

64533-1

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NO. 64533-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

RAFAEL A. LEYVA,

Appellant.

BRIEF OF RESPONDENT

MARK K. ROE
Prosecuting Attorney

CHARLES F. BLACKMAN
Deputy Prosecuting Attorney
Attorney for Respondent

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

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I. ISSUES

1. A detective testified that she had tried repeatedly to contact the defendant by phone without success. Was this an impermissible comment on the defendant's pre-arrest right to silence, when it was offered to show the course of the investigation?

2. In cross-examination, the prosecutor repeatedly asked the defendant if other civilian and police witnesses had "got it wrong." She argued the same in closing. Counsel did not object. Was this manifest constitutional error, so "flagrant" and "ill-intentioned" that no instruction could have cured it, when such questioning can be relevant and appropriate and, at most, is merely objectionable?

The prosecutor also once asked the defendant on cross-exam if the victim had 'made up' everything. Counsel did not object. Was this manifest constitutional error, so "flagrant" and "ill-intentioned" that no instruction could have cured it, when the single comment was not repeated, either in cross-exam or closing argument, and there was incriminating evidence from witnesses other than the victim?

3. Was counsel ineffective in not having objected to the “got it wrong” line of questioning and argument, when such questioning can be relevant and appropriate?

Was counsel ineffective in not having objected to the single question about whether the victim “made up” everything, when actual prejudice has not been shown?

II. STATEMENT OF THE CASE

In 2006, when J.L. was 13, she and her younger sister M.L. often spent the night at their cousin Anna Resendez’s apartment. 1 TRP 40-43; 2 TRP 82-83, 114-15, 127. J.L. viewed Anna as a big sister or a “mom-like figure.” They were quite close. 2 TRP 84, 145. Anna was married to Tino Resendez. 1 TRP 43. The defendant, Rafael Leyda, was a friend of Tino’s since childhood. 1 TRP 46; 2 TRP 102, 128. J.L. did not really know the defendant, having met him only a few times. 1 TRP 48-49.

On May 19, 2006, J.L. and M.L. were spending the night at Anna and Tino’s apartment. 1 TRP 43, 45; 2 TRP 82, 114-15, 127, 130. Anna’s brother was getting married the next day. The girls’ spending the night, and going to the wedding the next day, was planned. 1 TRP 43, 45.

The defendant ended up “crashing” and staying the night, too, although that had not been planned. 1 TRP 46-47; 2 TRP 131, 145.

Anna and Tino had a two-bedroom apartment. 1 TRP 47; 2 TRP 115. Anna and Tino slept in one bedroom, while their then two children slept in the second. 2 TRP 131. On the evening in question, Anna blew up a queen- or near-queen-size air mattress for J.L. and M.L. to sleep on in the living room, and told the defendant to sleep on the living room couch. 1 TRP 47; 2 TRP 89, 131-32. The defendant said no, he’d sleep on the air mattress instead. Anna thought her cousins would be uncomfortable with that arrangement, and said so. She also thought the defendant was joking. 2 TRP 132-22, 155.

It turned out he was not. He fell asleep on the air mattress. 1 TRP 48. Meanwhile M.L. had fallen asleep on the couch while watching a movie, and was lying in such a way that left no room for J.L. 2 TRP 89, 91, 99. J.L. changed into her pajama bottoms and tank top, covered herself with a blanket, and lay down on the air mattress. She wasn’t comfortable with the arrangement, but had a separate blanket, after all, and soon fell asleep. 1 TRP 48, 50-51.

She awoke to what felt like tickling on her arm, then fell asleep again. 1 TRP 51. She awoke again, suddenly wide awake this time, to find her arms pinned over her head and her face covered by a pillow. She squirmed to free her face and saw the defendant. He had gotten on top of her. She got one arm free and started punching him in the shoulder. 1 TRP 52-53; 2 TRP 93, 95.

The defendant continued to hold her remaining hand above her head with one hand, while pulling her pajama bottoms down with the other. 1 TRP 52-53; 2 TRP 93, 95. He digitally penetrated her. 1 TRP 53, 56; 2 TRP 77-78. J.L. heard him unzip his pants. He had spread her legs. 1 TRP 52-53, 2 TRP 78. She felt his erect penis touch her vagina. 2 TRP 79, 97. The defendant was "humping" her, "thrusting his hips and pushing really hard," trying to force his penis in. 1 TRP 56-57; 2 TRP 78-79. At one point he asked her if it felt good; she said no. 1 TRP 56, 58. J.L. managed to twist and move her body a lot, enough so that the defendant did not succeed in inserting his penis. 1 TRP 53, 57; 2 TRP 79. He then stopped and went into the bathroom. 1 TRP 57-58. J.L. had been too frightened to cry out. 1 TRP 53, 57.

