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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

CARL LEE DOMINGUE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Garold E. Johnson

No. 15-1-04187-0

Brief of Respondent

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

1. Did the prosecutor misstate the burden of proof in this case?
2. Alternatively, if the prosecutor did misstate the burden of proof in this case, did defendant object at trial?
3. Were the prosecutor's statements to the jury "flagrant and ill intentioned?"
4. Was a jury instruction based upon the language of 9A.44.020(1) a comment on the evidence?

B. STATEMENT OF THE CASE.

Appellant's Brief adequately relates the facts of this case necessary for resolution of the issues presented in this appeal.

C. ARGUMENT.

1. A SMALL PART OF THE PROSECUTOR'S CLOSING ARGUMENT WAS UNCLEAR, BUT IT WAS NOT PROSECUTORIAL MISCONDUCT.

"The State is generally afforded wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable

inferences from the evidence.” *State v. Anderson*, 153 Wn. App. at 427-28, 220 P.3d 1273 (2009). It is not error for a prosecutor to argue that the evidence does not support a defense theory, *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994) (citing *State v. Graham*, 59 Wn. App. 418, 429, 798 P.2d 314 (1990), *State v. Contreras*, 57 Wn. App. 471, 476, 788 P.2d 1114, *review denied*, 115 Wn.2d 1014, 797 P.2d 514 (1990)), and “the prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel.” *Russell*, 125 Wn.2d at 87.

The prosecutor’s statement regarding the burden of proof in this case is unobjectionable. 5 VRP 436. After a brief discussion about the “to convict” instruction,¹ the prosecutor addressed elements of the State’s case that were not effectively challenged. 5 VRP 437-40. The prosecutor then addressed the focus of his argument: whether sexual contact occurred. 5 VRP 440.

The prosecutor argued that K.W.’s ability to perceive the events around her was not compromised by noting that K.W. was the only witness who had not consumed any controlled substances at the time in question. 5 VRP 440-41. The prosecutor then stated:

So what do you -- what do you do? If she said it happened and he said it didn't happen, there's no percentage of weight assigned to what reasonable doubt is. But I mean, that's

¹ 5 VRP 436-37

50/50, and that's not it. So you've got to go one way or the other.

5 VRP 441. In the context of the argument, the prosecutor is, albeit confusedly, arguing to the jury that it will have to “go one way or the other” and apply the reasonable doubt standard—which is not 50/50. “Going one way or the other” is inoffensive under the facts of this case because the jury was told in instruction 12 that “you must fill in the blank provided in the verdict form the words ‘not guilty’ or ‘guilty’, according to the decision you reach.” (emphasis added) CP 63.

The prosecutor next very briefly discussed K.W., her testimony, and her absence of bias against defendant. 5 VRP 441. The prosecutor then continued to discuss K.W.’s testimony:

There’s really only two possibilities. One, she’s making it up; or two, she’s telling the truth.”

Id. This argument is logical and is based on the facts of the case. If the jury accepts the prosecutor’s reasoning and concludes that K.W. was intelligent, unbiased, and perceptually uncompromised, then the only remaining question is whether or not K.W. was “making it up” or “telling the truth.” 5 VRP 441. This is a question that the jury would need to resolve in the course of its deliberations.

A prosecutor may argue to the jury that if it accepts one witness's version of the facts, it can reject conflicting testimony. *See State v.*

Wright, 76 Wn. App. 808, 826, 888 P.2d 1214 (1995); *State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006). “The State has wide latitude in drawing and expressing reasonable inferences from the evidence, including inferences about credibility.” *State v. Rodriguez-Perez*, 406 P.3d 658, 664 (Wn. App. 2017) (citing *State v. Thompson*, 169 Wn. App. 436, 496, 290 P.3d 996 (2012)). In this case, the prosecutor argued only to the credibility of the State’s witness, the victim in this case.

Viewed in context, the argument complained of² is an argument relating to the credibility of K. W. and not misstatement of the burden of proof. Defendant has the burden of establishing that the prosecutor’s argument is improper. *State v. Osman*, 192 Wn. App. 355, 366, 366 P.3d 956 (2016). Defendant has failed to establish improper argument.

2. ALTERNATIVELY, DEFENDANT WAIVED ANY CLAIM OF PROSECUTORIAL MISCONDUCT BY FAILING TO TIMELY OBJECT.

“Trial court rulings based on allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard.” *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). To prove that a prosecutor’s actions constitute error, the defendant must show that the prosecutor did not act in good faith and the prosecutor’s actions were

² Appellant’s Brief at 17-18

improper. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing *State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952)). The defendant has the burden of establishing that the alleged error is both improper and prejudicial. *Stenson*, 132 Wn.2d at 718. Even if the defendant proves that the conduct of the prosecutor was improper, the misconduct does not constitute prejudice unless the appellate court determines there is a substantial likelihood the error affected the jury's verdict. *Id.* at 718-19. In analyzing prejudice, courts do not look at prosecutor's closing argument comments in isolation, but in the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury.³

A defendant claiming prosecutorial error bears the burden of demonstrating that the remarks or conduct was improper and that it prejudiced the defense. *State v. Gentry*, 125 Wn.2d 570, 640, 888 P.2d

