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Division II
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NO. 53771-1-II

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

STATE OF WASHINGTON, Respondent

v.

WENDELL MAURICE CLARK, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.18-1-01142-6

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. **Clark's trial counsel did not perform deficiently when he chose to discuss bias and race with the jury venire rather than move for a change of venue on account of the racial makeup of the venire.**
- II. **The prosecutor did not engage in misconduct during closing argument when she properly argued inferences from the evidence, for the jury to find Clark guilty, and that believing the victim's testimony beyond a reasonable doubt was sufficient to convict Clark of raping and assaulting her.**

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Wendell Maurice Clark was charged by third amended information with Rape in the Second Degree, Assault in the Fourth Degree, and Tampering with a Witness for incidents that occurred on or about the early morning and afternoon of April 22, 2018 and involved Sabrina Von Horn. CP 81-82. All of the counts included the special allegation of domestic violence. CP 81-82.

The case proceeded to a jury trial before the Honorable Judge Bernard Veljacic, which commenced on May 13, 2019 and concluded on May 16, 2019 with the jury's verdicts. RP 294-892. The jury found Clark guilty of Rape in the Second Degree and Assault in the Fourth degree, to include the domestic violence special allegations, but acquitted him of

Tampering with a Witness. CP 145-150; RP 890-93. The trial court sentenced Clark to a maximum term of 114 months of total confinement—the high end of the sentencing range—as part of an indeterminate sentence under RCW 9.94A.507. CP 196, 198, 200, 218-222; RP 907-09. Clark filed a timely notice of appeal. CP 228-29.

B. STATEMENT OF FACTS

Sabrina Von Horn lived in Clark County in an apartment with her teenage daughter. RP 533-34, 688. Wendell Clark met Ms. Von Horn online, and the two began dating in March of 2018. RP 319, 531-32, 776. By April of that same year, Ms. Von Horn considered Clark her boyfriend. RP 402-03, 531-32, 776. The couple's relationship included engaging in sexual intercourse. RP 532, 776. Clark and Ms. Von Horn had not engaged in anal sex, but when Clark broached the topic with her, Ms. Von Horn told him that she had not done it and did not want try it. RP 541, 661-62, 676-77.¹

Clark drove over to Ms. Von Horn's apartment on the evening of April 21, 2018 with plans to stay for the weekend. RP 533, 776-77. The couple watched a movie and a half together before cuddling and falling asleep in Ms. Von Horn's bed. RP 536-37.

¹ Clark acknowledged the conversation took place, but remembered it differently. RP 777-78.

At some point in the very early morning of April 22, Clark and Ms. Von Horn woke up and began kissing and touching each other. RP 537-39, 627. They then transitioned to oral and consensual vaginal sexual intercourse. RP 537-541.² Next, Clark told Ms. Von Horn to roll over onto her stomach, which she did. RP 541. Consensual vaginal intercourse continued, but then Clark removed his penis from Ms. Von Horn's vagina and, without asking Ms. Von Horn or even telling her, put his penis into her anus. RP 361-62, 401-02, 420, 542, 659, 677, 783-84.

Ms. Von Horn said "no" and repeatedly told Clark that she did not want to do that, that it hurt, and to please stop. RP 401-02, 420, 542, 544-45, 659, 677. But Clark did not respond or stop; instead, he held Ms. Von Horn down by her neck and right arm and kept doing it harder for another three to five minutes before ejaculating. RP 361-62, 383-84, 405, 407, 422, 425, 420, 542, 545-46, 550, 659, 677. Ms. Von Horn tried to get Clark off of her by moving away and pushing against the headboard, but her attempts were unsuccessful and she eventually gave up fighting and just laid there until Clark was finished. RP 529, 542, 614-15, 659, 677.

Ms. Von Horn reported that the anal penetration was very painful. RP 401-02, 420, 545-46. The sexual assault nurse examiner (SANE) who

² Ms. Von Horn testified that she felt pressured into performing oral sex because Clark kept asking her to do it.

examined Ms. Von Horn later that day reported that her external anal area was “very, very tender,” really red, and irritated and that when she (the SANE) attempted to do an internal anal swab that Ms. Von Horn scooted away from her saying “ow, ow, ow,” “please don’t,” and cried out in pain. RP 414-16, 559. Ms. Von Horn also had two small bruises on her right upper arm, a broken finger nail from pushing on the headboard, pain in her back, bottom, and neck, redness to the back of her neck, as well as limited mobility in her neck. RP 353-54, 383-85, 409-410, 424, 485-87, 546, 618-620.

Immediately after ejaculating, Clark asked Ms. Von Horn if she was okay, suggested using a lubricant next time so it would not hurt so bad, and ordered her to get a towel with which to wipe themselves. RP 334, 543, 547-48, 628, 632-33. Clark then instructed Ms. Von Horn to get in the shower because she needed “to get clean.” RP 421, 660.

