

**FILED**  
**Court of Appeals**  
**Division III**  
**State of Washington**  
**11/20/2019 10:31 AM**  
36359-7-III

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON, RESPONDENT  
v.

GORDON ENNIS, APPELLANT

---

APPEAL FROM THE SUPERIOR COURT  
OF SPOKANE COUNTY

---

**BRIEF OF RESPONDENT**

---

LAWRENCE H. HASKELL  
Prosecuting Attorney

Gretchen E. Verhoef  
Deputy Prosecuting Attorney  
Attorneys for Respondent

County-City Public Safety Building  
West 1100 Mallon  
Spokane, Washington 99260  
(509) 477-3662

**INDEX**

**I. ISSUES PRESENTED ..... 1**

**II. STATEMENT OF THE CASE ..... 2**

    Substantive facts. .... 2

    Procedural history. .... 13

**III. ARGUMENT ..... 17**

    A. ANY ERROR PERTAINING TO THE NON-CORROBORATION INSTRUCTION WAS NOT PRESERVED; THE INSTRUCTION NEITHER INTERFERED WITH THE DEFENSE NOR WAS IT A COMMENT ON THE EVIDENCE. .... 17

        1. The defendant did not object to the noncorroboration instruction; the claimed error is unpreserved; if this Court reviews the claimed error, the proper standard of review is abuse of discretion. .... 17

        2. The combined use of the noncorroboration instruction and the reasonable belief instruction did not interfere with the defendant’s right to present a defense, nor were the instructions confusing. .... 21

        3. The noncorroboration instruction was not an impermissible comment on the evidence. .... 24

    B. THE DEFENDANT CANNOT DEMONSTRATE THE STATE ENGAGED IN FLAGRANT AND ILL-INTENTIONED MISCONDUCT; DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT. .... 31

        1. Standard of review for prosecutorial misconduct claims. .... 31

        2. Standard of review for ineffective assistance of counsel claims. .... 32

3.	The State did not impermissibly comment on the defendant’s right to remain silent; any comment was not flagrant or incurable, and, in any event, the defendant opened the door. ....	34
a.	Detective Armstrong’s testimony. ....	37
b.	State’s closing argument. ....	39
4.	Vouching for credibility of the victim. ....	44
5.	Impugning counsel/commenting on the credibility of Beaver. ....	48
6.	Expressing a personal opinion on the defendant’s guilt. ....	51
7.	Claimed violation of the motion in limine regarding Doug Strosahl’s testimony. ....	57
8.	Arguing impeachment evidence as substantive evidence. ....	59
C.	THE DEFENDANT’S REMAINING INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS ALSO FAIL. ....	64
1.	Defense counsel did not have an actual conflict of interest that adversely affected his representation of Ennis. ....	64
a.	The “evidence” was insufficient to present an “other suspect” defense. ....	68
b.	The evidence was not otherwise admissible. ....	70
c.	The evidence would not have assisted Ennis in his defense. ....	71
2.	Defendant has failed to demonstrate deficiency or prejudice based upon counsel’s decision not to renew the change of venue motion. ....	73
3.	“Me Too” campaign. ....	76
4.	Defense counsel did not “dismiss” a defense or fail to advance a valid defense to the crime of second degree rape. ....	77

5.	Defense counsel did not fail to elicit exculpatory evidence. ....	80
D.	THE CUMULATIVE ERROR DOCTRINE IS INAPPLICABLE. ....	84
<b>IV.</b>	<b>CONCLUSION</b> .....	<b>85</b>

## TABLE OF AUTHORITIES

### *Federal Cases*

<i>Brown v. United States</i> , 356 U.S. 148, 78 S.Ct. 622, 2 L.Ed.2d 589 (1958).....	43
<i>Cuyler v. Sullivan</i> , 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980).....	65
<i>Holmes v. South Carolina</i> , 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006).....	22
<i>Lefkowitz v. Turley</i> , 414 U.S. 70, 94 S.Ct. 316, 38 L.Ed.2d 274 (1974).....	70
<i>Mickens v. Taylor</i> , 535 U.S. 162, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002).....	66
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	32, 33
<i>Taylor v. Illinois</i> , 484 U.S. 400, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988).....	22
<i>United States v. Mers</i> , 701 F.2d 1321 (11th Cir. 1983).....	64

### *Washington Cases*

<i>In re Cross</i> , 180 Wn.2d 664, 327 P.3d 660 (2014).....	84
<i>In re Davis</i> , 152 Wn.2d 647, 101 P.3d 1 (2004).....	31, 43
<i>In re Gomez</i> , 180 Wn.2d 337, 325 P.3d 142 (2014).....	65
<i>In re Rice</i> , 118 Wn.2d 876, 828 P.2d 1086 (1992).....	33
<i>L.M. by and through Dussault v. Hamilton</i> , 193 Wn.2d 113, 436 P.3d 803 (2019).....	21
<i>Matter of Phelps</i> , 190 Wn.2d 155, 410 P.3d 1142 (2018).....	32

<i>Matter of Pirtle</i> , 136 Wn.2d 467, 965 P.2d 593 (1998), as amended on denial of reconsideration (Dec. 7, 1998).....	32
<i>State v. Aguirre</i> , 168 Wn.2d 350, 229 P.3d 669 (2010).....	23
<i>State v. Babich</i> , 68 Wn. App. 438, 842 P.2d 1053 (1993).....	61
<i>State v. Brett</i> , 126 Wn.2d 136, 892 P.2d 29 (1995).....	46
<i>State v. Burke</i> , 163 Wn.2d 204, 181 P.3d 1 (2008).....	20, 21, 35, 36
<i>State v. Chenoweth</i> , 188 Wn. App. 521, 354 P.3d 13 (2015).....	25
<i>State v. Clark</i> , 143 Wn.2d 731, 24 P.3d 1006 (2001).....	76
<i>State v. Clayton</i> , 32 Wn.2d 571, 202 P.2d 922 (1949) .....	25, 26, 27, 29
<i>State v. Clinkenbeard</i> , 130 Wn. App. 552, 123 P.3d 872 (2005).....	62, 63
<i>State v. Coleman</i> , 155 Wn. App. 951, 231 P.3d 212 (2010), review denied, 170 Wn.2d 1016 (2011).....	45
<i>State v. Dhaliwal</i> , 150 Wn.2d 559, 79 P.3d 432 (2003) .....	65, 66, 67
<i>State v. Dickenson</i> , 48 Wn. App. 457, 740 P.2d 312, review denied, 109 Wn.2d 1001 (1987).....	60
<i>State v. Easter</i> , 130 Wn.2d 228, 922 P.2d 1285 (1996).....	35
<i>State v. Emery</i> , 174 Wn.2d 741, 278 P.3d 653 (2012).....	34
<i>State v. Fisher</i> , 165 Wn.2d 727, 202 P.3d 937 (2009).....	31
<i>State v. Galbreath</i> , 69 Wn.2d 664, 419 P.2d 800 (1966).....	27, 28
<i>State v. Gefeller</i> , 76 Wn.2d 449, 458 P.2d 17 (1969).....	39
<i>State v. Gore</i> , 101 Wn.2d 481, 681 P.2d 227 (1984).....	26
<i>State v. Greiff</i> , 141 Wn.2d 910, 10 P.3d 390 (2000).....	84
<i>State v. Hopson</i> , 113 Wn.2d 273, 778 P.2d 1014 (1989).....	24, 56

<i>State v. Ish</i> , 170 Wn.2d 189, 241 P.3d 389 (2010) .....	46
<i>State v. Jackson</i> , 150 Wn. App. 877, 209 P.3d 553, review denied, 167 Wn.2d 1007 (2009).....	47
<i>State v. Jackson</i> , 150 Wn.2d 251, 76 P.3d 217 (2003) .....	73
<i>State v. James</i> , 48 Wn. App. 353, 739 P.2d 1161 (1987) .....	64
<i>State v. Johnson</i> , 152 Wn. App. 924, 219 P.3d 958 (2009).....	28, 29
<i>State v. Johnson</i> , 40 Wn. App. 371, 699 P.2d 221 (1985).....	61
<i>State v. Jones</i> , 185 Wn.2d 412, 372 P.3d 755 (2016).....	20
<i>State v. Keene</i> , 86 Wn. App. 589, 938 P.2d 839 (1997) .....	36
<i>State v. Kennard</i> , 101 Wn. App. 533, 6 P.3d 38 (2000) .....	28
<i>State v. Lane</i> , 125 Wn.2d 825, 889 P.2d 929 (1995) .....	25
<i>State v. Lewis</i> , 130 Wn.2d 700, 927 P.2d 235 (1996).....	35
<i>State v. Madison</i> , 53 Wn. App. 754, 770 P.2d 662 (1989) .....	33
<i>State v. Malone</i> , 20 Wn. App. 712, 582 P.2d 883 (1978).....	25
<i>State v. McKenzie</i> , 157 Wn.2d 44, 134 P.3d 221 (2006) .....	45, 46
<i>State v. Munzanreder</i> , 199 Wn. App. 162, 398 P.3d 1160 (2017).....	76
<i>State v. Myers</i> , 133 Wn.2d 26, 941 P.2d 1102 (1997) .....	61
<i>State v. O’Hara</i> , 167 Wn.2d 91, 217 P.3d 756 (2009), as corrected (Jan. 21, 2010).....	19
<i>State v. Ortiz</i> , 119 Wn.2d 294, 831 P.2d 1060 (1992).....	82
<i>State v. Redmond</i> , 150 Wn.2d 489, 78 P.3d 1001 (2003).....	22
<i>State v. Regan</i> , 143 Wn. App. 419, 177 P.3d 783 (2008).....	64, 65
<i>State v. Reichenbach</i> , 153 Wn.2d 126, 101 P.3d 80 (2004) .....	33

<i>State v. Robinson</i> , 189 Wn. App. 877, 359 P.3d 874 (2015) .....	45, 46
<i>State v. Scott</i> , 110 Wn.2d 682, 757 P.2d 492 (1988) .....	18
<i>State v. Starbuck</i> , 189 Wn. App. 740, 355 P.3d 1167 (2015) .....	68, 70
<i>State v. Strine</i> , 176 Wn.2d 742, 293 P.3d 1177 (2013) .....	17, 18
<i>State v. Theroff</i> , 95 Wn.2d 385, 622 P.2d 1240 (1980) .....	24
<i>State v. Thomas</i> , 150 Wn.2d 821, 83 P.3d 970 (2004) .....	29, 30
<i>State v. Thompson</i> , 90 Wn. App. 41, 950 P.2d 977 (1998) .....	53
<i>State v. Thorgerson</i> , 172 Wn.2d 438, 258 P.3d 43 (2011) .....	49
<i>State v. Tili</i> , 139 Wn.2d 107, 985 P.2d 365 (1999) .....	22
<i>State v. Warren</i> , 165 Wn.2d 17, 195 P.3d 940 (2008), cert. denied, 556 U.S. 1192 (2009) .....	46, 47, 50
<i>State v. Weber</i> , 159 Wn.2d 252, 149 P.3d 646 (2006) .....	84
<i>State v. White</i> , 80 Wn. App. 406, 907 P.2d 310 (1995) .....	67
<i>State v. White</i> , 81 Wn.2d 223, 500 P.2d 1242 (1972) .....	34
<i>State v. Yates</i> , 161 Wn.2d 714, 168 P.3d 359 (2007) .....	31
<i>State v. Zimmerman</i> , 130 Wn. App. 170, 121 P.3d 1216 (2005), remanded on other grounds, 157 Wn.2d 1012 (2006) .....	25, 28
<i>State v. Coristine</i> , 177 Wn.2d 370, 300 P.3d 400 (2013) .....	77, 78
<b><i>Constitutional Provisions</i></b>	
Const. art. 4, § 16 .....	24
U.S. CONST. amend V .....	70

***Statutes***

RCW 5.60.060 ..... 70  
RCW 9A.44.020..... 25, 28

***Rules***

ER 602 ..... 82  
ER 607 ..... 60  
ER 613 ..... 60  
ER 701 ..... 81, 82  
ER 702 ..... 82  
ER 805 ..... 70  
RAP 2.5..... passim

***Other Authorities***

Black’s Law Dictionary (7<sup>th</sup> Ed. 2000)..... 61, 62  
Tyler J. Buller, *Fighting Rape Culture with Noncorroboration  
Instructions*, 53 Tulsa L. Rev. 1 (2017) ..... 26  
WPIC 19.03..... 77  
WPIC 5.30..... 61

## I. ISSUES PRESENTED

1. Were the defendant's claims pertaining to the combined use of the noncorroboration instruction and the reasonable belief instruction preserved where there was no objection to the use of the instructions at trial?
2. Did the combined use of the noncorroboration instruction and reasonable belief instruction deprive the defendant of his ability to put forth a defense?
3. Whether the combined use of the noncorroboration instruction and the reasonable belief instruction was an improper judicial comment on the evidence where the instructions were accurate statements of the law?
4. Has the defendant demonstrated that any of his multiple claims of prosecutorial misconduct were so flagrant and ill-intentioned such that no curative instruction could have obviated any asserted prejudice and has he demonstrated his counsel was ineffective for failing to object to the alleged misconduct?
5. Whether defendant has demonstrated that his trial counsel labored under a conflict of interest and whether he has demonstrated that the evidence he claims should have been admitted, but was not, was admissible?
6. Was defense counsel ineffective for failing to renew his change of venue motion where it was clear that both counsel and Ennis desired to try the case in Spokane and where the defense was satisfied with its ability to seat an unbiased jury?
7. Whether trial counsel was ineffective for failing to know, at a point prior to the commencement of trial, what the "Me Too" movement was?
8. Was trial counsel ineffective for advancing the "reasonable belief defense" while also advancing a theory that the victim was capable of and did consent to sexual contact with Ennis?

9. Was defense counsel ineffective for failing to elicit “exculpatory evidence” that was not probative or based upon anything other than speculation?
10. Whether the cumulative error doctrine applies where there were few errors, none of which prejudiced the defendant?

## **II. STATEMENT OF THE CASE**

Gordon Ennis was charged on December 2, 2015, in the Spokane County Superior Court, with one count of second degree rape, alleged to have been committed against another who was incapable of consent by reason of being physically helpless or mentally incapacitated. CP 1. A jury found him guilty as charged. CP 328.

### Substantive facts.

K.S. was hired by the Spokane Police Department as a full-time police officer in May of 2014. RP 814. Doug Strosahl had previously taught and mentored K.S. when she attended community college and the reserve officer training program in Spokane. RP 815-17. Ennis was a firearms instructor who also taught K.S. while she was in training. RP 827. When K.S. began work at the Spokane Police Department, Ennis was a corporal with the Department and, thereafter, he promoted to sergeant. RP 827. At times, the two would interact in their professional capacities; K.S. viewed Ennis as a mentor. RP 831, 833. However, when K.S. was injured and placed on light duty in July or August of 2015, she had no further

professional interaction with Ennis. RP 829, 832. After being hired by the Department, K.S. remained friends with her Field Training Officer (FTO) Kyle Huett. RP 815. In October 2015, she dated another officer, Spenser Rassier, with whom she had been friends for several years. RP 837-38.

On October 24, 2015, Doug and Heather Strosahl<sup>1</sup> hosted a party at their Chatteroy home. RP 568. Several friends of Ms. Strosahl attended the party, as well as her sister, Gina Watkins.<sup>2</sup> RP 569, 572-73. Mr. Strosahl invited K.S. and Ennis. RP 569, 1318.