³ *State v. Warren*, 165 Wn.2d 17, 28, 195 P.3d 940, 945 (2008). "A reviewing court does not assess '[t]he prejudicial effect of a prosecutor's improper comments... by looking at the comments in isolation but by placing the remarks 'in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.'" *Id.* (quoting *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997); *State v. Johnson*, 158 Wn. App. 677, 683, 243 P.3d 936 (2010). "[R]emarks must be read in context." *State v. Pastrana*, 94 Wn. App. 463, 479, 972 P.2d 557 (1999), *abrogated in part on other grounds* by *State v. Gamble*, 154 Wn.2d 457, 114 P.3d 646 (2005); *State v. Larios-Lopez*, 156 Wn. App. 257, 261, 233 P.3d 899 (2010). See also *State v. Russell*, 125 Wn.2d 24, 85-6, 882 P.2d 747 (1994), and *State v. Graham*, 59 Wn. App. 418, 428, 798 P.2d 314 (1990).

570 (1995) citing *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. *State v. Binkin*, 79 Wn. App. 284, 293-294, 902 P.2d 673 (1995), *overruled on other grounds* by *State v. Kilgore*, 147 Wn.2d 288, 53 P.3d 974 (2002). Failure by the defendant to object to an improper remark constitutes a waiver of that error unless the remark is deemed so “flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.”⁴ *Stenson*, 132 Wn.2d at 719, (citing *Gentry*, 125 Wn.2d at 593-594). In this case there was no timely objection to the prosecutor’s closing argument.

The brief remarks at issue in this case are much less insistent, much less pronounced, and much less grievous than the closing argument in *State v. Warren*—a child molestation case dependent upon the testimony of a young victim.⁵ In *Warren* the Supreme Court held that the

⁴“Without a proper timely objection at trial, a defendant cannot raise the issue of prosecutorial misconduct on appeal unless the misconduct was so flagrant and ill-intentioned that no curative jury instruction could have corrected the possible prejudice.” *State v. Curtiss*, 161 Wn. App. 673, 250 P.3d 496 (2011); *State v. Larios-Lopez*, 156 Wn. App. 257, 260, 233 P.3d 899 (2010) (citing *State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006) (quoting *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008, 118 S. Ct. 1193, 140 L. Ed. 2d 323 (1998)). This is because the absence of an objection “strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.” *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

⁵ See *State v. Warren*, 134 Wn. App. 44, 49-52, 138 P.3d 1081 (2006) (referenced at *Warren*, 165 Wn.2d at 23).

error created by prosecutorial misconduct was harmless because the curative instruction was sufficient. *Warren*, 165 Wn.2d at 30.

In *Warren*, the objectionable derogation of the burden of proof was explicit—the prosecutor suggested “that the defendant did not enjoy the benefit of any reasonable doubt.” *Warren*, 165 Wn.2d at 26. In this case, the prosecutor’s argument was unfocused. Defendant derives his prosecutorial misconduct argument from two ambiguous sentences.⁶ Appellant’s Brief at 17-18. In *Warren*, the prosecutor’s statement was repeated three times. *Warren*, 165 Wn.2d at 27. In this case, appellant relies on two connected statements separated by a brief passage of unobjectionable elided text. Appellant’s Brief at 17-18. In *Warren*, the derogation of the burden of proof was grievous. *Warren*, 165 Wn.2d at 27. In this case it is difficult to discern, from the confused nature of the argument, that the erroneous statement was even intentional, much less that it so flagrant and ill-intentioned that it caused an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury. *Warren*, 165 Wn.2d at 43.

State v. Reed, 168 Wn. App. 553, 577-79, 278 P.3d 203 (2012), a case with an unambiguous example of prosecutorial misconduct, relied

⁶ Compare those two sentences with the prosecutor’s proper and unambiguous presentation of the burden of proof during his rebuttal argument. 5 VRP 453.

upon *Warren* to conclude that a curative instruction would have neutralized any prejudice resulting from a prosecutor's misstatement regarding the presumption of innocence.

State v. Venegas, 155 Wn. App. 507, 526, 228 P.3d 813, 823 (2010), and *State v. Evans*, 163 Wn. App. 635, 220 P.3d 934 (2011) present cases where the misconduct found was persistent and "multi-pronged." *Evans*, 163 Wn. App. at 647-48. This case presents no other trial error⁷ along with a brief and ambiguous statement. If error subsisted in the prosecutor's closing argument, that error could have been amply addressed by a curative instruction. Defendant waived his prosecutorial misconduct objection by failing to make that objection in the trial court.

3. INSTRUCTION NO. 9 WAS PROPER.

This Court should follow the reasoning in *State v. Chenoweth*, 188 Wn. App. 521, 535-37, 354 P.3d 13 (2015). As the concurrence in *Chenoweth* notes, this conclusion is compelled by *State v. Clayton*, 32 Wn.2d 571, 572-78, 202 P.2d 922 (1949).

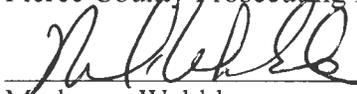
⁷ The only other claim of error relates to a jury instruction pertaining to corroboration. Appellant's Brief at 18-20.

D. CONCLUSION.

This case presents no prosecutorial misconduct. Jury instruction 9 was proper. The trial court should be affirmed.

DATED: March 21, 2018.

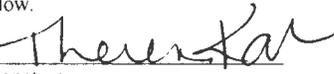
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