After making sure Clark was asleep, and still during the early morning hours, Ms. Von Horn retreated back to the bathroom and sent text messages to her friend. RP 549-555. In those text messages Ms. Von Horn told her friend, for example, that:

Please don’t call or say anything. I can’t talk. It’s all my fault. I tried to say no but he wouldn’t stop. Please don’t say anything. We were having sex and he forced his penis in my butt. I pulled away repeatedly. I said no and he wouldn’t stop. I guess it’s okay because we were having

sex, right? Sorry for texting. Just don't tell anyone, especially [K.S.] [³]. I'm okay. It's my boyfriend.

RP 555-57, 853-54; Ex. 82-102. Copies of these text messages were taken from Ms. Von Horn's friend's phone by the police. RP 494-95, 510-12. Ms. Von Horn had deleted them from her own phone because Clark had been frequently using it and she was afraid that he would read them. RP 552-53, 636.

The next morning and early afternoon were bookended by Clark's outbursts of anger. RP 560-62, 634-642, 708. First, Clark threw a fit about not getting enough bacon during breakfast and then he became upset after his car was towed from Ms. Von Horn's apartment complex's parking lot. RP 517-18, 560-62, 634-642, 708. Clark became especially enraged when Ms. Von Horn told him that she could not comply with his demand that she pay for half of the tow because she did not have enough money. RP 322, 388-390, 517-18, 560-62, 637-642. Ms. Von Horn repeatedly asked Clark to leave her home, but he refused to leave until Ms. Von Horn gave him money or got his car back. RP 379, 388, 517-18, 560-62, 637-642, 784.

At this point, Clark got so angry that he charged at Ms. Von Horn with his fists clenched and with one of them behind his head like he was

³ K.S. is Ms. Von Horn's daughter. RP 533.

going to punch or hit her. RP 388-390, 563-65, 642-43. Ms. Von Horn was terrified and covered her face because she believed he was going to hit her. RP 563. During this altercation, Clark was also calling Ms. Von Horn names like “bitch.” RP 565, 639.

Because Ms. Von Horn could not find her phone, she sent her daughter next door with instructions to have a neighbor call the police. RP 295, 297-98, 517-18, 560-62, 644-45, 692-94. She also ended up sending a text message to the neighbor to “call 911.” RP 296-98. That neighbor called 911 and put Ms. Von Horn’s daughter on the phone. RP 296-97. Ms. Von Horn even told Clark to leave because the police were on the way, but he refused. RP 563, 567, 647-48.

When the police arrived they noted that Ms. Von Horn appeared scared, nervous, and upset, and that she seemed reluctant to talk with the police at the door about what had happened. RP 312-13, 330-31, 379. Nonetheless, she told them that there was something more going on than just an “unwanted subject.” RP 312-13, 379-380. And when she got farther away from the apartment she told the police about the sexual assault. RP 333-35, 361-62, 380. In retelling what had happened, Ms. Von Horn cried several times and still appeared fearful. RP 333, 382, 386.

The police collected evidence, including the towel that was used to “clean up” after the sexual assault, took photographs of Ms. Von Horn’s

injuries and of the scratched up headboard, transferred Ms. Von Horn to the hospital for a sexual assault exam, and arrested Clark. RP 335-37, 350, 384, 387, 484, 490-91, 529. The SANE observed that during her interview with Ms. Von Horn that she was very, very tearful and that “at times she would curl into a little ball and I’d have to wait a minute for her to get her composure back.” RP 398, 408, 410-11.

Additionally, the police sent the towel and the swabs from the SANE examination to the crime lab. The towel had a dark color stain that tested positive for fecal matter. RP 435-38. The vaginal and perianal swabs had a positive indication of semen and unidentified male DNA was found on the perianal and anal swabs. PR 467-68.

Clark, who was cooperative with the police, testified at trial. RP 325, 525. He largely agreed with the timeline of events testified to by Ms. Von Horn. *See* RP 743-777. But, while acknowledging that he did not ask for consent or permission before putting his penis into Ms. Von Horn’s anus, Clark denied that the anal sex was not consensual. RP 745, 783-84. Instead, Clark explained that Ms. Von Horn said that it hurt, so he “quit thrusting,” “didn’t pull out,” and that after “maybe thirty seconds – a minute later she affirmed she was okay and we continued.” RP 744-45, 780-83.

Similarly, Clark admitted to getting “extremely angry” about the tow situation, shouting at Ms. Von Horn about it and using vulgarities, and refusing to leave the apartment, but denied raising his hand to her or charging at her. RP 755-57, 760, 762, 790-94. No other witnesses testified on behalf of the defense.

ARGUMENT

I. Clark’s trial counsel did not perform deficiently when he chose to discuss bias and race with the jury venire rather than move for a change of venue on account of the racial makeup of the venire.

Clark, a black man, argues that he has the constitutional right to the “realistic possibility” of a black person on his jury venire because he was charged with a sex crime against a white woman. Brief of Appellant at 17, 20.⁴ He further argues that because his trial attorney did not protect this “right” by moving to change venue to Pierce County, that he performed deficiently. Br. of App. at 17-20, 23. This novel argument is without merit.

