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2011 NOV -4 PM 4:59

NO. 67249-5-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

CRAIG A. ROWLAND,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S OPENING BRIEF

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Rule 9

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by admitting the hearsay statements of Chere Madill.

2. The trial court erred by failing to find by a preponderance of the evidence that Ms. Madill's statements to Mr. Anderson and Mr. Simmons were made under the stress of the startling event.

3. There was insufficient evidence to convict Mr. Rowland of assault by strangulation.

4. The prosecutor committed reversible misconduct by telling the jury not to wish for more evidence, by shifting the burden of proof to Mr. Rowland and instructing the jury to find the "true verdict."

5. The prosecutor committed reversible error by commenting on Mr. Rowland's constitutional right to remain silent.

6. Cumulative error denied Mr. Rowland his right to a fair trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Excited utterances are exceptions to hearsay because they are made under the stress of a startling event or condition, and are therefore likely to be reliable. In this case, the alleged victim, Chere Madill, was calm when she gave her statements to two

witnesses, and testified that she had had time to fabricate a story. Should Madill's statements have been excluded because they were not excited utterances?

2. In order to admit hearsay under the excited utterance exception, a trial judge is required to make a finding by a preponderance of the evidence that the declarant was under the stress of the startling event at the time the statement was made. In this case, the trial judge made no such finding. Did the trial court commit error?

3. There is insufficient evidence to support a conviction when, taken in the light most favorable to the State, a reasonable juror could not find all elements of the offense beyond a reasonable doubt. In this case, there was little physical evidence of assault, and Madill, the only witness to the actual incident, recanted on the stand. Absent Madill's impermissibly-admitted hearsay statements, was there insufficient evidence to convict Mr. Rowland of second-degree assault?

4. A prosecutor behaves improperly when he misstates the burden of proof or mischaracterizes the jury's role. In this case, the prosecutor told the jury not to wish that the State had more evidence to support its case; suggested that Mr. Rowland should

have presented evidence; and told the jury to find the “true verdict.”

Were the prosecutor’s comments improper?

5. Without an objection on the record, a prosecutor’s improper comments are reversible error when they were prejudicial and when they were so flagrant and ill-intentioned that curative instruction would not have mitigated the prejudice. In this case, there was scant evidence presented to support the State’s case, but Mr. Rowland was convicted of the charges against him. Did the prosecutor’s comments create enduring prejudice that was incurable by a jury instruction?

6. A State official may not comment on or encourage the jury to draw negative inferences from a defendant’s choice to exercise a constitutional right. In this case, the prosecutor told the jury that no witnesses had been presented to corroborate a theory of Mr. Rowland’s innocence. Did the prosecutor improperly comment on Mr. Rowland’s right to remain silent and privilege against self-incrimination?

7. In cases where no single error requires reversal, the combined errors in a trial may still deny an accused person a fair trial. In this case, did the evidentiary errors and prosecutorial misconduct constitute cumulative error?

C. STATEMENT OF THE CASE

1. The day of the incident

Chere Madill and Craig Rowland had a relationship for 11 years. 2RP 18.¹ They lived together in the Greenwood neighborhood of Seattle. 1RP 94; 2RP 18. On the evening of August 24, 2010, Ms. Madill saw fire trucks parked down the block from her apartment. 2RP 22. She was having an asthma attack, and she went over to the trucks. 2RP 22.

When she arrived, Ms. Madill spoke to Vance Anderson, a firefighter. 1RP 60. Madill sat on the ground and was breathing heavily. 1RP 60. She was having difficulty catching her breath and could not speak in full sentences. 1RP 60. Mr. Anderson noticed that Ms. Madill had some redness on both sides of her neck. 1RP 61. He wrote in his incident report that the redness was "mild." 1RP 76.

She calmed down after about ten minutes. 1RP 61, 64. Then, she told Mr. Anderson that Mr. Rowland had choked her. 1RP 62, 65. Mr. Anderson called the paramedics, who determined

¹ The transcripts in this case are contained in two individually-paginated volumes. They are referred to herein as:

1RP - March 29 & 31, 2011
2RP - April 4 & 5, June 3, 2011

that Ms. Madill did not need to go to the hospital. 1RP 73. The contact between Ms. Madill and Mr. Anderson lasted for around half an hour. 1RP 72–73.

Next, Ms. Madill spoke to David Simmons, a Seattle police officer. 1RP 98, 103. Simmons had arrived on the scene while Ms. Madill was still visibly upset. 1RP 104. Mr. Simmons described Madill as “fluctuat[ing] from being hysterical to calm,” and stated that “It took a substantial amount of time to calm her down.” 1RP 104, 126. Like Mr. Anderson, Mr. Simmons noted that Ms. Madill was having difficulty completing sentences. 1RP 105. Simmons stated that during her hysterical times, Ms. Madill “was hyperventilating” and “wasn’t able to talk.” 1RP 127, 129. Ms. Madill told Simmons several times that Mr. Rowland “choked [her] until [she] passed out.” 1RP 105. Mr. Simmons noted that Ms. Madill did not have any defensive injuries on her arms, or other injuries on her body. 1RP 123.

