.” *State v. Condon*, 182 Wn.2d 307, 367, 343 P.3d 357 (2015) (Gonzalez, J., dissenting) (quoting *United States v. Sinclair*, 144 U.S.App.D.C. 13, 444 F.2d 888, 890 (1971)).

Further, a lesser included instruction is not appropriate when the evidence presented by the State supports a conviction for the greater offense, and the defense is general denial. There must be some evidence presented which “affirmatively establishes the defendant’s theory on the lesser included offense before an instruction will be given.” *State v. Fowler*, 114 Wn.2d 59, 67, 785 P.2d 808 (1990). For example, in *State v.*

Charles, 126 Wn.2d 353, 894 P.2d 558 (1995), the victim testified that the defendant forced her to the ground, she struggled, and he forced her to engage in sexual intercourse. *Charles*, 126 Wn.2d at 355. The evidence presented by the defendant was that the act of sexual intercourse was consensual. *Id.* at 356. Thus, in order to convict the defendant of the proposed lesser included offense, the jury would have had to disbelieve the victim's testimony that the sexual intercourse was forced, and disbelieve the defendant's version of events that the sexual intercourse was consensual. *Id.* As there was no affirmative evidence that the intercourse was forced yet nonconsensual, the trial court properly refused to give an instruction on the proposed lesser offense. *Id.*

Likewise in Jackin's case, the evidence did not support giving a lesser included instruction. The evidence only supported either an acquittal or a conviction of indecent liberties without forcible compulsion. Thus giving an instruction on assault in the fourth degree would have been improper. At trial, Jackin testified that he walked to the kitchen to get a glass of water and as he walked back into the living room J.M. woke up and asked him what he was doing. RP 310. Jackin testified he did not touch J.M. on her vagina. RP 328. At no point in Jackin's testimony did he claim to have touched J.M. in another way; his testimony indicated he was a distance away from her when she woke up and asked him what he was

doing and then left the room to tell her sister he had touched her. RP 297-338. The victim testified that she was asleep in a rocking chair and then woke up with the defendant's hand inside her shorts. RP 195. As his hand was inside her shorts, the defendant was rubbing her clitoris back and forth with his hand and told her that he "want[ed] to get a piece." RP 195-96. With the victim's testimony about how the event occurred and Jackin's outright denial of any event occurring, there was no positive evidence presented at trial that would have supported a finding that Jackin had committed an assault in the fourth degree to the exclusion of indecent liberties. It would have been improper for the trial court to instruct the jury on the lesser included instruction. Therefore, Jackin cannot show he was prejudiced by his attorney's decision not to request this lesser included instruction as the trial court would have refused to give this improper instruction.

Even if this Court finds there was positive evidence to support the conclusion that an assault in the fourth degree was committed to the exclusion of indecent liberties, Jackin cannot show that his attorney's decision not to request such a lesser instruction was not a legitimate trial strategy. Whether to request a lesser included instruction is a tactical decision, and this Court grants considerable deference to trial counsel's decisions in this type of matter. *State v. Grier*, 171 Wn.2d 17, 39, 246 P.3d

1260 (2011). To sustain this claim, Jackin must show there is no conceivable legitimate trial strategy which motivated his attorney to choose to forego requesting a lesser included instruction. *Id.*

An “all or nothing” trial strategy can be a reasonable and legitimate strategy at trial. When the inclusion of a lesser included instruction will weaken the defendant’s claim of innocence, an “all or nothing” strategy is legitimate. *State v. Hassan*, 151 Wn.App. 209, 221, 211 P.3d 441 (2009). Even when an “all or nothing” strategy is risky, it is the defense’s prerogative to take the risk and pursue an “all or nothing” strategy. “Thus....a court should not second-guess [an all or nothing] course of action, even where, by the court’s analysis, the level of risk is excessive and a more conservative approach would be more prudent.” *Grier*, 171 Wn.2d at 39. And, as always, an appellate court needs to be mindful not to use hindsight in considering the reasonableness of counsel’s decision to forego a lesser included instruction. *Id.* Further, simply because a trial strategy proves unsuccessful does not mean counsel was ineffective for having pursued said strategy. *See Strickland*, 466 U.S. at 689.