A defendant has the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The defendant must make two showings in order to demonstrate ineffective assistance: (1) that counsel’s performance was

⁴ Clark’s articulation of this “right” is not consistent as he otherwise described it as the “realistic possibility” of having a black person on his *jury*. Br. of App. at 7, 22.

deficient and (2) that counsel's ineffective representation resulted in prejudice. *Strickland*, 466 U.S. at 687. A court reviews the entire record when considering an allegation of ineffective assistance. *State v. Thomas*, 71 Wn.2d 470, 471, 429 P.2d 231 (1967). Moreover, a "fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011) (quoting *Strickland*, 466 U.S. at 689).

The analysis of whether a defendant's counsel's performance was deficient starts from the "strong presumption that counsel's performance was reasonable." *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); *State v. Hassan*, 151 Wn.App. 209, 217, 211 P.3d 441 (2009) (stating that "[j]udicial scrutiny of counsel's performance must be highly deferential") (quotation and citation omitted). When counsel's actions or decisions can be characterized as "legitimate trial strategy or tactics, performance is not deficient." *Grier*, 171 Wn.2d at 33 (citing *Kylo*, 166 Wn.2d at 863). Thus, "given the deference afforded to decisions of defense counsel in the course of representation" the "threshold for the deficient performance prong is high." *Id.* And while trial counsel has "the duty to research relevant law" he or she "has no duty to pursue strategies

that reasonably appear unlikely to succeed.” *State v. Brown*, 159 Wn.App. 366, 371, 245 P.3d 776 (2011) (citations omitted). Accordingly, “an attorney’s failure to raise novel legal theories or arguments is not ineffective assistance.” *Id.* (citing cases). Nor does an attorney perform deficiently for failing to make arguments that are premised on anticipated “changes in the law” or that challenge settled law. *Id.* at 372; *State v. Studd*, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999); *State v. Slighte*, 157 Wn.App. 618, 238 P.3d 83 (2010); *State v. Millan*, 151 Wn.App. 492, 502, 212 P.3d 603 (2009).

In order to prove that deficient performance prejudiced the defense, “the defendant must establish that ‘there is a reasonable probability that, but for counsel’s deficient performance, the outcome of the proceedings would have been different.’” *Grier*, 171 Wn.2d at 34 (quoting *Kyllo*, 166 Wn.2d at 862). Moreover, where the alleged deficient conduct is the failure to bring a motion, the defendant can establish prejudice only if the motion would have been granted. *State v. Price*, 127 Wn.App. 193, 203, 110 P.3d 1171 (2005), *aff’d*, 158 Wn.2d 630, 146 P.3d 1183 (2006); *State v. McFarland*, 127 Wn.2d 322, 337 n.4, 899 P.2d 1251 (1995). 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.*

a. Deficient performance

Here, Clark is arguing a novel legal theory constructed by mixing together Census data, *Batson* case law⁵, law review articles, social science studies, and our Supreme Court’s recent holdings that address juror bias and the problem of implicit bias. Br. of App. at 8-17. Those ingredients do not, however, inexorably end with Clark’s proposed final product—the right to the “realistic possibility” of a black person on the jury venire when a black defendant is charged with committing a sex crime against a white woman *and* with the concomitant right to a change of venue when that “realistic possibility” does not exist in the county where the crime occurred.⁶ And, in fact, Clark fails to cite a single case construing the court rule which provides for a change in venue. *See* Br. of App; CrR 5.2(b)(2). Clark’s arguments are interesting and inventive, but another attorney’s failure to make the same arguments cannot constitute deficient performance. For this reason alone, Clark’s ineffective assistance claim must fail.

⁵ *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

⁶ Clark acknowledges that the “right to a fair trial does not guarantee the right to a jury that includes persons of his or her own race.” Br. of App. at 8, 22 (citing *Batson*, 476 U.S. at 85).

Clark’s novel theory also fails on its own merits and in no small part because the scope of the purported right is undefined and raises many substantive questions that Clark’s brief does not even attempt to answer. For example, for the purposes of such a claim, what constitutes a “realistic possibility” that a black person will be on the jury venire? Do we just look to the racial composition of a county in making that determination? Do average venire sizes and response rates to jury summons matter? Does the racial composition of Clark County provide for a “realistic possibility,” but still require a motion to change venue when a black person is not on the venire? To be effective, must all attorneys in counties in Division II, other than Pierce County, move to change venue to Pierce County in situations similar to Clark’s?⁷ If, after a change of venue to Pierce County, the jury venire did not have any black people, would we presume the defendant received a fair trial? CrR 5.2(b)(2). If a defendant in Clark’s position was charged and tried in Pierce County but no black people were part of the venire, would he proceed to have a “fair trial” or would his attorney have to move to change venue as well? CrR 5.2(b)(2). And if

⁷ Of the 13 counties in Division II, Clark County has a higher percentage of black people as part of its population than nine other counties. Appendix A – Census QuickFacts. And Pierce County’s percentage of black people as part of its population is over double the next closest county. App. A. In order of representation: Pierce (7.6%), Thurston (3.6%), Kitsap (3.1%), Clark (2.3%), Mason (1.5%), Grays Harbor (1.4%), Clallam (1.2%), Pacific (1.2%), Cowlitz (1.1%), Jefferson (1.0%), Lewis (0.9%), Skamania (0.7%), and Wahkiakum (0.6%). App. A.

