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JUNE 19, 2012
Court of Appeals
Division III
State of Washington

NO. 30132-0-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL WINN,

Appellant.

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant makes numerous assignments of error. These can be summarized as follows;

- 1) Because the telephone recording application was not signed should the order be suppressed?
- 2) Did the Deputy Prosecuting Attorney wrongfully express his personal opinion and if so was that misconduct?
- 3) Did the Deputy Prosecuting Attorney disparage the role of the defense attorney and thereby violate appellant's right to counsel and due process?
- 4) Did the trial court improperly limit cross-examination of the complaining witness?

B. ANSWERS TO ASSIGNMENTS OF ERROR.

- 1) The lack of a signature does not invalidate the order to record the telephone conversation; the application and order are not facially invalid.
- 2) The statements, in closing argument, made by the attorney for the State did not amount to misconduct, the Deputy Prosecuting Attorney did not "disparage" the attorney for appellant.
- 3) The trial court properly limited cross-examination of this rape victim.

II. STATEMENT OF THE CASE

The substantive and procedural facts have been adequately set forth in appellants brief therefore, pursuant to RAP 10.3(b); the State shall not set forth an additional specific fact section. As needed the State shall refer to specific sections of the record.

There are seven volumes of transcripts in this case. Five of those volumes are captioned with the date set out in a numerical sequence. The other two volumes are captioned “Winn Transcript” followed by the volume number. The State shall reference these various volumes by the numerical sequence or “Winn Transcript” followed by the specific page being referred to. The victim has been referred to as “H”, “HD” and “HAD.” The most common in the record was “HD” and therefore the State shall use this set of initials when referring to the victim.

III. ARGUMENT.

RESPONSE TO ALLEGATION “I”

THE FAILURE TO SIGN THE APPLICATION DID NOT INVALIDATE THE ORDER.

The claim that the entire document and the evidence gathered based on that document should be thrown out for a lack of a signature is without legal basis. The court ruled that there was no basis to throw out the entire document and the evidence gathered. The court reiterated this four times on the record:

COURT’S FINAL RULING

THE COURT: Well I, I just indicated sort of and I’ll confirm this that I do not find that the application or the order are facially invalid. I think if that was the intent as an initial proposition Mr. Klein, I, I don’t agree with that. I, I don’t, if you want to go beyond that I’m concerned about whether Judge Elofsen can

confirm this. You have a right, you have a right to get that confirmed.

(RP Winn Vol. 1 pg. 41)

...

THE COURT: Of course. Well as far as what I am, what I have done and what, what I'm prepared to say the fact that Janis didn't sign this application is not fatal. You read "A" and "B" together in a common sense fashion and I believe there's compliance with the statute. There was an application in writing in my opinion it was done under oath if you can establish that Elofsen sworn him in. I, in my opinion that, that is sufficient. You say it's not. Well then that's an issue maybe my colleagues on Division III will wrestle with, but if that's the, if that's the issue you wanted me to decide today then I've decided it.

(RP Winn Vol. 1 pg. 45-6)

...

THE COURT: Yeah.

MR. SOUKUP: You found that the oath is not an issue.

THE COURT: Is not fatal to the viability of the application...

MR. SOUKUP: Okay.

THE COURT: ...for the resulting order.

(RP Winn Vol. 1 pg. 49)

...

THE COURT: But, so let's summarize what we've done.

MR. SOUKUP: Yes.

THE COURT: The, the important issue that was hammered on today was this issue about whether Janis's failure to sign it was crucial. I'm saying not.

(RP Winn Vol. 1 pg. 54)

Appellant cites Williams, *infra*, indicating the legislature "intended to establish protections for individuals' privacy and to require suppression

of recordings of even conversations relating to unlawful matters if the recordings were obtained in violation of the statutory requirements.” State v. Williams, 94 Wash.2d 531, 548, 617 P.2d 1012 (1980). The State wholly agrees with this statement. However, appellant further indicates that Williams requires that “The Act must be strictly construed in favor of the right to privacy. *Williams*, at 548; *see also Christensen*, at 201.” (Appellant’s brief at 8) A full reading of this section of Williams indicates the court was discussing a very specific exception to the statute.

State v. Costello, 84 Wash.App. 150, 925 P.2d 1296 (1996), is supportive of the State’s case and the actions of the trial court. Costello endorses the analysis set forth in State v. Jimenez, 128 Wash.2d 720, 723, 911 P.2d 1337 (1996) where the court found that while there must be compliance with the statute there must be allowance for the humans who are using this act and their good faith attempts to comply with the edicts of that act. Costello states:

Jimenez held that because the authorizing officers attempted to comply with RCW 9.73.230 and acted in good faith on the invalid authorization, any information the officers obtained during the interception was admissible, as long as the information was not obtained solely from the illegal recording. Jimenez, 128 Wash.2d at 726, 911 P.2d 1337.

We interpret Jimenez to hold that, where officers make a genuine effort to comply with the privacy act, the admissibility of any information obtained is

governed by the specific provisions for each type of interception. Jimenez, 128 Wash.2d at 726, 911 P.2d 1337. Like RCW 9.73.230, RCW 9.73.210 allows for the admission of a participant's testimony if it is unaided by information obtained "pursuant to this section" from the recording. RCW 9.73.210(5). The questions we must address are whether Detective Linman's attempt to comply with RCW 9.73.210 was genuine and whether his subsequent testimony was aided by information obtained pursuant to that section.

We find that although the safety concerns in the body wire authorization request are conclusory and inadequate for authorization, they show a genuine attempt to describe the overriding fears of officers on undercover drug investigations. Likewise, the authorization's failure to identify all the participants is not persuasive proof of a lack of good faith. See Jimenez, 128 Wash.2d at 723, 725-26, 911 P.2d 1337. Consequently, we find that the officers genuinely attempted to comply with RCW 9.73.210.