K.S. and her roommate, Callie Roseland, arrived at approximately 7:32 p.m. RP 820, 1221. K.S. hugged Mr. Strosahl and met Ms. Strosahl and her friends, who had already arrived. RP 822-23. At approximately 9:30 p.m., Ennis arrived. RP 748-50, 826, 1222. When he arrived, K.S. hugged him too, excited to see a friendly face.<sup>3</sup> RP 750, 834. The attendees ate snacks and drank alcohol. RP 573. K.S. drank hard apple cider mixed with Fireball liquor.<sup>4</sup> RP 602, 628. Roseland did not drink any alcohol.

---

<sup>1</sup> At the time of trial, Ms. Strosahl was married to Douglas Strosahl, and used his last name. RP 567. At the time of the incident, she used the surname, "Lickfold." For the ease of the reader, Ms. Strosahl will be referred to by her married name.

<sup>2</sup> At the time of the incident, Watkins used the surname, "Braunsweig." For the ease of the reader, she will be referred to by the surname used at trial, "Watkins."

<sup>3</sup> At the party, K.S. only knew Mr. Strosahl, Ennis, and her roommate, Roseland. RP 836.

<sup>4</sup> K.S. brought a six-pack of hard cider. RP 905. K.S. estimated that she finished three or four of the ciders, each mixed with a shot of Fireball, and consumed an additional shot of alcohol. RP 836, 907-08, 910. Ms. Strosahl testified she saw

RP 700, 1046. During the evening, K.S. texted flirtatious messages to her boyfriend, Rassier. RP 838. When Ennis arrived, he observed that K.S. was already “slightly intoxicated,” as was Mr. Strosahl. RP 1324, 1389.

Ms. Strosahl attempted to enlist the partygoers into playing a party game, but they did not have much interest.<sup>5</sup> The partygoers listened to music and K.S. and Ms. Strosahl danced around Ennis.<sup>6</sup> RP 574, 649, 651, 726. During the game, K.S. leaned on Ennis, with her arms on his legs.<sup>7</sup> RP 1356, 1395. At approximately 11:00 p.m., the group went to the hot tub. RP 575, 576, 760, 1223. Ms. Strosahl gave the females swimsuits to wear. RP 576. While in the hot tub, “a couple of the girls got up and...danced in the middle of the hot tub,” including K.S. RP 576, 652. K.S. continued to exhibit signs of alcohol consumption. RP 728. Melissa Beaver, one of Ms. Strosahl’s

---

K.S. drink one hard cider mixed with Fireball as well as one shot of hard liquor, and the last time she saw K.S. consuming alcohol was when the group was in the hot tub. RP 633-35, 648. Watkins testified that she observed K.S. drink two or three cider/Fireball drinks and one shot of alcohol. RP 722. Roseland testified that K.S. drank three cider/Fireball mixtures and one shot of alcohol. RP 1145. Ennis stated he was not keeping track of how many drinks K.S. consumed. RP 1397.

<sup>5</sup> At this time, K.S. began to notice that she was affected by alcohol. RP 842.

<sup>6</sup> Ms. Strosahl is seen on a videotape recording straddling Ennis’ legs. RP 680; Ex. 33. K.S. had no recollection of dancing. RP 844. After dancing, K.S. gave Ennis a hug. Ex. 33; RP 1393.

<sup>7</sup> This surprised Ennis, and “made him feel good” that a “25-year-old girl...was showing [him (a 45-year-old man)] a lot of attention.” RP 1395.

friends, sat on Ennis' lap; they kissed.<sup>8</sup> RP 76, 804, 1055. K.S. had little memory of anything that occurred while in the hot tub; she recalled Ennis gave her a taste of his drink, and one of the other women took off her top.<sup>9</sup> RP 846. Ms. Strosahl and K.S. later left the hot tub to mix more drinks. RP 577, 847. K.S. returned to the tub; Ms. Strosahl did not. RP 577. Ms. Strosahl and Megan Weese<sup>10</sup> helped Beaver, who was intoxicated, sick, and needed assistance getting out of her swimsuit and into bed.<sup>11</sup> RP 578, 581, 766. The remaining guests soon exited the hot tub, and changed into their clothing. RP 584. Mr. Strosahl felt nauseous from the alcohol he had consumed and went to bed. RP 584, 1328. Ennis also felt more intoxicated than he had expected. RP 1412.

Roseland observed K.S. wander naked into the living room;<sup>12</sup> wanting to cover her up, Roseland took K.S. to the bathroom. RP 1058. Roseland then asked Ms. Strosahl to assist her with K.S. who was, at the

---

<sup>8</sup> Ennis told Roseland, "What are you going to do when it's right in front of you and she's on top of you?" RP 1444.

<sup>9</sup> Ms. Strosahl took off her own top while in the hot tub. RP 577.

<sup>10</sup> Another of Ms. Strosahl's friends.

<sup>11</sup> Beaver described herself as "fairly intoxicated" and lost her recollection of the evening's events while she was in the hot tub. RP 805. Roseland confirmed that she passed out on the floor of a bedroom. RP 1057.

<sup>12</sup> According to Roseland, Ennis observed K.S. naked in the living room. RP 1066. Ennis, instead, did not testify to seeing K.S. naked, but rather, only that Roseland was "called into the bathroom to take care of [K.S.]." RP 1407.

time, lying down on bathroom floor, naked.<sup>13</sup> RP 585. When interviewed by law enforcement shortly after the incident, Ms. Strosahl described K.S. as “pretty intoxicated.” RP 586. Roseland described K.S. as “stumbling, mumbling, [and] disoriented” with glassed over eyes; she was incoherent and passed out on the floor of the bathroom. RP 1062. Ms. Strosahl and Roseland cared for K.S. when she vomited. RP 586, 1064-65. The women clothed K.S. and put her to bed<sup>14</sup> in a guest bedroom. RP 586, 767. While being walked to her bedroom, K.S. asked for Ennis, and held his hand; Ennis observed she was “very intoxicated” at this time. RP 771, 1409. Ms. Strosahl provided K.S. a bucket to use if she again became sick. RP 594.

K.S. later left her bed, and stumbled into Watkins’ bedroom.<sup>15</sup> RP 595, 653, 707, 1070. K.S. was holding the garbage can, and could not walk in a straight line. RP 707. K.S. lay on Watkins’ bed and vomited,

---

<sup>13</sup> K.S. did not recall when she exited the hot tub, but vaguely recalled vomiting afterward. RP 847. K.S. did not recall any events occurring between the time she vomited and when she awoke to find Ennis’ hand inside her pants. RP 848.

<sup>14</sup> Ms. Strosahl and Weese flanked K.S., and “hoisted her” onto the bed. RP 593.

<sup>15</sup> Ms. Strosahl testified that Watkins yelled for her to get K.S. out of her room. RP 575. Watkins testified that she took care of K.S. for some time before Ms. Strosahl entered. Watkins denied calling for Ms. Strosahl’s assistance. RP 712.

stating “I drank too much and I don’t feel very well.”<sup>16</sup> RP 1072. When Watkins suggested Roseland should take K.S. home, K.S. said that she was too drunk, and did not want to become sick in the car. RP 596, 654, 730. Ms. Strosahl and Roseland walked K.S. back to her room. RP 595, 685, 1086. Ennis was present when K.S. again fell asleep.<sup>17</sup> RP 1415. Roseland then left the residence. RP 1087.

Ms. Strosahl cleaned up the kitchen while Ennis ate appetizers in an attempt to sober up; Mr. Strosahl reappeared, still intoxicated, but no longer nauseous. RP 598, 1330, 1418. Mr. Strosahl thought it would be funny if they made fun of K.S. because she had vomited. RP 598, 1331. Ms. Strosahl and Ennis agreed.”<sup>18</sup> RP 673, 675. At approximately 2:15 a.m.,<sup>19</sup> the three entered K.S.’s bedroom; they teased K.S. for “not being able to hold her liquor.” RP 600. At trial, Mr. and Ms. Strosahl testified K.S. giggled and sat up a bit. RP 601, 1331. When giving her original witness statement in 2015, Ms. Strosahl said K.S. moaned, reached out, and said “Sarge, Sarge,” to

---

<sup>16</sup> Watkins described K.S. as “throwing up” during her interview with police; at trial, she described K.S. as “having the body language of wanting to throw up and she was doing that gag reflex.” RP 708-09, 715.

<sup>17</sup> On cross-examination, Ennis admitted that he knew K.S. had vomited from the alcohol, and was intoxicated. RP 1447.

<sup>18</sup> At the time of her police interview, Ms. Strosahl indicated she was concerned with K.S.’s intoxication, and thought that the trio should “check on” K.S. RP 675.

<sup>19</sup> According to Ms. Strosahl’s estimation. RP 659. However, Mr. Strosahl did not estimate waking up and reentering the kitchen until 2:30 a.m. RP 1329.

which Ennis said, “You’re all right, go back to sleep...” “you’re just drunk.”  
RP 601, 677.

Mr. and Ms. Strosahl and Ennis all stated they returned to the kitchen; moments later, they claimed K.S. entered, walked up to Ennis, and wrapped her arms around his neck and rested her head on his chest. RP 601-02, 662, 1423-24. Mr. Strosahl said K.S. did not stumble as she walked. RP 1332. Ms. Strosahl asked Ennis to ensure K.S. got back to her room; Ms. Strosahl and Mr. Strosahl went to bed;<sup>20</sup> and Ennis and K.S. went down the hallway in the opposite direction.<sup>21</sup> RP 602. At trial, Ms. Strosahl testified that Ennis and K.S. appeared to act romantically. RP 605. During her earlier interview, however, she told investigators that the interaction did not appear romantic. RP 607. Ms. Strosahl testified that there was nothing about K.S.’s demeanor to indicate she was “highly intoxicated” at the time. RP 667.

While in the hallway, Ennis claimed K.S. grabbed him, pulled him close, and embraced him. RP 1426. He claimed they went into the bedroom, K.S. laid down, and Ennis sat next to her; K.S. cuddled around him, stroking his leg. RP 1427. Ennis then stroked her thigh and rubbed her vagina

---

<sup>20</sup> Ms. Strosahl testified that it was 2:38 a.m. when she went to bed. RP 608.

<sup>21</sup> Ennis, on the other hand, testified that Mr. Strosahl wanted to go back to sleep, so he started to leave the kitchen. Ms. Strosahl, however, stayed in the kitchen as Ennis and K.S. walked down the hall. RP 1425.

through the outside of her pants. RP 1428. Ennis asserted that K.S. pushed down her own pants, grabbed his wrist and placed his hand between her legs. RP 1429. Ennis then penetrated K.S. with his finger. RP 1429.

Ennis stated that after additional touching, he “had a reality check” that this was moving “towards sex, full sex” and he realized the implications it could have with both his personal and professional life. RP 1430. He told K.S. that he needed to leave. RP 1430-31. Ennis alleged that at no time was K.S. asleep when they had sexual contact; however, he did admit that, at the time of the sexual contact, both K.S. and himself were under the influence of alcohol. RP 1433-34. Ennis maintained that K.S. was not “incoherent” at the time, although he admitted she was more intoxicated than he was. RP 1434. Ennis readily admitted that, before the party, there had been no flirting or other sexual interaction between himself and K.S.; he also agreed that there had been no physical, sexual contact before K.S. hugged him in the kitchen at the end of the night. RP 1457-58, 1461.

K.S. had only a vague recollection of the evening. She recalled some events occurring while she was in the hot tub, and remembered vomiting after leaving the hot tub. She recalled nothing else until she awoke to find Ennis’ fingers in her vagina. RP 848. Ennis touched her aggressively and “almost painfully.” RP 849. She started crying and attempted to move away. RP 850. Ennis said, “Ah, I - I got - I got to go” and then quickly left. RP 853.

K.S. recognized Ennis by his voice and the hat he had been wearing earlier in the evening. RP 849-50, 853.

K.S. waited briefly, got out of bed, retrieved her phone, and locked herself in the bathroom. RP 854. At 3:07 a.m., she called Rassier, who answered the fourth time she called. RP 861; Ex. 7. Crying hysterically, she told him that she had been assaulted, but did not disclose her assailant's identity. RP 862, 962, 964. The two later exchanged text messages. RP 864-66. Still intoxicated<sup>22</sup> and afraid, K.S. did not call 911 or seek help from the Strosahls. RP 863.

K.S. fell asleep and awoke at approximately 7:15 a.m.; she texted Rassier. RP 867. She also texted Roseland to ask for a ride; Roseland arrived at 8:15 a.m. RP 868, 871, RP 1228. They decided that K.S. should speak to Mr. Strosahl for support and guidance. RP 871. K.S. was a probationary employee with the Department and was concerned that she could face trouble because of these events.<sup>23</sup> RP 872-74.

In Roseland's presence, K.S. spoke with Mr. Strosahl. RP 876, 1091. K.S. told him that she had been assaulted by Ennis; Mr. Strosahl downplayed her complaint, asked if she wanted water, and left the room.

---

<sup>22</sup> Rassier testified that K.S.'s speech was slurred and slow. RP 965.

<sup>23</sup> After reporting the assault, K.S.'s professional life suffered, she lost friends, and she was the subject of rumors and media attention. RP 935.

RP 877. When he did not return, K.S. and Roseland left the house. RP 877, 1092. Hungover, K.S. returned home, threw up, showered, and got into bed. RP 879-80. K.S. contacted Huett, her former FTO, who advised her to report the assault. RP 892-93, 1157. Huett and K.S. each contacted Sergeant Mike McNab, K.S.'s supervisor. RP 893, 1158. K.S. went to the hospital for a sexual assault kit. RP 894. Later, K.S. provided a statement to detectives. RP 894.

Ennis received a telephone call from John Gately, a sergeant with the Department (and the police union president) at 8:49 p.m. on October 25, 2015,<sup>24</sup> only five minutes after the Spokane County Sheriff's Department assigned Detective Brandon Armstrong to investigate. RP 1229. The following day, Gately called Ennis at 11:36 a.m. RP 1231. Ennis claimed that the first time he heard of the investigation was during the second call with Gately; yet, he agreed there had been two calls. RP 1431-32, 1454.

On October 26, 2015, Ennis met with investigators at his attorney's office. RP 1172, 1238, 1263. Ennis was cooperative. RP 1037. Although a forensic technician had intended to collect fingernail clippings from Ennis, no attempt was made because his fingernails were so short that it would cause him injury. RP 1035, 1172, 1239. The defendant's left ring finger,

---

<sup>24</sup> Detective Armstrong was called by his sergeant and assigned the case on October 25, 2015, at 8:44 p.m. RP 1229.

middle finger, and pinky finger all appeared to be shorter in length than the other fingernails. RP 1245; Ex. 26. At trial, Ennis claimed that he had cut his nails “a couple days” before, and not in preparation for the meeting.<sup>25</sup> RP 1433. He also asserted that he offered to cut his nails for the forensic technicians, but the offer was refused. RP 1467. Neither the forensic technician, nor Detective Armstrong recalled Ennis’ offer to cut his own nails, and Detective Armstrong recalled that he was silent through the meeting. RP 1037, 1472. Shirley Vanning, defense investigator, testified that Ennis offered to cut his nails, but the offer was refused. RP 1474.

Later, on October 28, 2015, Armstrong procured a warrant to collect evidence from Ennis’ vehicle; the warrant was executed on October 29, 2015. RP 1266.

Forensic scientist Brittany Wright tested the vaginal swabs taken from K.S, finding a low level of male DNA consistent with digital penetration.<sup>26</sup> RP 997-998. However, there was insufficient DNA in this sample to match it to a specific individual; Ennis was neither included nor excluded as the DNA’s contributor. RP 998, 1022. Wright also examined swabs taken from inside Ennis’ vehicle, including from the driver’s seatbelt.

---

<sup>25</sup> Before the start of the first trial, defense counsel agreed that there was no need for a 3.5 hearing; no such hearing was ever conducted. 5/19/17 RP 14.