In applying *Strickland*, *supra* to the facts of this case, it is clear that Jackin has failed to meet his burden to show that counsel was ineffective. Even if a criminal defendant meets the standards to request a

lesser included instruction, the defense may choose to forego such an instruction.

Jackin's testimony and defense at trial was that no event occurred, no touching occurred, and no sexual touching occurred. If Jackin had asked for a lesser included instruction his attorney would have been in the awkward position of arguing nothing happened, but then also arguing that *if* any touching happened it was not for sexual gratification and thus only warranted a conviction of assault in the fourth degree. This type of argument lacks credibility with a jury and is likely to lose any trust with the jury the attorney has garnered throughout the trial. It is a conceivable and perfectly reasonable trial tactic to choose to remain consistent with a defense and a message to the jury that *no touching occurred*. Inserting a caveat that if any touching occurred it wasn't so bad as to warrant the greater offense is in conflict with the trial strategy Jackin advanced at trial. His attorney's performance and choice not to request a lesser included instruction was a reasonable tactical decision. Presuming, as we must, that defense counsel was reasonable, and knowing that an "all or nothing" approach is conceivably a legitimate strategy to prevail at trial, Jackin's claim of ineffective assistance of counsel should be rejected.

II. The prosecutor did not commit misconduct.

Jackin alleges the prosecutor committed misconduct during closing argument by appealing to the passion and prejudices of the jury and by mischaracterizing evidence. Jackin failed to preserve his claims of prosecutorial misconduct and has not shown that any of these instances of alleged misconduct are so flagrant and ill-intentioned that they denied him a fair trial. Jackin's claim fails.

A defendant has a significant burden when arguing that prosecutorial misconduct requires reversal of his convictions. *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011). To prevail on a claim of prosecutorial misconduct, a defendant must establish that the prosecutor's complained of conduct was "both improper and prejudicial in the context of the entire record and the circumstances at trial." *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008) (quoting *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003) (citing *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997))). To prove prejudice, the defendant must show that there was a substantial likelihood that the misconduct affected the verdict. *Magers*, 164 Wn.2d 191 (quoting *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). A defendant must object at the time of the alleged improper remarks or conduct. A defendant who fails to object waives the error unless the remark is "so

flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). When reviewing a claim of prosecutorial misconduct, the court should review the statements in the context of the entire case. *Id.*

In the context of closing arguments, a prosecuting attorney has “wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence.” *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (citing *State v. Gregory*, 158 Wn.2d, 759, 860, 147 P.3d 1201 (2006)). The purported improper comments should be reviewed in the context of the entire argument. *Id.* The court should review a prosecutor’s comments during closing in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003); *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998).

In arguing the law, a prosecutor is confined to correctly characterizing the law stated in the court’s instructions. *State v. Burton*, 165 Wn. App. 866, 885, 269 P.3d 337 (2012) (citing *State v. Estill*, 80 Wn.2d 196, 199-200, 492 P.2d 1037 (1972)). It can be misconduct for a prosecutor to misstate the court’s instruction on the law, to tell a jury to

acquit you must find the State's witnesses are lying, or that they must have a reason not to convict, or to equate proof beyond a reasonable doubt to everyday decision-making. *Id* (citing to *State v. Davenport*, 100 Wn.2d 757, 675 P.2d 1213 (1984), *State v. Fleming*, 83 Wn. App. 209, 921 P.2d 1076 (1996), *State v. Anderson*, 153 Wn. App. 417, 220 P.3d 1273 (2009), and *State v. Warren*, 165 Wn.2d 17, 195 P.3d 940 (2008)). Contextual consideration of the prosecutor's statements is important. *Burton*, 165 Wn. App. at 885.