After Ms. Madill spoke to Mr. Simmons, Mr. Simmons and another officer escorted her to her car and then took her back to her apartment to make sure that she would be safe. 1RP 136. When they arrived at Ms. Madill’s apartment, Mr. Rowland was not

present. 1RP 145. No furniture appeared out of order. 1RP 145.

There was no indication that a struggle had taken place. 1RP 145.

2. Trial testimony

Mr. Rowland was charged with second-degree assault by strangulation, in violation of RCW 9A.36.021(1)(g). CP 1. At trial, Mr. Anderson and Mr. Simmons both testified that Ms. Madill had said that Mr. Rowland choked her. 1RP 62, 65, 105. Trial counsel objected on hearsay grounds. 1RP 61, 105.

Ms. Madill then took the stand as a state's witness. 2RP 16. She explained that on the day of the incident, she had learned that Mr. Rowland was cheating on her and become upset. 2RP 21. She stated that she and Mr. Rowland had argued, and he left the house. 2RP 21. She also stated that two other people had been in the apartment, including one of her roommates. 2RP 29. Ms. Madill explained that she followed Mr. Rowland outside and saw the fire trucks, and then decided that she wanted Mr. Rowland to be in trouble because she had just found out that he was cheating. 2RP 22. Aside from being upset, she was having an asthma attack and a panic attack. 2RP 22. Ms. Madill acknowledged telling Mr. Anderson and Mr. Simmons that Mr. Rowland had choked her, but stated that it never happened—rather, that she had concocted the

story so that “[he would] be in as much pain as [she] would.” 2RP 22, 30. As for the redness around her neck, Ms. Madill explained that she had gotten into a fight several days earlier, and that when her asthma attack began on the day of the incident, she held her neck in an effort to open her passageways. 2RP 33, 42. Ms. Madill repeatedly admitted to the jury that she had fabricated her earlier statements about Mr. Rowland. 2RP 30; see 2RP 22, 27, 39.

3. Closing argument

During closing argument, the prosecutor stated, “There’s a couple other folks present at the scene, according to Ms. Madill. We’ve never seen them. We never heard their statements.” 2RP 70. At the end of his testimony, the prosecutor stated,

The evidence is important. Domestic violence cases, it’s not like a burglary. You’re not going to get a videotape, you’re not going to get a million different witnesses all pointing to the same individual, all pointing to the same kind of crime . . . [L]ook at your jury instructions . . . [t]here’s nothing in there about calling every witness who again would say a darn thing.

2RP 86. He then said, “Look at all of that evidence, do not leave your commonsense at the door, please use it, and you will find that the [sic] only true verdict in this case. Find the defendant guilty.” 2RP 86.

Mr. Rowland was convicted and sentenced to 22 months in prison. CP 37, 40. He appeals.

D. ARGUMENT

1. THE STATEMENTS OF CHERE MADILL TO VANCE ANDERSON AND DAVID SIMMONS WERE INADMISSIBLE HEARSAY, AND WERE NOT EXCITED UTTERANCES.

Hearsay is any out-of-court statement offered to prove the truth of the matter asserted. ER 801(a), (c). Hearsay is inadmissible unless it falls into an exception in court rules or statute. ER 802.

The hearsay rule is designed to keep out unreliable evidence: statements made outside the presence of the jury are considered unreliable because they are neither subject to the jury's scrutiny nor to cross-examination. State v. Mott, 74 Wn.2d 804, 806, 447 P.2d 85 (1968); State v. Young, 160 Wn.2d 799, 822, 161 P.3d 967 (2007) (Sanders, J., dissenting). Still, there are some exceptions that are believed to restore the reliability of these inherently unreliable statements. Young, 160 Wn.2d at 822–23 (Sanders, J., dissenting). In this case, Madill's statements to Anderson and Simmons about being choked were admitted under the excited utterance exception, which permits

A statement relating to a startling event
or condition made while the declarant was

under the stress of excitement caused by the event or condition.

ER 803(a)(2); see 1RP 44-45, 61, 1-5. The rationale for this exception is that

[U]nder certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control. The utterance of a person in such a state is believed to be a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock, rather than an expression based on reflection or self-interest.