<sup>26</sup> No seminal fluid was present in this sample of male DNA. RP 1030.

RP 1014. DNA belonging to Ennis and his wife was present, as well as DNA from a third contributor. RP 1014-1015. The third partial profile matched K.S. with an estimated probability of selecting an unrelated individual in the United States population with the same profile of 1 in 1.4 million. RP 1015. K.S. had never been inside Ennis' vehicle. RP 888.

Procedural history.

The matter was originally set for trial before Judge James Triplet. During pretrial motions, the State indicated that it had concerns about completing its motions in limine prior to the trial date. 5/19/17 RP 7-8. Defense counsel, Rob Cossey, told the court that both parties had experienced difficulty interviewing Doug Strosahl. 5/19/17 RP 10. The State voiced concern that Mr. Strosahl intended to assert his Fifth Amendment privilege at trial or that there would be a claim that Mr. Strosahl was an alternative suspect. 5/19/17 RP 11-12; 5/25/17 RP 4. Cossey told the court that he had given "his word to Mr. Bugbee [Strosahl's attorney] [he] would not disclose" the substance of a conversation he had previously had with Bugbee about Mr. Strosahl. 5/19/17 RP 15. Ennis was present at this hearing. 5/19/17 RP 3.

The following week, Mr. Strosahl had hired a different attorney, Mr. Sullivan. 5/25/17 RP 2. Sullivan and Cossey expressed their belief that Mr. Strosahl intended to testify only to the information attributed to him in

the police report (with some disagreements), and Cossey indicated he had no intention of attempting to elicit any information Bugbee had disclosed to him at trial, including as rebuttal evidence. 5/25/17 RP 5-7, 9-10. Ennis was present at this hearing. 5/25/17 RP 2.

A week and a half later, the parties and the court discussed, again and at length, the substance of Mr. Strosahl's testimony and the conversation Cossey had with Bugbee. 6/7/17 RP at passim. Cossey told the court, "I'm not at all heading down the path of the alternative suspect...period...The information that was provided to me by...Bugbee, true or not...is not going to be used by me in any shape or form in this trial." 6/7/17 RP 80. Cossey also agreed that, if the defense tactic changed, he would seek an in camera review of the information before admitting it at trial. 6/7/17 RP 82. Ennis was present at this hearing. 6/7/17 RP 2.

The defendant's trial was set for June 9, 2017. CP 272. However, the Court granted Ennis' motion for a mistrial during voir dire due to concerns that the venire had been exposed to media publicity. CP 272, 277. Thereafter, the parties filed an agreed motion to change venue. CP 279-80.

Before the start of the second trial, Judge Triplet recused, and the matter was assigned to Judge Maryann Moreno. CP 282-83. After some

time, the Court and parties readdressed the change of venue motion. RP 11-

12. The State deferred to the defense; Cossey told the court:

[a] few months ago...we discussed [changing venue]...and we were in agreement, that I was not going to file a motion prior to trial because we wanted to see what the jury and what kind of a jury panel we could seat. I will tell you that my client and I have discussed this; and we would prefer this case to stay in this county, in our courthouse, and with you. And so we're not withdrawing the motion. I think its more we're reserving the motion.

RP 12.

The court agreed to reserve ruling on the motion until the parties had had the opportunity to conduct voir dire so as to allow counsel "to see what you've got before you...make that call." RP 12.

The matter proceeded to trial on February 20, 2018, and a jury was empaneled on February 22, 2018. CP 332. At the conclusion of the case, the court instructed the jury on the elements of second degree rape, CP 320-23; upon the defendant's request, the court instructed that "it is a defense to a charge of rape in the second degree that at the time of the act the defendant reasonably believed that [K.S.] was not mentally incapacitated or physically helpless" and that the defendant bore the burden of proving this defense by a preponderance of the evidence, CP 325; and, at the request of the State, the court instructed that "in order to convict a person of second degree rape, it shall not be necessary that the testimony of the alleged victim be corroborated," CP 324.

Additionally, the court instructed the jury that it was the sole judge of witness credibility, and the weight to be given to testimony, and that, in considering testimony, the lawyer's remarks are not evidence, CP 314; and other pattern instructions routinely given in all criminal cases. *See generally*, CP 312-27.

The jury found the defendant guilty of second degree rape. CP 328. Before sentencing, Ennis retained new counsel who moved for a new trial. CP 340, 410 *et seq.* In his post-verdict motion, Ennis alleged several errors: (1) the State committed misconduct by commenting on his pretrial silence; (2) his attorney had a conflict of interest that adversely affected his representation; and (3) the court erred in instructing the jury with the reasonable belief instruction and the noncorroboration instruction. CP 410-29. After much litigation, and after the court permitted Cossey to be interviewed regarding his conversation with Bugbee, and its effect on his trial strategy,<sup>27</sup> the court denied the motion. CP 1300-01; RP 1769-82. The defendant timely appealed.

---

<sup>27</sup> The transcript of the interview with Cossey was attached to the State's response to the defendant's motion for a new trial, filed on July 27, 2018. This response was given directly to Judge Moreno, who had concerns about its substance being open to the public. The court ordered the exhibits to the State's response to be sealed, after conducting a *Bone-Club* analysis. *See* CP 1170. On October 21, 2019, the State moved this Court to order the Superior Court to file its bench copy of the motion response and the transcript, as the originals were misplaced. That motion was granted, and the State designated the motion response and its exhibits for this Court's review on November 1, 2019. The clerk paper

Where appropriate, additional salient facts regarding motions in limine and trial testimony will be included below.

### III. ARGUMENT

#### A. ANY ERROR PERTAINING TO THE NON-CORROBORATION INSTRUCTION WAS NOT PRESERVED; THE INSTRUCTION NEITHER INTERFERED WITH THE DEFENSE NOR WAS IT A COMMENT ON THE EVIDENCE.

1. The defendant did not object to the noncorroboration instruction; the claimed error is unpreserved; if this Court reviews the claimed error, the proper standard of review is abuse of discretion.

It is a fundamental principle of appellate jurisprudence that a party may not assert on appeal a claim that was not first raised at trial. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013); RAP 2.5(a). This rule supports a basic sense of fairness, expressed in *Strine*, where the court noted the rule requiring objections helps prevent abuse of the appellate process:

[I]t serves the goal of judicial economy by enabling trial courts to correct mistakes and thereby obviate the needless expense of appellate review and further trials, facilitates appellate review by ensuring that a complete record of the issues will be available, ensures that attorneys will act in good faith by discouraging them from “riding the verdict” by purposefully refraining from objecting and saving the issue for appeal in the event of an adverse verdict, and prevents adversarial unfairness by ensuring that the prevailing

---

designation is estimated to be 1342-1398 (with the coversheet of Exhibit B starting at CP 1366).

party is not deprived of victory by claimed errors that he had no opportunity to address.

*Strine*, 176 Wn.2d at 749-50.<sup>28</sup>

Under RAP 2.5(a), a party may not raise a claim of error on appeal that was not first raised at trial unless the claim involves a manifest error affecting a constitutional right.<sup>29</sup> Specifically regarding RAP 2.5(a)(3), our high court has indicated that “the constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can ‘identify a constitutional issue not litigated below.’” *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988).

Here, defendant alleges the trial court erred by giving the noncorroboration instruction in combination with the defendant’s requested reasonable belief instruction, even though the defense did not object to either instruction, or to the court’s use of both instructions together. RP 1473. The failure to assert this issue at the trial court is not reviewable on appeal because there is no showing that the alleged error is manifest or obvious, as is required by RAP 2.5.

In order to ensure the actual prejudice and harmless error analyses are separate, the focus of the actual prejudice must be on whether

---

<sup>28</sup> Quoting BENNETT L. GERSHMAN, TRIAL ERROR AND MISCONDUCT § 6-2(b), at 472-73 (2d ed. 2007).

<sup>29</sup> An issue may also be raised for the first time on appeal if it involves trial court jurisdiction or failure to establish facts upon which relief can be granted. RAP 2.5(a)(1) and (2).

the error is *so obvious on the record* that the error warrants appellate review... It is not the role of an appellate court on direct appeal to address claims where the trial court could not have foreseen the potential error or where the prosecutor or trial counsel could have been justified in their actions or failure to object. Thus, to determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.

*State v. O'Hara*, 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010) (footnote and internal citation omitted) (emphasis added).

There is nothing in defendant's claim of manifest error that is plain and indisputable, or so apparent on review that it amounts to a complete disregard of the controlling law or the credible evidence in the record, such that the judge trying the case should have recognized that the use of both instructions (or even the noncorroboration instruction alone) was in error. Washington State Supreme Court precedent, approving of such an instruction, is still good law. Furthermore, there is no precedent that should have alerted the trial court that giving both the noncorroboration instruction and the reasonable belief instruction together would deprive the defendant of his constitutional right to present a defense, or was otherwise an improper judicial comment on the evidence. The error is unpreserved, and this Court should decline to hear it.

Furthermore, the defendant's inclusion of this claimed error in his motion for a new trial does not preserve the error for appeal. If it did, the

requirement for a timely objection that allows a trial court to address and correct potential errors, during trial, would be meaningless. *See e.g., State v. Burke*, 163 Wn.2d 204, 223-224, 181 P.3d 1 (2008) (Madsen, J. dissenting). In *State v. Jones*, 185 Wn.2d 412, 426-27, 372 P.3d 755 (2016), our high court stated, regarding a motion for a new trial in which the defendant first raised a right-to-be-present claim,

A motion for a new trial is not a substitute for raising a timely objection that could have completely cured the error... Indeed, the failure to raise a timely objection strongly indicates that the party did not perceive any prejudicial error until after receiving an unfavorable verdict.

...Jones unquestionably had ample opportunity to object to the designation of alternates in time to completely cure the error... Jones does not point to anything that prevented him from making a timely objection, and he does not explain how an objection, if granted, would have been an incomplete remedy.

Based on the record presented, we must conclude that “[t]he defense made a tactical decision to proceed, ‘gambled on the verdict,’ lost, and thereafter asserted the previously available ground as reason for a new trial. This is impermissible.”

(Internal citations omitted).

However, if this Court determines the claimed error to be reviewable, notwithstanding the fact that the defendant had ample opportunity to object before the jury was instructed, did not do so, gambled on the verdict, and lost, the issue is reviewed only for an abuse of discretion, as it was first raised during the motion for a new trial. *See, Burke*, 163

Wn.2d at 210 (majority opinion). As such, the court’s denial of the defendant’s motion for a new trial on this basis should not be reversed unless this Court finds the decision was based upon untenable grounds, or for untenable reasons. *Id.* A reviewing court will not reverse the decision of the trial court even if it would decide the case differently, unless no reasonable person would take the view adopted by the trial court; if the issue is “fairly debatable,” the appellate court will not disturb the trial court’s ruling. *L.M. by and through Dussault v. Hamilton*, 193 Wn.2d 113, 134-35, 436 P.3d 803 (2019).

2. The combined use of the noncorroboration instruction and the reasonable belief instruction did not interfere with the defendant’s right to present a defense, nor were the instructions confusing.

The defendant claims that the trial court erred by instructing the jury with both the noncorroboration instruction and the reasonable belief instruction. Because this issue was not raised in the trial court until after the verdict and during the motion for a new trial, this issue, if reviewable at all, is subject to review for abuse of discretion.<sup>30</sup>

---

<sup>30</sup> It is the State’s position that the claimed error is not “manifest” as required by RAP 2.5 for generally the same reasons that it was not an abuse of discretion for the court to deny the defendant’s motion for a new trial; the defendant’s claims are not “obvious” on the record, (RAP 2.5 standard) such that no reasonable judge would adopt the position taken by the trial court (abuse of discretion standard).

The United States Constitution guarantees a criminal defendant ““a meaningful opportunity to present a complete defense.”” *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006) (quoting *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986)). The fundamental due process right to present a defense is the right to offer testimony and compel the attendance of a witness.

[I]n plain terms the right to present a defense [is] the right to present the defendant’s version of the facts as well as the prosecution’s to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution’s witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

*Taylor v. Illinois*, 484 U.S. 400, 410, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988).

Jury instructions satisfy the defendant’s Sixth Amendment right to a fair trial if, taken as a whole, they accurately inform the jury of the relevant law, are not misleading, and allow the defendant to argue his theory of the case. *State v. Redmond*, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003); *State v. Tili*, 139 Wn.2d 107, 126, 985 P.2d 365 (1999).

Defendant claims that the combined use of the noncorroboration instruction and the reasonable belief instruction placed special emphasis on K.S.’s testimony while detracting from his own; he claims that “the court’s silence as to Ennis’ opposing testimony interfered with his constitutional right to present a defense” depriving him of a fair opportunity to defend

against the State's accusations. Br. at 51. Defendant laments that the instructions given to the jury did not instruct that the testimony of both the victim and the accused need not be corroborated.

Notwithstanding the fact that the defendant did not object to the instructions in order to provide the trial court with the opportunity to correct any potential prejudice to his right to present a defense, the defendant's argument also neglects the established rule that the jury instructions are to be read as a whole. *See e.g., State v. Aguirre*, 168 Wn.2d 350, 363-64, 229 P.3d 669 (2010). The instructions, as presented, held the State to its burden of proof – beyond a reasonable doubt. The combined instructions required the jury to assess the credibility of K.S.'s testimony as it would with any other witness or evidence.<sup>31</sup> The defendant's "reasonable belief" instruction when combined with the "assessment of credibility" instruction provided that the defendant's burden of proof for his affirmative defense was only a preponderance of the evidence; thus, to return a not guilty verdict predicated upon the defendant's reasonable belief, the jury would only need to find Ennis' testimony, if credible, demonstrated that, more likely than not, he reasonably believed K.S. was not mentally incapacitated or physically

---

<sup>31</sup> As discussed below, K.S.'s testimony *was* corroborated. Multiple witnesses testified to her varying levels of intoxication, and Ennis agreed that he had sexual contact with her.

helpless. In returning a verdict rejecting the affirmative defense, it is evident that the jury did not find Ennis (or other witnesses who provided evidence favorable to him) credible, or any belief he held, reasonable.

Defendant secondarily claims that the instructions, as given, were confusing. However, if one reads the instructions as a whole, treating all instructions with equal import, CP 315, it is clear that the jury had to find K.S.'s uncorroborated testimony credible beyond a reasonable doubt before it could return a guilty verdict predicated *only* on that testimony. There is no evidence that the jurors failed to follow the court's instructions, and the jury is presumed to have done so. *State v. Hopson*, 113 Wn.2d 273, 287, 778 P.2d 1014 (1989).

3. The noncorroboration instruction was not an impermissible comment on the evidence.

The defendant also alleges the trial court erred when it instructed the jury with the noncorroboration instruction, claiming that this instruction was an impermissible comment on the evidence.

Article 4, section 16, of the Washington Constitution provides, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Const. art. 4, § 16. This constitutional provision prohibits a judge from conveying to the jury a personal opinion regarding the merits of the case or a particular issue within the case. *State*

*v. Theroff*, 95 Wn.2d 385, 388-89, 622 P.2d 1240 (1980). The prohibition is intended to prevent a trial judge’s opinion from influencing the jury. *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). “A jury instruction is not an impermissible comment on the evidence when sufficient evidence supports it and the instruction is an accurate statement of the law.” *State v. Chenoweth*, 188 Wn. App. 521, 535, 354 P.3d 13 (2015). Here, the noncorroboration instruction mirrored RCW 9A.44.020(1), which provides: “In order to convict a person of any crime defined in this chapter[,] it shall not be necessary that the testimony of the alleged victim be corroborated.”