With the defendant in the bathroom, J.L. got up and sat on the couch next to her still-sleeping sister. She started crying. 1

TRP 58. She wandered into the kitchen, trying to figure out what to do. 1 TRP 59; 2 TRP 98. She went back to the air mattress and wrapped herself in the blanket as tightly as she could. 1 TRP 59; 2 TRP 98. She just wanted it to be morning. 1 TRP 59, 60.

When the defendant came out of the bathroom, he sat next to J.L. on the air mattress and made her repeatedly promise not to tell anyone. 1 TRP 59.

When Anna got up the next morning, she saw the defendant asleep on the air mattress without a blanket. J.L. was asleep on the air mattress too, wrapped tightly in a blanket, with a sweatshirt on and its hood pulled over her head. She was at the far edge of the air mattress, as far as she could go without falling off, and curled almost in a fetal position. 2 TRP 134.

The next day J.L. didn't tell Anna or anyone else what had happened because she didn't want to spoil the wedding. 1 TRP 61; see 2 TRP 134. But within a few days she told a friend at school, who told a counselor, who called her mother. Her mother called police. 1 TRP 62-64; 2 TRP 115-18, 124. Police took statements. Id.; see also 2 TRP 135. Detective Karen Kowalchyk of the Special Assault Unit of the Everett Police Department was assigned the case. 1 TRP 64; 2 TRP 119, 135, 175-76. Once she got the

defendant's full name from Anna, detective Kowalchuk tried repeatedly to contact the defendant by phone, with no success. 2 TRP 181, 195-96. The defendant had no permanent residence. 2 TRP 222.

Having no other leads, Det. Kowalchuk arranged for J.L. to call the defendant per a "wire tap" warrant. 1 TRP 64-65; 2 TRP 73-74, 119, 182-83, 191-93. When J.L. called, a roommate/neighbor, Felipe Valdillez, said the defendant was in the shower, and to call back in 15 minutes. 2 TRP 164, 168. When J.L. called back, the roommate gave the phone to the defendant. However, the defendant identified himself as "Jose," one of his brothers. 2 TRP 165, 168, 193-95, 219. To the detective, listening in, it sounded like "Jose" knew what J.L. was calling about. 2 TRP 215-16, 221.

Shortly after the incident the defendant did, however, call Anna and asked if her cousin J.L. was coming over. Anna said no, and asked why. The defendant said he wanted to bring his little sister Gabby over, to play with J.L. Yet Gabby is much younger than J.L. The defendant also said he needed to talk to Anna and Tino in person, and might drop by later. 2 TRP 138. Anna did not remember there being a follow-up conversation. Id.

Detective Kowalchyk followed one last lead to an apartment where she thought the defendant might be staying. She knocked on the door one morning. 2 TRP 196-98. Tenants invited her in and said the defendant had left for work. 2 TRP 198, 204-05. But the detective heard a crash or bang in the back of the apartment, headed towards it, and encountered another man, in shorts, in the bathroom. 2 TRP 199-202. He said his name was "Juan." 2 TRP 200. Kowalchyk recognized him as the defendant and said she said she needed to talk to him. 2 TRP 201-202. The defendant ran past her and fled out the door. 2 TRP 200-202. Detective Kowalchyk did not pursue because she had no backup. 2 TRP 200-202, 204-205, 207. When backup did arrive, officers were unable to find the defendant. Id.

Detective Kowalchyk referred the matter to the prosecutor's office in late July 2006. 2 TRP 180, 203. A warrant then issued for his arrest. 2 TRP 214, 221. Kowalchyk thought the defendant would get picked up in due course. 2 TRP 215.

Anna Resendez recalled the defendant "disappeared" for awhile, from 2006 to 2008. 2 TRP 139, 151. She thought he may have moved to California. 2 TRP 210, 214-15. He "came back in the picture" in 2008-09. 2 TRP 140, 151. Meanwhile, the

defendant and Anna's husband Tino remained friends. 2 TRP 139-40, 151.

On one occasion, just before he disappeared, Anna recalled the defendant trying to convince her that what happened was all J.L.'s doing. 2 TRP 139.

J.L. became upset at the lapse of time with nothing happening. Three years went by. Not having been informed of anything – that charges in fact had been filed, and a warrant issued – she assumed no one cared about what had happened to her. She thought if no one else cared, then perhaps she shouldn't care either. There were times she regretted having said anything at all. 1 TRP 66; 2 TRP 79-80, 103-04, 213-14; see 1 CP 100-103 (charges filed); 2 CP137-38 (warrant). There even were a few instances when the defendant was at Anna and Tino's when J.L. was also there; or both were part of a larger group. 1 TRP 66-68; 2 TRP 71-72, 76-77, 102, 121-23, 140-41, 152-53. Anna wasn't happy about it, and stayed "alert," "keeping [her] eyes" on J.L. 2 TRP 102, 140-41, 151-54.