State v. Chapin, 118 Wn.2d 681, 686, 826 P.2d 194 (1992) (internal quotation marks omitted).

a. The excited utterance exception does not apply where, as here, the declarant had an opportunity to fabricate her statement. The reasoning in Chapin indicates that the hearsay rule prevents the admission of statements made after the declarant has had sufficient time to plan her words: once the opportunity to fabricate exists, the statements lose the inherent sincerity of words spoken under the stress of an external shock. See 118 Wn.2d at 686. Chapin also set out the rule that three requirements must be met in order for a statement to qualify as an excited utterance: 1) a startling event or condition must have occurred, 2) the statement

must have been made while the declarant was experiencing stress or excitement caused by the event, and 3) the statement must relate to the starting event. 118 Wn.2d at 681. In this case, the first and second requirements have not been met.

State v. Brown is instructive on the second prong. 127 Wn.2d 749, 903 P.2d 459 (1995). In that case, the declarant, T.G., called 911 and stated that she had been raped. Id. at 751. She told the officer that she had been abducted and forced into her neighbor's apartment, and then raped by four men. Id. The statement was admitted at trial as an excited utterance. Id. at 752. On the stand, T.G. stated that she had actually gone over to the neighbor's apartment willingly, and had called 911 after making the decision to fabricate that part of the story. Id. at 753. A unanimous Supreme Court explained that the trial court had erred in finding her 911 call an excited utterance, since T.G. had the opportunity to, and actually had, fabricated her story. Brown, 127 Wn.2d at 759. The court acknowledged that the rape was a startling event sufficient to trigger the necessary conditions for an excited utterance, but stated that those conditions no longer existed once T.G. had time to change her story. Id. at 754, 759. The court explained, "[T]he key determination is whether the statement was

made while the declarant was still under the influence of the event to the extent that [the] statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment.” *Id.* at 759 (quoting State v. Strauss, 119 Wn.2d 401, 426, 832 P.2d 78 (1992) and Johnson v. Ohls, 76 Wn.2d 398, 406, 457 P.2d 194 (1969)) (internal quotation marks omitted) (second alteration in original).

Just like T.G., Ms. Madill had enough time between the startling event—the alleged strangulation—and her interactions with Mr. Anderson and Mr. Simmons that she was able to fabricate her story. See Brown, 127 Wn.2d at 753. And just like T.G., Ms. Madill admitted on the stand to fabricating the statements that were eventually admitted as excited utterances. *Id.* at 753; 2RP 22, 30. The Brown Court used the fact of actual fabrication to prove that there had been sufficient opportunity for possible fabrication, which thereafter became the test for whether a statement could properly

qualify as an excited utterance. See Brown, 127 Wn.2d at 758–59;² State v. Briscoeray, 95 Wn. App. 167, 172–73, 974 P.2d 912 (1999) (“[W]here there is substantial evidence that the witness did not have the time or opportunity to fabricate a story before making the statements at issue, the statements may properly fall within the excited utterance exception”).

b. The excited utterance exception does not apply to statements made after a declarant is calm and substantially removed from the stress of the startling act. In Briscoeray, this Court applied Brown to a case where a declarant recanted on the stand, stating that recantation did not prohibit an earlier statement from qualifying as an excited utterance. 95 Wn. App. at 174–75. A security guard received an anonymous phone call that domestic violence was occurring in the declarant’s apartment. Id. at 168. Between 30 and 40 seconds later, the declarant, Maketa Brazier,

² The Brown Court stated, “It is thus apparent that T.G.’s testimony that she had the opportunity to, and did in fact, decide to fabricate a portion of her story prior to making the 911 call renders erroneous the trial court’s conclusion that the content of her call was admissible as an excited utterance.” 127 Wn.2d at 759. The Court did not make a factual finding that she had, in fact, fabricated her testimony. See id. Rather, it used the fact that she had testified that she had actually fabricated her story as evidence of the opportunity to fabricate. See id. So in this case, it is irrelevant whether Madill’s story was fabrication or truth—the fact that she testified that she had decided to fabricate is enough under Brown to indicate that the trial court erred by admitting her statements as excited utterances.

ran out of her apartment to the guard shack, screaming and crying, and yelled “He tried to kill me! He tried to kill me! Just call 911. Call 911.” Id. at 168–69. The guard asked what happened, and she replied, “He tried to kill me, he tried to kill me. He put the gun to my head, clicked it six times.” Id. at 169. The guard called 911, and Brazier remained “upset and frantic” during the course of the call. Id. Brazier got on the phone to answer some questions from the dispatcher. Briscoeray, 95 Wn. App. at 169. While she was still on the phone, a police officer arrived and asked her what happened. Id. Brazier told the officer the details of her fight with her boyfriend. Id. The officer testified that she was calm at first, but then would become upset. Id. Both the guard and the officer stated that they observed bruises on her face. Id. On the stand, Brazier stated that she had made up the story about the assault because she was angry at her boyfriend. Briscoeray, 95 Wn. App. at 170–71. This Court ruled that the trial court did not abuse its discretion in admitting her statements as excited utterances. Id. at 175.