Washington courts have repeatedly upheld the propriety of noncorroboration instructions. *See State v. Clayton*, 32 Wn.2d 571, 573-74, 202 P.2d 922 (1949); *State v. Malone*, 20 Wn. App. 712, 714-15, 582 P.2d 883 (1978). In 2005, Division Two held that a nearly identical jury instruction correctly stated the law and was not an improper comment on the evidence. *State v. Zimmerman*, 130 Wn. App. 170, 182, 121 P.3d 1216 (2005), *remanded on other grounds*, 157 Wn.2d 1012 (2006). Most recently, Division One held that in cases involving sex crimes, it is permissible to instruct the jury that there is no corroboration requirement. *Chenoweth*, 188 Wn. App. at 537. Yet, in the current appeal, the defendant asks this Court to not only overrule its own precedent, but also overrule prior Washington Supreme Court precedent. *See Br.* at 60-62. This Court

must adhere to prior precedent of higher courts, including our Supreme Court. *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984).

Our Supreme Court long ago<sup>32</sup> decided *Clayton*, wherein the defendant was charged with “an unlawful and felonious attempt to carnally know and abuse a female child, not his wife, of the age of fifteen years.” The jury was instructed, in part, that the defendant may be convicted upon uncorroborated testimony of the victim.<sup>33</sup> 32 Wn.2d 572. On appeal, Clayton argued that the trial court impermissibly commented on the evidence by singling out the State’s evidence. *Id.* at 572-73. The court rejected the argument, finding that the jury must have understood that it was to determine Clayton’s guilt or innocence from all the evidence presented. *Id.* at 577. Further, the second sentence in that instruction made clear that

---

<sup>32</sup> Defendant claims that the need for noncorroboration instructions has passed. Br. at 57. Contrary to this assertion, in a 2017 law review article, an Iowa Assistant Attorney General discussed rape myths that are still “widely held by between a quarter and a third of Americans,” which include the myths that there are usually witnesses to rape, usually physical injuries associated with rape, and that false allegations are common. Tyler J. Buller, *Fighting Rape Culture with Noncorroboration Instructions*, 53 *Tulsa L. Rev.* 1, 4-8 (2017).

<sup>33</sup> The instruction read: “You are instructed that it is the law of this State that a person charged with attempting to carnally know a female child under the age of eighteen years may be convicted upon the uncorroborated testimony of the prosecutrix alone. That is, the question is distinctly one for the jury, and if you believe from the evidence and are satisfied beyond a reasonable doubt as to the guilt of the defendant, you will return a verdict of guilty, notwithstanding that there be no direct corroboration of her testimony as to the commission of the act.” *Clayton*, 32 Wn.2d at 572.

the jury was the sole judges of the weight to be given to the witness testimony. *Id.*

Later, in *State v. Galbreath*, 69 Wn.2d 664, 419 P.2d 800 (1966), the jury was instructed that an individual charged with indecent exposure could be convicted upon the uncorroborated testimony of the complaining witness. The defendant argued that it was error to omit the cautionary language regarding the burden of proof of beyond a reasonable doubt in that particular instruction and the instruction was a judicial comment on the evidence. *Id.* at 669. The Court rejected the argument, and held the instruction to be a correct statement of the law. *Id.*

The *Galbreath* court further held that the instruction was not a comment on the evidence as it did not express any view as to the credibility or weight of the evidence, the instructions defined the jury's role as fact-finder, and the jury was instructed to consider the instructions as a whole. *Id.* at 671. As stated by the *Galbreath* court:

An instruction, to fall within the constitutional ban in question, must convey or indicate to the jury a personal opinion or view of the trial judge regarding the credibility, weight or sufficiency of some evidence introduced at the trial. A trial judge, in his instructions, is not totally prohibited from making any reference to the evidence in a case. Indeed, he is oftentimes requested and required to advise the jury as to the purpose for which certain evidence is admitted and may be considered (e.g., prior convictions), or to caution the jury as to the application of some portion of the testimony (e.g., statements of an accomplice), or to outline the dispositive issues or premises which the jury must of may find. Such references, so long as they in

nowise indicate or reflect the trial judge's impressions concerning the weight, credibility, or sufficiency of the evidence, do not constitute proscribed comments.

69 Wn.2d at 671 (internal citation omitted).

More recently, in *Zimmerman*, the defendant was convicted of first degree child molestation. 130 Wn. App. 170. In that case, the noncorroboration instruction stated, "In order to convict a person of the crime of child molestation as defined in these instructions, it is not necessary that the testimony of the alleged victim be corroborated." *Id.* at 173-74. Division Two commented that the Washington Pattern Criminal Jury Instructions (WPICs) do not include a noncorroboration instruction and the Washington Supreme Court Committee on Jury Instructions has misgivings about the instruction, finding corroboration to really be a matter of sufficiency of the evidence. *Id.* at 182. However, in affirming the conviction, the court concluded that the instruction accurately stated the law because it "mirrored" RCW 9A.44.020(1). *Id.* at 181; *see also, State v. Kennard*, 101 Wn. App. 533, 538, 6 P.3d 38 (2000) (Kennard's argument that the instruction was an unconstitutional comment on the evidence failed because "the challenged instruction correctly reflect[ed] the law").

The defendant's reliance on *State v. Johnson*, 152 Wn. App. 924, 219 P.3d 958 (2009), is of no avail. In *Johnson*, the defendant argued that without additional safeguarding language, the trial court's non-

corroboration instruction “puts the complaining witness’s testimony in a favorable light,” and *timely objected* at trial, claiming that the instruction was a comment on the evidence. *Id.* at 929, 936. Although Division Two reversed Johnson’s conviction on different grounds, the court observed that *Clayton* contained “no clear pronouncement” mandating “safeguarding language” when issuing a non-corroboration instruction. *Id.* Ultimately, although not central to its decision, the *Johnson* court cautioned trial courts to consider including the burden of proof in the non-corroboration instruction, as not including the language in the instruction could be an impermissible comment on the evidence. *Id.* at 937.

In the present case, the record demonstrates that the trial court’s instructions satisfied the standard outlined in *Clayton* because the instructions “elsewhere expressly instructed” the jury that it must reach a verdict beyond a reasonable doubt after examining *all of the evidence*, including the factors bearing on the credibility of all witnesses. *See Clayton*, 32 Wn.2d at 577. The trial court also found this to be the case in ruling on the defendant’s motion for a new trial. RP 1774. This claim has no merit.

If this Court determines that trial court erred when it gave the non-corroboration instruction and that the error is reviewable, any error was harmless. An erroneous jury instruction that misleads the jury is subject to a constitutional harmless error analysis. *State v. Thomas*, 150 Wn.2d 821,

844, 83 P.3d 970 (2004). An instruction is harmless so long as an appellate court concludes beyond a reasonable doubt that the jury verdict would have been the same without the error. *Id.* at 845.

As discussed above, the jury was instructed elsewhere in the instructions on the guiding principles concerning the evaluation of the evidence, including what weight, if any, to place on the evidence and factors to determine credibility. There is no evidence that the jury did not follow those instructions. Further, there was ample *independent* evidence that, at the time of the rape, K.S. was mentally incapacitated or physically helpless. She had to be cared for by multiple individuals at the party, she roamed the house naked, she threw up multiple times, and she was put to bed by others (in the defendant's presence) twice. Even the defendant agreed that sexual contact occurred, and that K.S. was intoxicated at the time. The jury did not need to rely only upon K.S.'s word that she did not consent; rather, the objective and obvious manifestations of her intoxication throughout the night were sufficient for the jury to determine, even without her testimony, that she was mentally incapacitated or physically helpless at the time of the rape. Any error was harmless beyond a reasonable doubt.

**B. THE DEFENDANT CANNOT DEMONSTRATE THE STATE ENGAGED IN FLAGRANT AND ILL-INTENTIONED MISCONDUCT; DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT.**

Because the defendant alleges several instances of prosecutorial misconduct and claims his attorney was deficient for failing to object to that alleged misconduct, both claims will be addressed together below. As discussed above, the trial court's rulings on the motion for a new trial are reviewed for abuse of discretion.

1. Standard of review for prosecutorial misconduct claims.

A prosecutor generally has “wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury.” *In re Davis*, 152 Wn.2d 647, 716, 101 P.3d 1 (2004). To prevail on a claim of prosecutorial misconduct, a defendant must establish that the prosecutor's conduct was both improper and prejudicial. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). Prosecutorial misconduct is prejudicial where there is a substantial likelihood the improper conduct affected the jury's verdict. *State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359 (2007), *abrogated on other grounds by State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018). Because the defense did not object during trial, the defendant's prosecutorial misconduct claim is considered waived unless the misconduct is “so flagrant and ill-intentioned that it cause[d] an enduring and resulting prejudice that could not have been

neutralized by a curative instruction.” *Matter of Phelps*, 190 Wn.2d 155, 165, 410 P.3d 1142 (2018). In *Phelps*, our high court observed that it has only found prosecutorial misconduct was flagrant and ill-intentioned only “in a narrow set of cases where we were concerned about the jury drawing improper inferences from the evidence, such as those comments alluding to race or a defendant’s membership in a particular group, or where the prosecutor otherwise comments on the evidence in an inflammatory manner.” *Id.* at 170.

2. Standard of review for ineffective assistance of counsel claims.

Review of an ineffective assistance of counsel claim begins with a strong presumption that counsel’s conduct fell within the wide range of reasonable professional assistance. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct 2052, 80 L.Ed.2d 674 (1984). To prevail on this claim, the defendant must show his attorney was “not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment” and his error(s) were “so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Matter of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998), *as amended on denial of reconsideration* (Dec. 7, 1998). Judicial scrutiny of counsel’s performance is highly deferential and requires that every effort be made to eliminate the “distorting effects of hindsight” and to evaluate the conduct from “counsel’s perspective at the time”; in order to be successful

on a claim of ineffective assistance of counsel, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Strickland*, 466 U.S. at 689.

The first element of ineffectiveness is met by showing counsel's conduct fell below an objective standard of reasonableness. The second element is met by showing that, but for counsel's unprofessional errors, there is a reasonable probability the outcome of the proceeding would have been different. *In re Rice*, 118 Wn.2d 876, 888, 828 P.2d 1086 (1992).

It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.

*Strickland*, 466 U.S. at 693 (internal quotation omitted). Thus, the focus must be on whether the verdict is a reliable result of the adversarial process, not merely on the existence of error by defense counsel. *Id.* at 696. To rebut the presumption of effective assistance of counsel, the defendant must establish the absence of any "conceivable legitimate tactic explaining counsel's performance." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). In that regard, the decision to object, or to refrain from objecting even if testimony is not admissible, may be a tactical decision not to highlight the evidence to the jury. It is not a basis for finding counsel ineffective. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989)

(“The decision of when or whether to object is a classic example of trial tactics. Only in egregious circumstances, on testimony central to the State’s case, will the failure to object constitute incompetence of counsel justifying reversal”).

In addition, the competency of counsel is determined based upon the entire record in the trial court. *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972). A failure to demonstrate either deficient performance or prejudice defeats an ineffective assistance of counsel claim. *State v. Emery*, 174 Wn.2d 741, 755, 278 P.3d 653 (2012).

3. The State did not impermissibly comment on the defendant’s right to remain silent; any comment was not flagrant or incurable, and, in any event, the defendant opened the door.

The defendant alleges that the State impermissibly commented on his Fifth Amendment right to remain silent. The defendant claims as improper: (1) the State’s question to Detective Armstrong whether the defendant remained silent during the DNA collection, RP 1472; (2) and, during closing argument, five references to the credibility of the defendant’s testimony at trial, listed separately below. At issue is the defendant’s pre-arrest, post-*Miranda* “silence.”<sup>34</sup>

---

<sup>34</sup> The defendant was provided *Miranda* warnings during the meeting with investigators at his attorney’s office. He was not arrested at that time.

As a threshold matter, the defendant's allegations that the State impermissibly commented on his right to silence were not raised during trial. Defendant concedes this point. Br. at 66; CP 815-16. As with defendant's assignment of error to the noncorroboration instruction, the defendant must demonstrate that the alleged comments are a manifest error affecting a constitutional right. RAP 2.5. To the extent that the defendant partially raised the issue in his motion for a new trial, this Court would review the trial court's rulings for an abuse of discretion. *See Burke*, 163 Wn.2d at 210. However, in his motion for a new trial, the defendant only raised the "comments" made by the State during closing argument, not during the questioning of the detective. CP 412-13. Thus, the newly raised assignment of error to the questioning of Detective Armstrong would be reviewable only if it is a manifest error affecting a constitutional right.

Under both the state and federal constitutions, the State may not comment on a defendant's Fifth Amendment exercise of the right to remain silent, including prearrest silence. *See State v. Easter*, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996); *State v. Lewis*, 130 Wn.2d 700, 705, 927 P.2d 235 (1996). The State cannot use a defendant's silence after *Miranda* warnings have been given even for impeachment. *Burke*, 163 Wn.2d at 217. "The right against self-incrimination is liberally construed." *Easter*, 130 Wn.2d at 236. "[W]hen the defendant's silence is raised, [an appellate court] must

consider whether the prosecutor manifestly intended the remarks to be a comment on that right.” *Burke*, 163 Wn.2d at 216.<sup>35</sup> A comment on an accused’s silence occurs when the State uses the evidence to suggest the defendant is guilty. *State v. Keene*, 86 Wn. App. 589, 594, 938 P.2d 839 (1997).

However, a prosecutor’s statements will not be considered a comment on the right to silence if, “standing alone, [it] was so subtle and so brief that [it] did not naturally and necessarily emphasize the defendant’s testimonial silence.” *Burke*, 163 Wn.2d at 216 (internal quotations and citations omitted). A remark that does not amount to a comment is considered “a mere reference” to silence, and is not reversible error absent a showing of prejudice. *Id.* And, Justice Madsen, in *Burke*, would not have reviewed a “mere reference” to silence, absent a proper objection, even when raised in a motion for a new trial. *Id.* at 210, 223.

---

<sup>35</sup>In *Burke*, the defendant began a police interview about rape allegations, but stopped the interview when his father intervened and advised him to consult with a lawyer. 163 Wn2d at 207. During opening statement, the State described Burke’s father as “sensing that it wasn’t necessarily okay to have sex with [the underage girl]” and advising his son to end the interview, implying that the “guilty should keep quiet and talk to a lawyer.” *Id.* at 222. Our Supreme Court held that the State had violated Burke’s right to silence by implying that “suspects who invoke their right to silence do so because they know they have done something wrong.” *Id.* at 222.

*a. Detective Armstrong's testimony.*

During the cross-examination of forensic specialist Natalie Ruckenbrod, who accompanied law enforcement officers to collect evidence from Ennis at Cossey's office, and who testified that she did not collect fingernail samples from Ennis due to the short length of his nails, RP 1035, Cossey asked if she "recalled [Ennis] saying that he would cut [his own nails] and give them to her." RP 1037. She did not recall Ennis offering this accommodation. RP 1037.

Surprised by this question and not intending to elicit any statements by the defendant to law enforcement,<sup>36</sup> the State asked the court to disallow any other hearsay testimony regarding the defendant's statements to witnesses at the evidence collection meeting; the Court agreed that if defense believed the State opened the door to such hearsay, it would be addressed outside the presence of the jury. RP 1075-76, 79.

During his redirect examination, Ennis testified that he offered to clip his nails for investigators, but the offer was rejected. RP 1467. In rebuttal, the State recalled Detective Armstrong who testified that he did not remember Ennis offering to cut his own nails for investigators. RP 1472. The State then asked, "Did you indicate in your report that he remained

---

<sup>36</sup> As indicated above, there was no CrR 3.5 hearing per Cossey's agreement.

silent during the contact and conversations?,” to which Armstrong replied, “I indeed did.” RP 1472. In surrebuttal, Shirley Vanning, defense investigator, testified that Ennis offered to clip his own nails for law enforcement, but that law enforcement would not let him do so. RP 1474.

