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No. 51752-3-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

ZACKARY CALDWELL,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

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Respondent's Brief

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

By: _____
SARA I. BEIGH, WSBA No. 35564
Senior Deputy Prosecuting Attorney

Lewis County Prosecutor's Office
345 W. Main Street, 2nd Floor
Chehalis, WA 98532-1900
(360) 740-1240

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I. ISSUES

A. Did the deputy prosecutor commit prosecutorial error?

B. Did Caldwell receive ineffective assistance from his trial counsel?

C. Does the doctrine of cumulative error warrant reversal?

II. STATEMENT OF THE CASE

Ms. Jones met Caldwell in high school when they were on a conjoined wrestling team. RP 56, 251.[1] Ms. Jones had to leave the wrestling team after tearing her ACL. RP 57. Ms. Jones continued to see Caldwell, who she was an acquaintance with at the time, at wrestling meetings and matches she attended in support of her younger sisters who wrestled. RP 57.

Later, that summer during fair season, Ms. Jones and Caldwell began dating. RP 58, 251. The relationship lasted approximately one week. RP 58. Ms. Jones and Caldwell had sex once during their summer relationship.[2] RP 58. Afterwards, Ms. Jones went back to school, which was a different high school then Caldwell attended. RP 59. Ms. Jones and Caldwell had almost no contact after their one-week relationship. RP 59.

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[1] The State will refer to the three continually paginated volumes of the trial verbatim report of proceedings, which include hearings on 10/4/17, 10/26/17, jury trial 2/21/18, 2/22/18, 2/23/18, and sentencing 4/17/18, as RP.

[2] The State acknowledges Caldwell refutes this and stated he and Ms. Jones had sex multiple times during their high school relationship in high school. *See* RP 252.

Ms. Jones ran into Caldwell when she started attending Centralia College in the fall of 2015. RP 60, 253-54. Ms. Jones thought it was really cool to reconnect with Caldwell, as he was one of the only people she knew from high school at Centralia College. RP 60. Ms. Jones and Caldwell began hanging out, she would come over to his house between classes, and they reconnected a little bit from their previous relationship. RP 60, 254-55. According to Ms. Jones, she and Caldwell had another sexual encounter where she performed oral sex on him. RP 60.

Ms. Jones' recollection of her and Caldwell's relationship in 2015 was it picked up where it had left off, but it was ended quickly in part because she began dating Austin Dacus. RP 66, 67, 120. Mr. Dacus and Caldwell knew each other. RP 67, 271. Mr. Dacus knew about Ms. Jones' past with Caldwell, it was not an issue, and there was no tension between the three of them. RP 68. Ms. Jones would continue to hang out alone with Caldwell and Mr. Dacus did not have any issues with it. RP 69.

On December 1, 2015, there had been a party at Caldwell's house. RP 73. Ms. Jones smoked weed (marijuana) that day, drank alcohol, and felt high and intoxicated by the end of the evening. RP 73-74. Ms. Jones had been staying at Caldwell's house, sleeping

on the couch. RP 69-70. Ms. Jones fell asleep the early morning hours of December 2, 2015, watching television on the couch with Caldwell. RP 157.

Around 6:35 a.m. Ms. Jones woke up with her pants and underwear pulled down around her upper thighs and Caldwell's penis penetrating her vagina. RP 157. Ms. Jones was on her side, with her legs pushed up, almost in a fetal position. RP 76. When Ms. Jones realized Caldwell was having sex with her she froze, stayed still, and tried not to make any movements. RP 77. Ms. Jones was shocked because Caldwell was her best friend and she trusted him. RP 77-78.

Ms. Jones did not let Caldwell know she was awake because she was unsure of how he would react if he found out. RP 78. Caldwell finished, it was a matter of a few seconds after Ms. Jones woke up. RP 78. Caldwell ejaculated inside of Ms. Jones. RP 77. Caldwell then got up, walked into the bathroom, and then went into his bedroom. RP 78.

Ms. Jones did not give Caldwell consent to have sex with her, nor did Caldwell have an open invitation to have sexual intercourse or contact with Ms. Jones. RP 79. Ms. Jones grabbed her phone, looked at the time, and then ran out the door. RP 80.

Ms. Jones called Cody Bickle and asked him to pick her up and take her to the hospital. RP 81, 241. Mr. Bickle took Ms. Jones straight to Providence Hospital in Centralia. RP 81, 242. Centralia Providence could not assist Ms. Jones and she was directed to Providence St. Peter's Hospital in Olympia. RP 82, 242. Mr. Bickle drove Ms. Jones to the hospital in Olympia and stayed with her all day. RP 82, 242. Mr. Dacus joined them at the hospital in Olympia. RP 83.

Ms. Jones underwent a sexual assault examination at the hospital where evidence was collected. RP 83-85, 154-64. Lisa Curt, a sexual assault nurse examiner, performed the examination. RP 148, 154-66. Mr. Dacus and a safe place advocate were present during the evaluation. RP 183. Ms. Curt took swabs from inside Ms. Jones vagina. RP 164. Ms. Jones complained to Ms. Curt about sensitivity inside her vagina. RP 164.

Ms. Jones had a two-centimeter tear on the right side one inch below her vagina, on her perineum. RP 163. Perineal tears heal fairly quickly. RP 173. Ms. Jones indicated she had sex with her boyfriend on November 30th. *Id*. It is possible the perineal tear could come from consensual sex with Ms. Jones' boyfriend,

however, Ms. Jones did not exhibit any signs of healing which Ms. Curt would have noted had any been present. RP 173, 226.

After spending all day up in Olympia, Ms. Jones stayed the night at Mr. Bickle's residence. RP 242-43. Ms. Jones felt ill from all the medication she was given at the hospital. RP 85. Ms. Jones waited until December 3, 2015, to report the rape to law enforcement. RP 85. Ms. Jones did not want to talk to anyone about the incident, she did not want to get one of her best friends in trouble, yet she was advised the right thing to do was to report the incident to police. RP 86-87. When Ms. Jones spoke to police she did not admit to her drug use or alcohol consumption, in part, because she was a minor and concerned she would get in legal trouble. RP 98-99.