Improper argument does not require reversal unless the error was prejudicial to the defendant. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). The court in *Davenport* stated:

Only those errors [that] may have affected the outcome of the trial are prejudicial. Errors that deny a defendant a fair trial are per se prejudicial. To determine whether the trial was fair, the court should look to the trial irregularity and determine whether it may have influenced the jury. In doing so, the court should consider whether the irregularity could be cured by instructing the jury to disregard the remark. Therefore, in examining the entire record, the question to be resolved is whether there is a substantial likelihood that the prosecutor's misconduct affected the jury verdict, thereby denying the defendant a fair trial.

Davenport, 100 Wn.2d at 762-63.

In Jackin's case, the prosecutor did not improperly appeal to the passions and prejudices of the jury, nor did he mischaracterize the evidence. Jackin argues the prosecutor improperly inflamed the passions

of the jury by stating in his closing argument that the defendant may have “had plans to do something worse, we don’t know, but what he did was bad enough.” Opening Br. of Appellant, p. 19 (quoting RP 378). The prosecutor’s statement was a permissible conclusion from the evidence and supported the State’s theory of the case that Jackin took advantage of a woman, asleep, and only stopped his sexual advances on her when she woke up and confronted him for what he was doing. It is a reasonable inference that the prosecutor properly argued that no one knows what else would have happened had the victim not woken up when she did. The prosecutor’s argument did not improperly encourage the jury to convict based on emotion or any other improper basis, nor did this argument mischaracterize the evidence.

Jackin also fails to show that an instruction to the jury to disregard the prosecutor’s statement would not have cured any potential prejudice from his statements. As Jackin did not object at trial to the prosecutor’s arguments, he must show on appeal that the argument was so flagrant and ill-intentioned that no instruction to the jury could have cured the prejudice that resulted from the argument. When an error can be obviated by a jury instruction, that error is waived by failing to request such an instruction. *State v. Russell*, 33 Wn.App. 579, 588, 657 P.2d 338 (1983). The prosecutor’s fleeting reference to what else might have occurred was

simply an observation and reasonable inference from the evidence. The prosecutor never went further and argued that the jury should convict him because they all knew what he would have done had the victim not woken up, or any other such potentially improper statements. Had the trial court instructed the jury to disregard the statements or given another curative instruction, the jury would have followed this instruction and what he claims as improper statements would have been neutralized. As Jackin did not give the trial court the opportunity to cure the potential error he has waived this claim of error now.

Jackin failed to show the prosecutor made any improper statements or arguments, and the statements he complains of were so fleeting and minor that any potential improper statement did not affect the jury verdict. Jackin was not denied a fair trial. His claim of prosecutorial misconduct fails.

III. The trial court properly admitted evidence of Ms. Kirkland's prior inconsistent statements

Jackin alleges the trial court improperly allowed the state to present a witness it called primarily for the purpose of impeachment. Specifically, Jackin alleges that the State should not have been permitted to ask Ms. Kirkland whether she had told police that Jackin had confessed to her and whether that confession truly happened.

Initially, Jackin has failed to preserve this issue for appeal. Objections to the admission of evidence will not be considered for the first time on appeal unless based upon the same ground asserted at trial. *State v. Hayes*, 37 WnApp. 786, 790, 683 P.2d 237, review denied, 102 Wn.2d 1008 (1984). Jackin objected to the prosecutor asking Ms. Kirkland if she remembered telling the investigating deputy that the defendant had admitted touching J.M. on hearsay grounds. Jackin now argues the trial court improperly admitted this evidence as substantive evidence and that the statements were not proper inconsistent statements. Jackin did not raise any of these issues at the trial court and thus cannot raise them now for the first time on appeal. This Court should deny review of his allegation.

