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Supreme Court No. 100698-5
(COA No. 82193-8-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

WILBUR SKIN, JR.,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Wilbur Skin, Jr. asks this Court to accept review of an opinion affirming his conviction for assault in the third degree. The Court of Appeals issued the opinion on January 31, 2022. Mr. Skin has attached a copy of the Court of Appeals' opinion to this petition.

B. ISSUES PRESENTED FOR REVIEW

A prosecutor commits misconduct when he minimizes and misrepresents the State's burden of proof. A prosecutor also commits misconduct when he argues inaccurate and highly prejudicial facts never admitted as evidence bolsters a witness' credibility. Here, the prosecutor discussed the "beyond a reasonable doubt" standard of proof in the context of his personal experience with a coffeemaker. This discussion trivialized the State's burden of proof and misrepresented when the jury could have a reason to doubt Mr. Skin's guilt.

Additionally, when the prosecutor acknowledged the inconsistencies in the complainant's case, he asserted there was a lot of "emotional baggage" in this case and domestic violence "isn't a one day thing," which suggested Mr. Skin previously assaulted the complainant. But the complainant never claimed Mr. Skin ever assaulted her in the past.

The prosecutor's misconduct substantially prejudiced Mr. Skin. Yet the Court of Appeals did not reverse. This Court should accept review. RAP 13.4(b)(1), (3), (4).

C. STATEMENT OF THE CASE

From 2018 to 2020, Wilbur Skin, Jr. and JoEllen Ellenwood were in an off-and-on relationship. RP 617. The two had trust issues because Ms. Ellenwood believed Mr. Skin was communicating with other women. RP 618, 627-28, 699, 701. However, by January of 2020, the two were engaged. RP 577, 618.

Mr. Skin helped Ms. Ellenwood transfer some pictures to her new phone when some videos and pictures from his phone

somehow showed up on Ms. Ellenwood's phone. RP 620-21. A video from Mr. Skin's phone showed a woman with her legs up in the air, and her breasts were exposed. RP 621. Ms. Ellenwood did not know who this woman was, and she was upset because "they had problems with other girls before." RP 627-28. Mr. Skin told Ms. Ellenwood the video came with Google Chrome, but she did not believe him. RP 628-29, 701. Additionally, other videos popped up with more naked women. RP 650, 703.

This incident with the naked videos was "the final straw" for Ms. Ellenwood. RP 701. Ms. Ellenwood ended her relationship with Mr. Skin. RP 577, 582, 651.

When Ms. Ellenwood ended the relationship, Mr. Skin called 911 and told them he intended to commit suicide. RP 648. Mr. Skin grabbed a kitchen knife during the call. RP 651-52. In the background, Ms. Ellenwood said this was a "garbage call," and she said she was not going to watch Mr. Skin kill himself "because that's what he wants me to do." RP 650, 654.

Mr. Skin previously tried to kill himself when Ms. Ellenwood attempted to break up with him. RP 687. Mr. Skin told the operator he did not want to live because of the breakup. RP 656. When the operator asked Ms. Ellenwood if their fight was physical, Ms. Ellenwood said the argument was only verbal. RP 581, 651.

Ms. Ellenwood's account of what happened later changed. Ms. Ellenwood told an officer she was unsure if Mr. Skin hit her. RP 711-12. A police officer who responded to Mr. Skin's suicide call saw some swelling on Ms. Ellenwood's left eye and some cuts on her back and hands. RP 785, 793. At trial, Ms. Ellenwood claimed Mr. Skin stabbed her with a knife, punched her, pulled her hair, and kicked her after she tried to take the knife away from him. RP 633-39, 715, 719. Additionally, during her testimony, Ms. Ellenwood sometimes stated Mr. Skin assaulted her before the 911 call, and she sometimes stated Mr. Skin did not assault her before the 911

call. RP 673-75. Ms. Ellenwood was twice convicted of theft. RP 697-98.