Caldwell voluntarily went to the Centralia Police Station and spoke to the police about the incident in November 2016. RP 185-87. Caldwell also voluntarily gave police a DNA sample. RP 187. Caldwell explained Ms. Jones was sleep stripping, he was lying behind her, and after he woke her up they had sex. RP 188, 190. Caldwell said they did not have sex very long and he ejaculated inside of Ms. Jones. RP 190. Caldwell also stated they did not speak while having sex. RP 191. Caldwell said Ms. Jones did not

protest while they had sex. RP 208. Caldwell stated Ms. Jones never told Caldwell he had raped her. RP 209.

The State charged Caldwell with one count of Rape in the Third Degree. RP 1-3. The State amended the charge to Indecent Liberties. RP 26-27. Caldwell elected to have his case tried to a jury. *See* RP. Much of the State's case was presented as the facts outlined above.

Caldwell called Bailey Poole and Cody Bickle to testify on his behalf. RP 225-50. Mr. Poole explained he was a friend of Caldwell and would see Ms. Jones and Caldwell interact every once and a while. RP 225. According to Mr. Poole, Ms. Jones and Caldwell had a sexual relationship, although he acknowledged he had never watched the two have sex. RP 228. Mr. Poole also stated Ms. Jones had a reputation in the community for not being trustworthy. RP 239.

Mr. Bickle testified regarding the events taking Ms. Jones to the hospital. RP 241-43. Mr. Bickle also explained how Ms. Jones appeared to bounce right back from her traumatic experience the following day, acting healthy and happy. RP 243. Ms. Jones' behavior struck Mr. Bickle as odd because it was unlike the behavior of other people Mr. Bickle had interacted with who had

been involved in similar situations. RP 234-44. Mr. Bickle also stated Ms. Jones had a reputation for being dishonest with everyone. RP 244.

Caldwell testified on his own behalf. RP 244-86. According to Caldwell, he and Ms. Jones started their romantic relationship back up in 2015 when college started. RP 253-54. Ms. Jones would come over, hang out between classes, and they would have sex maybe once a week. RP 254-55. Caldwell explained he and Ms. Jones continued their sexual relationship into December, including while she dated Mr. Dacus. RP 255-56.

Caldwell explained in the early morning hours of December 2, 2015, he and Ms. Jones smoked a little marijuana then went inside and watched movies. RP 260. Ms. Jones fell asleep. RP 261. According to Caldwell, Ms. Jones was “laying in front of me, and she appeared to be asleep and starting taking her clothes off.” RP 262. Caldwell then woke up Ms. Jones, informed Ms. Jones she was getting naked, and she replied, “I know.” RP 263. Ms. Jones’ pants were already down past her butt. RP 263. Ms. Jones grabbed Caldwell’s penis and began to stroke it. RP 264. Caldwell stated he took his penis out of Ms. Jones’ hand, slid it inside her vagina, she began grinding into him, and a few minutes later he ejaculated. RP

264. According to Caldwell, the sexual interaction Caldwell had with Ms. Jones was consistent with their past sexual interaction with her. RP 266. Caldwell stated, if Ms. Jones had asked Caldwell to stop, he would have stopped. RP 266.

Caldwell was found guilty as charged and was sentenced to 15 months in prison. CP 73, 110. Caldwell timely appeals his conviction. CP 141.

The State will supplement the facts as necessary throughout its argument below.

III. ARGUMENT

A. THE DEPUTY PROSECUTOR DID NOT COMMIT PROSECUTORIAL ERROR, WITH THE EXCEPTION OF IMPROPERLY INVOKING CONCERN FOR COMMUNITY SAFETY; CALDWELL CANNOT MEET HIS BURDEN TO SHOW THE DEPUTY PROSECUTOR ACTED FLAGRANTLY AND ILL-INTENTIONED, AND THAT CALDWELL SUFFERED PREJUDICE AS A RESULT.

Caldwell claims the deputy prosecutor committed prosecutorial error (misconduct)[3] by (1) eliciting the passions and

[3] "'Prosecutorial misconduct' is a term of art but is really a misnomer when applied to mistakes made by the prosecutor during trial." *State v. Fisher*, 165 Wn.2d 727, 740 n. 1, 202 P.3d 937 (2009). Recognizing that words pregnant with meaning carry repercussions beyond the pale of the case at hand and can undermine the public's confidence in the criminal justice system, both the National District Attorneys Association (NDAA) and the American Bar Association's Criminal Justice Section (ABA) urge courts to limit the use of the phrase "prosecutorial misconduct" for intentional acts, rather than mere trial error. *See* American Bar Association Resolution 100B (Adopted Aug. 9-10, 2010), https://www.americanbar.org/content/dam/aba/directories/policy/2010_am_100b.authcheckdam.pdf (last visited March 8, 2019); A number of appellate courts agree that the

prejudices of the jury, (2) improperly eliciting testimony to invoke the sympathy, (3) denigrating defense counsel and impugning the defense, (4) improperly drawing negative inference by Caldwell's exercise of his constitutional rights, and (5) misstating the burden of proof, and (6) inciting the jury by invoking concerns for community safety. Brief of Appellant 16-33. Caldwell's argument is without merit. The deputy prosecutor did not commit prosecutorial error, with the exception of invoking concerns for community safety. The State concedes the deputy prosecutor improperly invoked concern for community safety, but the error was not flagrant, ill-intentioned, and Caldwell cannot establish prejudice.

1. Standard Of Review.

The standard for review of claims of prosecutorial error is abuse of discretion. *State v. Ish*, 170 Wn.2d 189, 195, 241 P.3d 389 (2010).

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term "prosecutorial misconduct" is an unfair phrase that should be retired. *See, e.g., State v. Fauci*, 282 Conn. 23, 917 A.2d 978, 982 n. 2 (2007)*; State v. Leutschaft*, 759 N.W.2d 414, 418 (Minn. App. 2009), *review denied*, 2009 Minn. LEXIS 196 (Minn., Mar. 17, 2009); *Commonwealth v. Tedford*, 598 Pa. 639, 960 A.2d 1, 28-29 (Pa. 2008). In responding to appellant's arguments, the State will use the phrase "prosecutorial error." The State will be using this phrase and urges this Court to use the same phrase in its opinions.

2. The Deputy Prosecutor Did Not Commit Prosecutorial Error Throughout The Trial, And In Particular, During His Closing Argument, With The Exception Of Invoking Concern For Community Safety, But Such Error Was Not Flagrant, Ill-Intentioned, And Caldwell Cannot Show Prejudice.