Sometime in 2008 J.L. got a call from Tino Resendez's call phone. That was a bit unusual. When she picked up, Tino answered and handed the phone over to the defendant. The

defendant asked her if she would be willing to tell the police she had lied if he paid her. When she said no, he kept raising the price, from \$200 up to \$800. Finally, when she kept saying no, he said he'd call her later. 2 TRP 74-75, 105. However, he didn't. Id.

In early 2009 Anna got a phone call from the defendant. He asked her to intercede with J.L. to get the matter dropped and to get J.L. to say it didn't happen, so he could get on with his life. Anna said she'd be willing to call J.L., but not tell her any such thing, and that she wouldn't force J.L. to do anything. 2 TRP 139.

Finally, on May 14, 2009, a state trooper noticed a vehicle with a cracked windshield on Evergreen Way and stopped it. 2 TRP 225-26. The defendant was behind the wheel. He was acting nervous. 2 TRP 227. He provided only the vehicle registration, said he didn't have his license with him, and gave his brother Jose's name and date of birth. 2 TRP 229-30, 236. But the physicals didn't match. 2 TRP 231-33. Moreover, DOL records indicated Jose had been in a 3-car accident in Everett. Asked by the trooper about any collisions, the defendant recalled a 2-car accident in Tacoma. Id. Convinced the defendant was lying, the trooper arrested the defendant. The defendant said he'd say who he really was, and did so. 2 TRP 233-36. He said he knew he had

a warrant out, and was wanted for questioning on some sort of rape or sex charge. 2 TRP 235, 237. The trooper confirmed this was true. 2 TRP 237-38. The defendant was arraigned the next day. 2 CP 136 (minute entry of 5/15/09).

The defendant testified that on the night in question he awoke to a tickling on his arm, saw J.L. asleep on the air mattress about 2 feet away, and went back to sleep until the next morning. 2 TRP 265-67; 3 TRP 304. He said nothing else happened, and denied ever raping or molesting J.L. 3 TRP 329-330.

The defendant recalled getting messages to call the detective, but he didn't return them – he felt uncomfortable and nervous about police in general, based on prior contacts where he felt he had been mistreated. 2 TRP 272-76.

Tino Resendez, testifying for his childhood friend, said he recalled a dinnertime conversation at his apartment where J.L. said she was sorry for what had happened and that she didn't want to pursue the case. 3 TRP 354. He denied ever giving his cell phone to the defendant to ask J.L. to drop the charges. 3 TRP 349. He did recall the defendant saying he felt the phone call from J.L. had been a "set-up." 3 TRP 352. Christian Leyda, testifying for his brother, said he overheard the same dinner conversation, recalling

J.L. had said she was sorry for what she had said and would make sure there would be no charges. 3 TRP 358. The defendant for his part similarly recalled J.L. having said she was sorry for what she'd said, that she didn't want to testify against him, and that she would drop the charges. 2 TRP 287. However no one, not even the defendant, testified that J.L. had ever said her allegations were untrue. See 2 TRP 287; 3 TRP 354, 358.

When J.L. testified at trial, she was 16 and 5'3". She acknowledged she would have been shorter back when she was 13. 2 TRP 93-94. Charging documents indicated the defendant was 5'10". 1 CP 99; see 2 TRP 233. At the time he digitally raped J.L., he was 22 years old. 2 TRP 23, 250.

The defendant was charged by amended information of one count of second-degree rape by forcible compulsion and one count of second-degree rape of a child. 1 CP 98-99. The jury convicted on both counts. 1 CP 42-43. At sentencing both parties agreed that statutory double jeopardy compelled dismissal of the second charge, and the court did so. 1 CP 23, 25, 39-41; 4 TRP (Sent'g) 411, citing State v. Hughes, 166 Wn.2d 675, 683-84, 212 P.3d 558 (2009). The defendant was sentenced within the standard range

on the remaining count of second-degree rape. 1 CP 29; 4 TRP (Sent'g) 418-19.

III. ARGUMENT

A. OVERVIEW.

The defendant on appeal raises two claims of error. First, he argues that testimony concerning detective Kowalchyk's unsuccessful attempts to reach the defendant impermissibly implied guilt from pre-arrest silence. BOA 10-16. Secondly, he claims that the prosecutor's cross examination and closing argument, highlighting discrepancies between his own testimony and that of other witnesses (particularly Anna), impermissibly required one witness to comment on the credibility of another. BOA 16-22. Because the latter comments and argument were not objected to, he also claims trial counsel was ineffective. BOA 22-27.

B. ELICITING EVIDENCE OF THE DETECTIVE'S UNSUCCESSFUL EFFORTS TO CONTACT THE DEFENDANT WAS NOT AN IMPERMISSIBLE COMMENT ON PRE-ARREST SILENCE.