During closing arguments, and over Mr. Skin's overruled objection, the prosecutor discussed the "beyond a reasonable doubt standard" in the context of his experience with the coffee maker he used during his college years. RP 852-53. The prosecutor also discussed Ms. Ellenwood's differing representations of what occurred on the date Mr. Skin threatened to take his life. RP 858. After discussing this, and over Mr. Skin's overruled objection, the prosecutor asked the jury to use "a little bit of common sense," because "domestic violence isn't a one day thing." RP 859. The State did not present any evidence that Mr. Skin previously assaulted Ms. Ellenwood.

The jury acquitted Mr. Skin of assault in the second degree, but found Mr. Skin guilty of assault in the third degree and assault in the fourth degree. CP 115, 117. The court

dismissed the assault in the fourth degree conviction due to double jeopardy. RP 927.

Mr. Skin raised prosecutorial misconduct issues on appeal, but the Court affirmed. Op. at 1.

D. ARGUMENT

The prosecutor committed prejudicial misconduct when he misrepresented the State's burden of proof and argued facts not in evidence to bolster the complainant's credibility. The Court of Appeals' opinion to the contrary fundamentally misapprehends this Court's prior cases, requiring review.

a. <u>Both the federal and the Washington constitutions secure the right to a fair trial, and prosecutorial misconduct can deprive the accused of this right.</u>

The Sixth and Fourteenth Amendments of the United States Constitution and article I, section 22 of our State Constitution secure a person's right to a fair trial. U.S. Const. amends. VI, XI; Const. art. I, § 22; *In re Pers. Rest. of Glasmann*, 175 Wn.2d 696, 703, 286 P.3d 673 (2012). A

prosecutor may deprive a person of this right if the prosecutor engages in misconduct. *Glasmann*, 175 Wn.2d at 703.

As a representative of the State, prosecutors have a duty to ensure the defendant receives a fair trial. *Berger v. U.S.*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935). This duty requires the prosecutor to refrain from misstating the law to the jury. *See State v. Allen*, 182 Wn.2d 364, 373-74, 341 P.3d 268 (2015); *accord State v. Warren*, 165 Wn.2d 17, 27, 195 P.3d 940 (2008). Because the jury knows the prosecutor is an officer of the state, it is "particularly grievous" for a prosecutor to mislead the jury on the law. *Warren*, 165 Wn.2d at 27.

Prosecutorial misstatements of the law regarding the "beyond a reasonable doubt" standard are uniquely troubling, as this burden of proof is "the bedrock principle of the presumption of innocence, the foundation of our criminal justice system." *Id*. at 27. A prosecutor can dilute and even wash away the presumption of innocence if he defines it "so as to be illusive or too difficult to achieve." *Id*. at 25. A prosecutor

also misrepresents his burden of proof when he compares the "beyond a reasonable doubt" standard to everyday decision making, as "it improperly minimizes and trivializes the gravity of the standard and the jury's role." *State v. Lindsay*, 180 Wn.2d 423, 434, 326 P.3d 125 (2014) (internal quotations and citations omitted). Misrepresentations of the "beyond a reasonable doubt" standard constitute misconduct. *Id.* at 436.

Additionally, while a prosecutor has wide latitude to persuade the jury that it may make inferences based on the evidence he produced at trial, a prosecutor may not urge the jury to decide a case based on evidence he never presented. *State v. Pierce*, 169 Wn. App. 533, 553, 283 P.3d 1158 (2012); *accord State v. Jones*, 144 Wn. App. 284, 293, 183 P.3d 307 (2008). This is because it is a fundamental principle in our criminal justice system that a jury convict someone *only* with the evidence presented at trial. *See State v. Miles*, 139 Wn. App. 879, 886, 162 P.3d 1169 (2007), (*citing State v. Yoakum*, 37 Wn.2d 137, 144, 222 P.2d 181 (1950)). A prosecutor therefore

commits misconduct when he claims evidence the court never admitted at trial is evidence of a person's guilt. *State v. Belgarde*, 110 Wn.2d 504, 508-09, 755 P.2d 174 (1988).