Clark's right to a *fair trial* or equal protection did not require a black person to be seated on the jury, how could the right to a *fair trial* require the "realistic possibility" of a black person on the jury venire? *Batson*, 476 U.S. at 85; *State v. Rhone*, 168 Wn.2d 645, 650-51, 229 P.3d 752 (2010) (citation omitted).

Furthermore, a motion to change venue under CrR 5.2(b)(2) appears to be just one reasonable choice among many possible strategic or tactical choices by a trial attorney unsatisfied by the racial makeup of the jury venire. CrR 5.2(b)(2) is reserved for situations in which "the defendant . . . believes he *cannot* receive a fair trial in the county where the action is pending." (emphasis added). Intermediate steps could ameliorate a trial attorney's concerns and obviate the need to move for a change of venue. Because "[t]rial courts have the inherent authority to control and manage their calendars, proceedings, and parties" a trial attorney could ask and possibly receive a new jury venire with a different racial composition. *State v. Gassman*, 175 Wn.2d 208, 211, 283 P.3d 1113 (2012). *See, e.g., State v. Berkins*, 2 Wn.App. 910, 919, 471 P.2d 131 (1970) (stating that the "court could have . . . excused the remaining members of the jury panel who were present in the courtroom when the incident occurred and obtained a new panel of jurors from the presiding judge's department"); *State v. Bird*, 136 Wn.App. 127, 134, 148 P.3d 1058

(2006) (noting that the timely objection “allowed the trial court to correct its error by seating a new venire for jury selection”). Or a trial attorney could do what Clark’s did: introduce and discuss the idea of racial bias and implicit bias with the venire. RP 234-244; *See State v. Davis*, 141 Wn.2d 798, 825-838, 10 P.3d 977 (2000); *State v. Munzanreder*, 199 Wn.App. 162, 174-180, 398 P.3d 1160 (2017). Accordingly, Clark’s trial attorney’s decision not to move for a change of venue can be characterized as “legitimate trial strategy or tactics” and cannot constitute deficient performance. *Grier*, 171 Wn.2d at 33 (citation omitted). Thus, Clark’s claim fails.

b. Prejudice

Clark also cannot establish prejudice. First, Clark cannot show that the motion to change venue would have been granted. *McFarland*, 127 Wn.2d at 337 n.4. The trial court would not have abused its discretion had it denied the motion to change venue as not compelled by the authority that Clark cites. *State v. Hemenway*, 122 Wn.App. 787, 798, 95 P.3d 408 (2004) (applying the abuse of discretion standard of review to the denial of a “change of venue motion”).

Second, any claimed prejudice requires speculation on top of speculation. There is no way to know, had a motion to change venue to Pierce County been brought and granted, what the racial makeup of

Clark’s jury venire would have looked like in May 2019. And one step removed from that speculative assessment is the unknowable⁸ of what the likelihood would be that a black person would have actually served on Clark’s jury. Next comes the speculation that if a black person or persons actually served on the jury that there is a *reasonably probability* that Clark would have been acquitted. But based on what? Clark claims “[a] different jury makeup *could* result in different credibility assessments, which *could* have changed the outcome of this trial.” Br. of App. at 22 (emphasis added). Prejudice is not so easily established, especially considering that reviewing courts are to presume that the actual “jury acted according to the law” and “exclude the possibility that the . . . jury acted arbitrarily, with whimsy, caprice . . . , or anything of the like.” *Strickland*, 466 U.S. at 694-95.

Notably, Clark’s prejudice claim, which is reliant on there being “[a] different jury makeup” is different than his argument that the purported right is to a “realistic possibility of having black people in the jury venire.” Br. of App. at 20, 22.⁹ If Clark’s argument is the latter—

⁸ If either of these statistics is knowable, Clark has failed to provide the means to the end.

⁹ At one point Clark does state that “there is a reasonable probability that the outcome of his case would have been different with a more diverse jury venire.” Br. of App. at 20. But this claim is not supported by an argument and ignores the fact that the record before this Court does not establish the diversity of the jury venire aside from trial counsel’s claims as to the lack of black individuals on the venire and the individual voir dire of a native Mandarin speaker. Br. of App. at 20-22; CP 115 (jury chart); RP 234-39.

focused on the venire—then his claim of prejudice becomes even more remote. Regardless of the exact nature of the argument, however, Clark cannot show the requisite prejudice to establish the ineffective assistance of counsel.

II. The prosecutor did not engage in misconduct during closing argument when she properly argued inferences from the evidence, for the jury to find Clark guilty, and that believing the victim’s testimony beyond a reasonable doubt was sufficient to convict Clark of raping and assaulting her.