As recounted above in the factual recitation, detective Kowalchyk tried repeatedly to contact the defendant by phone. 2 TRP 181, 195-96. However, she never testified that she had left messages, only that she was repeatedly unsuccessful in trying to reach him by phone, *id.*, and that, as far as she knew, he had no

permanent residence, either. 2 TRP 222. It was the *defendant*, on direct examination, who supplied the fact that he had gotten messages from the detective, but hadn't called back. 2 TRP 272-73.

There actually had been more to this. The detective initially *had* made phone contact with the defendant on a ruse, making an appointment to talk to him, ostensibly about another case. The defendant then had not kept that appointment. In limine, the defendant sought to keep this evidence out. 1 TRP 13-19. His counsel succeeded: the trial court ruled that inadmissible. 1 TRP 20-23, 26-27. Next, defense counsel sought to keep out evidence of the subsequent repeated unsuccessful attempts at contact, at issue here. The State argued that this was offered to show the course of the investigation: otherwise, a jury might think the authorities only bothered to talk to one side, and then filed charges. 1 TRP 17. The trial court ruled this admissible. 1 TRP 20-27. Lastly, counsel wished to exclude testimony about the encounter in the apartment bathroom, but since flight can be evidence of guilt, the trial court ruled this admissible. 1 TRP 20-27.

On appeal, the defendant complains of the admission of evidence that detective Kowalchyk's efforts to contact the

defendant were unsuccessful, and asserts he is entitled to a new trial as a result. BOA 10-16.

The Fifth Amendment of the United States Constitution states, in part, that no person “shall ... be compelled in any criminal case to be a witness against himself.” Similarly, article I, section 9 of the Washington Constitution reads: “[n]o person shall be compelled in any criminal case to give evidence against himself.” The same interpretation is given to both the State and Federal clauses. State v. Easter, 130 Wn.2d 228, 235-36, 922 P.2d 1285 (1996).

A defendant's constitutional right to silence applies in both pre- and post-arrest situations. Easter, 130 Wn.2d at 243. When, as here, a defendant elects to testify at trial and thus puts his credibility at issue, a prosecutor may comment on a defendant's pre-arrest silence for the limited purpose of impeachment. Easter, 130 Wn.2d at 237 (citing Fletcher v. Weir, 455 U.S. 603, 606-07, 102 S. Ct. 1309, 71 L. Ed. 2d 490 (1982)). A prosecutor may not go further and use the defendant's pre-arrest silence as substantive evidence of guilt. State v. Burke, 163 Wn.2d 204, 206, 181 P.3d 1 (2008); State v. Gregory, 158 Wn.2d 759, 839, 147 P.3d 1201 (2006); State v. Lewis, 130 Wn.2d 700, 706, 927 P.2d 235 (1996).

However, the prohibition only attaches when there has been some sort of exercise of the right. Thus, while there need not be a formal invocation of the right of silence – there are no required “magic words” – there must have been an assertion, by words or conduct, “‘sufficiently definite to apprise’ the listener that the claim is being made.” Burke, 163 Wn.2d at 220-21 (quoting Quinn v. United States, 349 U.S. 155, 164, 75 S. Ct. 668, 99 L. Ed. 964 (1955)). And the allegedly improper statement must actually relate to and impinge upon that right. Thus, a statement will not be considered an impermissible comment on the right to remain silent if it is so subtle and brief that it does not “naturally and necessarily” emphasize a defendant's pre-arrest silence. Burke, 163 Wn.2d at 216; e.g., State v. Lewis, 130 Wn.2d at 705 (after defendant denied rape, officer said “my only other conversation was that if he was innocent he should just come in and talk to me about it,” held to be mere reference to silence and not impermissible comment).

Here, in limine, the prosecutor explained she was offering the evidence “so that the jury does not think that this detective talked to everybody on one side, took their word for it, and never bothered to try to get a hold of anyone – the defendant to find out what his story was.” 1 TRP 17. In direct exam of Kowalchuk, the

prosecutor, consistent with her in limine explanation, elicited that the detective had tried to contact the defendant by phone from the first day she got the case. 2 TRP 181. She elicited further that the detective had continued to try for several weeks, without success. 2 TRP 195-96. On redirect, the detective said that the defendant did not have “a permanent residence anywhere.” 2 TRP 222 (explaining why she never served the warrant). No mention was made of any actual contact with the defendant (other than the “wire tap” call), much less anything from him – through conduct or by words – that could be construed as an assertion of his right to silence. The prosecutor thus adhered to the limitations imposed by the court. Compare 1 TRP 21-23, 24-25 (court’s ruling) with 2 TRP 181, 195-96 (testimony). It is hard to see, then, how the trial court erred in ruling this testimony admissible, or how the prosecutor erred in adhering to that ruling.

The defendant for his part testified, on direct, that he knew the detective had left messages for him; but that he felt nervous, anxious, and uncomfortable about it, because of his fear and mistrust of police generally, based on several bad prior experiences. 2 TRP 272-77.