To prove prosecutorial error, it is the defendant's burden to show the deputy prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial. *State v. Gregory*, 158 Wn.2d 759, 809, 147 P.3d 1201 (2006) *reversed in part on other grounds State v. Gregory,*192 Wn.2d 1, 427 P.3d 621 (2018), *citing State v. Kwan Fai Mak,* 105 Wn.2d 692, 726, 718 P.2d 407 (1986); *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003). Full trial context includes, "the evidence presented, 'the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.'" *State v. Monday*, 171 Wn.2d 667, 675, 257 P.3d 551 (2011), *citing State v. McKenzie,* 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (other internal citations omitted).

There are two standards of review for prosecutorial error, one if the defendant objected at trial and a heightened standard if the defendant failed to object. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). If a defendant objects to the alleged error, the inquiry is whether the error "resulted in prejudice that had a

substantial likelihood of affecting the jury's verdict." *Emery,* 174 Wn.2d at 760 (internal citations omitted).

In contrast, a defendant's failure to object waives the alleged error, "unless the prosecutor's misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice." *Id.* at 760-61*, citing State v. Stenson,* 132 Wn.2d 668, 727, 940 P.2d 1239 (1997). A defendant is required to show the reviewing court, "(1) no curative instructions would have obviated any prejudicial effect on the jury and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict." *Id.* at 761 (internal quotations and citations omitted).

"[A] prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and may freely comment on witness credibility based on the evidence." *State v. Lewis,* 156 Wn. App. 230, 240, 233 P.3d 891 (2010), *citing Gregory*, 158 Wn.2d at 860. That wide latitude is especially true when the prosecutor, in rebuttal, is addressing an issue raised by a defendant's attorney in closing argument. *Id.* (citation omitted).

Prosecutors recognize the dual role they play, prosecuting those who have broken our laws while also being "the

representative of the people in a quasi-judicial capacity in a search for justice." *State v. Walker*, 182 Wn.2d 463, 476, 341 P.3d 976 (2015), *cert. denied* 135 S. Ct. 2844 (2015). A prosecutor cannot fulfill this role if he or she secures a conviction of the accused whose right to a fair trial has been violated. *Walker*, 182 Wn.2d at 476. Such a conviction would "undermine the integrity of our entire criminal justice system." *Id.*

a. The deputy prosecutor did not improperly appeal to the passion and prejudice of the jury.

Caldwell asserts the deputy prosecutor committed error by appealing to the passions and prejudice of the jurors. Brief of Appellant 17-29. Caldwell also asserts such conduct was flagrant and ill-intentioned on the part of the deputy prosecutor, as Caldwell's trial counsel did not object. Brief of Appellant 21-29. The deputy prosecutor did not commit error, with the exception of impermissibly invoking concern about community safety. Caldwell cherry picks statements out of the deputy prosecutor's closing argument without acknowledging the full context of the argument. Caldwell's arguments are without merit, as there was no error. For the error that was committed, Caldwell cannot meet his burden to

show the deputy prosecutor's actions were flagrant, ill-intentioned, and he suffered prejudice.

A prosecutor cannot encourage a jury to convict a defendant based upon emotion, rather than the evidence presented, by appealing to the passions of the jury. *State v. Berube*, 171 Wn. App. 103, 118-19, 286 P.3d 402 (2012). "'A trial in which irrelevant and inflammatory material is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial.'" *Berube,* 171 Wn. App. at 119, *citing, State v. Miles*, 73 Wn.2d 67, 70, 436 P.2d 198 (1968).

i. The deputy prosecutor did not improperly elicit testimony to inflame the jury or impermissibly invoke passion and prejudice during his closing.

Caldwell asserts admissible evidence, which was introduced to establish in part the victim's credibility, was irrelevant and only admitted to inflame the jury. This was a sexual assault case where the credibility of the victim and her version of the events surrounding the incident were crucial for the State's case and, as such, undermining Ms. Jones' credibility was the lynchpin of Caldwell's case. The State necessarily knew the defense strategy,

it would be apparent to any trial attorney and the deputy prosecutor had been present at the defense interview with Ms. Jones. RP 104.

Caldwell complains of the deputy prosecutor's line of questioning posed to Ms. Jones regarding seeking medical treatment for the sexual assault. Brief of Appellant 17-19, *citing,* RP 82-84. Caldwell asserts eliciting testimony from the victim of a sexual assault about the process of the medical examination and the difficult nature of disclosing the details of sexual assault are improper testimony. *Id.* Further, Caldwell complains of the elicited testimony from Ms. Curt about the process of the sexual assault examination, and characterizing it as invasive. Brief of Appellant 19, *citing,* RP 152.

The State is allowed to present its theory of the case, eliciting relevant evidence. ER 402. The State is not required to sanitize and sterilize a case because the actions of the defendant caused the victim to suffer. *State v. Pirtle*, 127 Wn.2d 628, 653-55, 904 P.2d 245 (1995). In *Pirtle*, the defendant complained of particularly gruesome and graphic photographs of the murdered victims shown to the jury. *Pirtle,* 127 Wn.2d at 653-55. Pirtle argued the trial court abused its discretion as the photos were inflammatory, more probative than prejudicial, and duplicative. *Id.* at

653. The Supreme Court disagreed, "[t]he fact the photographs were gruesome and therefore potentially inflammatory does not change the result. This was a gruesome and horrible crime. It simply cannot be presented to a jury in a way that glosses over that fact." *Id.* at 655.

It was not prosecutorial error for the deputy prosecutor to ask Ms. Jones:

> Q. And did they perform any sort of examination on you?
>
> A. Yes, they did.
>
> Q. And what was this examination like?
>
> A. It was absolutely terrible. They were using swabs, and it was painful and measuring things. And I absolutely hated it. They took the clothes that I was wearing. They gave me a bag that had clothes that didn't fit me to wear, and it was -- I absolutely hated it.
>
> Q. And when you say -- and I don't mean to bring up bad memories or talk about uncomfortable things, but I want to talk a little bit more about this exam. Where were they taking the swabs from?
>
> A. From my vaginal area.
>
> Q. And what were they -- you said they were measuring things. Where were they measuring?
>
> A. I had an abrasion according to the nurse…
>
> Q. Go ahead.