At trial, “[c]ounsel are permitted latitude to argue the facts in evidence and reasonable inferences” in their closing arguments. *State v. Smith*, 104 Wn.2d 497, 510, 707 P.2d 1306 (1985). This latitude is wide and allows a prosecutor to “freely comment on witness credibility based on the evidence.” *State v. Lewis*, 156 Wn.App. 230, 240, 233 P.3d 891 (2010). Any allegedly improper statements by the State in closing argument “should be viewed within the context of the prosecutor’s entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions.” *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.2d 432 (2003) (citing *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)). Juries are presumed to follow jury instructions absent evidence to contrary. *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d

125 (2007) (citing *State v. Davenport*, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984)).

A prosecutor “may not properly express an independent, personal opinion as to the defendant’s guilt.” *State v. McKenzie*, 157 Wn.2d 44, 53, 134 P.3d 221 (2006). Our Supreme Court has held, however, that the prosecutor may:

nevertheless argue from the testimony that the accused is guilty, and that the testimony convinces him [or her] of that fact.

...

...

In other words, there is a distinction between *the individual opinion of the prosecuting attorney, as an independent fact, and an opinion based upon or deduced from the testimony in the case.*

Id. at 54 (emphasis in original) (*quoting State v. Armstrong*, 37 Wn. 51, 54-55, 79 P. 490 (1905)). Furthermore, the context of the purported personal opinion is important as:

[i]t is not uncommon for statements to be made in final arguments which, standing alone, sound like an expression of personal opinion. However, when judged in the light of the total argument, the issues in the case, the evidence discussed during the argument, and the court’s instructions, it is usually apparent that counsel is trying to convince the jury of certain ultimate facts and conclusions to be drawn from the evidence. Prejudicial error does not occur until such time as it is *clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion.*

McKenzie, 157 Wn.2d at 54-55 (emphasis in original) (*quoting State v. Papadopoulos*, 34 Wn.App. 397, 400, 662 P.2d 59 (1983))

Thus, in *State v. Warren*, for example, our Supreme Court held that a prosecutor who argued that certain details about which the complaining witness testified were a “badge of truth” and had the “ring of truth,” and that specific parts of the witness’s testimony “rang out clearly with truth in it” were properly based on the evidence presented rather than on personal opinion. 165 Wn.2d 17, 30, 195 P.3d 940 (2008); *Lewis*, 156 Wn.App. at 240-41.

Similarly, a prosecutor who uses the phrase “we know” does not commit misconduct when he or she uses the phrase to “marshal the evidence” and draw “reasonable inferences from that evidence.”

State v. Robinson, 189 Wn.App. 877, 894-95, 359 P.3d 874 (2015) (citation omitted); *State v. Hoffman*, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991) (examining a prosecutor’s use of the phrases “I think” and “I think the evidence shows” during closing argument, but determining “that there was no unfair assertion of personal opinions”); *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995) (holding prosecutor’s use of “I would suggest” in closing argument was not improper).

In the same vein, “it is misconduct for a prosecutor to argue that in order to acquit a defendant, the jury must find that the State’s witnesses are either lying or mistaken. *State v. Fleming*, 83 Wn.App. 209, 213, 921 P.2d 1076 (1996) (citing *State v. Casteneda–Perez*, 61 Wn.App. 354, 362-63, 810 P.2d 74 (1991)). Nonetheless, a rape defendant may be convicted based on the victim’s uncorroborated testimony alone and the jury can be so instructed. *State v. Chenoweth*, 188 Wn.App. 521, 535-38, 354 P.3d 13 (2015); RCW 9A.44.020(1). In other words, a defendant can be convicted of rape if the jury believes the victim’s testimony recounting a rape beyond a reasonable doubt. *Id.*; RCW 9A.44.020(1).

If the defendant can establish that misconduct occurred, the determination of whether the defendant was prejudiced is subject to one of the two standards of review: “[i]f the defendant objected at trial, the defendant must show that the prosecutor’s misconduct resulted in prejudice that had a substantial likelihood of affecting the jury’s verdict. If the defendant did not object at trial, the defendant is deemed to have waived any error, unless the prosecutor’s misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting

prejudice.” *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012) (citations omitted).

Simply put, a defendant must first establish a prosecutor engaged in misconduct and then, when failing to object at trial, that “(1) no curative instruction 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 760-61 (citation omitted); *State v. Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). Under the heightened standard, “[r]eviewing courts should focus less on whether the prosecutor’s misconduct was flagrant or ill-intentioned and more on whether the resulting prejudice could have been cured.” *Id.* at 762; *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994) (“Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request.”). Importantly, “[t]he absence of a motion for mistrial at the time of the argument 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) (citations omitted).

Here, Clark identifies four instances of what he claims constitute prosecutorial misconduct. Br. of App. at 24-29. Despite only objecting to one of these instances, however, Clark does not inform this Court of that

fact nor does he apply the appropriate standard of review to the other three alleged instances of misconduct; he does not argue that those alleged instances of misconduct were “flagrant or ill-intentioned” and he does not address whether any resulting prejudice could have been cured by a curative instruction. Br. of App. at 25-30. When coupled with Clark’s failure to provide any context to the complained about sentences, it cannot be said that the issue has been fairly presented.

a. Instance objected to in closing argument

The first instance about which Clark complains, and to which Clark objected, is a statement about Ms. Von Horn’s credibility that is italicized in the following excerpt:

That when you see the scratches on the headboard – when you see the way that she testified – when you hear how everyone who interacted with her talked about her demeanor do you have an abiding belief that this was not consensual and that the Defendant forced it anyway? And if you believe Sabrina’s testimony beyond a reasonable doubt then you have enough evidence to convict the Defendant.