Importantly, the court did not limit the holding in Brown. Rather, the Briscoeray Court stated that Brown did not apply to the case before it because there was considerable independent evidence that the declarant was still under the stress of the

triggering event when she made the statements—and she therefore did not have an opportunity to fabricate a lie.³ Briscoeray, 95 Wn. App. at 174. The independent evidence included the short time period of 30-40 seconds between the neighbor’s phone call and her statements to the guard and the fact that Brazier remained upset and emotional throughout her contact with the guard and the police officer, which contact began less than a minute after the phone call indicating that abuse was going on. Id. at 174–75.

This case is more like Brown than Briscoeray. Here, in addition to Ms. Madill’s repeated admission that she fabricated her initial claim, there is simply not independent corroboration that Madill did not have an opportunity to fabricate a story. Cf Briscoeray, 95 Wn. App. at 174. Ms. Madill testified that she and Mr. Rowland had been arguing for hours before he left the apartment. 2RP 22. She said that he “eventually got in his car and left,” and that she then went over to the fire trucks. 2RP 21–22. Mr. Anderson, who contacted her first by the trucks, did not offer any testimony about the amount of time that had passed between the

³ Again, the court could make this finding regardless of the truth value of the declarant’s initial statements: whether her statements were true or a fabrication, the dispositive inquiry is whether there was sufficient opportunity for her to fabricate. Brown, 127 Wn.2d at 759; Briscoeray, 95 Wn. App. at 174.

alleged startling event and Ms. Madill's statements. See 1RP 60.

This is not like Briscoeray, where the guard independently saw that 30-40 seconds elapsed from a phone call reporting the startling event to his encounter with the declarant. 95 Wn. App. at 168–69.

Second, Mr. Anderson clearly stated that Ms. Madill had “calmed down” by the time she told him that Mr. Rowland had choked her. 1RP 61–62 (“[W]hen we finally got her calmed down, she said that her boyfriend . . . had choked her.”). Mr. Simmons stated that Ms. Madill was fluctuating between hysterical and calm. 1RP 104. But he stated that Ms. Madill was not able to talk while she was hysterical, and he was able to calm her down. 1RP 104, 129. The fact that a declarant has calmed down is a critical factor in determining whether a statement is an excited utterance; even in cases where only a short amount of time has passed after a startling event, a declarant’s calm demeanor shows that the declarant is no longer under the stress of that event. Brown v. Spokane City Fire Protec. Dist. 1, 100 Wn.2d 188, 195–96, 668 P.2d 571 (1983); see State v. Doe, 105 Wn.2d 889, 893–94, 719 P.2d 554 (1986). Ms. Madill’s statements to Mr. Anderson and Simmons were hearsay, and should have been excluded.

c. The trial court erred by not entering an explicit finding that Ms. Madill was still under the stress of the startling event when she made the statements to Mr. Anderson and Mr. Simmons. In order to admit hearsay evidence under the excited utterance exception, a trial judge must find by a preponderance of the evidence that the declarant was under the influence of the startling event at the time the statement was made. ER 104(a); State v. Ramires, 109 Wn. App. 749, 757–58, 37 P.3d 343 (2002); State v. Williamson, 100 Wn. App. 248, 257, 996 P.2d 1097 (2000). Here, the trial judge made no such finding. During the pretrial motions, the defense moved to exclude as hearsay some of Ms. Madill's statements to Mr. Simmons. 1RP 43–44. The State indicated its intention to admit them as excited utterances. 1RP 44. The court stated, “[I]t depends upon whether there's evidence that the declarant is still under the stress of the event, and so obviously it's going to depend on how the evidence comes in. Certainly [a] longer period of time is going to require more evidence that they're under the stress of the event in order to be convincing that it is an excited utterance.” 1RP 45. The court made no preliminary finding at that time, and made no finding later in the proceedings, that Ms. Madill had been under the stress of a startling event during her

statements to either Mr. Simmons or Mr. Anderson. Under Ramires and Williamson, this was error. Ramires, 109 Wn. App. at 757–58; Williamson, 100 Wn. App. at 257.

d. Absent Ms. Madill’s improperly-admitted hearsay statements, there was insufficient evidence to convict Mr. Rowland of assault by strangulation. The due process guarantees of Article I, § 3 of the Washington Constitution and the Fourteenth Amendment to the United States Constitution require that every element of a charged crime be proved beyond a reasonable doubt. State v. Baeza, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). In order to convict Mr. Rowland of Assault in the Second Degree-Strangulation, the State must have proved that Mr. Rowland intentionally assaulted Ms. Madill by strangulation, which is the compression of another’s neck, obstructing blood flow or ability to breathe, or doing so with the intent to obstruct blood flow or the ability to breathe. RCW 9A.36.021(1)(g); RCW 9A.04.110.