> A. She said I had a small abrasion, and that she needed to measure how long it was.
>
> Q. And were they using tools and things to do this?
>
> A. Yes, they were.
>
> Q. And this nurse was just a stranger to you before you met her?
>
> A. Yes.
>
> Q. And did this procedure involve, you know, invasive tools entering your vagina?
>
> A. Yes.
>
> Q. Was this uncomfortable?
>
> A. Very.
>
> Q. Was it something you wanted to be going through?
>
> A. No.
>
> Q. Why did you go up there for this procedure or for this examination?
>
> A. To get a rape kit done, because I knew what just happened was wrong. And it was first response of to get it done.

RP 83-85. The State was entitled to present evidence regarding Ms. Jones going to the hospital, the type of medical examination she received, the nature of the examination, the procedures performed during the examination, and why Ms. Jones went to seek the medical attention and have the sexual assault examination.

Ms. Jones did have to have swabs placed inside her vagina, which collected samples for DNA testing, and were used at trial. RP 164, RP 212-18. Ms. Jones' intentions behind getting the examination and her desire to have it done were important components to the State's case, as they went to establishing Ms. Jones' credibility. There was no objection, with the exception to hearsay regarding the vaginal tear. RP 83-85.

Caldwell next asserts the State continued its improper conduct in its closing argument. Caldwell claims these comments incited the passion and prejudice of the jury, denigrated defense counsel, impugned his defense, and drew a negative inference from Caldwell's exercise of his constitutional rights. Brief of Appellant 19-29. Caldwell does not explore the entire context as to what the deputy prosecutor discussed, fails to acknowledge how the victim's experience following her sexual assault is relevant, demands the State not respond to defense counsel's repeated arguments regarding Ms. Jones' credibility, and stretches to argue the State was commenting on Caldwell's right to a trial. There was no prosecutorial error.

The issue in the case became Ms. Jones' credibility, whether the jury would believe Ms. Jones' accounting of the events beyond

a reasonable doubt. The State, therefore, had to continually draw the jury's attention to everything it considered made Ms. Jones credible. This evidence included in large part that Ms. Jones subjected herself to an invasive sexual assault examination immediately after the sexual encounter with Caldwell.

The deputy prosecutor starts by going through the facts, what occurred, how the sexual assault played out, Ms. Jones calling Mr. Bickle, how he picked her up and took her to the hospitals, Ms. Jones calling Mr. Dacus, and how Mr. Dacus sat in on the sexual assault examination. RP 324-26. The deputy prosecutor then states:

> What happens at Centralia? This isn't just your average doctor's appointment at this point. You've heard about this, this process, this experience. This isn't something that [Ms. Jones] [4] wanted to go through. This is an invasive, very personal, potentially humiliating examination. You are having a stranger, a nurse, put swabs up in her vagina. You are having someone examine you from head to toe. You're having to recount a sexual assault to a complete stranger, and that's what she did. She goes there and submits to this examination first thing after this incident, tells her story to the nurse, submits herself to this examination because she wanted to get treatment.

[4] The State will omit Ms. Jones' first name or full name from the record and refer to her as Ms. Jones throughout its briefing in an attempt to afford her some privacy as a victim of sexual assault.

> And then what? She goes home. And, yeah, she is still a little out of it, she said. She is hungover. She's on medications that have been prescribed to her by the sexual assault clinic or sexual assault nurse, so she is done for the day.
>
> The next day she reports this. Did she do it enthusiastically? No. She was -- she was kind of scared. Took some people talking to her, she said. But she decided to do it. She wasn't jumping up and down to do this, but she decided this needed to be done. So she went and reported it one day later. She then told this story again to another officer.
>
> And what did this all get her? Well, she's been subjected to multiple interviews, had to talk to the defense attorney, came in here told her story to a group of 14 strangers, talked about this experience, which is obviously upsetting to her. And you got to witness [Ms. Jones]. [Ms. Jones] sat right here in this chair, right here. You guys are right here. She was this close to you. You heard her. You saw into her eyes. You saw her emotion. She was upset as she got up there and talked about this.
>
> This was difficult, I would submit to you, for her to say. This has been a process for her, she explained. She lost her relationship with her boyfriend, she has had to talk about this with multiple people. She has had to go through this process since 2015.

RP 326-28.[5]

Caldwell complains of the above argument, asserting it improperly appeals to the passion and prejudice of jury and to Caldwell's right to a jury trial. Caldwell takes similar issue with an

[5] The State acknowledges the block quote is long, but believes the deputy prosecutor's exact words show the entire context of the argument. There will be other block quotes later. The State apologizes in advance for their length.

argument in the deputy prosecutor's rebuttal closing argument. Yet, Caldwell in his briefing begins the deputy prosecutor's statement halfway through that section of the deputy's argument and ends it prior to the deputy prosecutor actually wrapping up what he has to say. Brief of Appellant 21. It is disingenuous and contrary to case law to view the deputy prosecutor's argument in such a way. *See, Monday,* 171 Wn.2d at 675; *Gregory*, 158 Wn.22d at 809. The deputy prosecutor argued:

> You have to look at both versions of events and decide which one makes more sense, and I submit to you when you look at the defendant's version of events, it's not reasonable. It doesn't make sense. He's added things that are so crucial late in the game that he never told law enforcement to begin with. It just doesn't make sense. So ultimately you need to ask yourself, does this make any sense to you that a woman, a young lady, with a boyfriend would one night all of a sudden have consensual sex with her boyfriend's friend, her friend, then submit herself to an invasive, uncomfortable physical examination, interviews with law enforcement, defense attorneys, testify in front of all of you just because on December 2, 2015, she felt like calling it a sexual assault. Does that make any sense? I submit it does not. And I'm going to ask you to go back there and weigh the evidence, use your common sense, think about all the flaws in the defendant's version of events and story, the facts that he omitted earlier, and I'm going to ask you ultimately to return a verdict of guilty, because the state has proven each and every element of indecent liberties beyond a reasonable doubt. Thank you for your time and attention.

RP 361-62.

Caldwell argues these passages in closing argument, actually portions of these passages, and the questioning of Ms. Jones and Ms. Curt during the State's case were flagrant, prejudicial, and ill-intentioned misconduct on the part of the deputy prosecutor. This would be required for Caldwell to prevail as his attorney did not object. Caldwell asserts the deputy prosecutor repeatedly invoked sympathy for Ms. Jones and drew negative inferences from Caldwell exercising his constitutional right to the criminal trial process. Brief of Appellant 21-29. There was no error.