In closing, the prosecutor stressed that when a defendant takes the stand, his credibility is subject to examination the same as any other witness. 3 TRP 369. This was a correct statement of the law. State v. Martin, 151 Wn. App. 98, 115, 210 P.3d 345 (2009), citing, e.g., State v. Etheridge, 74 Wn.2d 102, 113, 443 P.2d 536 (1968) (testifying defendant is treated same as any other witness for purposes of cross-examination and credibility challenges). The prosecutor then argued that the defendant's being afraid of a police detective's phone calls was not believable. 3 TRP 379. This was to impeach the defendant's credibility, not to infer guilt, and was thus permissible. See Easter, 130 Wn.2d at 237 (prosecutor may comment on pre-arrest silence for limited purpose to impeach). To the extent one statement – "wouldn't make a phone call because he was terrified of the police?" – might be read as going further than that, it was a reference so brief that it did not "naturally and necessarily" emphasize a defendant's pre-arrest silence. 3 TRP 379; see Burke, 163 Wn.2d at 216.

The defendant disagrees, arguing State v. Burke compels a different result. In Burke, the State had charged the 22-year-old defendant with third degree rape of a child for engaging in sexual intercourse with a 15-year-old girl. Burke, 163 Wn.2d at 206. During

their investigation, police officers questioned Burke in his home, in the presence of his father. Burke acknowledged he had consensual sex with a high school girl, but hadn't known her age. At that point, Burke's father ended the interview, informing the officers that his son would not continue the interview without consulting counsel. Burke, 163 Wn.2d at 207-09.

At trial Burke claimed the victim had told him she was 16, about to turn 17. Burke, 163 Wn.2d at 208. During opening statement and closing argument the prosecutor emphasized that if Burke truly had thought the victim was 16, he would have told the officers of this during the interview. Id. The prosecutor also stressed this theory during direct examination of the investigating officers and during cross-examination of Burke. Id. The Supreme Court held this constituted an impermissible comment on the defendant's right to remain silent. Burke, 163 Wn.2d at 222. Specifically, it found that "the State imputed to Burke the reasons it believed his father gave for ending the interview: a 'sense' that Burke's sexual encounter with [the victim] was illegal." Burke, 163 Wn.2d at 222.

Burke involved an actual interview, and an invocation in some form, at least by one of the people there. There was no

testimony about an interview or about an invocation here. Burke does not dictate the outcome.

In Keene a defendant was charged with rape of a young child. State v. Keene, 86 Wn. App. 589, 590, 938 P.2d 839 (1997). An investigating detective spoke to and exchanged several phone messages with the defendant. Keene, 86 Wn. App. at 592. They made an appointment to meet, which the defendant called to say he had missed. Eventually, the detective left a message with the defendant, warning him that if he did not get back to her by a certain date she would turn the case over to the prosecuting attorney's office. Id. The detective never heard again from the defendant, and told the jury so. Id. The prosecutor argued in closing that an innocent person would have returned the detective's call. Keene, 86 Wn. App. at 592 (“[i]t's your decision if those are the actions of a person who did not commit these acts”). Division Two of this Court held this to be an impermissible comment on Keene's right to remain silent. Keene, 86 Wn. App. at 595.

Here, there was no such ultimatum delivered to the defendant by detective Kowalchuk. And, as discussed above, closing argument on the matter focused on credibility, not substantive evidence of guilt. Compare 3 TRP 379 (“wouldn't make

a phone call because he was terrified of the police?") with Keene at 595 ("[i]t's your decision if those are the actions of a person who did not commit these acts"). The argument here was not like that in Keene. Id.

This case more closely resembles State v. Gregory. There, the prosecutor made a reference in closing argument to the defendant's failure to contact the police investigator for three days. Gregory, 158 Wn.2d at 840. The Supreme Court held that the prosecutor's reference did not amount to a comment on the defendant's pre-arrest silence because the State used the investigator's testimony to explain the investigative process. Id. The same result obtains here. See 1 TRP 17 (evidence offered so jury wouldn't think authorities only bothered to talk to one side). The Gregory court concluded that the prosecutor's reference was "so subtle and so brief that it did not naturally and necessarily emphasize [any] testimonial silence." 158 Wn.2d at 840. Like the prosecution in Gregory, the State in this case did not "manifestly intend" the remark to be a comment on Leyva's right to silence. See Gregory, 158 Wn.2d at 840.

Leyva bears the burden of demonstrating that the State's alleged error of commenting on his right to silence actually affected

his rights. Gregory, 158 Wn.2d at 839. The defendant has not demonstrated, and the record does not show, that Detective Kowalchuk's testimony, or anything said in closing, amounted to a comment on Leyva's constitutional right to silence that actually affected his right to a fair trial.