Detective Linman testified from his visual observation of the transaction as well as from his memory of the conversation with Mr. Costello. According to Jimenez, when officers fail to obtain authorization pursuant to RCW 9.73.230 (assuming they made a genuine attempt to comply with the statute), the intercepted communication is inadmissible, but the "unaided evidence provision in the same section precludes the suppression of any other evidence." Jimenez, 128 Wash.2d at 726, 911 P.2d 1337. The recorded conversation here was destroyed before trial, was never mentioned at trial, and apparently was not used to aid Detective Linman's testimony in any way. It follows that his testimony was properly admitted. (Costello at 155-56)

The distinction between this present matter and Costello is the type of authorization involved. This court, in Costello, was asked to consider the actions of police officers using the “self-authorizing statutes.” (Costello at 154) The present matter before this court was not “self-authorized” but was reviewed by a Superior Court Judge.

Even if this court were to indicate the State must “strictly comply” with the letter of the law in RCW 9.73 this application and order would still be upheld. A review of the various sections of this statute, even those which might even be remotely applicable, reveals there is not one single mention of the word “**signature**.” The statute reads as follows:

RCW 9.73.040. Intercepting private communication - Court order permitting interception – Grounds for issuance – Duration - Renewal

(5) The court may examine upon **oath or affirmation** the applicant and any witness the applicant desires to produce or the court requires to be produced. (Emphasis mine.)

The oath was read, the detective was sworn and that detective, Det. Janis filed an affidavit, under penalty of perjury, that this was true;

I, Chad Janis, declare as follows:
On July 14th, 2010 at 1:55 p.m. I, Detective Chad Janis of the Yakima Police Department Special Assault Unit presented an application in the matter of authorization to intercept and record communication or conversations pursuant to 9.73.090, to Superior Court Judge Elofson for approval. I was placed under oath for this application by Judge Elofson and attested to the accuracy of the information provided in this application. The application

was granted by Judge Elofson, at which time he placed his signature on the order. I failed to sign the application above my typed signature, prior to leaving the judges chambers. The application and order was then filed with the Superior Court Clerk of Courts and given the corresponding number of #269

I declare (or certify) the above statements are true under penalty. of perjury, signed in Yakima, Washington on November 12, 2010.
(CP 45)

There is nothing presented to the trial court nor is there anything in the record before this court that would dispute that the **oath** was given.

Costello points out that even if this court were to find the recording was made in error, the good faith found by both trial court judges who reviewed this matter, would allow the victim to testify to the conversation through her recall of that conversation

Further, State v. Smith, 85 Wn.App. 381, 932 P.2d 717 (1997) *review denied*, 132 Wash.2d 1010, 940 P.2d 655 (1997) found that even though the recording did not meet the statutory requirements there was no error from the admission:

But there is nothing in the record before us to suggest that the police intentionally or negligently omitted the information about expected location. The authorization includes the names of the officers authorized to record the conversation, the identity of the alleged offender, the details of the offense, an expected date and time, and a notation of whether the police attempted to obtain a judicial authorization. In short, it complies with all but one of the detailed requirements of RCW 9.73.230(2).

The record does not demonstrate that the police failed to make a genuine effort to comply with the statutory requirements. Therefore the unaided evidence provision of RCW 9.73.230(8) controls.

Because Detective Kettells' account of the April 27 drug transaction is not inadmissible, it is unlikely that the result of the trial on that count would have been different in the absence of the recording. Thus, the error of admitting the recordings was harmless. (Footnote omitted.)

Once again even if the court should not have allowed the admission of the recording the failure to suppress evidence obtained in violation of the privacy act is prejudicial unless, within reasonable probability, the erroneous admission of the evidence did not materially affect the outcome of the trial. State v. Rupe, 101 Wash.2d 664, 681-82, 683 P.2d 571 (1984). There is no doubt based on the evidence presented that that this phone call would not have changed the outcome of this case.

The testimony of the victim in this case was, standing alone, overwhelming. The black and white transcript sets forth a factual scenario that depicts a youngster who was sexually groomed and abused over a lengthy period of time, one can only imagine the impact on the jury who sat and listened to this young woman describe in great detail a loving boyfriend/girlfriend relationship with the man she also considered her father. A young woman who was a “willing” participant and who testified that Winn was a good father and person whom the victim loved in

a boyfriend – girlfriend relationship because she assumed, had been taught, that this was the type of relationship she was in with Winn. She describes the various sexual acts between she and Winn to include “French kissing, digital penetration, jacking him off, sitting on his face, masturbation, oral sex, sexual intercourse – penile/vaginal” to name some. She testified that these occurred for years and in numerous locations in and out of the home. This testimony was not swayed by the cross-examination. Testimony that covers over one-hundred pages of the verbatim report of proceedings. (RP 062011 pgs 122-234)

The cross-examination of the defendant thoroughly disassembles his “theory” of the case. His justification for discussing his feelings about the sexual relationship on the recorded call was done because he was trying to play detective and because he believed that he “evil aunt” was behind all that was going on. He played along and did not deny that he had had a sexual relationship with the victim because he was trying to find out what was going on with what was being said on Facebook. (RP 363-75)

The rebuttal testimony by the State’s witnesses corroborated essential portions of the victim’s testimony, further bolstering the fact that even if this court were to find there was a technical violation of the privacy act the evidence admitted was overwhelming and any error was

harmless. (RP 381-92) Even the mother of the victim had at one time made statements to the lead detective that implicated Winn. (RP 414-16)

State v. Wade, 138 Wn.2d 460, 979 P.2d 850, 852 (Wash. 1999);

A trial court's admission of evidence is reviewed for an abuse of discretion. State v. Lane, 125 Wash.2d 825, 831, 889 P.2d 929 (1995). A court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. State ex rel. Carroll v. Junker, 79 Wash.2d 12, 482 P.2d 775 (1971). A trial court's judgment is presumed to be correct and should be sustained absent an affirmative showing of error. Smith v. Shannon, 100 Wash.2d 26, 35, 666 P.2d 351 (1993); Mattice v. Dunden, 193 Wash. 447, 450, 75 P.2d 1014 (1938).