However, if this Court does review this issue on the merits, the State urges this Court to find the evidence was properly admitted. Jackin alleges that Ms. Kirkland's statements to the deputy investigating the case constituted the only substantive evidence against him presented at trial. Jackin fails to realize that the victim's testimony as to what occurred constituted direct, substantive evidence of his sexual assault against her. The State never presented the inconsistent statements from Ms. Kirkland as substantive evidence, nor did the State argue them as substantive evidence. In fact, the trial court instructed the jury that the only

permissible purpose for which to consider the impeachment evidence was to assess the credibility of Ms. Kirkland. CP 76. The trial court instructed the jury it could not consider this evidence for any other purpose. *Id.* The evidence was clearly admitted as impeachment evidence and not substantive evidence. Jackin's allegation that the evidence was improperly admitted as substantive evidence fails.

Jackin also alleges the trial court improperly admitted the evidence in violation of ER 613. A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003) (citing *State v. Lough*, 125 Wn.2d 847, 856, 889 P.2d 487 (1995)). A trial court abuses its discretion if its decision is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Brown*, 132 Wn.2d 529, 572, 940 P.2d 546 (1997) (citing *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)).

Pursuant to ER 613, a witness may be examined regarding any statements they previously made that are inconsistent with their testimony on the stand. *State v. Classen*, 143 Wn.App. 45, 59, 176 P.3d 582 (2008). Such prior inconsistent statements are not substantive evidence and they are admissible and relevant to aid the jury in determining witness credibility. *State v. Garland*, 169 Wn.App. 869, 885, 282 P.3d 1137 (2012). Once the witness being impeached has been afforded the

opportunity to explain or deny the prior inconsistent statement, then extrinsic evidence of the prior inconsistent statements may be offered into evidence. *Garland*, 169 Wn.App. 885-86 (quoting ER 613(b)).

At Jackin's trial, the State called Ms. Kirkland as she was the initial disclosure witness, observed the victim's demeanor immediately after the attack, and heard her excited utterances describing the attack. Her testimony was relevant and admissible to support the State's contention that the defendant committed indecent liberties against J.M. During her testimony, Ms. Kirkland denied that the defendant had confessed to her when she previously told the investigating deputy that he had admitted he had touched J.M. RP 442-43. This evidence is a clear prior inconsistent statement of the witness and was relevant. The State examined Ms. Kirkland and allowed her to explain or deny the prior statement pursuant to ER 613(a). After she denied making the statement, the deputy's testimony was properly admitted under ER 613(b) as extrinsic evidence of her prior inconsistent statement.

Jackin's claim the State improperly relied upon this evidence as substantive evidence of the crime is without any support in the record. Not only did the State never argue this evidence as substantive evidence, but the trial court explicitly instructed the jury as to the proper purpose for which it could consider the evidence. CP 76. This evidence was never

treated as substantive evidence and never used for an improper purpose. Furthermore, Jackin's allegation this was the *only* substantive evidence presented at trial is wholly inaccurate. The victim's testimony at trial, along with the excited utterances she made that were testified to, constituted substantive evidence. Jackin was properly convicted upon sufficient evidence, and the impeachment evidence was not the sole basis, or even a substantive basis, for his conviction. Jackin's claim that the trial court erred in allowing evidence of Ms. Kirkland's prior inconsistent statements fails.

IV. Trial counsel was not ineffective for failing to object and failing to impeach the victim.

Jackin further alleges his attorney was ineffective for failing to object to the State's impeachment of Ms. Kirkland and for failing to impeach the victim about prior inconsistent statements. The same standard of review for Jackin's initial claim applies to this claim of ineffective assistance of counsel as well. *See Sec. I. above.* Jackin must show his attorney's decision not to object to the State's impeachment of Ms. Kirkland could not conceivably have been a trial tactic and that such decision prejudiced Jackin. Jackin also must show that his attorney's decision not to attempt to impeach the victim on a claimed prior inconsistent statement was not conceivably a trial tactic and that such

decision prejudiced him. Jackin cannot make this showing; his claim of ineffective assistance of counsel fails.

Jackin claims the state's impeachment of Ms. Kirkland on her prior inconsistent statements to the investigating deputy constituted impeachment on a collateral matter. However, the issue of whether Ms. Kirkland was a reliable witness was highly relevant to this case as she was a first disclosure witness, was present in the house at the time of the attack, is the victim's sister and the defendant's fiancée. Her reasons for potential bias are evident and her reliability as a witness was highly relevant. Further, the issue on which she was attacked, whether the defendant had confessed to her, was anything but collateral.