C. POINTING OUT FACTUAL DISCREPANCIES BETWEEN THE DEFENDANT'S TESTIMONY AND THAT OF OTHER WITNESSES LIES WITHIN THE PERMISSIBLE SCOPE OF CROSS-EXAMINATION AND ARGUMENT. TO THE EXTENT IT DOES NOT, ANY ERROR IS WAIVED.

The defendant contends that the prosecutor committed misconduct¹ in repeatedly questioning him, on cross-exam, on whether other witnesses had "got it wrong," and then arguing from

¹ Respondent follows established convention and uses the term "misconduct" here, but urges the Court on review to distinguish between deliberate misconduct on the one hand, and prosecutorial error on the other. Labeling all prosecutor error as "misconduct" is inaccurate, attaches opprobrium where it is unwarranted, and compromises public trust where it has not been breached. See State v. Fisher, 165 Wn.2d 727, 740 n. 1, 202 P.3d 937 (2009) ("Prosecutorial misconduct' is a term of art but is really a misnomer when applied to mistakes made by the prosecutor during trial. If prosecutorial mistakes or actions are not harmless and deny a defendant fair trial, then the defendant should get a new one. Attorney misconduct, on the other hand, is more appropriately related to violations of the Rules of Professional Conduct."); accord, State v. Leutschaff, 759 N.W.2d 414, 418 (Minn. 2009) ("there is an important distinction to be made between prosecutorial misconduct and prosecutorial error"; recommending use of term "prosecutorial error"); State v. Fauci, 282 Conn. 23, 917 A.2d 978, 982 n.2 (2007) (explaining that the term "prosecutorial misconduct" is improperly applied to a claim asserting improper statements by a prosecutor at trial; suggesting the use of the term "prosecutorial impropriety"). The American Bar Association House of Delegates recently adopted the following resolution: "RESOLVED, That the American Bar Association urges trial and appellate courts, in criminal cases, when reviewing the conduct of prosecutors to differentiate between 'error' and 'prosecutorial misconduct.'" ABA House of Delegates Resolution 100B (2010). Respondent urges this Court to draw that distinction here.

this in closing. BOA 16-20. The defendant is mistaken as to the “got it wrong” comments, which are not misconduct at all. As to a single question that was admittedly improper (asking if victim “made up” everything), he cannot show the error was “flagrant and ill-intentioned.”

“A prosecutor commits misconduct when his or her cross examination seeks to compel a witness’ opinion as to whether another witness is telling the truth.” State v. Jerrels, 83 Wn. App. 503, 507, 925 P.2d 209 (1996). In practice, this means one cannot ask a defendant if the other witnesses are lying. E.g., State v. Suarez-Bravo, 72 Wn. App. 359, 366, 864 P.2d 426 (1994) (asking if other witness “not telling the truth” improper); State v. Stith, 71 Wn. App. 14, 856 P.2d 415 (1993) (asking if other witnesses are “lying” or have “fabricated story” improper); State v. Padilla, 69 Wn. App. 295, 846 P.2d 564 (1993) (asking if other witness “lying” improper)); But it is permissible to inquire of the defendant if the other witnesses are “mistaken,” where this is relevant. State v. Wright, 76 Wn. App. 811, 826 (chart), 888 P.2d 1214 (1995).² “When a witness’ testimony contradicts that of another witness, it is proper to point out the inconsistency and ask whether, in view of

that, the witness wishes to modify or retract his or her statements.” State v. Walden, 69 Wn. App. 183, 187, 847 P.2d 956 (1993). In order to establish prosecutorial misconduct, a defendant must show both improper conduct and prejudice. State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005).

In her cross-exam of the defendant, the prosecutor highlighted numerous factual discrepancies between the testimony of other witnesses and that of the defendant, and asked if they others had “got it wrong.” Anna had said the two girls arrived first on the night in question, while the defendant said he was already at the apartment. 3 TRP 396. Anna had said both the defendant and Tino were playing video games that evening, while the defendant said Tino was not. 3 TRP 301. Anna had told the defendant to sleep on the couch, and the girls to sleep on the air mattress; the defendant recalled no such direction. 3 TRP 301-02. J.L. recalled the defendant getting up to go to the bathroom on the night in

² Statutorily overruled on other grounds (sentencing issue), by RCW 9.94A.525 (formerly RCW 9.94A.360).

question, whereas the defendant said he'd not done so. 3 TRP 304. There were discrepancies between the defendant's testimony and detective Kowalchuk's on whether the defendant had fled from the bathroom or an adjacent hallway. 3 TRP 316. And the arresting trooper recalled the defendant saying he was wanted on some sort of sex crime, whereas the defendant had said he'd only mentioned there being a warrant. 3 TRP 323. In each of the cited instances, the prosecutor asked if the other witness "got it wrong," to which the defendant said yes. The prosecutor then asked if everything J.L. had said about him was "made up," and if everybody else "got it wrong," to which the defendant again said yes. 3 TRP 331. In closing argument, the prosecutor reiterated these discrepancies, noting that, per the defendant, all these witnesses "got it wrong." 3 TRP 380-82.