The defendant bears the burden of proving abuse of discretion.

State v. Hentz, 32 Wn. App. 186, 190, 647 P.2d 39 (1982), rev'd on other grounds, 99 Wn.2d 538, 663 P.2d 476 (1983).

RESPONSE TO "IP" PROSECUTORIAL MISCONDUCT.

Appellant alleges the Deputy Prosecuting Attorney (DPA) committed reversible error by;

1. Vouching for the evidence and seeking to convict Winn on matters outside the record
2. The DPA infringed on Winn's right to counsel by disparaging the role of trial counsel and impugning Winn's counsel's integrity.

These two allegations are based on alleged prosecutorial misconduct during closing arguments.

Winn states that this is an error affecting a constitutional right and therefore it is reviewed based on the standard set out in State v. Toth, 152 Wash.App. 610, 615, 217 P.3d 377 (2009). Winn then states “The constitutional right to a jury trial includes the right to a verdict based solely on the evidence developed at trial. U.S. Const. Amend. VI; Turner v. Louisiana, 379 U.S. 466, 472, 85 S. Ct. 546, 13 L. Ed. 2d 424 (1965). The due process clause affords a similar protection. U.S. Const. XIV; Sheppard v. Maxwell, 384 U.S. 333, 335, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966).” (Appellant’s brief at 14)

Winn however never sets forth a single “fact” that was introduced by this alleged grievous conduct. He merely states that the alleged vouching and or the invocation of the wisdom of all the prosecutors is or are “facts” which were introduced. These are not facts and the actions of the DPA, even if this court were to consider the used of each “I” an error, did not introduce a single “fact” into this case. Therefore the standard is not that as set forth in Winn’s brief.

The totality of the misconduct is addressed under the allegation of vouching and matters outside the record consists of several statements where the DPA used the pronoun “I.”

Jury instruction number “1” sets forth the law for the jury with regard to argument by trial counsel. This instruction was read to the jury.

(RP 062211 pgs 441-43, CP 216-17) The jury is presumed to follow the instructions of the court as was so elegantly set forth in State v. Grisby, 97 Wn.2d 493, 509, 647 P.2d 6 (1982):

Jurors are presumed to follow instructions. State v. Kroll, 87 Wash.2d 829, 558 P.2d 173 (1976). We agree with the observation made in State v. Pepoon, 62 Wash. 635, 644, 114 P. 449 (1911):

In addition, we must indulge some presumptions in favor of the integrity of the jury. It is a branch of the judiciary, and if we assume that jurors are so quickly forgetful of the duties of citizenship as to stand continually ready to violate their oath on the slightest provocation, we must inevitably conclude that a trial by jury is a farce and our government a failure.

The appellant objected to the use of the pronoun “I” on several occasions. The court upheld those objections. Winn did not move to have them stricken nor did he ask for a curative instruction and he does not argue that his counsel was ineffective. It is not the job of the court to make objections, move to strike, nor to move for mistrial or ask for a curative instruction. As can be seen by the colloquy at the break when this matter was addressed the DPA sincerely did not believe his actions were objectionable (062211 pgs 455-47, 479-81)

The use of “I” was discussed after there was a sidebar and after the jury had been removed from the court. Below is the ruling of the court. Winn ‘s attorney specifically indicates they did not ask for a mistrial and

addresses this question with Mr. Winn specifically. Mr. Winn states on the record that he does not want to ask for a mistrial.

THE COURT: All right. The jury has left the courtroom. There was one sidebar at the beginning of the state's opening argument. Mr. Klein was expressing concern regarding Mr. Soukup's use of the word I. In the sidebar I indicated to Mr. Soukup I didn't believe it was appropriate, that it's not David Soukup vs. Michael Winn. It's the State of Washington vs. Michael Winn. I indicated that he should not personalize this as far as what he believed or did not believe further. I think that was abided by. Mr. Soukup indicated, although he was not in agreement with my ruling, he would abide by it. Is there anything further for purposes of the record, Mr. Soukup?

MR. SOUKUP: No, your Honor. I just think the concern that you're talking about is the concern of personal belief and whether or not the evidence -- things in the evidence. In my opinion, I don't think that this type of thing is prohibited. As I say, I don't think I'll probably change your mind about that today. So I'll abide by your ruling obviously.

THE COURT: Especially not, Mr. Soukup, in light of the number of prosecutorial misconduct cases that have been coming back lately where prosecutors have been inserting themselves into the process.

Mr. Klein, anything further for the record?

MR. KLEIN: We did not move for a mistrial. Michael, do you want to have any reason to start this trial over again? We could ask the judge. She would say no. You have the right to ask the judge to start over in light of the prosecutor's comments.

MR. WINN: No.

MR. KLEIN: No motion, Judge.

THE COURT: Thank you. We'll take a quick recess so we can switch everything over. It will be my intentions to go the rest of the way through until we finish this and get it to the jury.

(RP 062211 pgs 479-81, Emphasis mine.)

State v. Cunningham, 23 Wn. App. 826, 598 P.2d 756 (1979);

Although we agree that argument, inflammatory remarks, and the injection of the prosecutor's personal opinion of the case have no place in the opening statement, State v. Kroll, 87 Wn.2d 829, 558 P.2d 173 (1976), we have reviewed the record and find no prejudicial error. The relevant inquiry is whether the remarks when viewed against the backdrop of all the evidence, so taint[ed] the entire proceedings that the accused did not have a fair trial?

State v. Kraus, 21 Wn. App. 388, 391, 584 P.2d 946 (1978), quoting from State v. Nettleton, 65 Wn.2d 878, 880, 400 P.2d 301 (1965).