Ms. Jones went to the hospital after being sexually assaulted by Caldwell because she needed medical treatment, she knew what happened was wrong, and it was her first response to being sexually assaulted. RP 84, 86. The allegation by the defense was Ms. Jones concocted this allegation against Caldwell because she did not want her boyfriend, Mr. Dacus, to find out she had consensual sex with Caldwell and leave her. RP 339-41.

> Now, on the way to the hospital she is not calling the police because, you know, she has been sexual assaulted. She is calling Austin. Why? Why is she calling Austin about this instead of calling the police? Well, according to the nurse, she suffers from some anxiety, suffers from some depression, she is engaged in some self-harm. Okay. Because at this point it's reasonable that she is concerned that Austin is going to find out that she had sex with Zack. And there is a way to keep him from getting upset and

> breaking up with her, which is to accuse Zack of sexual assault.
>
> And I know the state is going to say, why in the world would she do that? Why would she subject herself to the exams and all that stuff? Well, I mean, when people have some mental health issues, they will go to extremes. But I think insight into this case is the fact that she didn't want to call the police. She wanted to preserve her relationship with Austin. But she didn't necessarily want the police called, because that's going to elevate it even farther.
>
> And Austin and her get into an argument over this, and Austin is the one who is pressuring her. And then eventually because of Austin's pressure she calls the police. And ask yourself, is that reasonable? Okay. If you have been sexual assaulted, okay, would you not want to call the police but you are willing to go get a sexual assault kit done and suffer the exam? Those two don't make -- they don't make sense. But it makes sense if she is trying to preserve her relationship with Austin so he doesn't get mad at her because she had consensual sex with Zack.

RP 340-41.

The State necessarily understood this would be Caldwell's strategy, attack Ms. Jones' credibility, come up with a reason why she would lie, and put on witnesses who would attempt to substantiate that Ms. Jones was untruthful. The State is allowed to present relevant evidence of Ms. Jones' actions after the sexual assault, the difficult choices she had to make in taking those actions, and what exactly the nature of the examination Ms. Jones had to endure after being sexually assaulted by Caldwell.

The initial closing argument outlined the evidence, what Ms. Jones' actions were following the sexual assault, the procedure of the examination, and the nature of the examination. The fact the sexual assault examination is humiliating and invasive is a fact Caldwell has to endure, much like Ms. Jones had to endure the actual examination, because it is part of the nature of a sexual assault allegation and the State is not required to sanitize it for the jury.

To assert the State was commenting on Caldwell's exercise of his constitutional right to effective assistance of counsel and the trial process and asking the jury to draw a negative inference from Caldwell exercising these rights is a stretch. The State in its initial closing asked the jury to consider the entire context of what Ms. Jones had been through in this matter and how she presented to the jury on the witness stand. This argument pieces together all of the different things Ms. Jones had to do since 2015 in regards to the sexual assault she suffered at the hands of Caldwell for the jury to assess her credibility.

The State asked the jury to consider the two versions of the events told by Caldwell and Ms. Jones, what Ms. Jones endured, and why Ms. Jones would subject herself to a sexual assault

examination and the entire criminal process because she simply felt like calling the matter a sexual assault, when determining credibility. RP 361-62. The State further requested the jury keep these considerations in mind when it ultimately decided if the State had proved its case beyond a reasonable doubt. *Id*. This is permissible argument, especially in consideration of Caldwell's attack of Ms. Jones during his closing argument.

The determination of the credibility of a witness or evidence is solely within the scope of the jury and not subject to review. *State v. Myers,* 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), *citing State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). "The fact finder…is in the best position to evaluate conflicting evidence, witness credibility, and the weight to be assigned to the evidence." *State v. Olinger*, 130 Wn. App. 22, 26, 121 P.3d 724 (2005) (citations omitted). The jury was instructed as such. CP 90, *citing*, WPIC 1.02. The line of questioning elicited by the deputy prosecutor laid the foundation for establishing, in part, Ms. Jones' credibility regarding the sexual assault allegations. The closing arguments, while perhaps impassioned at times, were not beyond the scope of permissible argument, based upon the evidence presented regarding the victim's credibility. The deputy prosecutor

is allowed to argue his case, including what may be at times graphic and uncomfortable details, to establish a witness' credibility, thereby laying the foundation for the State proving each element of the charged crime beyond a reasonable doubt. This is exactly what the deputy prosecutor here was doing. This is not error, let alone flagrant, ill-intentioned, and prejudicial misconduct warranting reversal.

ii. The deputy prosecutor's closing argument regarding an illustrative guidebook for sexual assault did not denigrate Caldwell's counsel or impugn the defense, but did improperly invoke concern about community safety. Caldwell cannot show prejudice from the deputy prosecutor's error.

Caldwell asserts during the deputy prosecutor's rebuttal closing argument he denigrated Caldwell's counsel, impugned the defense, and improperly invoked concern for community safety. Brief of Appellant 25-29. The deputy prosecutor's argument, illustratively using a guidebook, did not denigrate Caldwell's counsel or impugn the defense. RP 350-53. The State concedes deputy prosecutor's argument improperly invoked concern about community safety, but Caldwell does not establish the error was flagrant, ill-intentioned, and nor has he shown prejudice.

During Caldwell's counsel's closing he argued Ms. Jones did not act like a victim of sexual assault. 338-41, 343-44, 346-47. This argument tied into the evidence Caldwell's attorney presented from Mr. Poole and Mr. Bickle about how they perceived Ms. Jones' actions and conduct following the sexual assault. RP 230, 243-44. The deputy prosecutor is afforded wide latitude during closing arguments, especially while responding to Caldwell's counsel's arguments. *Lewis*, 156 Wn. App. at 240.

The deputy prosecutor first addressed how having anxiety or depression did not make Ms. Jones less capable of being a victim of sexual assault, contrary to defense counsel's argument. RP 350. The deputy prosecutor next stated:

> [Ms.] Jones got up here and told you how she felt. Now the defense is telling you, she didn't act properly for a victim of sexual assault. If she was a victim of sexual assault, she would do A, B, C, D, E. She would call the police on her way to Centralia. Is there a guide book for how a young lady, a female, a woman acts as a victim of sexual assault? Is there a guide book that [Ms.] Jones would carry around, "How Do I Behave After I've Been Sexual Assaulted"? Are there rules for how a lady, a woman, is supposed to behave after being sexually assaulted? And if she doesn't meet the standards that other people impose and say that's the way you should act, then you are not a victim? Is that how it works? That if you don't act a certain way that someone else says you should, then you are not a victim of sexual assault? Is that how it works around here? No.