First, as above, this error was not preserved by objection. The court should decline to review it at all because the claimed error was neither manifest, RAP 2.5, nor flagrant and ill-intentioned, as required for review of prosecutorial misconduct absent objection.

Secondly, the State’s question to Detective Armstrong regarding whether the defendant remained silent during the contact, had nothing to do, whatsoever, with implying the defendant was guilty because he remained silent. The State’s manifest intent in questioning Detective Armstrong in this manner was to rebut the defendant’s *own* assertion that he offered to clip his nails; the intent was not to comment on the defendant’s right to silence or infer guilt therefrom. Thus, at best, it was a “mere reference” to silence, not intended to comment on the defendant’s invocation of the constitutional right.

Third, it is of import that the defendant, not the State, first raised this line of inquiry. There had been no CrR 3.5 hearing. The State was clearly unaware that the defendant would allege he offered to clip his fingernails. Even assuming that the brief reference to the defendant’s silence was

impermissible, if raised by the State in its case in chief, the defendant opened the door to this testimony.<sup>37</sup> *State v. Gefeller*, 76 Wn.2d 449, 458 P.2d 17 (1969). He cannot now complain of the brief reference to his silence on appeal, because the State was entitled to rebut his assertion that he did not remain silent. This claim fails.

*b. State's closing argument.*

The defendant also asserts that several statements made by the prosecution during its closing argument also impermissibly commented on his right to silence. The statements made were:

- (1) Part of what you will do in this case is to look at the testimony and examine it. We heard the defendant's statement for the first time yesterday when he took the stand. He is presumed innocent...he is not presumed credible.

RP 1496.

---

<sup>37</sup> The most cited case dealing with the "open door rule," is *Gefeller*, where our state supreme court explained:

It would be a curious rule...which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it. Rules of evidence are designed to aid in establishing the truth. *To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths.* Thus, it is a sound general rule that, when a party opens up a subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced.

76 Wn.2d at 455 (emphasis added).

- (2) And again, this applies equally to the defendant's statement. You can look at the timing and the accuracy of a statement and you can also consider how someone testifies and what motive or bias they may have.

RP 1497.

- (3) You can look at the timing of the statements in this case and the testimony that contradicts not only the claim by the defendant that [K.S.] was flirting, but also that by the time this occurred she had suddenly been ridden of all the effects of being intoxicated.

RP 1499.

- (4) The defendant spoke to you the other day after having two years and four months and access to his reports and being seated in the courtroom throughout this and he gave you a version of events you must analyze. And it's a version of events, ladies and gentleman, that was driven by the fact that despite the defendant's efforts, DNA was discovered in this case. The defendant had hoped first that he would go undetected because [K.S.] was not in any condition he thought to remember the report [sic].

RP 1500.

- (5) And again, the defendant was caught because [K.S.'s] DNA was on the seatbelt of that car she had never been in. That took away some options from the defendant as to what he would testify to. His testimony was full of justifications, not taking responsibility. Ladies and gentlemen, actions can speak louder than words. And, the defendant's actions prior to taking the stand need to be considered and not ignored.

RP 1510.

The trial court rejected the defendant's claim that the State's argument commented on his right to silence during the defendant's motion

for a new trial. RP 1780-82.<sup>38</sup> The court found the statements to lack any specific comment on the defendant's silence, to be ambiguous, and to directly reflect the defendant's own testimony at trial. RP 1781-1782. The trial court did not abuse its discretion in denying the defendant's motion as discussed below.

The above statements were directed at the defendant's credibility while testifying, not at his pre-arrest or post-arrest silence to law enforcement. The first statement, "we heard the defendant's statement for the first time yesterday," implies nothing about guilt from any earlier silence. It simply indicates that the jury heard the defendant testify for the first time the preceding day; it merely regarded the order of evidence presented at trial. It is not even a mere reference to the defendant's earlier silence – when considered with the argument as a whole, it is apparent that the statement was directed at the defendant's credibility while testifying.

The remaining comments above, also related to the defendant's credibility while testifying, and did nothing more than (1) explain to the jury that the court's instructions, relating to credibility determinations, also

---

<sup>38</sup> The trial court analyzed: (1) "We heard the defendant's statement for the first time yesterday when he took the stand"; (2) "You can look at the timing and accuracy of a statement, how someone testifies and what motive or bias they may have"; and (3) "The defendant spoke to you the other day after having two years and four months to access reports and being seated in the courtroom throughout this, and he gave you a version of events you must analyze."

applied to the defendant's own testimony and (2) argue how, based on the testimony, the jury should find Ennis' trial testimony to not be credible. *See* CP 314. The comments emphasized the defendant's actions prior to trial – i.e., clipping his fingernails and contacting witnesses in violation of a court order as evidence that he was attempting to “get rid of potential evidence,” and how those actions bore on his credibility as a witness. RP 1500, 1511. Furthermore, the defendant himself, testified that he had spent “two years and four months” thinking about the case and, therefore, could remember minute details, despite his level of intoxication during the party:

Q. And so you were on the stand for almost two hours, and you've given a variety of details down to the minutiae. And your level of intoxication didn't affect any of your ability to do that from that night, did it?

A. Well, its something that I've thought about all the details of that party as soon as the allegation was made...I started thinking back to everything that I had seen, everything that I had heard at that party. For two years and four months, it's all I've thought about every single day. So, yeah, I have a pretty good recall of what happened that night.

Q. And you thought about how to explain your actions to your wife?

A. Yes, ma'am.

RP 1437-38.

The defendant's ability to recall the events and details from the night of the party was a proper subject for both cross-examination and closing argument. A defendant who testifies at trial may have his credibility questioned by the prosecution, just as any other witness, with some

constitutional limitations. *See e.g., Brown v. United States*, 356 U.S. 148, 154, 78 S.Ct. 622, 2 L.Ed.2d 589 (1958) (“If [a defendant] takes the stand and testifies in his own defense his credibility may be impeached and his testimony assailed like that of any other witness”).

None of the above statements was a comment on the defendant’s right to silence, or inferred guilt therefrom; the record reflects the State only intended its remarks as an attack on the defendant’s credibility at trial. Thus, there was no misconduct, and the trial court’s ruling denying a new trial was correct. And, even assuming the remarks did somehow amount to an improper reference to the defendant’s silence, they are not so flagrant and ill-intentioned or otherwise manifest to call for review. This claim fails.

Additionally, any claim that defense counsel was ineffective for failing to object also is unfounded. The defendant is unable to demonstrate deficient performance when none of the comments or questions he cites amounts to an unconstitutional comment on his right to silence. He has failed to demonstrate how a reasonable attorney should have recognized these statements to be an improper comment on a defendant’s right to silence, and, therefore, objected. Furthermore, “[l]awyers do not commonly object during closing argument ‘absent egregious misstatements.’ A decision not to object during summation is within the wide range of permissible professional legal conduct.” *In re Davis*, 152 Wn.2d at 717.

Tactically speaking, Cossey may not have objected to avoid calling undue attention to the prosecutor's arguments regarding his client's credibility. Even if the above statements were improper, the defendant has failed to demonstrate that the argument was so egregious as to require an objection. The defendant has failed to demonstrate his counsel was ineffective.

4. Vouching for credibility of the victim.

The defendant next claims that the prosecutor vouched for K.S.'s credibility during closing argument, citing five comments made by the prosecutor:

[K.S.] never stopped Officer Heuett from making that report, *because she knew the truth*. And [K.S.] *has abided by that truth* for two years and four months.

RP 1513 (emphasis added).

[K.S.] refused to give up on a job she loves, and *she has abided by the truth in this courtroom under oath in front of each of you and everyone else here*.

RP 1514 (emphasis added).

And ladies and gentlemen, *when you find [K.S.]'s credibility to be such that her statement to you is nothing more and everything that includes the truth*, you will realize under the law that the state has met its burden...

RP 1543 (emphasis added).

[T]he defendant in his—in his statement suggested to you that this was a woman that had an agenda; that she was so jilted by this experience and her sexual aggressiveness being stopped by a defendant that she began a vendetta; *that she stayed with that for*

*two years and four months; that she, committed to a profession that supposed to be about the truth, stayed with that truth.*

RP 1543 (emphasis added).

[W]hen you look at the facts in this case...*the truth and the reality of what occurred will be clear.* Not based on emotion, not based on games by the state, *not based on anything else than the truthful word of [K.S.]*.

RP 1543-1544 (emphasis added).

As above, there was no objection to the State's argument at trial. Thus, the defendant must demonstrate that the State's argument was misconduct that was so flagrant and ill-intentioned that it could not have been remedied by a curative instruction.

Prosecutors have "wide latitude to draw and express reasonable inferences from the evidence" in their closing arguments. *State v. Robinson*, 189 Wn. App. 877, 893, 359 P.3d 874 (2015). "The prejudicial effect of a prosecutor's improper comments is not determined by looking at the comments in isolation but by placing the remarks 'in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.'" *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)).

A prosecutor may not vouch for a State witness's credibility. *State v. Coleman*, 155 Wn. App. 951, 957, 231 P.3d 212 (2010), *review denied*,

170 Wn.2d 1016 (2011). The trier of fact has sole authority to assess witness credibility. *State v. Ish*, 170 Wn.2d 189, 196, 241 P.3d 389 (2010). Prosecutorial misconduct by vouching occurs when the prosecutor either (1) places the prestige of the government behind the witness, or (2) indicates that information that was not presented to the jury supports the witness's testimony. *Robinson*, 189 Wn. App. at 892-93. However, there is a difference between a prosecuting attorney's individual opinion presented as an independent fact, and "an opinion based upon or deduced from the testimony in the case." *McKenzie*, 157 Wn.2d at 53 (quoting *State v. Armstrong*, 37 Wash. 51, 54-55, 79 P. 490 (1905) (emphasis omitted)). Prejudicial error will not be found unless it is "clear and unmistakable" that counsel is expressing a personal opinion. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995)

Even the use of the word "truth" during closing argument is not necessarily improper. In *State v. Warren*, for example, the prosecutor argued that 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." 165 Wn.2d 17, 30, 195 P.3d 940 (2008), *cert. denied*, 556 U.S. 1192 (2009). Our Supreme Court held that this argument was proper because it was based on the evidence presented at trial rather than on the prosecutor's personal opinion.

*Id.*; see also *State v. Jackson*, 150 Wn. App. 877, 884, 209 P.3d 553, review denied, 167 Wn.2d 1007 (2009) (prosecutor's statements that police testified accurately were not improper vouching because the prosecutor outlined the evidence that could support the jury's conclusion that the officers were credible after reminding the jury that it was the sole judge of credibility).

Here, it is not clear and unmistakable that counsel expressed a personal opinion of K.S.'s veracity during closing argument. The State's argument regarding K.S.'s credibility did not place the prestige of the government behind the witness. Nor did it suggest or convey the existence of evidence not heard by the jury that supported K.S.'s testimony.

Rather, the prosecutor's argument that K.S. was truthful was tied to the evidence that was elicited at trial, and the instructions given to the jury: (1) she did not attempt to stop her FTO from reporting the allegations she made to him; (2) despite the difficulties in K.S.'s professional and personal life that resulted from the fact that she reported the assault, she adhered to the statements she had given to law enforcement and others nearly two and a half years earlier;<sup>39</sup> (3) the evidence did not reflect a sexually aggressive

---

<sup>39</sup> As discussed above, it was *the defendant* who first suggested to the jury during his testimony that he had thought of the events occurring during the party every day for two years and four months. RP 1437.

woman with a vendetta (as suggested by defendant both in his testimony and during his closing argument); and (4) based on the facts of the case, the jury could find that K.S. was truthful and credible, and could convict upon her testimony alone. The prosecutor also reminded the jury that *it* was to judge the credibility of the witnesses in light of the evidence and testimony presented. RP 1496, 1497, 1543. The prosecutor asked the jury to look at the bias and motive of *both* K.S. and Ennis and to hold them to the same standard. RP 1544. The statements of the prosecutor, when considered as a whole and in context, are not vouching. They are simply an argument that, based upon the evidence, K.S. was credible and Ennis was not. There was no prosecutorial misconduct in this regard, let alone flagrant and ill-intentioned misconduct.

Defendant's claim that his attorney was ineffective for failing to object to the above also fails. As indicated above, attorneys do not frequently object during closing, oftentimes to avoid highlighting unfavorable arguments. The prosecutor's closing argument was not so egregious that the failure to object was deficient performance.

5. Impugning counsel/commenting on the credibility of Beaver.

Defendant next contends that the State impermissibly commented on the credibility of Beaver and impugned defense counsel "with one remark." Br. at 88. During direct examination by Cossey, Beaver testified

that early in the evening, K.S. had no trouble pouring shots of alcohol, and “she seemed to be, you know, having fun. She seemed to be walking normal. She seemed to be talking just fine.” RP 1354. At issue is the following exchange occurring during cross-examination:

BY MR. TREECE:

Q....And do you recall [during your October 29<sup>th</sup> interview, Detectives] talking about, or asking you about being introduced to [K.S.] and Callie in the kitchen?

A. Yes.

Q. Do you recall telling them, “I don’t know if they were trying to be funny. I think they were just a little wasted at that point in time”?

A. Um, I do recall that. However --

Q. Okay. I know you told Mr. Cossey just now that they weren’t, but --

A. Right.

Q. -- you did tell detectives back then that?

A. Correct.

Q. Okay.

A. But wasted --

Q. *No, that’s fine. Mr. Cossey can clean that up, and you can explain why you’re changing it now.*

MR. COSSEY: *Objection, your Honor.*

THE COURT: *Okay, sustained.*

MR. TREECE: Okay.

RP 1360-61 (emphasis added).

It is improper for a prosecutor to disparagingly comment on defense counsel’s role or impugn the defense lawyer’s integrity. *State v. Thorgerson*, 172 Wn.2d 438, 258 P.3d 43 (2011). The above comment was improper, although it did not impugn defense counsel. This statement makes no suggestion that defense counsel was engaging in “sleight of hand,” or

subversive tactics, and did not otherwise impugn defense counsel. The statement only indicated that defense counsel would provide Beaver an opportunity to explain why her testimony differed from her earlier statement.

In this case, even assuming the comment did disparage defense counsel, the comment was not so egregious as to be incurable. *See Warren*, 165 Wn.2d at 29 (State’s argument that defense counsel’s “mischaracterizations” were an example of “what people go through in a criminal justice system when they deal with defense attorneys” and that defense counsel’s mischaracterizations were in the hope that the jury “was not smart enough to [it] figure out,” impugned defense counsel but were not so flagrant and ill-intentioned that no instruction could have cured them). Defense counsel objected, and the objection was sustained; there is no evidence that, had defense counsel desired a curative instruction, it would not have sufficed.

Regarding the defendant’s second claim, that this remark by the prosecutor commented on the witness’ credibility, the State concedes that the comment was improper and should not have been made. Here, the prosecutor explicitly stated that Beaver had changed her testimony; the change in Beaver’s testimony would have been apparent to the jury without the remark. This error was harmless because Beaver’s testimony was not

central to either party's case, nor was her credibility of import. Beaver's recollection of the evening's events had little probative value considering that she was intoxicated even earlier than K.S., and also had to be dressed and put to bed after vomiting. Thus, her testimony did not have any bearing, whatsoever, on the events occurring later in the evening, or on K.S.'s intoxication level at or near the time of the assault. And, as above, defense counsel's objection to the comment was sustained, and there is no evidence that the comment was so flagrant and ill-intentioned that, had a curative instruction been requested, it would not have obviated any prejudice resulting from the comment. Although the comment was improper, it had no effect on the trial.