...

Unless the misconduct of counsel in his opening statement is so flagrant, persistent and ill-intentioned, or the wrong inflicted thereby so obvious, and the prejudice resulting therefrom so marked and enduring, that corrective instructions or admonitions clearly could not neutralize their effect, any objection to such misconduct of counsel or error in the opening statement is waived by failure to make adequate timely objection and request for a corrective instruction or admonition. (Some citations omitted.)

As set forth above, the evidence in this matter was overwhelming.

It was not a typical case. In this instance, the victim had in effect “aged-out” of the law. The State was unable to use many statements to others through a child hearsay exception.

However, the victim’s sister testified on rebuttal that she had personally observed the “face sitting” incident and had confronted both Winn and her mother about what had occurred. This sister also indicated

that their mother has also observed HD “sitting on Winn’s face” and there had been an enormous fight over his actions. (RP 062111 pg 384-87)

On this occasion the Mother came to this sister and justified Winn’s actions indicating that HD had been the proactive party in this “face-sitting” incident. “My mom. She told me it was not Mike's fault what happened, that Holly was the one that was actually looking for that sort of attention and she was seducing him.” (RP 062111 pg 387)

Further, the victim’s own mother stated to Det. Janis that she had observed Winn on two occasions. A statement she was conveniently able to not remember by the time she testified. (RP 062111 304-07, 413- 16)

While possibly not the best use of the pronoun “I” all DPA’s are in fact representatives of the State of Washington and the presentation of the case and the evidence was done by the DPA not “the State.”

As was stated by Mr. Soukup ”No, your Honor. I just think the concern that you're talking about is the concern of personal belief and whether or not the evidence -- things in the evidence. In my opinion, I don't think that this type of thing is prohibited. As I say, I don't think I'll probably change your mind about that today. So I'll abide by your ruling obviously.

The several times the DPA used the term “I” were not referencing any evidence. The DPA merely stated;

Ladies and gentlemen, you may remember while we were selecting a jury that you were asked a lot of questions. One of the questions I asked you is to raise your hand if

you have a hard time believing that there is people in our community that sexually abuse children, and no one raised their hand. **I** don't doubt that that was an honest answer. After all, we all know there's people in every community that sexually abuse children. Yet **I** know that when I try a case in which the allegation is sexual abuse – (RP 062211 pg 455)

At this time there as an objection which was sustained by the court. The fact is none of these statements has anything to do with the **facts** of the case. The DPA was merely discussing the procedures of the trial and the next page the DPA once again refers to the procedure of this type of case and uses the pronoun “I” which is not objected to by Winn’s counsel. There follows several other uses of “I” by the DPA two of which are objected to by counsel for Winn. It is at this time there is a sidebar which is later addressed on the record wherein the court states “Especially not, Mr. Soukup, in light of the number of prosecutorial misconduct cases that have been coming back lately where prosecutors have been inserting themselves into the process.”

Thereafter Winn and his counsel specifically state they considered and do not want a mistrial, they do not want to “start over again.” Reversal is not required if the error could have been obviated by a curative instruction and the defendant did not request one. State v. Hoffman, 116 Wash.2d 51, 93, 804 P.2d 5 (1991)

“Unless the misconduct of counsel in his (closing) statement is so flagrant, persistent and ill-intentioned, or the wrong inflicted thereby so obvious, and the prejudice resulting therefrom so marked and enduring, that corrective instructions or admonitions clearly could not neutralize their effect, any objection to such misconduct of counsel or error in the opening statement is waived by failure to make adequate timely objection and request for a corrective instruction or admonition.” (Cunningham, supra.)

While the court did not at the time of the alleged error “admonish” the jury, it did so in the jury instructions.

“However, not all statements by a prosecutor relating to a witness' credibility are barred.

It 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.”

State v. Papadopoulos, 34 Wn. App. 397, 400, 662 P.2d 59, review denied, 100 Wn.2d 1003 (1983)

The actions of the DPA in the instant case are far more akin to those set forth in State v. Brett, 126 Wn.2d 136, 174-75, 892 P.2d 29 (1995):

Allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard. State v. Hughes, 106 Wn.2d 176, 195, 721 P.2d 902 (1986). The defendant bears the burden of "establishing both the impropriety of the prosecutor's conduct and its prejudicial effect." (Footnote omitted.) State v. Furman, 122 Wn.2d 440, 455, 858 P.2d 1092 (1993). Prosecutorial misconduct does not constitute prejudicial error unless the appellate court determines there is a substantial likelihood the instances of misconduct affected the jury's verdict. State v. Evans, 96 Wn.2d 1, 5, 633 P.2d 83 (1981).

Brett argues the prosecutor improperly vouched for the credibility of Mrs. Milosevich during his closing argument. It is improper for a prosecutor personally to vouch for the credibility of a witness. State v. Sargent, 40 Wn. App. 340, 344, 698 P.2d 598 (1985). Prosecutors may, however, argue an inference from the evidence, and prejudicial error will not be found unless it is "clear and unmistakable" that counsel is expressing a personal opinion. Sargent, 40 Wn. App. at 344.

In speaking to the jury about the discrepancy between Mrs. Milosevich's and Shirley Martin's testimony as to whether the alarm went into full alarm mode, the prosecutor argued:

And you're going to have to evaluate credibility on that issue I guess. But I would suggest that one reason you might want to believe Pat Milosevich on that issue is that she at the time those events were occurring was watching her husband of 33 years being blown away by a .410 shotgun. And maybe that's the kind of scenario of events that she's going to remember fairly well for the rest of her life. . . . Report of Proceedings vol. 14 (June 11, 1992), at 25-26. This argument does not set forth a statement of personal belief, as was done in Sargent when the prosecutor stated, "I believe Jerry Lee Brown. I believe him . . .".