When considering whether there was sufficient evidence to support a conviction, courts examine the evidence in the light most favorable to the prosecution to determine whether a rational fact-finder could have found all of the essential elements beyond a

reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)).

In this case, the State's evidence was thin. It consisted of the testimony of Mr. Anderson, Mr. Simmons, and Kevin Stewart, a second police officer who accompanied Mr. Simmons and Ms. Madill back to her home. Mr. Anderson stated that there was some redness around Ms. Madill's neck, but that it was "mild." 1RP 76. He said that there was no redness in the shape of fingers. 1RP 80. There was also no petechiae, or small red bumps typical of strangulation cases. 1RP 75. Mr. Anderson testified that her injuries did not require treatment at a hospital. 1RP 73. The State also introduced photographs, but several showed minimal redness, if any at all. See, e.g., Ex. 3-6.⁴

Mr. Simmons stated that Ms. Madill had no defensive injuries on her arms, or injuries anywhere else. 1RP 123. He admitted that any red marks on her neck could have been caused by something other than strangulation. 1RP 130. Mr. Stewart stated that when they were nearing Ms. Madill's apartment, he saw someone

⁴ Exhibits 3-10 were supplementally designated.

matching Mr. Rowland's description run in the other direction. 1RP 141. But Mr. Stewart could not positively identify Mr. Rowland as the same man. 1RP 141. Mr. Stewart testified that Madill's apartment appeared in order when he arrived there. 1RP 145. There were no indications that a struggle had taken place. 1RP 145.

Finally, Ms. Madill herself testified that no assault had taken place. 2RP 22. Without Ms. Madill's impermissibly-admitted hearsay statements, there was insufficient evidence, even in the light most favorable to the State, to convict Mr. Rowland of each element of assault by strangulation beyond a reasonable doubt. In light of this limited evidence, the admission of the hearsay statements was prejudicial, as her earlier statements affected the outcome of the trial. See Ramires, 109 Wn. App. at 760.

2. THE PROSECUTOR COMMITTED REVERSIBLE MISCONDUCT BY TELLING THE JURY NOT TO ASK FOR MORE EVIDENCE, BY TELLING THE JURY TO FIND THE TRUTH, AND BY SHIFTING THE BURDEN OF PROOF TO MR. ROWLAND.

A prosecutor's conduct in the courtroom may deprive a defendant of a fair trial. State v. Evans, 163 Wn. App. 635, 260 P.3d 934, 938 (2011). A defendant asserting prosecutorial misconduct must show both improper comments and that there was

actual prejudice. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). Where there is no objection by defense counsel to improper commentary, the defendant must show that the misconduct was so flagrant and ill-intentioned that the prejudice could not have been cured by an instruction to the jury. State v. Gregory, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006); e.g., State v. Allen, 161 Wn. App. 727, 747, 255 P.3d 784 (2011), rev. granted, 172 Wn.2d 1014, ___ P.3d ___ (Sep 26, 2011).

In this case, there were three instances of improper commentary: first, the prosecutor argued that the jury should not expect a significant amount of evidence. 2RP 86. Second, he instructed the jury to find the only “true verdict” in the case. 2RP 86. Finally, he shifted the burden of proof to Mr. Rowland by suggesting that Mr. Rowland should have presented a defense. 2RP 70. The improper comments were prejudicial and were flagrant and ill-intentioned, depriving Mr. Rowland of a fair trial.

a. It is improper for a prosecutor to tell a jury not to wish for more evidence. At the end of his testimony, the prosecutor stated,

The evidence is important. Domestic violence cases, it's not like a burglary. You're not going to get a videotape, you're not going to get a

million different witnesses all pointing to the same individual, all pointing to the same kind of crime . . . [L]ook at your jury instructions . . . [t]here's nothing in there about calling every witness who again would say a darn thing.

2RP 86. It is improper for a prosecutor to suggest that the jury overlook weaknesses in the State's evidence. Evans, 260 P.3d at 939–40. In Evans, an accomplice liability case, the prosecutor told the jury “Don't say, ‘I wish I had the universe,’ okay? Don't say, ‘I wish I had fingerprints,’ and then, ‘I wish we had fingerprints, I wish we had the video from the satellite.’” Id at 938. He later said, “And I suggest to you your instruction doesn't tell you to say, ‘Well, I wish I had more.’ Because let me tell you what, you are always going to wish you had more. Always going [to] be questions.” The court explained that the attorney had “miscast the jurors' role as one of determining what happened and not whether the State had met its burden of proof.” Id at 939. Similarly, in Mr. Rowland's case, the prosecutor changed the jury's role from determining whether there was proof beyond a reasonable doubt to determining whether there was enough proof in light of the general paucity of evidence in the typical domestic assault case. This was improper. Id at 939–40.

b. It is improper for a prosecutor to instruct a jury to find the truth. The Evans Court explained that the “don't ask for

more” argument was especially troublesome because it was coupled with the prosecutor’s urging the jury to “get to the truth.” Id. at 939 (“In doing so, the prosecutor aggravated the erroneous truth-seeking argument by suggesting that the jurors disregard weaknesses in the State’s case.”).