6. Expressing a personal opinion on the defendant's guilt.

Next, the defendant claims that the State engaged in misconduct by expressing a personal opinion as to the defendant's guilt. At issue is the State's use of the word "assaulted" in nine of its questions all addressed to K.S.<sup>40</sup> The last instance to which defendant assigns error drew an objection from trial counsel, which was sustained by the court:

---

<sup>40</sup> (1) "Why didn't you tell him who had *assaulted* you?," RP 862; (2) "Had you at that point told him who *assaulted* you?," RP 866; (3) "So I want to take you to the point where you wake up *after you had been assaulted* and it's in the morning," RP 867; (4) "Did you tell Callie at that point who had *assaulted* you?," RP 869; (5) "And did you tell him how you were being *assaulted*?," RP 876; (6) "And were those the clothes that you were wearing when you woke up being *sexually assaulted*?," RP 877; (7) "And can you tell me a little bit—at this point you've been sexually assaulted that—why would you shower?,"

[STATE]: Okay. You'd been up -- *you'd suffered a sexual assault, been up until midnight* --

MR. COSSEY: Judge, I'm going to object on that. She's doing it constantly. It's not appropriate. She's constantly making that statement. It's not appropriate.

[STATE]: *Your Honor, I'm stating the fact that there was an assault where fingers were placed inside this woman's vagina. That's why we're here.*

MR. COSSEY: It's an allegation, and she's making it as a fact that she's -- when she's asking questions.

RP 933-934 (emphasis added). No curative instruction was requested by the defense or provided by the court. RP 934.

There are two issues that defendant fails to distinguish. The first, is whether the use of the term "assault," "assaulted," or "sexual assault," in and of itself constitutes misconduct. The second issue is whether the State's response to defendant's objection, in front of the jury, that "I'm stating the fact that there was an assault where fingers were placed inside this woman's vagina. That's why we're here," constitutes misconduct, and, if so, whether that misconduct could have been cured by an instruction to the jury.

Regarding the first issue, whether the prosecutor's use of the word "assault" or "sexual assault" constitutes misconduct, it is of note that there was no objection to, motion in limine regarding, or court order prohibiting the state from using the term, "assault" during its questioning. Thus, even

---

RP 879-880; (8) "And so it was a couple of minutes almost immediately after that you report that *you were assaulted* to [Rassier]?" RP 933.

assuming that the use of the term, in a sexual assault trial, is misconduct, the defendant must demonstrate that the use of the term was flagrant and ill-intentioned such that the use of the term could not have been cured.

On this issue, *State v. Thompson*, 90 Wn. App. 41, 950 P.2d 977 (1998), is instructive. In *Thompson*, a vehicular assault prosecution, a police officer testified, in violation of an order in limine, that a vehicle had been driven “in a reckless manner.” Although the comment was improper because it violated the order in limine, the court observed that the remark was cumulative with other evidence that had already been admitted at trial that did not violate the order.

Here, before the State use the word “assault” in any of its questions, K.S. had already testified, in several different ways, that she woke up to Ennis’ fingers in her vagina, and did not consent to the sexual contact:

Q. Okay. And so what happened next that you can recall?

A. Um, I woke up in a bed with Gordon next to me.

...

Q. What woke you up?

A. Um, the feeling of, um, thrusting in my pants.

Q. ...What was in the pants?

A. Um, Gordon’s hands.

...

Q. And when you woke up, where on your body was the defendant’s hand?

A. Um, in my vagina.

Q. Okay. What part of his hand was in your vagina?

A. His fingers.

RP 848.

Q. ...Do you know and can you tell us based on how it felt, how many fingers the defendant was using to penetrate you?

A. I thought at least two.

Q. ...Do you have a sense of what hand he was using?

A. ...I think he would have been using his left hand.

...

Q. How do you know that it was the defendant that had his fingers in your vagina?

A. ...[t]here was a little bit of ambient light coming in from the room from outside, so I could see a little bit of light in there. And then I remember him wearing a hat, so I remember looking up and seeing that, seeing kind of like his face and with the hat. I also remember at one point feeling facial hair like rubbing up against my face.

...

Q. Were you at all conscious and awake when the defendant used his fingers and penetrated your vagina?

A. No.

RP 849-850.

Q. Okay. And is that the bed that you woke up in when the defendant had his fingers in your vagina?

A. Yes.

RP 857.

Q. And what did you tell [Rassier]?

A. Um, I was crying. I was telling him I was scared and what happened. Um, I didn't tell him who, but I told him I was just assaulted.

RP 862.

Thus, before the prosecutor used the term, "assault" for the first time, K.S. had testified to and used the term to describe the incident. K.S.'s own use of the term was not objected to, and is not assigned as error on appeal. Thus, if anything, the prosecutor's use of the term eight times, in

short succession, after the victim's own use of the term, and detailed description of the assault, was merely cumulative. And, the prosecutor ceased using the term after the defendant objected and the court sustained, demonstrating the prosecutor's attempt to comply with court's order. Even if misconduct, the prosecutor's use of the term was not flagrant or ill-intentioned such that any resulting prejudice could not be cured.

Regarding the second issue, the prosecutor's statement that the reason for the trial was the "fact that there was an assault where fingers were placed inside this woman's vagina," this statement does not indicate that it was the defendant who committed the assault. It does not express an opinion by the prosecutor that the defendant was guilty of anything. Therefore, it is not a personal opinion on the defendant's guilt. But, even assuming that it was improper for the prosecutor to make this statement, the defendant is still not entitled to relief. The defendant has not demonstrated that the prosecutor's fleeting statement was so flagrant and ill-intentioned that an instruction to the jury to disregard the statement could not have cured any potential prejudice arising from the statement. Moreover, the statement was harmless because the defendant admitted to placing his finger in K.S.'s vagina.

If anything, the statement was neutralized by defense counsel's own reminder to the court (in the presence of the jury) that the "assault" was

nothing more than an allegation. RP 934. This statement was further neutralized by the court's later instructions to the jury that (1) a charge is only an accusation and the filing of a charge is not evidence that the allegation is true, CP 313; (2) the lawyer's remarks, statements and arguments are not evidence and only evidence is to be considered in deliberations, CP 313-314; and (3) the defendant is presumed innocent and is only to be found guilty if the jury finds, based on the evidence, that the presumption has been overcome beyond a reasonable doubt, CP 319. The jury is presumed to follow the court's instructions. *See, Hopson*, 113 Wn.2d at 287. The defendant is unable to demonstrate that the remark by the prosecutor, if in error, was flagrant, ill-intentioned, or incurable.

As with the issues above, defendant is unable to demonstrate that counsel was ineffective for failing to object earlier to the use of the term "assault" or for failing to object to the prosecutor's statement to the court. Defense counsel's decision to object is generally a tactical decision, and only in egregious cases, will this Court find deficient performance based on a lack of objection. Similarly, the defendant has failed to demonstrate prejudice from the use of the terms or the state's characterization of the evidence; as above, K.S. had already testified that she was "assaulted," and described that "assault" in a number of ways. Furthermore, the jury was instructed that "the lawyers remarks, statements and arguments" are not

evidence, and that the jury must disregard any remark, statement or argument that is not supported by the evidence or the instructions. CP 314. The defendant has failed to demonstrate that he was prejudiced by counsel's lack of objection – or that the result of the proceeding would have been different; the jury was directed to decide the case upon the evidence, not upon the prosecutor's remarks.

7. Claimed violation of the motion in limine regarding Doug Strosahl's testimony.

During a defense interview, Doug Strosahl was asked why he did not do anything after K.S. reported the assault to him; he claimed he did not do anything because he did not think that she was reporting that it was a sexual assault. RP 27. Because of that information, the State asked the Court to prohibit Mr. Strosahl from expressing an opinion as to the credibility of the victim's disclosure on October 25, 2015; Cossey agreed he could not ask Mr. Strosahl his opinion on K.S.'s credibility; and the court granted the motion. CP 302; RP 27. Defendant now complains that the State violated its own motion in limine: (1) by claiming in opening statement that Doug Strosahl "didn't do anything [and] just left" when K.S. told him of the allegation and (2) when K.S. and Roseland testified that Mr. Strosahl did nothing when K.S. disclosed the assault. Br. at 93; RP 561, 876-77.

Defendant claims that both instances were “direct violations” of the motion in limine. Br. at 93. Yet, neither instance addresses Mr. Strosahl’s opinion of K.S.’s credibility. They are simply statements of fact – Mr. Strosahl did not do anything when K.S. reported the incident to him; he just left the room and did not return.<sup>41</sup> This testimony did not provide the reason he did nothing – the jury could have inferred any number of reasons for Mr. Strosahl’s inaction. While the jury *might* have inferred that Mr. Strosahl did not believe K.S., this inference would only likely work to Ennis’ advantage;<sup>42</sup> if the jury found Mr. Strosahl credible, then, to the jury, K.S.’s testimony might have been less credible. However, based upon Mr. Strosahl’s later testimony of his significant alcohol impairment the preceding night, the jury could have inferred that he was ill, just as K.S. had been; alternatively, upon Roseland’s testimony (that Mr. Strosahl’s reaction upon K.S.’s disclosure was to sit and say, “Oh, oh,”<sup>43</sup> before leaving and not returning), the jury could have believed that Mr. Strosahl was simply shocked and did not know what to do with an allegation that a rape of a

---

<sup>41</sup> There was no testimony as to how long K.S. or Roseland waited for Mr. Strosahl to return after he left the room - for all the jury knew, they might have waited only a few minutes before deciding to leave; after all, K.S. was hung over, felt as though she was going to throw up, and had a headache. RP 878.

<sup>42</sup> A strategic reason for defense counsel’s lack of objection to the testimony.

<sup>43</sup> This hearsay testimony was objected to and the objection was sustained, but the answer was not stricken, nor was it requested to be stricken. RP 1092.

fellow officer occurred, in his home, at a party, hosted by him, to which he had invited both the victim and the alleged perpetrator.

Ultimately, because defendant did not object to this testimony, or ask for a curative instruction, the defendant must demonstrate that the State's alleged misconduct was flagrant and ill-intentioned such that the court could not have obviated the prejudice to the defendant by an instruction. The defendant has not demonstrated the impropriety of this evidence, any prejudice from these statements, and, especially, that no instruction to disregard the testimony or argument would have mitigated that prejudice. This claim fails.

As indicated above, the defendant has failed to demonstrate Cossey was ineffective for failing to object to this testimony; the lack of objection was strategic, Cossey could reasonably have believed the testimony was favorable to his client, and there is no showing of prejudice where the State elicited evidence permitting the jury to infer that a seasoned law enforcement officer did not believe K.S.'s allegation.

8. Arguing impeachment evidence as substantive evidence.

The defendant claims, for the first time on appeal, that the State engaged in incurable misconduct when it told the jury in closing:

[K.S.] was so intoxicated that she could not care for herself. And in fact, those effects didn't suddenly disappear. We know from Heather Strosahl, who was not intoxicated at the time and had been

playing, as she put it, “mother hen” to both Melissa Beaver and [K.S.] all evening that, at two o’clock when it was just her, *the defendant and her husband present, she was so worried about how intoxicated [K.S.] was she wanted to go check on her.* She talked about doing the rounds, checking to make sure everybody was alive. [K.S.] was under the effects of her alcohol consumption at the time that the defendant used his fingers to sexually assault her.

RP 1494.

During her direct examination testimony, Ms. Strosahl stated that she “played mother hen” to her guests who had become sick, including K.S. RP 582, 586. Although Ms. Strosahl denied being “concerned” about K.S. at the end of the night, when confronted with her previous statement to police,<sup>44</sup> Ms. Strosahl conceded that she did say, “figuratively speaking,” that she, Mr. Strosahl and Ennis should “go and check on her, make sure she’s still alive.” RP 598-99.

Under Washington law, a witness may be impeached with a prior out-of-court statement of a material fact that is inconsistent with his or her testimony in court. ER 607; ER 613; *State v. Dickenson*, 48 Wn. App. 457, 466, 740 P.2d 312, *review denied*, 109 Wn.2d 1001 (1987). A jury may consider a prior inconsistent statement admitted to impeach a witness’s

---

<sup>44</sup> Ms. Strosahl’s statement to police was: “Then - and then I was still kind of cleaning up and we were talking. It was like, you know, ‘Maybe we should go and check on [K.S.], make sure she’s doing okay.[.]’ And - and I kind of wanted to - to do - and I kind of wanted to do, you know, a sweep of - make sure everybody’s still alive.” RP 599.

testimony only for purposes of evaluating that witness's credibility and not as substantive proof of the underlying facts. *State v. Johnson*, 40 Wn. App. 371, 377, 699 P.2d 221 (1985). For that reason, “[a] prosecutor may not use impeachment as a guise for submitting to the jury substantive evidence that is otherwise unavailable.” *State v. Babich*, 68 Wn. App. 438, 444, 842 P.2d 1053 (1993) (quoting *United States v. Silverstein*, 737 F.2d 864, 868 (10th Cir.1984)).

Here, defense counsel never objected to the admission of Ms. Strosahl's out-of-court statements on any grounds.<sup>45</sup> He never requested the court instruct the jury that Ms. Strosahl's out-of-court statements could only be used for impeachment purposes. *See, e.g.*, WPIC 5.30 (Evidence Limited as to Purpose). Because the evidence was presented without limitation, the jury could consider this evidence for any purpose. *See, State v. Myers*, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997) (“[A]bsent a request for a limiting instruction, evidence admitted as relevant for one purpose is deemed relevant for others”).

Impeachment evidence is defined as “[e]vidence used to undermine a witness' credibility.” Black's Law Dictionary 459 (7<sup>th</sup> Ed. 2000).

---

<sup>45</sup> As discussed below, the defendant's argument pertaining to ineffective assistance of counsel on this point is limited solely to defense counsel's failure to object, not his failure to request a limiting instruction. *See, Br.* at 118.

“[I]mpeach means to discredit the veracity of a witness.” *Id.* at 603. Here, the discrepancy in Ms. Strosahl’s testimony may not even truly be impeachment evidence. At trial, despite her denial that she was “concerned” about K.S., Ms. Strosahl adopted her earlier statement to police – that she figuratively meant that she, Mr. Strosahl and Ennis should “check to make sure everybody was still alive.” RP 598-99. The two statements are not inconsistent with each other – one may wish to check on their house guests without feeling any sort of concern for them.

Assuming this was proper impeachment evidence, the defendant’s argument still fails. The defendant cites *State v. Clinkenbeard*, 130 Wn. App. 552, 123 P.3d 872 (2005), for the proposition that the use of impeachment evidence as substantive evidence in closing argument is improper. Br. at 94. Yet, defendant fails to fully explain why the *Clinkenbeard* court determined the use of impeachment evidence as substantive evidence required reversal. In *Clinkenbeard*, the *only* evidence supporting the necessary element of sexual intercourse in a sexual misconduct with a minor case, were the hearsay statements of the minor that, later at trial, the minor disavowed. The *Clinkenbeard* court declined to deem the issue waived, despite the lack of a recorded objection; apparently the entire record was replete with omissions due to the court turning off the record during sidebar conferences. Lastly, the court analyzed the

sufficiency of the evidence without the impeachment evidence, finding that there was no other evidence intercourse occurred. *Clinkenbeard* is unhelpful to defendant's claim.