Sargent, 40 Wn. App. at 343. Rather, the prosecutor was drawing an inference from the evidence as to why the jury would want to believe one witness over another. This statement was not improper.

While parts of this closing argument could have been worded differently and still imparted the same meaning and message, it clearly did not rise to the level of misconduct.

Winn alleges that these statements somehow brought “facts” from outside the record into this trial and yet there are not “facts” set forth in Winn’s brief. He indicates that “The prosecutor’s “I” statements directly vouched for the evidence; the claim that “No prosecutor would have any concerns about the evidence” indirectly vouched by suggesting that facts not in evidence (the collective wisdom of all prosecuting attorneys) supported conviction.” (Appellant’s brief at 16) Somehow the “collective wisdom” is a “fact” that was introduced. This is argument not testimony.

State v. Thorgerson, 172 Wash.2d 438, 258 P.3d 43 (2011) cited by Winn is factually very similar to this case. In Thorgerson the DPA made statements which were far in excess of those made in this case and even with that the court found there was no error. This court need only read the case cited by Winn to determine that the action of the State in this case were not error.

ALLEGED DISPARAGING COMMENT.

Winn next argues that the DPA engaged in some “subtler form of disparagement” by indicating that the defense counsel was there to get the best possible result he could for his client.” The State is unsure how stating the truth of what counsel is doing, attempting to get an acquittal, can be anything but a statement of the role of one party. This alleged error was so subtle that that even the person being disparaged did not perceive it apparently he, trial counsel did not object to this alleged error and therefore it has not been preserved for review. State v. Swan, 114 Wn.2d 613, 661, 663, 790 P.2d 610 (1990);

We have consistently held that unless prosecutorial conduct is flagrant and ill-intentioned, and the prejudice resulting therefrom so marked and enduring that corrective instructions or admonitions could not neutralize its effect, any objection to such conduct is waived by failure to make an adequate timely objection and request a curative instruction. Thus, in order for an appellate court to consider an alleged error in the State's closing argument, the defendant must ordinarily move for a mistrial or request a curative instruction. The 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. Moreover, “[c]ounsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal.

...

Moreover, remarks of the deputy prosecuting attorney that would otherwise be improper are not grounds for reversal where they are in reply to defense counsel's statements unless the remarks are so prejudicial that an instruction would not cure them.

Further this alleged error must be read in light of the preceding argument by Winn's counsel, where counsel misstates the law

We've got a society where we're arming teenagers with a nuclear button. Teenagers are able to press the button at will. Mom goes too far. Daddy disciplines too much, whatever. 911. Help me. Mommy kicked me. Help me. Daddy slapped me. Help me. Somebody touched me inappropriately.

Again, maybe it's nothing. Don't you remember Justine when she was on the stand? She says eight-year old Holly goes to mommy and says, Mike touched me inappropriately. The question is would an eight-year old use that kind of language or is Justine simply shading her testimony? Wouldn't an eight-year old say Mike kissed me? Of course. That's what it would have been if it was true.

The prosecutor gets the last word. While he's speaking and telling you how an officer must always be believed and how an officer would never have thrown suggestive comments to a witness and then just written it down in his report as what someone said, or the prosecutor is saying how Justine just had to wait until she and her family were safe to come forward with their side of things, I mean, I don't know what you're going to think of that. Let's hold him to this. **Let's hold him to you can't convict Mike unless you believe Holly completely.**

It's not a little bit. It's not like some of what she said is true. You have to have a complete faith in what she said before you ruin his life. There is just no way, no way you should be there.

I thank you for your time. I'm sorry that the subject matter is so difficult. **Hold on to your oath and acquit Mike.**

(RP 505-06)

Once again while this is argument and the court properly instructed the jury the fact remains that the statement which Winn now alleges is “disparaging” was made immediately after Winn’s attorney misstated the law on reasonable doubt, said that if a teenager reported a crime against themselves then we as a society were not protecting them

We've got a society where we're arming teenagers with a nuclear button. Teenagers are able to press the button at will. Mom goes too far. Daddy disciplines too much, whatever. 911. Help me. Mommy kicked me. Help me. Daddy slapped me. Help me. Somebody touched me inappropriately. (RP 062211 pg 505)

In State v. Thorgerson, 172 Wash.2d 438, 258 P.3d 43 (2011) the court found no error in the statements made by the deputy prosecutor. This court need only compared the comments in that case to the alleged misconduct in this case to see there was no error. Here Winn stretches the law by indicating that the alleged wrong is a “more subtle” error.

It is improper for the prosecutor to disparagingly comment on defense counsel's role or impugn the defense lawyer's integrity. State v. Warren, 165 Wash.2d 17, 29-30, 195 P.3d 940 (2008); State v. Negrete, 72 Wash.App. 62, 67, 863 P.2d 137 (1993). To the extent these comments can fairly be said to focus on the evidence before the jury, we agree with the Court of Appeals that no misconduct occurred. But unlike the Court of Appeals, we believe the comments are not so restricted. Rather, the prosecutor impugned defense counsel's integrity, particularly in referring to his presentation of his case as “bogus” and involving "

sleight of hand." Warren, 165 Wash.2d at 29, 195 P.3d 940; see id. (improper for prosecutor to describe defense counsel's argument as a "classic example of taking these facts and completely twisting them to their own benefit, and hoping that you are not smart enough to figure out what in fact they are doing" (quoting court proceedings)). In particular, "sleight of hand" implies wrongful deception or even dishonesty in the context of a court proceeding. *Webster's Third New International Dictionary 2141 (2003)* ("sleight of hand" defined in part as "adroitness and cleverness in accomplishing a deception" and "a cleverly executed trick or deception"). The prosecutor went beyond the bounds of acceptable behavior in disparaging defense counsel. Further, given that the "sleight of hand" argument was planned in advance, we conclude that it was ill-intentioned misconduct.