RP 350-51. Immediately following this statement the deputy prosecutor walked the jury through a list of the evidence presented. RP 351-52. Following going through a summation of the evidence, the deputy prosecutor stated,

> Now, the defense's position is that she didn't follow the right order of events, you know, for a woman that has been sexual[ly] assaulted that, you know, she violated the handbook essentially, that she was supposed to call the police on the way to the hospital. I think you will have to excuse [Ms. Jones]. I mean, she had just been sexually assaulted. She did what she needed to do in those circumstances.

RP 352-53. The deputy prosecutor then continued with how Ms. Jones contacted the people she trusted. RP 353.

A deputy prosecutor cannot impugn the integrity or the role of defense counsel. *State v. Lindsay*, 180 Wn.2d 423, 431-32, 326 P.3d 125 (2014). "Prosecutorial statements that malign defense counsel can severely damage an accused opportunity to present his or her case and are therefore impermissible." *Lindsay,* 180 Wn.2d at 432, *citing Bruno v. Rushen,* 721 F.2d 1193, 1195 (9th Cr. 1983).

In *Lindsay* the deputy prosecutor made offensive statements such as, ""She doesn't care if the objection is sustained or not, We're going to have like a sixth grader argument, and We're into silly." *Id.* The deputy prosecutor took it further by interrupting during

defense counsel's objections, stating, "'Maybe if counsel and her client could be quiet for a few minutes they might be able to hear something.'" *Id.* The Supreme Court noted that those comments, alone though would not require reversal. *Id.*

The Supreme Court discussed more egregious conduct of past cases requiring reversal, such as statements that defense counsel was "'being paid to twist the words of witnesses.'" *Id.* at 433, citing *State v. Negrete,* 72 Wn. App. 62, 66, 863 P.2d 137 (1993). Another example from the Supreme Court was where the deputy prosecutor stated a defense attorney's role was to his client and the deputy prosecutor's role was "'to see that justice was served.'" *Id.*, citing *State v. Gonzales*, 111 Wn. App. 276, 283, 46 P.3d 2005 (2002). Finally, the Supreme Court discussed *Bruno v. Rushen* "'the obvious import of the prosecutor's comments was that *all* defense counsel in criminal cases are retained solely to lie and distort the facts and camouflage the truth.'" *Id.*, citing *Bruno v. Rusen*, 721 F.2d 1193, 1194, (9th Cir. 1983).

There is nothing in the deputy prosecutor's comments that impugn the defense or denigrate Caldwell's trial counsel. The deputy prosecutor was responding to Caldwell's trial counsel's closing argument. Caldwell's counsel had urged the jury to

conclude Ms. Jones did not act like the victim of a sexual assault because she did not call police immediately and according to Caldwell's witnesses, Ms. Jones' reactions were not appropriate. The deputy prosecutor's response was not impugning the defense or denigrating counsel, but proper rebuttal argument. There was no prosecutorial error.

Caldwell also argues the deputy prosecutor went too far because his statement at the end of his first rebuttal argument invoked concern for community safety. The deputy prosecutor stated, "That if you don't act a certain way that someone else says you should, then you are not a victim of sexual assault? Is that the way it works around here? No." RP 351.

A prosecutor is also not at liberty to appeal to the passion and prejudice of jurors by urging them to convict a defendant in a criminal action in order to protect their community from future law breaking, protect community values, or preserve civil order. *State v. Ramos*, 164 Wn. App. 327, 338, 263 P.3d 1268 (2011), *citing United States v. Solivan,* 937 F.2d 1146, 1153 (6th Cir. 1991). The reasoning being this prohibition is the possibility jurors could be persuaded by such an appeal, believing they are helping their

community, and the defendant is convicted for reasons other than his or her guilt or innocence. *Id.*

The deputy prosecutor in *Ramos* appealed to the jury during closing argument to stop Ramos from continuing to deal drugs at a parking lot located near a number of businesses the general public would frequent on a regular basis. *State v. Ramos*, 164 Wn. App. at 337-38. After arguing that on a specific date Ramos had delivered drugs, the deputy prosecutor stated,

> This is also why we are here today, so people can go out there and buy some groceries at the Cost Cutter or go to a movie at the Sunset Square and not have to wade past the coke dealers in the parking lot. That's why they were there, that's why you're here, and that's why I am here, to stop Mr. Ramos from continuing that line of activities. That is what this case is about and that's what the truth of the case is about and that's why this is a serious case.

Id. The State conceded the deputy prosecutor "impermissibly argued that the jury should convict Ramos in order to eliminate drug dealing at Sunset Square." *Id.* at 337. The State argued to the court Ramos could not establish prejudice, but the court rejected the State's argument. *Id.* at 340. The court stated unlike a 6th Circuit case, the deputy prosecutor's argument was not based on the evidence, and was not an isolated incident of appealing to the community conscience. *Id.* at 340. The court determined that no

jury instruction could have cured prejudicial effect of the deputy prosecutor's improper appeal to the passion and prejudice of the jury. *Id*.

The State concedes the deputy prosecutor impermissibly argued the citizens of this community do not impose an arbitrary set of standard operating procedures for a person alleging sexual assault and find if that person does not follow those standards, no sexual assault occurred. The deputy prosecutor made one, brief, rhetorical question at the end of his argument regarding there was no correct order of operation for which a victim of sexual assault must proceed. RP 350-51. This is not like *Ramos*, where the deputy prosecutor repeatedly made references to community safety. This was an isolated incident of appealing to the community conscience and Caldwell does not explain how the prejudice from this error on the part of the deputy prosecutor could not have been cured by an instruction to the jury.

Caldwell simply states these comments (as in all of the above statements in this entire section) were so corrosive a curative instruction could not erase the prejudice. Yet, the other statements were not error, therefore, it is unclear how this one statement could not have been cured by an instruction to the jury.

Therefore, Caldwell has not shown the prosecutor's improper appeal to community safety was flagrant or ill-intentioned. Caldwell cannot show this one rhetorical question by the deputy prosecutor had a substantial likelihood of affecting the jury verdict, and therefore cannot establish prejudice and this Court should affirm.

b. The deputy prosecutor did not improperly instruct the jury or minimize the State's burden of proof.