When the defendant asserts the prosecutor engaged in misconduct, the defendant must show the prosecutor's conduct was both improper and prejudicial. *Glasmann*, 175 Wn.2d at 704. When the defendant preserves a claim of prosecutorial misconduct, this Court must reverse if a substantial likelihood exists the misconduct affected the jury verdict. *Allen*, 182 Wn.2d at 376.

b. <u>The prosecutor committed misconduct when he misrepresented the "beyond a reasonable doubt standard"</u>

The "beyond a reasonable doubt" standard requires the jury to acquit a person if a reasonable person, based on the evidence or lack of evidence, has a reason to doubt the person committed the crime the State accused him of committing. *See State v. Bennett*, 161 Wn.2d 303, 310-11, 317, 165 P.3d 1241 (2007); *see also* CP 81. However, in a misguided attempt to

explain the inverse of the beyond a reasonable doubt— "unreasonable doubt" —, the prosecutor gave an example regarding his experience with a coffee maker that impermissibly (1) analogized the beyond a reasonable doubt standard to everyday decision making; and (2) described the beyond a reasonable doubt standard inaccurately. Because this explanation misrepresented the State's burden of proof, the prosecutor's comments constitute misconduct.

During summation, the prosecutor began to discuss the beyond a reasonable doubt standard. RP 851-52. He said a reasonable doubt "is one based on reason," which he believed was "kind of circular." RP 852. The prosecutor expressed he wanted to distinguish between beyond a reasonable doubt from "beyond a shadow of a doubt." RP 852. He then said he wanted to give an example of "unreasonable doubt." RP 852. This was the example the prosecutor gave to the jury:

> When I was in college -- and I won't tell you how long ago that was -- **I had one of these really, really old coffee machines.** And all it does -- there's no on/off

> switch. It's literally -- it's one of these pots you plug into the wall and it heats water and it percolates water and makes coffee. **When you're done with it, you unplug it, that's -- it's simple, it's easy.** I think I bought it at a garage sale for $2. Okay**. One day, as I was rushing to class, I forgot to unplug it. And for, literally, the next three week, my room smelled of burnt coffee** and I could not get rid of that smell. That incident is so strong in my mind now that no -- **every day I leave my home, just as I'm getting to my car or walking out the door, I have this nagging feeling: Did I turn off my coffee machine? Okay.**
> **I still have that doubt now**, even though I have a completely automated coffee machine that turns itself off after, like, 30 minutes of unattendance. **My doubt on whether I turned off my coffee machine is not reasonable because I don't have any reason for it. It's my personal neurosis.**

RP 852-53 (emphases added).

Mr. Skin objected, arguing this "example" of "unreasonable doubt" diminished and misstated the burden of proof. RP 853. The court overruled the objection. RP 853. After the court overruled Mr. Skin's objection, the prosecutor stated:

> As I said, that's my personal neurosis, that's not a reasonable doubt because I have no evidence or lack of evidence that support that thing. All right. So that is the standard we're asking you to apply.

RP 853.

The prosecutor's "example" and the court's decision to overrule Mr. Skin's objection to this "example" was in error for two material reasons. First, the prosecutor improperly compared the inverse of the "beyond a reasonable doubt" standard—the "unreasonable doubt" standard— to everyday decision making by comparing it to the mundane act of him checking his coffee maker before he leaves his house. *Lindsay*, 180 Wn.2d at 434. This argument improperly suggested to the jury that they too could decide whether they had a reasonable doubt as to Mr. Skin's guilt by equating their everyday decision making to the beyond a reasonable doubt standard. But this improperly minimizes the jury's duty and erroneously "trivializes the gravity of the standard." *Id*. The prosecutor's "example" inappropriately diluted the State's burden of proof.