Nonetheless, this misconduct was not likely to have altered the outcome of this case. As pointed out, the victim's testimony was consistent throughout the trial and was consistent with what the witnesses testified she had told them before the trial, with one exception. The prosecutor's disparaging remarks essentially told the jury to disregard what the prosecutor believed was irrelevant evidence. While characterizing the defense as "sleight of hand" was entirely inappropriate, it cannot fairly be said to have had a substantial likelihood of altering the jury's determination that relevant evidence showed the defendant committed these crimes. (Thorgerson, supra, 50-1)(Emphasis mine.)

This court should only review the issue if Winn can demonstrate that the prosecutor's questions were "so flagrant and ill intentioned" as to evince "enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." Thorgerson, 172 Wn.2d at 443 (quoting *Russell*, 125 Wn.2d at 86). That clearly is not possible here.

The Washington State Supreme Court recently upheld the ruling in State v. Thorgerson in State v. Emery, Supreme Court No. 86033-5, (June 14, 2012) In Emery the court addresses standard which Winn indicates is the appropriate standard. The Court specifically rejected this test when addressing an allegation of prosecutorial misconduct similar to that alleged herein;

We decline to adopt the constitutional harmless error standard here for three reasons. First, we have already declined to apply the constitutional harmless error standard in prosecutorial misconduct cases when a prosecutor makes a truth statement and misstates the burden of proof. State v. Warren, 165 Wn.2d 17, 26 n.3, 195 P.3d 940 (2008)... Even though the prosecutor mischaracterized the trial as a search for truth and undermined the presumption of innocence, we applied our established standard of review. Under this standard, we held that any prejudice was cured even though the trial court's curative instruction was imperfect.

...

Second, this case does not involve the apparently deliberate injection of racial bias, but an improper attempt to explain "an esoteric concept, not always well understood by lawyers and judges." Bennett, 161 Wn.2d at 319. The prosecutor in Monday committed egregious racial misconduct, repeatedly referring to the police as "po-leese" and arguing that "'black folk don't testify against black folk.'" 171 Wn.2d at 674 And while the prosecutor's attempted explanations are certainly and seriously wrong, there is no evidence that the prosecutor was acting in bad faith or attempting to inject bias.

Finally, closing argument cannot be likened to instructional error. Because jurors are directed to disregard any argument that is not supported by the law and the court's instructions, a prosecutor's arguments do not carry the "imprimatur of both the government and the judiciary."

The court in Emery then went on to analyze the actions of the prosecutor. The Court states that what must first be determined is "Under our established standard of review, Emery and Olson must first show that the prosecutor's statements are improper."

In the case before the bar this has not been done. The court sustained the objection of Winn's attorney indicating the statements using the pronoun "I" were inappropriate. If this court contrasts the use of "I" in this case it comes no where near the level of impropriety in the Emery. Even if this court were to determine that the statements were improper the next question would be;

Once a defendant establishes that a prosecutor's statements are improper, we determine whether the defendant was prejudiced under one of two standards of review. If 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. Anderson, 153 Wn. App. at 427 (citing State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984))

...

Under this heightened standard, the defendant must show 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."
Thorgerson, 172 Wn.2d at 455.
(Emery, supra.)

The Court in Emery discusses in footnote 14 that additional area which is set out elsewhere in this brief that “we do not look at the comments in isolation, but in the context of the total argument, the issues in the case, the evidence, and the instructions give the jury.” The court then states that the evidence was “probably overwhelming.”

Winn objected, but he did not move for a mistrial nor did he ask the court for a curative instruction, the claimed error is contained within a few sentences in a closing that covers pages of the verbatim report of proceedings and came at the end of a multiple day trial and as in Emery, the evidence here was overwhelming.

RESPONSE TO ALLEGATION “III” LIMITATION OF CROSS-EXAMINATION.

The State is uncertain exactly how to address a portion of this alleged error. Winn indicates in the factual portion of his brief:

“...and that H.D.A.’s description of Mr. Winn’s genitalia did not match the reality. RP (6/17/11) 33-56, 74-77. It also consisted of **significant cross-examination** of H.D.A. on details regarding Mr. Winn’s anatomy,” and yet in the argument and analysis section of his brief addressing the courts ruling limiting Winn from addressing areas such as;

alleged prior gang involvement, alleged acts of theft or an allegation that there was some sort of “deal” with the State for reduction of or and agreement to not charge certain offense, Winn states he was relegated to **“weak impeachment** by contradiction, which centered on H.A’s description of Mr. Winn’s penis.” (Appellants brief page 6 and footnote 6.) The State is uncertain how “significant cross-examination becomes “weak impeachment.”

The trial court speaks directly to the possibility of appeal and the court then sets forth a ruling which is “even handed.” The lengthy ruling by the court, set out below is text book example of a trial court weighing the probative value of evidence against the prejudice of that information. The court sets forth its analysis with regard to all of the areas that Winn wished to address. This ruling allows for the use of information regarding HD and her past but it does so in a measured and reasoned method insuring Winn is allowed to present his theory while at the same time not disparaging this victim;

THE COURT: Okay. I was reading through Rule 403 and 404(b), as I indicated. One of the things that I think is important for this record, for purposes of appeal, if it becomes necessary, is for the Court of Appeals to understand that I'm trying to weigh out. As Rule 403 provides, they call it evenhandedness actually in the rule itself as far as the balancing process that the court goes through. On the one hand, it would not be a fair depiction for the state to present HD in a light of a stellar student,

straight A's. I'm making exaggerated examples now. She does community service at the local homeless shelter on her weekends, etcetera. That's an exaggerated example. It cannot be an unfair depiction.

Yet what the defense is attempting to do with the extent of information that it wants to go into I also don't believe -- the prejudice outweighs the probative value. So my rulings are an attempt to add evenhandedness in light of the information.