Here, unlike in *Clinkenbeard*, the defendant's prosecutorial misconduct argument fails because (1) there was no objection to the argument by the State, which waives the issue unless the argument was flagrant and ill-intentioned, and (2) there was ample other evidence of each of the material elements of second degree rape, to include K.S.'s intoxication level at the time of the assault. Unlike *Clinkenbeard*, the record in this case is lengthy and complete – there is no indication of unrecorded objections. Therefore, the principles by which the *Clinkenbeard* court refused to apply the waiver doctrine to the defendant are inapplicable here.

Other than to baldly claim that the argument was so flagrant and ill-intentioned as to be incurable, the defendant fails to explain the incurability of the "misconduct," especially in light of other evidence that K.S. was highly intoxicated that was cumulative with any evidence that Ms. Strosahl was "concerned" about K.S.'s intoxication, and cumulative with her own testimony that she had to "play mother hen" to K.S. This claim fails.

Furthermore, defense counsel was not ineffective for failing to object to the prosecutor's statement during closing argument. As above, it is common for attorneys to not object during closing argument. This

evidence, whether impeachment or not, had little materiality to either the State's or the defendant's case. Ms. Strosahl's lack of concern for K.S.'s state of intoxication did not bear on whether K.S. could and did consent to sexual contact, nor did her concern, or lack thereof, make the defendant's belief that K.S. could consent to sexual contact any more or less reasonable. Defense counsel was not ineffective for failing to object to this argument, if error, as the argument was not so egregious, or material as to require an objection. This claim fails.

**C. THE DEFENDANT'S REMAINING INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS ALSO FAIL.**

1. Defense counsel did not have an actual conflict of interest that adversely affected his representation of Ennis.

This court reviews whether circumstances demonstrate a conflict of interest de novo. *State v. Regan*, 143 Wn. App. 419, 428, 177 P.3d 783 (2008). The court will not find an actual conflict unless the defendant can point to specific instances in the record to suggest an actual conflict or impairment of their interest. *State v. James*, 48 Wn. App. 353, 366, 739 P.2d 1161 (1987); *United States v. Mers*, 701 F.2d 1321, 1328 (11th Cir. 1983).

Where, as here, the defendant does not make a timely objection in the trial court,<sup>46</sup> a conviction will stand unless the defendant can show that

---

<sup>46</sup> The record demonstrates that Ennis sat through multiple hearings during which the conversation between Bugbee and Cossey was discussed between the parties and with the court. 5/25/17 RP 2; 5/19/17 RP 3; 6/7/17 RP 2. Despite his later-

his lawyer had an actual conflict that adversely affected the lawyer's performance. *Cuyler v. Sullivan*, 446 U.S. 335, 350, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). An "actual conflict" is a term of art, requiring a "conflict that affected counsel's performance – as opposed to a mere theoretical division of loyalties." *Regan*, 143 Wn. App. at 427-28 (quoting *Mickens v. Taylor*, 535 U.S. 162, 171, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002)). "Possible or theoretical conflicts of interest are 'insufficient to impugn a criminal conviction.'" *In re Gomez*, 180 Wn.2d 337, 349, 325 P.3d 142 (2014) (quoting *Sullivan*, 446 U.S. at 350). Until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance. *State v. Dhaliwal*, 150 Wn.2d 559, 573, 79 P.3d 432 (2003).

In *Mickens*, Mickens was convicted of the premeditated murder of Timothy Hall. Mickens' attorney, Bryan Saunders, had represented Hall on assault and concealed-weapons charges *at the time of the murder*. The same judge who dismissed the charges against Hall later appointed Saunders to represent the petitioner. Saunders did not disclose to the court, his co-

---

claimed "belief" that the substance of that discussion would be used at trial, he did not object to his counsel's repeated assurances that the evidence would not be used at trial, and he did not seek new counsel (as he did post-trial) who would attempt to admit evidence that Mr. Strosahl also had sexual contact with K.S. during the party.

counsel, or to the petitioner that he had previously represented Hall. The Court found that since this was not a case in which counsel or defendant made the court aware of a potential conflict it was necessary, in order to void the conviction, for petitioner to establish that the conflict of interest *adversely affected his counsel's performance*. Because the lower court found no such adverse performance, the petitioner's conviction was affirmed. *Mickens*, 535 U.S. at 173-74.

In *Dhaliwal*, 150 Wn.2d 559, Dhaliwal was charged with the murder of a fellow cab driver. Dhaliwal was represented at trial by attorney Salazar. On review, Dhaliwal argued that Salazar's performance was affected by his dual representation of Dhaliwal and Sohal<sup>47</sup> because Salazar failed to object to various hearsay statements and testimony about Dhaliwal's prior bad acts during Sohal's testimony. Our Supreme Court found the failure to object to testimony did not indicate Salazar was operating under a conflict, because there are numerous tactical reasons for not objecting to testimony. 150 Wn.2d at 573. The Court noted that in its analysis of ineffective assistance

---

<sup>47</sup> Salazar was also simultaneously representing several of the State and defense witnesses in civil litigation involving the cab company. He had also previously represented two of the witnesses on an assault charge in which Dhaliwal had been a codefendant. *Dhaliwal*, 150 Wn.2d at 562.

of counsel claims, it had been reluctant to find counsel's performance deficient solely on the basis of questionable trial tactics:

In *Sullivan*, the United States Supreme Court found that the trial attorney's tactical decision to rest Sullivan's defense was a reasonable response to the weakness of the prosecutor's case rather than evidence of a conflict of interest. 446 U.S. at 347-48, 100 S.Ct. 1708. Similarly, Salazar's failure to object to testimony is a tactical decision that, without more, does not indicate that he was acting under a conflict of interest. This is not a case where the defendant's attorney utterly failed to make any objections, to cross examine the State's witnesses, or to mount a defense.

Under *Mickens* and *Sullivan*, the defendant bears the burden of proving that there was an actual conflict that adversely affected his or her lawyer's performance. *Mickens*, 535 U.S. at 174, 122 S.Ct. 1237; *Sullivan*, 446 U.S. at 350, 100 S.Ct. 1708. Holding that the possibility of a conflict was not enough to warrant reversal of a conviction, the *Sullivan* Court stated: "[U]ntil a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." *Id.* at 350, 100 S.Ct. 1708. Here, Dhaliwal has demonstrated the possibility that his attorney was representing conflicting interests. However, he has failed to establish an actual conflict because he has not shown how Salazar's concurrent representation of the witnesses involved in the shareholder action and his prior representation of Grewal affected Salazar's performance at trial.

*Dhaliwal*, 150 Wn.2d at 573. Even where counsel commits a technical violation of a rule of professional conduct, unless there is an indication that he actively represented conflicting interests that adversely affected the representation of the defendant, no constitutional violation occurs. *See State v. White*, 80 Wn. App. 406, 412-13, 907 P.2d 310 (1995) ("The RPC does not embody the constitutional standard for effective assistance of counsel").

Here, Ennis is unable to establish that Cossey’s representation was adversely affected by whatever promises he made to Bugbee. This analysis does not hinge on whether Bugbee made an assertion of fact relating to Mr. Strosahl’s potential relationship with K.S. or whether his comments to Cossey were made as a quasi-hypothetical scenario. Under either circumstance, the information was not admissible. Furthermore, even if the evidence had been admitted, it would not have helped Ennis’ defense. Other than to merely claim that Bugbee’s information provided a “plausible defense strategy or tactic” that might have been pursued but was not, Ennis fails to demonstrate how that information, whether fact or hypothetical, would have been admissible at trial, or would have worked to his benefit, and thus, was a “plausible defense strategy.”

*a. The “evidence” was insufficient to present an “other suspect” defense.*

This Court succinctly discussed the admissibility of “other suspect” evidence in *State v. Starbuck*, 189 Wn. App. 740, 751, 355 P.3d 1167 (2015):

As noted in [*State v.*] *Franklin*, a trial court’s exclusion of “other suspect” evidence is an application of the general evidentiary rule that excludes evidence if its probative value is outweighed by such factors as unfair prejudice, confusion of the issues, or potential to mislead the jury. 180 Wn.2d [371], 378, 325 P.3d 159 [(2014)]. . . . Before the trial court will admit “other suspect” evidence, the defendant must present a combination of facts or circumstances that points to a nonspeculative link between the other suspect and

the crime. *Franklin*, at 381, 325 P.3d 159. The standard for the relevance of such evidence is whether it tends to connect someone other than the defendant with the charged crime. *Id.* The inquiry “‘focuse[s] upon whether the evidence offered tends to create a reasonable doubt as to the *defendant’s* guilt, not whether it establishes the guilt of the *third party* beyond a reasonable doubt.’” *Id.* (alteration in original)...Additionally, the probative value of “other suspect” evidence must be based on whether it has a logical connection to the crime, not based on the strength of the State’s case. *Id.* at 381-82, 325 P.3d 159.

(Some internal citations omitted).

Here, the information provided to Cossey by Bugbee, if a hypothetical, would not constitute a “nonspeculative link” between Mr. Strosahl and the sexual assault of K.S. If the information provided to Cossey by Bugbee had been communicated as a representation of fact, the defendant would not have been able to establish that the evidence that Mr. Strosahl had sexual contact (whether consensual or nonconsensual) with K.S. tended to create a reasonable doubt as to *Ennis’* guilt. After all, K.S.’s DNA was found on Ennis’ driver’s side seatbelt, Ennis clipped his fingernails (in an apparent effort to prevent the collection of DNA evidence), K.S. recognized the voice and clothing worn by her assailant, and all of the witnesses, *including Ennis*, admitted that K.S. was intoxicated, to the point that she vomited and passed out, and Ennis admitted to the sexual intercourse. If anything, evidence that Mr. Strosahl had sexual

contact with K.S. established an *additional* suspect in an additional, separate offense, not an *alternative* suspect in a single offense.

*b. The evidence was not otherwise admissible.*

A defendant does not have a right to present irrelevant or inadmissible evidence. *See, e.g., Starbuck*, 189 Wn. App. at 750. Bugbee told Cossey that, if questioned about sexual contact with K.S., Mr. Strosahl would deny it. CP 1373 (Ex. 2) at ll. 278-81. If questioned directly about sexual contact with K.S., Mr. Strosahl would also likely be entitled to assert his constitutional right against self-incrimination, and, in fact, his attorney represented that he would, if pressed, invoke this privilege. U.S. CONST. amend V (No person “shall be compelled in any criminal case to be a witness against himself”); *Lefkowitz v. Turley*, 414 U.S. 70, 77, 94 S.Ct. 316, 38 L.Ed.2d 274 (1974) (The Fifth Amendment privileges individuals not to answer official questions put to him in any proceeding, civil or criminal, formal or informal, where the answers might incriminate him in further proceedings). Bugbee would not have been able to testify regarding his conversation with Mr. Strosahl due to the attorney-client privilege, waivable only by Mr. Strosahl. *See* RCW 5.60.060(2)(a). Assuming Cossey had withdrawn as counsel prior to trial, Cossey’s own testimony about his conversation with Bugbee would have been hearsay within hearsay. ER 805. Ennis has not proffered any other evidence rule or exception to the

above privileges that would permit this testimony. Further, it does not appear that any other witness had personal knowledge of any sexual contact between Mr. Strosahl and K.S., such that Cossey could have located an alternative source of this asserted evidence.

*c. The evidence would not have assisted Ennis in his defense.*

Evidence that Mr. Strosahl *also* had sexual contact with K.S. on the night in question would not have helped Ennis in his defense. Perhaps if Ennis had denied the charges altogether, a purported interaction between Mr. Strosahl and K.S. might have assisted Ennis to claim that he had no sexual contact with K.S. However, tactically speaking, the presence of K.S.'s DNA on the driver's side seatbelt of Ennis' car (without any other plausible explanation for its presence), and his newly manicured left hand, forced Ennis to abandon any claim that he and K.S. did not have sexual contact. Instead, the only plausible defense Ennis could proffer was that his sexual contact with K.S. was, in fact, consensual or that he reasonably believed K.S. was capable of consent.

The evidence that Mr. Strosahl also had sexual contact with K.S. would not have helped Ennis in his consent defense. As Cossey explained when interviewed after trial, he pressed K.S. during his defense interview for any information that might indicate she recalled having consensual sexual contact with Mr. Strosahl; she did not. CP 1373-74 (Ex. 2) at ll. 312-

34. In Cossey's reasonable estimation, if K.S. did not remember having sexual contact with Mr. Strosahl, and that evidence were admitted at trial, it would undermine Ennis' claim that a mere thirty to forty minutes later, K.S. had her full faculties, was sober enough to be the sexual aggressor, and could form consent to engage in sexual contact.

Lastly, the purported evidence that Mr. Strosahl had sexual contact with K.S. 30 to 40 minutes before Ennis' contact could conceivably have put Ennis and Mr. Strosahl in the bedroom with K.S. at the same time.<sup>48</sup> At worst, evidence that *both* Mr. Strosahl and Ennis engaged in sexual contact with the same incapacitated woman within the same hour (or in rapid succession) could make it appear that the two took turns doing so.<sup>49</sup> Ultimately, any sexual contact Mr. Strosahl had with an incapacitated K.S.

---

<sup>48</sup> Cossey stated that he understood that it was "40 minutes or less" between Mr. Strosahl's sexual contact with K.S. and Ennis' sexual contact with K.S. CP 1370 (Ex. 2) at ll.165-69.

Mrs. Strosahl testified that she, Mr. Strosahl and Ennis woke K.S. at approximately 2:15 a.m. to check on her or poke fun at her. RP 659. However, Mr. Strosahl testified that he did not wake up from his nap until 2:30 a.m. RP 1329. Ms. Strosahl testified that she and Mr. Strosahl went to bed at 2:38 a.m., leaving K.S. in Ennis' "care." RP 608. K.S. called Rassier at 3:07 a.m. to tell him of the assault. RP 861.

Based on that timeline (and whose version of events is to be believed), if Mr. Strosahl did, in fact, have sexual contact with K.S. during the 30 to 40 minutes before Ennis' contact with K.S., Mr. Strosahl's contact could have occurred immediately before, during or after the trio woke K.S. to make fun of her, and potentially could have occurred at the same time Ennis occupied the room.

<sup>49</sup> A perceived "gang rape" by members of the Spokane Police Department would not bode well for either officer.

did not negate Ennis' own conduct. This claim of ineffective assistance fails.

2. Defendant has failed to demonstrate deficiency or prejudice based upon counsel's decision not to renew the change of venue motion.

The defendant claims that counsel was ineffective for failing to request a change of venue. In order to prevail on this claim, the defendant must demonstrate that, had the motion been made, it would have been granted, and that, without the motion for a change of venue, the defendant suffered prejudice. A decision to grant or deny a change of venue is subject to abuse of discretion review. *State v. Jackson*, 150 Wn.2d 251, 269, 76 P.3d 217 (2003). The fact that a vast majority of a venire has heard about a particular case is not the relevant question – the relevant question is whether the jurors at the trial had such fixed opinions that they could not be impartial. *Id.* at 271. Here, the defendant has not demonstrated that the jurors seated in his case were biased, and, therefore, if the motion had been made and granted, the result of the proceeding would have been different.

After the first trial resulted in a mistrial on June 12, 2017, the parties jointly requested a change of venue based upon pretrial media publicity. CP 276-80. Eight months later, after the case was assigned Judge Moreno, the parties and the court readdressed the motion on February 7, 2018.

RP 11-12. The State deferred to defense counsel, who told the court that, during a status conference:

[a] few months ago...we discussed [changing venue]...and we were in agreement, that I was not going to file a motion prior to trial because we wanted to see what the jury and what kind of a jury panel we could seat. I will tell you that my client and I have discussed this; and we would prefer this case to stay in this county, in our courthouse, and with you. And so we're not withdrawing the motion. I think its more we're reserving the motion.

RP 12.