Now you are the sole judges of credibility but I would submit to you that Sabrina’s testimony yesterday was genuine. And the evidence –

[Defense]: Objection Your Honor as to the characterization of the testimony given by a witness.

Judge: Overruled.

[Defense]: Okay.

[Prosecutor]: - the evidence would show that she was being truthful. She was not angry –

[Defense]: Again Your Honor I would reiterate my objection based on that particular word.

Judge: Overruled.

RP 851. Following Clark’s objections, the prosecutor continued to discuss Ms. Von Horn’s credibility, and how the evidence supported the conclusion that she was credible, by pointing to her testimony, the “interactions she had with the police and with the sexual assault nurse examiner,” the text messages she sent shortly after the incident, and the physical evidence. RP 852-56.

When the complained about sentence is “judged in the light of the total argument, the issues in the case, the evidence discussed during the argument, and the court’s instructions,”¹⁰ it cannot be said that it was “clear and unmistakable that counsel . . . [wa]s expressing a personal opinion.” *McKenzie*, 157 Wn.2d at 54-55. Instead, when considering the sentence within the context of the entire argument, the prosecutor was properly “arguing an inference from the evidence.” *Id.* And, in fact, that’s

¹⁰ The jury was properly instructed that “You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness.” CP 122.

exactly how the trial court viewed the argument because immediately after the case was submitted to the jury the court explained¹¹ to counsel that:

Essentially what the prosecutor here did was say it's – it was credible or genuine and truthful. And she went on to state out why the jury should believe that to be the case. And so I do feel that there is a distinction. She didn't say it's my opinion and I don't think I can infer from the entirety of the argument that it was her opinion. It was a – an assertion followed by the reasons for that assertion. So that's why I overruled the objections. I wanted to make a record on that.

RP 886-87. The complained about sentence could not be a “clear and unmistakable” expression of personal opinion if the trial court, which knew the law and was in best position to assess the nature of the argument, came to the conclusion that it did not think it could “infer from the entirety of the argument that it was [the prosecutor's] opinion.” RP 887. This Court should similarly conclude that the prosecutor did not commit misconduct.

Nevertheless, even assuming misconduct, Clark cannot show that the misconduct “resulted in prejudice that had a substantial likelihood of affecting the jury's verdict.” *Emery*, 174 Wn.2d at 760. The jury was properly instructed that it was the “sole judge[] of the credibility of each witness” and “of the value or weight to be given to the testimony of each

¹¹ The trial court, in its post-trial discussion about overruling Clark's objections during closing argument, reviewed and applied the relevant case law to include the cases cited herein, e.g., *McKenzie*, *supra*. RP 885-87.

witness.” CP 122. And when combined with evidence that corroborated Ms. Von Horn’s credibility—the contemporaneous text messages in particular—it cannot be said that the prosecutor’s single sentence statement about Ms. Von Horn’s credibility had a “substantial likelihood of affecting the jury’s verdict.” *Emery*, 174 Wn.2d at 760. Accordingly, Clark suffered no prejudice.

b. Instances not objected to in closing argument

Clark’s complaints about the other portions of the prosecutor’s closing argument do not fare any better. And because Clark did not object to these instances, he must show that each was “flagrant and ill-intentioned” and that any resulting prejudice could not have been cured by a curative instruction. *Emery*, 174 Wn.2d at 760. In discussing the incident the prosecutor stated:¹²

He continued forcing his penis into her anus while holding down her upper body – holding her down hard enough that he left bruises. He continued forcing his penis into her anus while she was struggling to get him off of her while she was pushing against the headboard, breaking a nail.

She wasn’t trying to arouse him. Sabrina was writhing in pain. She’s not going to give consent and he was penetrating her. He continued to force his penis into her anus even though her words and her actions told the Defendant that she was not consenting to this act. *This is forcible compulsion. This is rape.*

¹² The statements about which Clark complains are italicized.

...

And she didn't want to believe that somebody that she trusted – somebody that she allowed inside her home – somebody she'd allowed around her daughter – would do that to her – would violate her that way – would rape her. But that's what it was. *It was a rape. The law is clear about that.*

Let's talk about some of the jury instructions. The Judge just read jury instruction number eleven which defines Rape in the Second Degree. It lists out the elements that the State has to prove to you beyond a reasonable doubt.

RP 848-49. And in concluding the prosecutor remarked "He is guilty of Rape in the Second Degree. He is guilty of Tampering with a Witness and he is guilty of Assault in the Fourth Degree." RP 861.