(RP 061711 pg 74-5)

As far as the indication of HD's gang involvement, I certainly will, if Ms. Winn, HD's mother testifies, she can certainly testify that HD was running with kids that she didn't approve of, my words, a rough crowd, things of that nature. As far as referring to it as gang involvement, specifically the Flatheads, I would not allow that type of testimony. I think it would also be appropriate on cross-examination to inquire of HD whether she was hanging around with kids that her mom did not approve of, again, without specifically elaborating that they have the gang involvement.

As to the next grouping, I put together the marijuana use and the thefts. I want to follow up further on the thefts. Part of the thefts goes to witness credibility because they're crimes of dishonesty.

Again, Mr. Klein, they're not convictions. To utilize the defendant's own admissions as to committing thefts in that fashion I don't think would be appropriate by way of impeaching her credibility. I would not allow it. I want to take that side note off first.

Part of this gang involvement is smoking a lot of marijuana and the organized shoplifting incidents. Again, she did not -- none of this activity resulted in any arrests or convictions.

Again, HD's mother can testify that her daughter was certainly doing things that she did not approve of. You've already got her running with a crowd that she did not approve of, was participating in things that she did not approve of.

I will allow HD to be asked if some of the activities that her mother was having problems with involved breaking the law. It's a yes or no question. I'm assuming she will say yes. It does not go any further.

I will allow HD to be asked what her grades are and whether she was, in fact, missing school. Again, they're limited inquiry.

There will be no reference to body odor, bad hygiene issues. I will not allow that.

The next area, the possession with intent to deliver, the prescription medication. My position on this, as I understand the testimony to come out -- I'm saying this more for Mr. Soukup. It may be I still want to talk about it a little bit.

MR. SOUKUP: Okay.

THE COURT: My intention would be to allow testimony that the conflict between HD and her mother kind of comes to a head when her mother apparently finds prescription medication in HD's room that obviously is not HD's prescription.

MR. SOUKUP: Before the first time she moved out, that's true. Not the second time.

THE COURT: Right. So I think it would be appropriate to point out that -- it goes back to the choice of rehab or of moving in with the sister and what caused her to move in with the sister. I guess, that's perhaps why I'm being a little more liberal, if you want to call it that.

It would be appropriate to point out that the mother, HD's mother, discovered this prescription medication, confronted her daughter, that it wasn't her prescription medication. That then led to HD's mother giving her a choice to go into rehab or move in with her sister, that HD exercised the option of moving in with her sister, which is what led to the first move out and moving in with the sister the first time.

MR. SOUKUP: If I am understanding correctly, without reference to intent to deliver then.

THE COURT: Yes, with no mention that it's part of the gang activity or what their expectations are, correct. That would be my intention was that testimony.

I'll make sure I haven't missed anything here. I think that covers it. Anything further from the state?
(RP 061711 pgs 75-77)

The State asked HD that which was allowed by the courts ruling.

The following was what was asked of HD on direct:

Q. Before we talk about that, I want to ask you, were you Kind of going through a teenage rebellion as you got older?

A. Yes.

Q. So were you running around with kids that your mom didn't approve of?

A. Yes.

Q. And engaging in activities that your mother didn't approve of?

A. Yes.

Q. Did that include breaking some laws?

A. Yes.

Q. What were your grades like back then?

A. I had C's, D's and F's.

Q. And were you missing school?

A. I was.

Q. Let me ask you something. Are you going to school now?

A. No. I just graduated June 1st.

Q. From?

A. A.C. Davis High School.

Q. What were your grades like your senior year?

A. I had A's, B's, a few C's.

Q. And so when was it that you moved out again?

A. May of 09.

(RP 062011 pgs 153-54)

Q. Was there a situation where she found some prescription medications that were not yours in your drawer?

A. Yes.

Q. Did she give you an ultimatum or a choice as to what You could do at that point?

A. Yes. She said I could go to rehab or live with my older

sister, Justine.

Q. What did you choose?

A. To live with Justine.

Q. When was that that you moved out approximately?

A. May of 09.

Q. Okay. How was life with Justine, a big party at that point?

A. No. She was very strict. When I got into the house, she was ripping apart all my stuff, making sure I didn't have drugs hidden in anything. She was very strict. I could go to school and come home and go to work and that was it. It was worse than rehab.

(RP 062011 pgs 154-55)

Cross of victim

Q. Then there was an incident where your mother found prescription pills that weren't yours in a dresser in your room, correct?

A. Yes, sir.

Q. And you were given a choice between rehab and going to live with your sister, correct?

A. Yes, sir.

Q. So at that point you moved in with Justine.

(RP 062011 pg 205)

The defense questioned HD's mother about this period of HD's life extensively. (RP 062111 pgs 266-74)

Even though the court ruled that there could be inquiry about HD defense counsel started his inquiry but never asked Winn anything about those areas which were open for inquiry. If this was such an essential area in this case the defense counsel would have, and there is no claim of ineffective assistance, covered this area more thoroughly. This would appear to be the sum total asked of Winn by his own counsel:

Q. I want to separate out Holly and her high school experience. We'll get to that soon. Prior to Holly entering high school, how was she interacting with yourself and the rest of the family?

A. Prior to entering --

Q. Prior to high school.

A. Fine.

Q. She went through problems in high school. I want to talk about those in a second. Prior to high school, how was Holly --

A. Fine.

(RP 062111 pg 329)

As can be seen from the closing argument Winn was more than able to put forward his theory of the case; that HD was accusing appellant just because she was a rebellious teen;

We've got a society where we're arming teenagers with a nuclear button. Teenagers are able to press the button at will. Mom goes too far. Daddy disciplines too much, whatever. 911. Help me. Mommy kicked me. Help me. Daddy slapped me. Help me. Somebody touched me inappropriately.

...

Let's hold him to you can't convict Mike unless you believe Holly completely.

It's not a little bit. It's not like some of what she said is true. You have to have a complete faith in what she said before you ruin his life. There is just no way, no way you should be there.