Caldwell asserts the deputy prosecutor committed error by "indicating to jurors that they had to decide who was telling the truth and lying in order to decide the case." Brief of Appellant 29. Caldwell cherry picks portions of the deputy prosecutor's argument in an effort to paint a picture of prosecutorial error and improper argument. When the deputy prosecutor's argument is read in its full context, it is an argument regarding credibility, how the jurors need to assess the different versions of events that were presented, and ultimately determine if the State proved its case. RP 332-33, 361-62.

Jurors are instructed they must decide a case based upon the evidence presented at trial and accept the law as given in the jury instructions. WPIC 1.02. Jurors are also instructed a lawyer's remarks, arguments or statements are not evidence, the law is

contained in the instructions and the jury must disregard any statement, argument or remark by the lawyer that is not supported by the law in the instructions or the evidence. WPIC 1.02. A jury is presumed to follow the jury instructions. *State v. Yates*, 161 Wn.2d 714, 763, 168 P.3d 359 (2007) (citations omitted). A lawyer's statements to the jury regarding the law "must be confined to the law as set forth in the instructions given by the court." *State v. Davenport*, 100 Wn.2d 757, 760, 675 P.2d 2113 (1984) (citation omitted).

It is improper conduct for a deputy prosecutor to mischaracterize the State's burden of proof as "anything less than an abiding belief that the evidence presented established the defendant's guilty beyond a reasonable doubt." *State v. Feely*, 192 Wn. App. 751, 762, 368 P.3d 514 (2016). It is not a jury's job to declare the truth or solve a case, but to determine from the evidence presented if the State has proven the case beyond a reasonable doubt. *State v. Anderson*, 153 Wn. App. 417, 220 P.3d 1273 (2009), *review denied*, 170 Wn.2d 1002 (2010).

Caldwell cites broken up pieces of the deputy prosecutor's closing argument, stitching together sentences that are not sequential, are interrupted by argument regarding credibility, and

then finally a sentence that is part of rebuttal and taken completely out of context. All in a desperate attempt to make the deputy prosecutor appear as if he is requiring an all or nothing decision by the jury. That somehow the deputy prosecutor is demanding the jury to only be able to return a guilty verdict if they believe Caldwell is lying and Ms. Jones is telling the truth. This is simply not true.

The deputy prosecutor argued credibility throughout his closing argument, as evidenced in the section argued above. This continued in the statements here, in their full context:

> Now, we know what this all comes down to ultimately. It's going to be what she told you and what Zack said. We heard Mr. Caldwell's version of events. She was awake. I will submit to you there is some issues with the credibility of his statement. And we are going to get to those a little bit later. What is going to happen is Mr. Caldwell's attorney is going to get to talk to you, tell you their version of events, give you a closing. And then what I'm going to do is I'm going to come back and get to talk to you one more time. And we are going to go through sort of what evidence do we know is undisputed, what's [Ms. Jones'] story, and what's Mr. Caldwell's story, and where are the holes in Mr. Caldwell's story and why does it not make sense. So that's what we're going to do, and I submit to you at the end of this whole process you will be convinced beyond a reasonable doubt that the defendant committed the crime of indecent liberties.

RP 332-33. The next statement Caldwell took a snippet of also reads markedly different in its full context:

> You have to look at both versions of events and decide which one makes more sense, and I submit to you when you look at the defendant's version of events, it's not reasonable. It doesn't make sense. He's added things that are so crucial late in the game that he never told law enforcement to begin with. It just doesn't make sense. So ultimately you need to ask yourself, does this make any sense to you that a woman, a young lady, with a boyfriend would one night all of a sudden have consensual sex with her boyfriend's friend, her friend, then submit herself to an invasive, uncomfortable physical examination, interviews with law enforcement, defense attorneys, testify in front of all of you just because on December 2, 2015, she felt like calling it a sexual assault. Does that make any sense? I submit it does not. And I'm going to ask you to go back there and weigh the evidence, use your common sense, think about all the flaws in the defendant's version of events and story, the facts that he omitted earlier, and I'm going to ask you ultimately to return a verdict of guilty, because the state has proven each and every element of indecent liberties beyond a reasonable doubt. Thank you for your time and attention.

RP 361-62. Caldwell does not even bother to quote the complete sentence he complains of, instead, cuts off the sentence where it best suits his argument. Brief of Appellant 30.

Caldwell's intentional and repeated refusal to consider the deputy prosecutor's statements to the trial court in their full context is once more contrary to the law and disingenuous. There were two version of the events in this matter, and the jury would have to decide which version was more reasonable, and determine if the State had proven its case beyond a reasonable doubt if they tended

to find the version as presented by Ms. Jones more reasonable. There is no other way to argue this case. Either the jury found Ms. Jones' version of the events credible, and if so, could determine from that, if the State proved its case beyond a reasonable doubt. In the alternative, if the jury finds Ms. Jones not credible, the only possibility is the State does not prove its elements beyond a reasonable doubt and the jury would acquit.

The State came back to its burden, beyond a reasonable doubt, each time. As the jury could find Ms. Jones' version of events more reasonable and still not find the State had met its burden. The State did not demand the jury declare the truth in order to return a verdict. The State did not diminish its burden of proof. The jury was correctly instructed on the law and it is presumed the jury followed the instructions. *Yates,* 161 Wn.2d at 763; CP 89-92, 97. The deputy prosecutor's arguments asking the jurors to assess the testimony of Ms. Jones and Caldwell to determine credibility is not improper. The prosecutor did not commit error.

While not conceding error, if the deputy prosecutor's statements during closing arguments did impermissibly shift the burden or misstate the law there was no objection to the statements

and Caldwell has not met his burden to show the deputy acted flagrantly or he was prejudiced in any way.

Caldwell failed to object to the deputy prosecutor's statements. A curative instruction and an admonishment to the jury to disregard the prosecutor's argument would have sufficiently cured the possible resulting prejudice incurred by the improper statements. Because this prejudice could have been cured had a timely objection been raised, Caldwell waived his right to raise the issue for the first time on appeal.

Further, the deputy prosecutor's statements are not flagrant and ill-intentioned and within the context of the entire record Caldwell cannot show he was prejudiced by the alleged misstatements, therefore, there is no prosecutorial error and Caldwell's convictions should be affirmed.