For one, a prosecutor may "argue from the testimony that the accused is guilty, and that the testimony convinces him [or her] of that fact." *McKenzie*, 157 Wn.2d at 54. Accordingly, concluding a closing argument by stating that the defendant is guilty of the crimes for which he is charged cannot be considered "flagrant and ill-intentioned" prosecutorial misconduct. Moreover, as discussed above, such a concluding statement is not tantamount to a prosecutor's individual opinion of the defendant's guilt and the comments here do not rise to an impermissible personal opinion of Clark's guilt "independent of the evidence actually in the case." Br. of App. at 26.

Similarly, the prosecutor's comments that the incident Ms. Von Horn described constituted "forcible compulsion" and "rape" is a proper application of the evidence to the law; not a "personal opinion" as to Clark's guilt. *Robinson*, 189 Wn.App. at 894-95. It can hardly be contested that, if true, Clark "forcing his penis into [Ms. Von Horn's] anus while she was struggling to get him off of her" and that he engaged in this behavior while "[Ms. Von Horn's] words and her actions told the Defendant that she was not consenting to this act" would constitute rape. RP 848-49. But even certainty in this *legal conclusion* does not transform the argument into one of personal opinion as to Clark's guilt.¹³ Consequently, Clark has failed to establish that the prosecutor committed misconduct, let alone flagrant and ill-intentioned misconduct.

Clark likewise fails to establish prosecutorial misconduct when he argues that the prosecutor "improperly implied that the jury had to find Ms. Vanhorn lied or was mistaken in order to acquit Mr. Clark." Br. of App. at 29. The prosecutor argued that "if you believe Sabrina's testimony beyond a reasonable doubt then you have enough evidence to convict the Defendant." RP 851. Because a rape defendant may be convicted based on a victim's uncorroborated testimony alone and the jury can be so

¹³ A prosecutor who misstates the law or argues that the applicable law differs from the law stated in the jury instructions commits misconduct. *State v. Davenport*, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984); *State v. Perez-Cervantes*, 141 Wn.2d 468, 475, 6 P.3d 1160 (2000). That did not happen here.

instructed, this was a correct statement of the law. *Chenoweth*, 188 Wn.App. at 535-38; RCW 9A.44.020(1). The prosecutor did not commit flagrant and ill-intentioned misconduct.

Assuming misconduct, however, Clark has still failed to establish that “(1) no curative instruction 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.” *Emery*, 174 Wn.2d at 760-61. Had Clark objected at trial, the trial court could have reminded the jury that it was “the sole judge[] of the credibility of each witness” and “of the value or weight to be given to the testimony of each witness” or that the “lawyers’ statements are not evidence” or some other curative instruction crafted to satisfy an objection by Clark. CP 122. To the extent that any prejudice would have originally ensued from the challenged statements, a direct, curative instruction would have obviated any prejudicial effect. And if any prejudice remained it would not have “had a substantial likelihood of affecting the jury verdict” because of the strength of the contemporaneous corroborative evidence of the crimes and the physical evidence supporting Ms. Von Horn’s testimony. *Emery*, 174 Wn.2d at 760-61.

CONCLUSION

For the reasons argued above, Clark's convictions should be affirmed.

DATED this 17th day of April, 2020.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By:



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APPENDIX A

The 2020 Census is Happening Now. Respond Today.

QuickFacts

Skamania County, Washington; Lewis County, Washington; Cowlitz County, Washington; Clark County, Washington

QuickFacts provides statistics for all states and counties, and for cities and towns with a *population of 5,000 or more*.

able

Race and Hispanic Origin	Skamania County, Washington	Lewis County, Washington	Cowlitz County, Washington	Clark County, Washington
Population estimates, July 1, 2019, (V2019)	12,083	80,707	110,593	488,241
PEOPLE				
Race and Hispanic Origin				
White alone, percent	▲ 93.0%	▲ 92.0%	▲ 91.1%	▲ 86.4%
Black or African American alone, percent (a)	▲ 0.7%	▲ 0.9%	▲ 1.1%	▲ 2.3%
American Indian and Alaska Native alone, percent (a)	▲ 1.9%	▲ 2.0%	▲ 2.0%	▲ 1.2%
Asian alone, percent (a)	▲ 1.0%	▲ 1.3%	▲ 1.6%	▲ 4.9%
Native Hawaiian and Other Pacific Islander alone, percent (a)	▲ 0.2%	▲ 0.3%	▲ 0.4%	▲ 0.9%
Two or More Races, percent	▲ 3.2%	▲ 3.5%	▲ 3.7%	▲ 4.3%
Hispanic or Latino, percent (b)	▲ 6.3%	▲ 10.3%	▲ 9.2%	▲ 10.0%
White alone, not Hispanic or Latino, percent	▲ 87.6%	▲ 83.1%	▲ 83.4%	▲ 78.0%

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QuickFacts

Thurston County, Washington; Grays Harbor County, Washington; Mason County, Washington; Kitsap County, Washington

QuickFacts provides statistics for all states and counties, and for cities and towns with a *population of 5,000 or more*.