It is improper for a prosecutor to tell the jury to “find the truth” because the jury’s duty is to determine whether the State proved each element beyond a reasonable doubt, and not to solve the case. Evans, 260 P.3d at 939; State v. Anderson, 153 Wn. App. 417, 429, 220 P.3d 1273 (2009). Thus, in both Evans and Anderson, this Court stated that “find the truth” arguments are improper. Evans, 260 P.3d at 939; Anderson, 153 Wn. App. at 429.

In this case, the prosecutor told the jury, “Look at all of that evidence, do not leave your commonsense at the door, please use it, and you will find that the [sic] only true verdict in this case. Find the defendant guilty.” 2RP 86. As in Anderson and Evans, the prosecutor here misstated the jury’s role, and his comments were improper. See Evans, 260 P.3d at 939; Anderson, 153 Wn. App. at 429; see also State v. Emery, 161 Wn. App. 172, 193, 253 P.3d 413 (2011).

c. It is improper for a prosecutor to shift the burden of proof to the defendant. The presumption of innocence is the foundation of the criminal justice system in Washington and in the United States. State v. Finch, 137 Wn.2d 792, 844, 975 P.2d 967 (1999); Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976). To overcome the presumption, the State must prove every element of the charged offense beyond a reasonable doubt. State v. Bennett, 161 Wn.2d 303, 315–16, 165 P.3d 1241 (2007); Winship, 397 U.S. at 364.

A prosecutor may not dilute or shift this burden. State v. Jones, 163 Wn. App. 354, 357, 259 P.3d 351 (2011). At the same time, it is a prosecutor's duty to act impartially and to ensure that a defendant receives a fair trial. State v. Charlton, 90 Wn.2d 657, 664–65, 585 P.2d 142 (1978). When a prosecutor, a quasi-judicial officer, mischaracterizes the burden of proof it deprives the defendant of a fair trial. State v. Warren, 165 Wn.2d 17, 27, 195 P.3d 940 (2008), cert. denied, 129 S. Ct. 2007 (2009). The jury knows that the prosecutor is an officer of the State, and any standard he indicates below the beyond-a-reasonable-doubt standard is error. See id.

In this case, the prosecutor argued during closing: "There's a

couple other folks present at the scene, according to Ms. Madill. We've never seen them. We never heard their statements." 2RP 70.⁵ Madill was a witness for the State, but her testimony was exculpatory of Mr. Rowland. 2RP 22, 30. For the prosecutor to suggest to the jury that witnesses should have been presented to corroborate her story was to claim that Mr. Rowland should have put on a defense. This is contrary to the law and confusing to the jury, and Washington courts have consistently found this type of argument improper. See, e.g., State v. Montgomery, 163 Wn.2d 577, 597, 183 P.3d 267 (2008); State v. Traweck, 43 Wn. App. 99, 106–07, 715 P.2d 1148 (1986), overruled on other grounds by State v. Blair, 117 Wn. 2d 479, 816 P.2d 718 (1991).

For example, in State v. Fleming, the prosecutor argued, "It's true that the burden is on the State. But you would expect and hope

⁵ Under the missing witness doctrine, if a party fails to call a witness who would naturally be part of the case, whose testimony would be in that party's interest, and who is in control of that party, the jury is allowed to draw a negative inference from the absence of that witness. State v. Blair, 117 Wn. 2d 479, 485–86, 816 P.2d 718 (1991). But the doctrine only applies in narrow circumstances, where all of the following conditions have been met: 1) where the testimony is material and not cumulative, 2) where the witness is particularly under the control of the defendant and not equally available to both parties, 3) if the witness's absence is not satisfactorily explained, and 4) if applying the doctrine would not infringe on a defendant's right to remain silent and would not shift the burden of proof. State v. Dixon, 150 Wn. App. 46, 54, 207 P.3d 459 (2009). In this case, the roommates are not under the particular control of Mr. Rowland. The application of the doctrine also shifts the burden of proof and infringes on Mr. Rowland's right to remain silent, as explained here.

that if the defendants are suggesting there is a reasonable doubt, they would explain some fundamental evidence in this [matter]. And several things, they never explained.” 83 Wn. App. 209, 214, 921 P.2d 1076 (1996). In State v. Cleveland, the prosecutor stated, “Mr. Cleveland was given a chance to present any and all evidence that he felt would help you decide. He has a good defense attorney, and you can bet your bottom dollar that Mr. Jones would not have overlooked any opportunity to present admissible, helpful evidence to you.” 58 Wn. App. 634, 647, 794 P.2d 546 (1990). In both cases, this Court stated that the comments were improper. Fleming, 83 Wn. App. at 214–15; Cleveland, 58 Wn. App. at 648.