The court agreed to reserve ruling on the motion until the parties had had the opportunity to voir dire the jury venire so as to allow counsel “to see what you’ve got before you...make that call.” RP 12.

The parties were given nine peremptory challenges each – six for the first twelve jurors and three for the alternates. RP 390. The defendant waived two peremptory challenges – one for the first twelve jurors and one for the alternate jurors; the State waived three peremptory challenges – two for the first twelve jurors and one for the alternates. CP 305.

Of the 15 jurors<sup>50</sup> who were ultimately empaneled, only five jurors indicated any prior knowledge of the case. *See*, RP 145 (Juror 20), 192 (Juror 29), 198 (Juror 30), 206 (Juror 34), 210 (Juror 37). Each of these individuals told the court that despite previously hearing of the case, they

---

<sup>50</sup> Including the alternate jurors.

could all be fair and impartial, RP 147 (Juror 20), 192-93 (Juror 29), 199 (Juror 30), 414 (Juror 34), 218, 220 (Juror 37); one indicated a belief that the news was not always correct, RP 150 (Juror 20); one indicated that she did not form any opinions based upon what she had previously read, RP 192 (Juror 29); one indicated that he had heard something through co-workers about jury duty for the case, but nothing substantive about the case itself, and did not see any news coverage in the paper, television, or internet, RP 199 (Juror 30); one indicated that she had heard that jurors were being called for the case, and knew that it involved a police officer, but nothing substantive about the allegations, RP 206 (Juror 34); and, an alternate juror stated that although she had heard of the incident on both the TV and internet, she understood her duty was to judge the case based upon the evidence only; she recognized the news can be incorrect or biased, RP 214, 217-18 (Juror 37).

Upon this record, the defendant is unable to demonstrate that, despite the pretrial publicity, had his counsel requested a change of venue for the second trial, that request would have been granted. Additionally, the defendant, through counsel, indicated a desire to stay in Spokane, if an impartial jury could be seated, presumably to be close to his family and friends for support. The defendant has also failed to demonstrate that the jury was *not* fair and impartial or that any of the seated jurors could have

been challenged for cause. Ennis did not challenge any of the aforementioned jurors, either for cause or by peremptory challenge. If a defendant does not exercise all peremptory challenges, as here, it is presumed he or she was satisfied with the jury. *State v. Clark*, 143 Wn.2d 731, 759, 24 P.3d 1006 (2001). The defendant's current claim that "jurors may not fully appreciate or accurately state the nature of their own biases,"<sup>51</sup> does not establish that the jurors who heard his trial suffered from any bias, or that the guilty verdict was attributable to such bias. This claim of ineffectiveness fails.

3. "Me Too" campaign.

The defendant claims that his trial attorney was ineffective because he was unfamiliar with the "Me Too" campaign. Although the defense attorney indicated he was unfamiliar with the term, "Me Too," there is no evidence that he did not educate himself before trial commenced. Additionally, regardless of whether the defense attorney knew of the significance of "Me Too," the court instructed defense counsel not to mention or inquire into that movement or its potential effect on the members of the venire. RP 36. As a result, the defendant is unable to demonstrate prejudice. The defendant has failed to demonstrate how this would have

---

<sup>51</sup> Citing *State v. Munzanreder*, 199 Wn. App. 162, 398 P.3d 1160 (2017).

been a proper subject for voir dire, or that, had the questions been permitted, the outcome of the proceedings would have been different.

4. Defense counsel did not “dismiss” a defense or fail to advance a valid defense to the crime of second degree rape.

The defendant next claims that counsel was ineffective for “dismissing” or failing to advance a valid defense to the rape charge.

Defense counsel proffered the “reasonable belief” instruction, an instruction ultimately given by the court.<sup>52</sup> However, defendant claims that defense counsel’s closing argument which focused on K.S.’s ability to consent, i.e., that she was not physically or mentally incapacitated, rather than on the defendant’s reasonable perception of whether she could consent, constituted ineffective representation.

In *State v. Coristine*, a second-degree rape prosecution, much like this case, the defendant’s sole defense was that the State failed to prove its case; the defendant objected to a “reasonable belief” instruction. 177 Wn.2d 370, 300 P.3d 400 (2013). Our Supreme Court accepted the defendant’s argument that the trial court erred in instructing the jury on “reasonable belief” over defendant’s objection. The Supreme Court stated, “While an

---

<sup>52</sup> Although the record does not explicitly indicate that defense counsel requested the reasonable belief instruction, it is clear that defense counsel did so. The State’s requested instructions did not include WPIC 19.03. CP 80-96. Defense counsel requested two instructions, one of which he moved to withdraw, and the other of which, pertaining to “the defense” the Court included in its instructions. RP 1478-79. Thus, it is clear defense counsel requested WPIC 19.03 to be given at trial.

attorney's failure to recognize and raise an affirmative defense can fall below the constitutional minimum for effective representation, the record here confirms a valid strategic decision." *Id.* at 379. In so deciding, the Court found no issue with the defendant's strategic decision to argue only that the victim was not mentally incapacitated or physically helpless. *Id.*

Here, defense counsel requested the jury be instructed on the "reasonable belief" defense. However, in closing, defense counsel emphasized the State's burden of proof and, then set forth the reasons that the jury should reasonably doubt that K.S. was actually incapacitated or physically helpless, arguing: (1) the photos and video of K.S. did not appear to reflect someone who was incapacitated or physically helpless; (2) that, over the seven hours K.S. was at the house consuming alcohol, she was burning off that alcohol at the rate of one drink per hour; (3) witnesses' testimony that up until the hot tub, K.S. was not spilling drinks, poured shots for everyone, and was not stumbling or slurring her words; (4) K.S. sent sixteen text messages during the evening, all of which were grammatically correct; (5) that although K.S. became ill after being in the hot tub, so was Mr. Strosahl, who, after sleeping for a few hours was more sober and walking fine (the implication being that K.S. would also be fine after sleeping for a few hours); (5) that when K.S. returned to the kitchen, she was not stumbling and she was not slurring her words; (6) K.S. had a reason

to persist in a lie over the two and a half years since the incident because, if caught in a lie, she would lose her job; and (7) that it would make no sense that Ennis would sit in a room with K.S. for thirty or more minutes, to wait for her to fall back asleep, and then choose to assault her. Cossey stated:

*I believe that there are certain jury instructions that are going to be important. And one of them goes -- it's No. 11, and Judge Moreno read it. And it's the one that says, "If the defendant reasonably believed that [K.S.] was not mentally incapacitated or physically helpless," if he had that reasonable belief, given everything we've shown you, everything you've seen, the video, the pictures, everything you've heard, that if more likely than not that you believe he reasonably believed she was capable of consent, then that is another prong that you have to consider in your deliberations. But I don't believe you need to do that, because here's why. They're telling you his story doesn't make sense. There was two people there. Only those two people know what happened. Go through the timeline. Go through the testimony. You will make the decision that [K.S.'s] version of what happened that night does not make sense. We know what her reasons are. She told you those. She told you her motivation.*

...

When you review the evidence and you carefully evaluate the credibility of witnesses, I believe that you will truly agree with me that [K.S.] knew what was going on at the time of the night that the state is charging him with this awful crime. She was coherent. She was consenting. She was part of the interaction that they were doing. It started earlier in that evening, but it culminated during that time between 2:40 and three o'clock where it escalated to where it shouldn't have; but at that period of time she had her full faculties, knew what was going on, and she was a willing participant.

RP 1536-37 (emphasis added).

Contrary to defendant's current claim, trial counsel did not discount the reasonable belief defense. If a defendant may strategically forego

requesting an instruction or making an argument on his “reasonable belief” and instead opt only to hold the State to its burden of proof, then it cannot be ineffective assistance for defense counsel *to make both arguments*, but emphasize that the jury need not even reach consideration of the affirmative defense because the evidence of the victim’s actual consent created a reasonable doubt. Furthermore, the defendant has failed to demonstrate that, if Cossey had emphasized the reasonable belief defense, the result of the proceeding would have been different. This claim fails.

5. Defense counsel did not fail to elicit exculpatory evidence.

Ennis next alleges that defense counsel was ineffective for failing to elicit exculpatory information at his trial, specifically testimony from Beaver and Weese “as to their impressions regarding the relationship between K.S. and Mr. Ennis.” Br. at 114. At trial, defense counsel agreed with the State that the testimony would not be admissible at trial.

Before trial, and during a defense interview with Weese, Weese indicated that, prior to the party, she had never met the victim. CP 287. Also prior to the party, she had only occasionally seen Ennis at a local hospital, but not socially. CP 287. Weese indicated that she thought that the victim and the defendant were a couple at the party, but that this conclusion was not based on anything she observed – it was just an impression or “feeling” she had. CP 287; RP 739. During trial, the parties spoke with Weese during

a recess, confirming that she had no basis for her impression that Ennis and K.S. were in a relationship. RP 739. Rather, it appears from the record, that this belief was only speculation or an assumption. RP 739. Cossey agreed that Weese's testimony should be limited to her observations and not her speculation or "gut instincts." RP 740. However, Weese did observe K.S.'s reaction when Ennis arrived at the party, K.S.'s act of grabbing Ennis' hand and "caressing" it, and that during the evening, K.S. was frequently near the defendant. RP 740.

Similarly, the State requested the court limit Beaver's testimony to her own observations, not her opinions for which there was no foundation. During an interview, Beaver opined that K.S. had "some kind of puppy love" for Ennis. RP 799. When asked to provide the reasons she held that belief, she only was able to articulate that it was her "feeling." Cossey agreed that a "feeling" without a foundation would not be admissible. RP 798-99.

The defendant's claim that trial counsel was ineffective for failing to elicit this information fails for a number of reasons. In order to demonstrate deficient performance, the defendant must demonstrate that the evidence was admissible. A lay opinion is only admissible under ER 701 if it is an opinion or inference that is (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness'

testimony or the determination of a fact in issue. ER 701.<sup>53</sup> Speculation, on the other hand, is inadmissible. ER 602. In other words, “Under Rule 701 and Rule 602, the witness must have personal knowledge of the matter that forms the basis of testimony of opinion; the testimony must be based rationally upon the perception of the witness; and of course, the opinion must be helpful to the jury.” *State v. Ortiz*, 119 Wn.2d 294, 308-09, 831 P.2d 1060 (1992) (quoting E. Cleary, *McCormick on Evidence* 29 (3d ed. 1984)).

Here, neither Weese nor Beaver was able to articulate why, based upon their perceptions, they believed (1) Ennis and K.S. were romantically involved, or (2) K.S. harbored some sort of “puppy love” for Ennis. Neither was very familiar with Ennis, and both women met K.S. for the first time on the night of the incident. Both women were permitted to testify to their observations of Ennis and K.S., from which the jury could draw its own conclusions about the relationship between the two. It was not probative, however, (and not helpful to the jury) to have the women speculate about their hunches or assumptions.

Defendant claims that this evidence was “highly probative” of Ennis’ defense that K.S. “wanted” the sexual contact. However, whether

---

<sup>53</sup> Lay opinion must also not be based on scientific, technical, or other specialized knowledge within the scope of ER 702.

K.S. felt “puppy love” for Ennis, was not probative of whether she in fact consented, or was capable of consent to sexual intercourse with him. Neither was Weese’s “impression” that Ennis and K.S. were in a relationship. This argument seems to suggest that if Ennis and K.S. were in a relationship, then Ennis could have intercourse with K.S. regardless of whether she was capable of consent.

In any event, this testimony would not have helped the defendant in his defense, and, although Cossey agreed the testimony was inadmissible, Cossey might also have tactically sought to exclude the evidence. Ennis’ testimony readily admitted that, before the party, there had been no flirtation or sexual contact between himself and K.S.; he also agreed that there had been no sexual, physical contact at the party until K.S. hugged him in the kitchen at the end of the night. RP 1457-58, 1461. Thus, the perceptions of Weese and Beaver were irrelevant to Ennis’ defense and contradictory with Ennis’ own testimony. Even assuming that Ennis and K.S. had a relationship, other than that of teacher-student or sergeant-probationary officer, Ennis did not readily admit it – perhaps out of a desire to save what was left of his marriage, or perhaps, as K.S. testified, because no such relationship existed. Testimony to the contrary by Weese or Beaver could only have undermined Ennis’ own testimony. Ennis has failed to

demonstrate the admissibility of this evidence, and how it would have affected the result of the proceeding. This claim fails.

**D. THE CUMULATIVE ERROR DOCTRINE IS INAPPLICABLE.**

The cumulative error doctrine applies when a trial is affected by “several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial.” *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). To determine whether cumulative error requires reversal of a defendant’s conviction, the court considers whether the totality of circumstances substantially prejudiced the defendant. The totality of the circumstances does not substantially prejudice the defendant where the evidence is overwhelming against the defendant. *In re Cross*, 180 Wn.2d 664, 691, 327 P.3d 660 (2014), *abrogated on other grounds by State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018). Additionally, the cumulative error doctrine does not apply when there are no errors or where the errors are few and have little or no effect on the trial’s outcome. *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006).

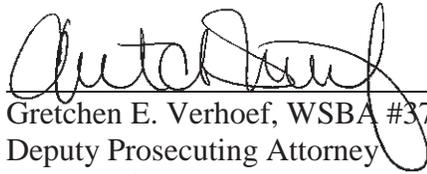
As explained above, the defendant’s allegations of prosecutorial misconduct are generally unfounded, and the one instance of improper conduct by the State was harmless. The other alleged errors have no merit as explained above; therefore, the cumulative error doctrine is inapplicable.

#### IV. CONCLUSION

For the reasons discussed herein, the State respectfully requests the court affirm the lower court and jury verdict.

Dated this 20 day of November, 2019.

LAWRENCE H. HASKELL  
Prosecuting Attorney



A handwritten signature in black ink, appearing to read "Gretchen E. Verhoef", is written over a horizontal line. The signature is fluid and cursive.

Gretchen E. Verhoef, WSBA #37938  
Deputy Prosecuting Attorney  
Attorney for Respondent

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

STATE OF WASHINGTON,

Respondent,

v.

GORDON ENNIS,

Appellant.

NO. 36359-7 -III

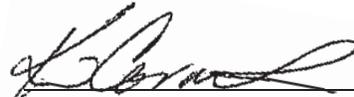
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on November 20, 2019, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Mark Vovos  
mvovos@concentric.net

11/20/2019  
(Date)

Spokane, WA  
(Place)

  
\_\_\_\_\_  
(Signature)

**SPOKANE COUNTY PROSECUTOR**

**November 20, 2019 - 10:31 AM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 36359-7  
**Appellate Court Case Title:** State of Washington v. Gordon James Ennis  
**Superior Court Case Number:** 15-1-04544-1

**The following documents have been uploaded:**

- 363597\_Briefs\_20191120103013D3229666\_4169.pdf  
This File Contains:  
Briefs - Respondents  
*The Original File Name was Ennis Gordon - 363597 - Resp Br - GEV.pdf*
- 363597\_Motion\_20191120103013D3229666\_7187.pdf  
This File Contains:  
Motion 1 - Waive - Page Limitation  
*The Original File Name was Overlength Br Mtn - 112019 - 363597.pdf*

**A copy of the uploaded files will be sent to:**

- lsteinmetz@spokanecounty.org
- mvovos@concentric.net
- srichards@spokanecounty.org

**Comments:**

---

Sender Name: Kim Cornelius - Email: kcornelius@spokanecounty.org

**Filing on Behalf of:** Gretchen Eileen Verhoef - Email: gverhoef@spokanecounty.org (Alternate Email: scpaappeals@spokanecounty.org)

Address:  
1100 W Mallon Ave  
Spokane, WA, 99260-0270  
Phone: (509) 477-2873

**Note: The Filing Id is 20191120103013D3229666**