In *Lindsay*, the prosecutor gave an example of the reasonable doubt standard in the context of crossing a sidewalk. 180 Wn.2d 423, 436, 326 P.3d 125 (2014). Like a pedestrian

crossing a sidewalk, preparing coffee with a coffeemaker is an everyday experience for millions of people throughout the country. *See* Nick Brown, *NCA Report Shows Dramatic Shifts in Pandemic-Era Coffee Drinking Trends*, Roast Mag. (Apr. 1, 2021)[1] (discussing prevalence of brewing coffee at home). But using an example of everyday decision making to illustrate the beyond a reasonable doubt standard "improperly minimizes and trivializes the gravity of the standard and the jury's role." *Id*. at 436.

The Court of Appeals' opinion misses this point and distinguishes *Lindsay* by claiming that the prosecutor's comments here only referred to "what would make a doubt unreasonable." Op. at 7. This distinction exalts form over substance. Inaccurately describing the inverse of the "beyond a reasonable doubt" standard presents the same concerns as a

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[1] https://dailycoffeenews.com/2021/04/01/nca-report-shows-dramatic-shifts-in-pandemic-era-coffee-drinking-trends/.

prosecutor inaccurately describing the “beyond a reasonable doubt” standard.

The prosecutor’s “example” of “unreasonable doubt” was also inaccurate and misleading. The prosecutor asserted he had an “unreasonable” reason to doubt he turned off his coffee maker before he left his home, but he actually did have a reasonable reason. This was because, in the past, he has forgotten to turn off his coffee machine. This led to the unfortunate consequence of his house smelling like burnt coffee for several weeks. Because the prosecutor actually gave an example of having a reason to doubt that he turned off his coffee maker, the prosecutor’s story was an inapt and incorrect way of describing to the jury what it means to have no reason to doubt the defendant’s guilt.

c. The prosecutor also committed misconduct when he argued facts never admitted as evidence.

At another point during summation, the prosecutor acknowledged the inconsistencies between Ms. Ellenwood's initial claim Mr. Skin did not assault her versus her later allegation Mr. Skin assaulted her. RP 858-59. The prosecutor then claimed the purported assault was a "chaotic" and "quick" event. RP 859. The prosecutor then argued:

> There's clearly a lot of emotional baggage prior to this incident. You heard -- Ms. Ellenwood said she finallyjust got sick and tired of it. It's not -- here, we're going to ask you a little bit of common sense a little bit, right? Domestic violence (inaudible) isn't a one-day thing.

RP 859.

Mr. Skin objected, arguing this claim involved facts not admitted into evidence. RP 859. Mr. Skin also argued these statements contravened ER 702, which dictates when a court may allow an expert to testify. RP 859. The court overruled the

objection. RP 859. After the court overruled the objection, the prosecutor claimed:

> [T]here was multiple prior incidents. This is, kind of, the camel that broke the back, if you will, right? You heard her mention prior -- they had this arguments before. You heard her mention that she suspected infidelity before because Mr. Skin contacted one of her friends. This is, let's call it, accumulation of a number of incidents.

RP 853.

This argument was inappropriate for several reasons. First, the court never admitted any evidence that Mr. Skin previously assaulted Ms. Ellenwood. Indeed, before this case, Mr. Skin did not have any convictions—much less domestic violence convictions— involving Ms. Ellenwood. Ms. Ellenwood also never alleged Mr. Skin at any time assaulted her in the past. Yet the prosecutor's comment that domestic violence "isn't a one day thing" falsely suggested Mr. Skin previously assaulted Ms. Ellenwood.

Nevertheless, the Court of Appeals held these statements did constitute misconduct, opining the "domestic violence"

references actually referred to Mr. Skin and Ms. Ellenwood's prior arguments. Op. at 10. But having prior arguments is not the same thing as having prior incidents of domestic violence. The Court of Appeals falsely equated the two.