(RP 062211 pg 505, 506)

In State v. Perez-Valdez, 172 Wn.2d 808, 815-16, 265 P.3d 853

(2011) a case also involving sex abuse and young children the defendant sought to introduce an alleged act of arson. The Supreme Court considered the trial courts ruling denying the admission of this evidence.

It would appear from the record in opinion in Peres-Valdez that, as here, this arson was not a charged crime:

Perez-Valdez now argues that the arson evidence should have been admitted pursuant to ER 404(b). However, ER 404(b) is a rule of exclusion, not a rule of inclusion. The rule prohibits "[e]vidence of other crimes, wrongs, or acts ... to prove the character of a person in order to show action in conformity therewith" ; but it does not apply when such evidence is offered for other purposes, including " proof of motive." ER 404(b). Even where such evidence is admissible despite ER 404(b), the trial court retains discretion to preclude it if it is irrelevant "to prove an element of the crime charged" or if the prejudicial effect substantially outweighs the probative value of the evidence. State v. Vy Thang, 145 Wash.2d 630, 642, 41 P.3d 1159 (2002); see ER 402, 403.

Here, because the arson evidence was not proposed to show conformity of action with personal character, but instead to show a motive for false accusation, it was not precluded by ER 404(b). Still, we defer to the trial court's discretion to bar the evidence as irrelevant or unduly prejudicial. A trial court's evidentiary ruling is an abuse of discretion only if it is "manifestly unreasonable or based upon untenable grounds or reasons." State v. Powell, 126 Wash.2d 244, 258, 893 P.2d 615 (1995). We do not find such a basis to overturn the trial court's judgment in this matter.

The record indicates careful consideration by the trial court of whether to admit the arson evidence. The trial court conditionally granted the State's motion in limine to prevent the defense from raising the incident...

...

Although another trial judge might well have admitted the same evidence, the decision to not allow admission of the arson evidence is neither

manifestly unreasonable nor based on untenable grounds or reasons.

...

Moreover, the defense was still able to argue its theory of the case, including by presenting substantial evidence about S.V.'s and A.V.'s reputations for untruthfulness. Yet the jury, which saw the girls and all other witnesses testify, was convinced of Perez-Valdez's guilt.

See also, State v. Classen, 143 Wn.App. 45, 176 P.3d 582 (2008), review denied, 164 Wn.2d 1016 195 P.3d 88 (2008);

The right to cross-examine adverse witnesses is not absolute. Chambers v. Mississippi, 410 U.S. 284, 295, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). A trial court may, in its discretion, reject cross-examination where the circumstances only remotely tend to show bias or prejudice of the witness, where the evidence is vague, or where the evidence is merely argumentative and speculative. State v. Knapp, 14 Wash.App. 101, 107-08, 540 P.2d 898 (1975); see also State v. Roberts, 25 Wash.App. 830, 611 P.2d 1297 (1980). We review a trial court's limitation of cross examination for manifest abuse of discretion. State v. Campbell, 103 Wash.2d 1, 20, 691 P.2d 929 (1984), cert. denied, 471 U.S. 1094, 105 S.Ct. 2169, 85 L.Ed.2d 526 (1985). We find no such abuse here.

IMMUNITY – BIAS ALLEGATION

Winn alludes to some possible motive for HD to maintain her story regarding Winn's eight years of molestation. The claim is that she did this in order to cure favor with the State regarding her uncharged past acts. Allegedly some thefts and or the possession of drugs or possession with intent to deliver drugs.

The argument with regard to this allegation is contained, primarily, in one sentence “H.A. may have believed that the government would be interested in prosecuting her for the thefts and drug dealing if she changed her story and exonerated Mr. Winn in her testimony.”

There is nothing in the appellant’s brief, no citation to a section of the verbatim report of proceedings, which would direct the State or this court to the area of the record upon which this alleged error is based. The State has scoured the entire record and there is not one mention of “immunity” from prosecution for anything. This alleged error is based on nothing.

This alleged motive or bias is made from whole cloth. There is not one single use of the word “immunity” and the term “bias” is only used in the record in the jury instructions and in closing. This attempt by Winn to invent a new error which is not supported by the record, nor raised in any form at the trial court level, should not be considered by this court.

As was stated in State v. Hopkins, 134 Wn.App. 780, 787, 142 P.3d 1104 (2006) “And even though we address her assertions, her claims are naked castings into the constitutional sea and are not sufficient to command judicial consideration and discussion. (Citations omitted.)

If there is a specific portion of the record which addresses this

alleged error Winn has not referred the State or this court to that section of the record. A similar situation was addressed in State v. Garcia, 45 Wn. App. 132, 140, 724 P.2d 412 (1986), “[a] party seeking review has the burden of perfecting the record so that the appellate court has before it all the evidence relevant to the issue. State v. Jackson, 6 Wn. App. 510, 516, 676 P.2d 517, aff’d, 102 Wn.2d 689, 689 P.2d 76 (1984).” See also State v. Smith, 68 Wn. App. 201, 207-8, 842 P.2d 494 (1992); “This court is not obligated to search the record and decide how the trial court would have evaluated that evidence, if it was present.” “The appellant has the burden of perfecting the record so that the court has before it all the evidence relevant to the issue.” In re Marriage of Haugh, 58 Wn. App. 1, 6, 790 P.2d 1266 (1990).

IV. CONCLUSION

Based on the forgoing facts and law Winn’s appeal should be denied.

Dated June 18, 2012

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DECLARATION OF SERVICE

I, David B. Trefry state that on June 18th 2012, emailed a copy, by agreement of the parties, of the Respondent's Brief, to Jodi Backlund and Manek Mistry at backlundmistry@gmail.com and mailed a copy to;

Michael Winn, DOC #993777
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 18th day of June, 2012 at Spokane, Washington,

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