In a criminal case, the defendant has no duty to present evidence. Fleming, 83 Wn. App. at 215. By suggesting that Mr. Rowland had an obligation to do so here, the prosecutor acted improperly. Montgomery, 163 Wn.2d at 597; State v. Cheatam, 150 Wn.2d 626, 652, 81 P.3d 830 (2003).

d. In light of the thin evidence presented in this case, the prosecutor’s misconduct was likely prejudicial. The State presented thin evidence in this case. See supra § 1.c. Comments are prejudicial if there is a “substantial likelihood” that they affected the jury. State v. Reed, 102 Wn.2d 140, 145, 684

P.2d 699 (1984). Courts are more likely to find prejudice when there was weak evidence, removed from the persuasive commentary, to support the jury's verdict. For example, in Reed, the court stated that there was "not overwhelming" evidence that the defendant had acted with sufficient premeditation to constitute first-degree murder: he had been intoxicated, and testimony supported the theory that he suffered from borderline personality disorder. 102 Wn.2d at 147. Thus, there was a "substantial likelihood" that the prosecutor's statements about the credibility of the witnesses, calling the defendant a liar, and stating that defense counsel did not have a case had affected the jury's verdict. Id. at 147–48.

In Evans, the prosecutor told the jury that the presumption of innocence "kind of stops once you start deliberating," and had told the jury that they should have a specific reason if they had a doubt as to guilt. 260 P.3d 938–40. The court stated that the comments were prejudicial because the case against the defendants was not particularly strong; witnesses offered inconsistent testimony and had admitted to using drugs at the time of the incident. Id.; see also State v. Johnson, 158 Wn. App. 677, 686, 243 P.3d 936 (2010), rev. denied, 171 Wn.2d 1013, 249 P.3d 1029 (2011) (explaining

that a prosecutor's "fill in the blank" commentary was prejudicial because there was conflicting testimony was presented at trial); State v. Venegas, 155 Wn. App. 507, 526–27 & n. 20, 228 P.3d 813 (2010) (finding prejudicial an improper argument when the case was supported primarily by witness testimony, rather than physical evidence); compare Emery, 161 Wn. App. at 195–96 (improper comments were not prejudicial because there was substantial physical evidence, including DNA evidence, supporting the State's theory of the case); Anderson, 153 Wn. App. at 431–32 & n. 8, (rejecting a claim of prejudice for improper argument when the "untainted evidence against [the defendant] was overwhelming.").

Against that standard, the case against Mr. Rowland was very weak. See supra § 1.c. MS. Madill told the jury that she had fabricated her story because she was upset that her relationship was breaking down. 2RP 22. The conviction was based only on the testimony of two officials who spoke to Ms. Madill after the incident, one of whom admitted that the redness at Ms. Madill's neck could have been caused by anything, and neither of whom felt that Ms. Madill needed to go to the hospital. 1RP 73, 130. The photographs were also not convincing evidence of strangulation. See Ex. 2-6. In

light of the small amount of evidence clearly in the State's favor, there is a "substantial likelihood" that the prosecuting attorney's improper comments affected the verdict. See Reed, 102 Wn.2d at 145.

e. Each instance of misconduct contravened clearly-established Washington law, indicating that the conduct was flagrant and ill-intentioned. It is well-settled that burden-shifting is improper, and that a prosecutor may not imply that the defendant has a duty to present a defense. See supra § 2.c. Telling the jury not to "wish for more" and instructing the jury to "find the truth" are new types of established prosecutorial misconduct in Washington courts (adjudicated within the past two years), but the Evans Court explained that these arguments were forms of burden-shifting. In Evans, the only witnesses who testified were from the State, and so the prosecutor's encouragement to "find the truth" indicated that the jurors should determine which of the witnesses' stories they wanted to believe. 260 P.3d at 939. But this argument presumes that one of the witnesses—necessarily a State's witness—was telling the truth. Id. The court explained that this type of argument was improper because it encouraged the jury to overlook weaknesses in the State's case, thinning the burden of proof. Id. at 939–40. (" [T]he

problem was aggravated by the prosecutor's admonition to the jury not to ask for 'more' because the court's instruction did not require it . . . This further diluted and shifted the State's burden of proof."). By shifting the burden in three separate instances, the prosecutor in this case flagrantly contravened Washington law.