B. CALDWELL RECEIVED EFFECTIVE ASSISTANCE FROM HIS ATTORNEY THROUGHOUT THE TRIAL PROCEEDINGS.

Caldwell's attorney provided competent and effective legal counsel throughout the course of his representation. Caldwell asserts his trial counsel was ineffective for failing to object to the deputy prosecutor's alleged improper comments during closing arguments and improperly elicited testimony of Ms. Jones and Ms.

Curt. Brief of Appellant 33-36. Caldwell's attorney was not ineffective in any of the areas of his representation of Caldwell. If Caldwell's attorney was deficient in any way, Caldwell cannot show he was prejudiced by his attorney's conduct and his ineffective assistance claim therefore fails.

1. Standard Of Review.

A claim of ineffective assistance of counsel brought on a direct appeal confines the reviewing court to the record on appeal and extrinsic evidence outside the trial record will not be considered. *State v. McFarland,* 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (citations omitted).

2. Caldwell's Attorney Was Not Ineffective During His Representation Of Caldwell Throughout The Jury Trial.

To prevail on an ineffective assistance of counsel claim Caldwell must show (1) the attorney's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 674 (1984); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The presumption is the attorney's conduct was not deficient. *Reichenbach*, 153 Wn.2d at 130, *citing State v. McFarland*, 127 Wn.2d at 335. Deficient performance exists only if

counsel's actions were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The court must evaluate whether given all the facts and circumstances the assistance given was reasonable. *Id.* at 688. There is a sufficient basis to rebut the presumption that an attorney's conduct is not deficient "where there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, 153 Wn.2d at 130.

If counsel's performance is found to be deficient, then the only remaining question for the reviewing court is whether the defendant was prejudiced. *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). Prejudice "requires 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *State v. Horton*, 116 Wn. App. at 921-22, *citing, Strickland v. Washington*, 466 U.S. at 694.

a. Caldwell's attorney was not ineffective for failing to object to the deputy prosecutor's questioning of Ms. Jones and Ms. Curt in regards to the sexual assault examination and statements argued above as prosecutorial error during closing.

Failure to object to testimony will constitute ineffective assistance of counsel only in "egregious circumstances" or testimony central to the State's case. *State v. Neidigh*, 78 Wn. App. 71, 77, 895 P.2d 423 (1995). If trial counsel's failure to object could

have been a legitimate trial tactic counsel is not ineffective and the ineffective assistance claim fails. *Neidigh*, 78 Wn. App. at 77.

Caldwell argues his trial counsel was ineffective for failing to object when the deputy prosecutor elicited testimony from Ms. Jones and Ms. Curt regarding the nature of the sexual assault examination. Brief of Appellant 35-36. Caldwell further argues his trial counsel's failure to object to the State's statement during closing regarding its invocation of the passions and prejudices of the jury and alleged misstatement of the law was ineffective. *Id.* at 34-36. Caldwell argues there was no legitimate trial strategy for failing to object to the State's pervasive misconduct alleged in the section above. *Id.*

As argued above, with the exception of the rhetorical question which improperly invoked concern for community safety, the deputy prosecutor did not commit error during his closing argument and therefore, there was no reason for Caldwell's trial counsel to object. Also, as argued above, there was no prosecutorial error when the deputy prosecutor elicited testimony from Ms. Jones and Ms. Curt regarding the invasive nature of the sexual assault examination. An attorney need not, and should not, make a frivolous objection.

Moreover, counsel, who is in the courtroom and sitting in the presence of the jury, is in the best position to determine the impact of a particular piece of evidence, and whether the impact was such that reemphasizing the evidence is worth the risk. Trial counsel's failure to object to the remarks at the time they were made "'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), *cert. denied,* 498 U.S. 1046 (1991).

The deputy prosecutor committed prosecutorial error when he improperly invoked community safety concerns during his closing arguments, inquiring “Is that how it works around here? No.” RP 351. Failing to object to this rhetorical question, is at its worse, deficient performance by Caldwell’s counsel. Therefore, the analysis becomes can Caldwell establish he was prejudiced by his attorney’s failure to object to this one statement? As argued above, this quick, one time appeal to community safety was not prejudicial. There is not a reasonable probability that, but for failing to object to the deputy prosecutor’s rhetorical question or statement during closing argument, the outcome of the trial would have been different. RP 350; See *Horton*, 116 Wn. App. at 921-22. Trial

counsel was not ineffective. This Court should affirm Caldwell's conviction.

C. THE DOCTRINE OF CUMULATIVE ERROR DOES NOT APPLY IN CALDWELL'S CASE.

The doctrine of cumulative error applies in situations where there are a number of trial errors, which standing alone may not be sufficient justification for a reversal of the case, but when those errors are combined the defendant has been denied a fair trial. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000) (citations omitted). When a defendant/petitioner fails to demonstrate prejudice arising from any single error, he is not entitled to relief under a cumulative error analysis. *Thompson v. Calderon*, 109 F.3d 1358, 1369 (9th Cir. 1996). Alleged errors that are individually insufficient to require relief do not become meritorious simply by aggregating them into one claim. "The fact that many claims of . . . error are pressed does not alter fundamental math – a string of zeros still adds up to zero." *Hunt v. Smith*, 856 F. Supp. 251, 258 (D. Md. 1994); *Mullen v. Blackburn*, 808 F.2d 1143, 1147 (5th Cir. 1987) ("Twenty times zero equals zero.").

IV. CONCLUSION

The deputy prosecutor's actions in Caldwell's trial did not amount to prosecutorial misconduct. The deputy prosecutor did not

commit prosecutorial error, with the exception of improperly invoking community safety concerns during his closing argument. Caldwell has not shown the conceded error was flagrant, ill-intentioned, or that he suffered prejudice. Therefore, Caldwell's claim of prosecutorial misconduct fails. Caldwell received effective assistance from his trial counsel throughout the trial process. Finally, the doctrine of cumulative error does not apply to Caldwell. Therefore, this Court should affirm Caldwell's conviction.

RESPECTFULLY submitted this 12th day of March, 2019.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

by:_____
SARA I. BEIGH, WSBA 35564
Attorney for Plaintiff

LEWIS COUNTY PROSECUTING ATTORNEY'S OFFICE

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