None of this was objected to below. "The general rule is that appellate courts will not consider issues raised for the first time on appeal." State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007) (citing RAP 2.5(a)). The exception under RAP 2.5(a)(3) for manifest constitutional error is a "narrow one." Id. at 934 (quoting State v. Scott, 110 Wn.2d 682, 687, 757 P.2d 492 (1988)). To establish manifest constitutional error, the defendant must establish

actual prejudice. State v. O'Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). To demonstrate actual prejudice, there must be a plausible showing by the appellant that the asserted error had practical and identifiable consequences in the trial of the case. Id. In determining whether a claimed error is manifest, the reviewing court views the error in the context of the record as a whole, rather than in isolation. State v. Burke, 163 Wn.2d at 224 (citing Scott, 110 Wn.2d at 688).

Failure to object to questioning and argument at trial waives the issue for appeal unless the questioning and argument were so flagrant and ill-intentioned that it causes prejudice so strong that a cautionary instruction would not cure it. Boehning, 127 Wn. App. at 518 (questioning); State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997); (argument) State v. Gentry, 125 Wn.2d 570, 640, 888 P.2d 1105 (1995) (argument).

Here, the prosecutor asked the defendant if other witnesses had "got it wrong." This Court has held that asking a witness if another witness is "mistaken" or "got it wrong" does not constitute misconduct. "Rather, such questions are merely objectionable to the extent that they are irrelevant and not helpful to the jury." Wright, 76 Wn. App. at 822.

Unlike questions about whether someone is lying which are unfair to the witness because there may be other explanations for discrepancies in testimony, questions about whether another witness was mistaken do not have the same potential to prejudice the defendant or show him or her in a bad light. In addition, questions about whether another witness was mistaken may, under certain circumstances, be relevant and probative. Where, for example, there are conflicts between part but not all of various witnesses' versions of the events, such cross examination may be relevant and helpful to the jury in its efforts to sort through conflicting testimony. So long as they are relevant, questions about whether another witness was mistaken or had "got it wrong" are not objectionable or improper..

Wright, 76 Wn. App. at 822.

In order to resolve this case the jury necessarily had to make credibility determinations and sort through conflicting testimony. Factual discrepancies – and there were many – may seem minor as they are listed here, but many bore on the circumstances of the victim's contact with the defendant both before and after the rape. These circumstances were contested. Highlighting differences in testimony was relevant not only to the accuracy and credibility of witnesses but also to what the atmosphere was among these friends and family members before and after the crime. The defendant's testimony had tracked that of other witnesses in part, and in part diverged. Under all these circumstances, the

prosecutor was justified in asking the defendant whether he agreed or disagreed with the testimony of other witnesses, especially the civilians.

To the extent the discrepancies can be read as merely reflecting two very different versions of events, and thus not relevant enough to have merited the inquiry here, the questioning was still, at most, “merely objectionable.” And because they were not objected to, error has been waived unless the defendant can show manifest constitutional error.

As to the “got it wrong” comments, both on cross examination and in argument, the defendant cannot make this showing. Just as any error in questioning and argument over whether other witnesses were “mistaken” or “got it wrong” was found waived in Wright, the same result obtains here. See Wright, 79 Wn. App. at 822-23. The defendant does not cite Wright in his briefing, but it controls here as to the “got it wrong” comments.

That leaves the single question, asking whether J.L. had “made up” what she’d said about the defendant. See 3 TRP 331. Respondent concedes this lone comment, which was not repeated in argument, was improper. But the failure to object to it waives the issue for appeal unless the question was so flagrant and ill-

intentioned that it caused prejudice so strong that a cautionary instruction would not cure it. Boehning, 127 Wn. App. at 518. The defendant cannot make this showing here, either. A curative instruction could have stricken the comment, and could have reinforced to the jury that it is their role alone to decide the credibility of witnesses. And the improper question came only once. It was not repeated in argument. The defendant cannot show this single comment was incurably “flagrant and ill-intentioned.”

The defendant disagrees, citing Fleming and Castaneda-Perez. In Castaneda-Perez, the prosecutor, on cross-exam, repeatedly asked defendants if police witnesses were lying. In closing, the prosecutor said one of the defendants had called the officers liars. State v. Castaneda-Perez, 61 Wn. App. 354, 357-59, 810 P.2d 74 (1991). This Court held “it is misleading and unfair to make it appear that an acquittal requires the conclusion that the police officers are lying.” Id. at 362-63. In Fleming, the prosecutor argued that to acquit the defendants, they had to find that the rape victim was lying or had fantasized what happened. State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996). Because this was precisely what had been condemned in Castaneda-Perez two years earlier, this Court found the argument was flagrant and

ill-intentioned in light of clear admonitory guidance in the caselaw. Fleming, 83 Wn. App. at 214.