Table

Race and Hispanic Origin 	Thurston County, Washington	Grays Harbor County, Washington	Mason County, Washington	Kitsap County, Washington
Population estimates, July 1, 2019, (V2019)	290,536	75,061	66,768	271,473
 PEOPLE				
Race and Hispanic Origin				
White alone, percent	▲ 81.8%	▲ 87.2%	▲ 87.7%	▲ 82.6%
Black or African American alone, percent (a)	▲ 3.6%	▲ 1.4%	▲ 1.5%	▲ 3.1%
American Indian and Alaska Native alone, percent (a)	▲ 1.8%	▲ 5.6%	▲ 4.8%	▲ 1.7%
Asian alone, percent (a)	▲ 6.2%	▲ 1.5%	▲ 1.4%	▲ 5.5%
Native Hawaiian and Other Pacific Islander alone, percent (a)	▲ 1.0%	▲ 0.3%	▲ 0.5%	▲ 1.0%
Two or More Races, percent	▲ 5.6%	▲ 4.0%	▲ 4.2%	▲ 6.1%
Hispanic or Latino, percent (b)	▲ 9.2%	▲ 10.2%	▲ 10.4%	▲ 8.0%
White alone, not Hispanic or Latino, percent	▲ 74.6%	▲ 79.2%	▲ 80.0%	▲ 76.3%

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QuickFacts

Wahkiakum County, Washington; Pacific County, Washington; Jefferson County, Washington; Clallam County, Washington

QuickFacts provides statistics for all states and counties, and for cities and towns with a population of 5,000 or more.

Table

Race and Hispanic Origin	Wahkiakum County, Washington	Pacific County, Washington	Jefferson County, Washington	Clallam County, Washington
Population estimates, July 1, 2019, (V2019)	4,488	22,471	32,221	77,331
 PEOPLE				
Race and Hispanic Origin				
White alone, percent	▲ 91.6%	▲ 89.9%	▲ 91.4%	▲ 87.2%
Black or African American alone, percent (a)	▲ 0.6%	▲ 1.2%	▲ 1.0%	▲ 1.2%
American Indian and Alaska Native alone, percent (a)	▲ 1.6%	▲ 2.9%	▲ 2.3%	▲ 5.6%
Asian alone, percent (a)	▲ 1.8%	▲ 2.1%	▲ 1.9%	▲ 1.9%
Native Hawaiian and Other Pacific Islander alone, percent (a)	▲ 0.2%	▲ 0.2%	▲ 0.2%	▲ 0.2%
Two or More Races, percent	▲ 4.2%	▲ 3.7%	▲ 3.1%	▲ 4.0%
Hispanic or Latino, percent (b)	▲ 5.3%	▲ 9.8%	▲ 3.7%	▲ 6.4%
White alone, not Hispanic or Latino, percent	▲ 87.3%	▲ 82.0%	▲ 88.5%	▲ 82.5%

The 2020 Census is Happening Now. Respond Today.

QuickFacts

Pierce County, Washington

QuickFacts provides statistics for all states and counties, and for cities and towns with a *population of 5,000 or more*.

Table

Race and Hispanic Origin 

Pierce County,
Washington

Population estimates, July 1, 2019, (V2019)

904,980

 PEOPLE

Race and Hispanic Origin

White alone, percent	▲ 74.8%
Black or African American alone, percent (a)	▲ 7.6%
American Indian and Alaska Native alone, percent (a)	▲ 1.8%
Asian alone, percent (a)	▲ 6.9%
Native Hawaiian and Other Pacific Islander alone, percent (a)	▲ 1.7%
Two or More Races, percent	▲ 7.3%
Hispanic or Latino, percent (b)	▲ 11.1%
White alone, not Hispanic or Latino, percent	▲ 66.3%

About datasets used in this table

Value Notes

▲ Estimates are not comparable to other geographic levels due to methodology differences that may exist between different data sources.

Some estimates presented here come from sample data, and thus have sampling errors that may render some apparent differences between geographies statistically indistinguishable. Click the Quick Info ⓘ icon to t row in TABLE view to learn about sampling error.

The vintage year (e.g., V2019) refers to the final year of the series (2010 thru 2019). *Different vintage years of estimates are not comparable.*

Fact Notes

- (a) Includes persons reporting only one race
- (b) Hispanics may be of any race, so also are included in applicable race categories
- (c) Economic Census - Puerto Rico data are not comparable to U.S. Economic Census data

Value Flags

- Either no or too few sample observations were available to compute an estimate, or a ratio of medians cannot be calculated because one or both of the median estimates falls in the lowest or upper i open ended distribution.
- D Suppressed to avoid disclosure of confidential information
- F Fewer than 25 firms
- FN Footnote on this item in place of data
- N Data for this geographic area cannot be displayed because the number of sample cases is too small.
- NA Not available
- S Suppressed; does not meet publication standards
- X Not applicable
- Z Value greater than zero but less than half unit of measure shown

QuickFacts data are derived from: Population Estimates, American Community Survey, Census of Population and Housing, Current Population Survey, Small Area Health Insurance Estimates, Small Area Income and Estimates, State and County Housing Unit Estimates, County Business Patterns, Nonemployer Statistics, Economic Census, Survey of Business Owners, Building Permits.

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CLARK COUNTY PROSECUTING ATTORNEY

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