It is true that a witness cannot be impeached by collateral matters. *State v. Oswalt*, 62 Wn.2d 118, 121, 381 P.2d 617 (1963) (citations omitted). This rule is in place to avoid undue confusion and to prevent an unfair disadvantage on party may obtain by discussing unrelated matters. *Id.* A subject is not collateral if it could have been shown in evidence for any purpose independent of the contradiction. *Id.* (citations omitted). A defendant's out-of-court statements are admissible under ER 801(d)(2) as statements by a party opponent. The defendant's statements to his fiancée about the crime and his commission of it are highly relevant and would typically be admissible under ER 801(d)(2). Therefore, these statements

had relevance outside of the impeachment of Ms. Kirkland and they would have been admissible for an independent purpose – to prove Jackin’s commission of the crime. Jackin’s claim that this matter was collateral is unfounded.

A defendant can only meet his burden of establishing ineffective assistance of counsel if he can show that he was prejudiced by his counsel’s failure to object. “Counsel’s decisions regarding whether and when to object fall firmly within the category of strategic or tactical decisions.” *Id.* (citing *State v. Madison*, 53 Wn.App. 754, 763, 770 P.2d 662 (1989)). The failure to object only establishes ineffective assistance of counsel in the most egregious of circumstances. *Id.* This Court presumes that the failure to object was the result of legitimate trial strategy or tactics, and the onus is on the defendant to rebut this presumption. *Id.* at 20 (citing *Davis*, 152 Wn.2d at 714). As discussed above, Jackin’s claim regarding improper admission of Ms. Kirkland’s prior inconsistent statements is meritless. His attorney was not expected to object to frivolous issues, and he was not ineffective for failing to do so.

Jackin also claims his attorney was ineffective for failing to cross-examine the victim regarding what he claims is an inconsistent statement she made about the attack. At trial the victim testified that she was asleep and woke to Jackin standing over her, rubbing her vagina with his hand.

RP 198. When she asked him what he was doing he said he was “just want[ed] to get a piece.” RP 198. The victim further testified that she stood up and started to scold him and then went to wake her sister up. RP 199. Jackin claims this is different from the statements she made at some point prior to trial as evidenced by a line from the presentence investigation (notably written *after* the trial) that the victim had made a statement saying she reacted verbally and physically to Jackin’s attack. Jackin presumes this statement must have been in a police report, though there is no evidence in the record to support this presumption. When a defendant’s claim rests on evidence outside of the record, the correct vehicle for attack is a personal restraint petition wherein additional evidence may be presented. In this direct appeal, we must rely upon the record as it exists. Thus there is nothing to substantiate the idea that the victim made any prior inconsistent statement and that this was known to defense counsel at the time of trial.

Furthermore, there is simply no inconsistency in the victim’s testimony from her statements, even as contained in the presentence investigation report. The report says the victim indicated she reacted verbally and physically. CP 92-101. The trial testimony shows the victim said she “scolded” the defendant and stood up. Scolding is considered a verbal response, and standing up is considered a physical response. Thus

this testimony is entirely consistent with her potential prior claim (or the officer's summary of her prior statements to him) that she responded verbally and physically.

A defense attorney's decision to object or not to object is tactical. An attorney need not object to frivolous issues and preserving his credibility in front of the jury as someone who makes appropriate and reasonable objections is a legitimate trial tactic. But even if it weren't a legitimate trial tactic, Jackin still must support this claim with a showing of prejudice. Though Jackin points out this case was the victim's word versus his word, whether she made nearly imperceptible differences in statements about her reaction to the attack by Jackin would not have affected the jury's verdict and thus counsel's decision not to impeach the victim did not prejudice Jackin. Had the jury known the victim made the original statement saying she responded both verbally and physically and compared it with her statement at trial that she scolded Jackin and stood up, there is no doubt that their verdict would have been the same. Such a microscopic difference would not have impacted the jury's assessment of the credibility of the victim. The two statements were simply not inconsistent, and to the extent that Jackin now wishes his attorney had made an issue out of this difference, it would have only served to harm Jackin's credibility with the jury. An over-emphasis on a minor issue

makes a defendant appear guilty as he attempts to make a mountain out of a molehill in attacking a victim. It's a potential trial tactic that would not have served Jackin in this case. In any event, it's clear that not seeking to admit this evidence is a conceivably legitimate trial tactic. Jackin's claim of ineffective assistance of counsel fails.