Castaneda-Perez and Fleming do not address the factual scenario of posing questions and making argument on whether witnesses were mistaken or “got it wrong.” Wright addresses that, and holds adversely to the defense position here.

Castaneda-Perez involved repeated improper questioning, coupled with improper closing argument. Fleming involved flagrantly improper closing argument on what a jury must find to acquit, which misstated the law and shifted the burden of proof. Here, there was one improper question, which was not repeated. And while the prosecutor highlighted factual discrepancies in closing, she never argued that the only way the jury could believe the defendant, and acquit him, would be to find the other witnesses were lying. See 3 TRP 380-82. Thus, the one improper question was not so flagrant and ill-intentioned under Fleming and Castaneda-Perez that no instruction could have cured it. This argument fails.

D. THE DEFENDANT HAS NOT SHOWN THAT PRIOR COUNSEL WAS INEFFECTIVE.

Lastly, the defendant asserts prior trial counsel was ineffective. To prevail on a claim of ineffective assistance, the defendant must show that (1) his trial counsel's representation was deficient, and (2) the deficiency prejudiced him. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Under the first prong, representation is deficient if it falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.3d 1239 (1997). Under the second prong, prejudice occurs when, but for the deficient performance, there is a reasonable probability the outcome would have been different, thus demonstrating actual prejudice. Hendrickson, 129 Wn.2d at 77-78; In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). Both prongs must be shown.

Counsel is presumed effective, a presumption the defendant must overcome. State v. McFarland, 127 Wn.2d 322, 334-36, 899 P.2d 1251 (1995). Deficient performance is not shown by matters that go to trial strategy or tactics. Hendrickson, 129 Wn.2d at 77-78. A court may not sustain a claim of ineffective assistance if

there was a legitimate tactical reason for the allegedly incompetent act. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994).

As to the first claim of error – admitting evidence that the detective had unsuccessfully and repeatedly tried to reach the defendant – counsel had in fact objected in limine. 1 TRP 18-19. Given the court’s ruling, counsel indicated she may seek a limiting instruction. 1 TRP 25. Trial counsel later decided against it. 3 TRP 364. This does not show ineffective assistance. First, as argued above, the evidence was properly admitted. See State v. Gregory, 158 Wn.2d at 840 (to show course and conduct of investigation). Secondly, counsel made a decision not to seek a limiting instruction. There was good reason for this, so as to not highlight a matter best left in the periphery. Deficient performance is not shown by matters that go to trial strategy or tactics. Hendrickson, 129 Wn.2d at 77-78; State v. Garrett, 124 Wn.2d at 520; Strickland, 466 U.S. at 690. Neither prong is shown.

As to the “got it wrong” comments, they were at least arguably relevant, and if so, admissible. See Wright, 76 Wn. App. at 822. The matter having been debatable, it is hard to see how, in hindsight, counsel’s not objecting establishes deficient performance and overcomes the presumption of effectiveness. Further, the

defendant cannot, on appeal, show how questions and argument that were, at worst, “merely objectionable” somehow establish *actual* prejudice. See Hendrickson, 129 Wn.2d at 77-78; In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). Thus, neither prong is shown here, either.

As for the single question that was improper – asking whether J.L. had “made up” what she said – respondent concedes it may have been deficient performance not to object. But, once again, actual prejudice cannot be established – that is, a reasonable probability the outcome at trial would have been different. See Hendrickson, 129 Wn.2d at 77-78; In re Pers. Restraint of Pirtle, 136 Wn.2d at 487. Some of the most damning evidence in this trial was the defendant’s phone call to J.L., offering money if she would recant, 2 TRP 74-75, 105; and his phone call to Anna, asking her to intercede with J.L. 2 TRP 139. The defendant at one point had also told Anna it was all J.L.’s doing. 2 TRP 139. And Anna recollected, the morning after the rape, that she saw J.L. wrapped tightly in a blanket, curled in a near-fetal position on the edge of the air mattress, with a sweatshirt on and the hood pulled over her head. 2 TRP 134. Whatever motives one might attribute to the victim, none apply to Anna, who was caught between her

cousin and her husband's childhood friend, and who ended up as a witness in a trial where her own husband testified for the other side. In light of the evidence in this trial, the defendant cannot show actual prejudice resulting from counsel's failure to object to the single "J.L. 'made up' everything" question. Thus, the second prong of resulting prejudice cannot be established, and the argument fails.

IV. CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted on August 17, 2010.

MARK K. ROE
Snohomish County Prosecutor

by: 

CHARLES FRANKLIN BLACKMAN, #19354
Deputy Prosecuting Attorney
Attorney for Respondent