In order to require reversal, the flagrant conduct must not have been curable by an instruction. State v. Stenson, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997). There is not a fixed standard for determining whether a curative instruction would have been effective. But similar to the prejudice prong of the prosecutorial misconduct test, courts have looked to whether there was strong evidence in favor of the State. Where there is strong evidence against the defendant, courts generally do not find that conduct was so flagrant and ill-intentioned that it could not have been cured by an instruction to the jury. See, e.g., State v. Sakellis, ____ P.3d ____, 2011 WL 4790918 at *8 (Div. 2 Oct. 4, 2011); cf State v. Ramos, ____ P.3d ____, 2011 WL 4912836 at *8 (Div. 1 Oct. 17, 2011) ("Although the evidence against Ramos was strong, we hold there is a substantial likelihood that prosecutorial misconduct on cross examination and in closing argument impermissibly affected the jury's verdict."). The court in Sakellis explained, "Because of the

strength of the evidence that Sakellis assaulted Bernal with a deadly weapon, there is not a substantial likelihood that the prosecutor's 'fill-in-the-blank' argument affected the jury's guilty verdict. Accordingly, because the 'fill-in-the-blank' argument in this case was not so flagrant and ill-intentioned as to cause an enduring and resulting prejudice, Sakellis's claim fails." Sakellis, 2011 WL 4790918 at *8. As noted above, the case against Mr. Rowland was weak. Supra § 1.c. The prosecutor's repeated improper comments created prejudice so enduring that a curative instruction would not have been effective. See State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).

3. THE PROSECUTOR COMMITTED REVERSIBLE ERROR BY COMMENTING ON MR. ROWLAND'S RIGHT TO REMAIN SILENT.

By arguing that Mr. Rowland did not present witness corroborating his innocence, the prosecutor violated Mr. Rowland's Fifth Amendment privilege against self-incrimination and his right to due process under the Fourteenth Amendment. 2RP 70. Both the United States and the Washington Constitutions protect the right to remain silent and the privilege against self-incrimination. U.S. Const amend. V.; Const. art. I, § 9. The Fifth Amendment applies to the states through the Fourteenth Amendment. Malloy v. Hogan, 378

U.S. 1, 3–4, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964). The Fifth Amendment right to silence prevents the State from encouraging the jury to draw a negative inference from its invocation. State v. Burke, 163 Wn.2d 204, 217, 181 P.3d 1 (2008); Doyle v. Ohio, 426 U.S. 610, 618, 96 S. Ct. 2240 49 L. Ed. 2d 91 (1976).

In State v. Dixon, the State conceded that the prosecutor improperly commented on a defendant's right to remain silent when he said, "Did [Dixon] make any statement that '[Dixon's passenger] put that in [her] purse'? No. We didn't hear any of that testimony." 150 Wn. App. 46, 61, 207 P.3d 459 (2009) (Hunt, J., dissenting and concurring). Likewise, in this case, the prosecutor commented on Mr. Rowland's right to remain silent and privilege against self-incrimination by implying that Mr. Rowland should have presented exculpatory evidence. See 2RP 70.

When the State impermissibly comments on a defendant's right to silence, an appellate court applies the constitutional harmless error standard. Burke, 163 Wash.2d at 222. The error is only harmless if the appellate court is convinced beyond a reasonable doubt that the jury would have reached the same conclusion absent the improper comment, and where the evidence is so overwhelming that it must lead to a finding of guilt. Id.; State v.

Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). That is not the case here. See supra § 1.c. The prosecutor's suggestion that Mr. Rowland should have presented a case was not harmless beyond a reasonable doubt, because there was a possibility that the jury would have reached a different conclusion without the improper comment. See, e.g., State v. Romero, 113 Wn. App. 779, 794–95, 54 P.3d 1255 (2002) (noting that the State's evidence was "not overwhelming" and therefore declining to find a comment on the defendant's right to silence harmless beyond a reasonable doubt). The possibility of a different verdict is all the test requires. See, e.g., State v. Jones, 168 Wn.2d 713, 724–25, 230 P.3d 576 (2010) (explaining that "a reasonable jury . . . may have been inclined to see the [matter] in a different light.").

4. CUMULATIVE ERROR DENIED MR. ROWLAND A FAIR TRIAL.

Even when any single error standing alone may not require reversal, a reviewing court may find that the combined errors denied a defendant a fair trial. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). The cumulative error doctrine states that reversal is required when the cumulative effect of the errors had a

material affect on the outcome of a trial. State v. Alexander, 64 Wn. App. 147, 150–51, 822 P.2d 1250 (1992).

In this case, the trial court admitted damaging hearsay statements. See supra § 1a, b. In addition, the prosecutor confused the jury by suggesting that Mr. Rowland should have presented a defense. 2RP 70. The prosecutor misstated the jury’s role by telling them to find the “true verdict,” and by encouraging them to forgive the State’s lack of evidence. 2RP 86. Even if no individual error warrants reversal, the cumulative error doctrine mandates reversal in this case.

E. CONCLUSION

For the foregoing reasons, Mr. Rowland respectfully requests that this Court reverse his conviction for assault in the second degree.

DATED this 4th day of November 2011.

Respectfully submitted,



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