V. The trial court properly denied giving WPIC 6.41.

Jackin argues the trial court's denial of his request to instruct the jury pursuant to WPIC 6.41 was erroneous. Jackin requested the trial court instruct the jury that

You may give such weight and credibility to any alleged out-of-court statements of the defendant as you see fit, taking into consideration the surrounding circumstances.

CP 44. The notes on this WPIC indicate it's appropriate to use this instruction upon the defendant's request after a CrR 3.5 hearing when statements a defendant has made to government agents are admitted and there is an allegation the statements were not voluntary. WPIC 6.41, Note on Use. This instruction is also appropriate when a defendant denies making the alleged statements to government officials. *State v. Hubbard*, 37 Wn.App. 137, 144-45, 679 P.2d 391 (1984). There is no authority, and Jackin offers none, which shows this instruction is appropriate when there has been evidence admitted that the defendant made statements to a non-governmental entity and the defendant denies making those statements.

The notes on the use of this WPIC are clear: its intended purpose is for statements made by the defendant to governmental officials. In fact, the comments on the use of WPIC 4.61 specifically state: “[t]he instruction is required only when the defendant challenges the voluntariness of a confession to a law enforcement official. The instruction is not necessary when the prosecution offers an alleged confession to a private person. *State v. Smith*, 36 Wn.App. 133, 672 P.2d 759 (1983).” Comment, WPIC 6.41.

In *Smith*, the Court noted that the giving of the cautionary instruction contained in WPIC 6.41 is only for when the “challenged statement is made to law enforcement officials; it is inapposite to statements made to private persons.” *Smith*, 36 Wn.App. at 141 (citing *State v. McFarland*, 15 Wn.App. 220, 222, 548 P.2d 569 (1976)). The instruction Jackin requested is clearly appropriate after a CrR 3.5 hearing wherein the trial court determines the admissibility of statements a defendant made to law enforcement. The CrR 3.5 procedure is not followed for statements made to private citizens and thus an instruction pursuant to WPIC 4.61 is not needed when the statements in question were made to a private citizen. *Smith*, 36 Wn.App. at 141 (citing CrR 3.5(d)(4)).

Jackin's claim that the trial court erred in failing to give his requested jury instruction is without merit. The trial court should be affirmed.

VI. Cumulative error did not deny Jackin of a fair trial.

Jackin argues cumulative error denied him a fair trial. As discussed in each of the preceding sections, Jackin has not shown any error below, let alone cumulative error that together affected the outcome of his trial.

The defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994). Where no prejudicial error is shown to have occurred, cumulative error cannot be said to have deprived the defendant of a fair trial. *State v. Stevens*, 58 Wn. App. 478, 498, 794 P.2d 38 (1990). The cumulative error doctrine does not provide relief where the errors are few and had little to no effect on the outcome of the trial. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). As discussed above, Jackin failed to show error, or how each alleged error affected the outcome of his trial. Further, Jackin has not shown how the combined error affected the outcome of his trial. Accordingly, Jackin's cumulative error claim fails.

VII. The State does not intend to seek a cost bill.

Jackin asks this Court to deny any future request for costs if he does not substantially prevail in this appeal. The State does not intend to seek a cost bill if it substantially prevails on this appeal, so Jackin's request is moot.

CONCLUSION

Jackin's claims of error fail. His conviction should be affirmed.

DATED this 12th day of May, 2017.

Respectfully submitted:

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