The prosecutor's suggestion that there was prior domestic violence in this case was particularly prejudicial because this case concerned an accusation that Mr. Skin committed an act of domestic violence. *See State v. Gunderson*, 181 Wn.2d 916, 925, 337 P.3d 1090 (2014). This argument was "likely to stimulate an emotional response rather than a rational decision." *Salas*, 168 Wn.2d at 671 (*referencing State v. Powell*, 126 Wn.2d 244, 264, 898 P.2d 615 (1995)). By falsely suggesting Mr. Skin repeatedly assaulted Ms. Ellenwood in the past, the prosecutor undoubtedly raised the ire of the jury against Mr. Skin. The prosecutor used this false suggestion inappropriately to bolster Ms. Ellenwood's credibility, which was at issue in this case.

Second, the State never produced any evidence about the dynamics of domestic violence relationships and whether they are typically comprised of more than a "one day thing." The State certainly could have introduced expert testimony via ER 702 relating to domestic violence relationships to explain Ms. Ellenwood's differing stories, but the State chose not to. *See, e.g., State v. Grant*, 8 Wn. App. 98, 920 P.2d 609 (1996) (discussing the propriety of introducing expert testimony to explain inconsistent stories in cases involving accusations of domestic violence). The decision not to introduce expert testimony might have been because no evidence existed that Mr. Skin previously assaulted Ms. Ellenwood. Nevertheless, no evidence—much less expert evidence—supported the prosecutor's claim that domestic violence "isn't a one day thing." RP 859. The prosecutor inappropriately argued facts not in evidence to overcome a weakness in his case: the complainant's differing accounts of what occurred on the date in question.

d. The prosecutor's misconduct prejudiced Mr. Skin.

To assess whether prosecutorial misconduct warrants reversal, the person must show the prosecutor's conduct prejudiced him. *Glasmann*, 175 Wn.2d at 704. This Court does not assess whether the prosecutor's misconduct prejudiced the defendant simply by assessing whether sufficient evidence exists to uphold the verdict. *Allen*, 182 Wn.2d at 376. Instead, this Court assesses the prejudice in the context of the entire record, the issues in the case, the instructions to the jury, and the circumstances at trial. *Warren*, 165 Wn.2d at 28. This Court also examines whether the court overruled the objection. *Allen*, 182 Wn.2d at 378. This is because a trial court's erroneous overruling of a specific objection "lends an aura of legitimacy to what was otherwise an improper argument." *Id.* (quoting *State v. Davenport*, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984)). If a substantial likelihood exists that the prosecutor's

comments *affected* the jury verdict, then this Court must reverse. *Id*. at 376-79.

For numerous reasons, a substantial likelihood exists the misconduct affected the jury's verdict. First, the prosecutor's argument concerning "unreasonable doubt —" and the court's overruling of Mr. Skin's objection to the prosecutor's representation of "unreasonable doubt —," misrepresented the "beyond a reasonable doubt standard" to the jury. The jury's sole role is to determine whether the State met its burden in proving its case beyond a reasonable doubt. *State v. Emery*, 174 Wn.2d 741, 751, 278 P.3d 653 (2012). But the prosecutor's comments allowed the jury to analogize the standard to everyday decision making, and it confused the jury by providing an example that actually demonstrated when a person could have a reason to doubt.

Here, the jury certainly had a multitude of reasons to doubt Ms. Ellenwood's story. She originally told the 911 operator that Mr. Skin did not assault her but then later claimed

he did. RP 583, 633-37, 673-74, 706-07, 730. Ms. Ellenwood's testimony was also inconsistent, as she would equivocate by sometimes testifying that Mr. Skin did not assault her before the 911 call and by sometimes testifying that he did assault her before the 911 call. RP 673-75. Ms. Ellenwood even told an officer on the date of the incident that she did not know if Mr. Skin hit her. RP 711-12. She was previously convicted of two crimes of dishonesty, theft, which also detracts from her credibility. RP 697-98.[2] Yet the prosecutor's inapt description of "unreasonable doubt" essentially told the jury that if these reasons caused it to doubt Mr. Skin's guilt, then that would be unreasonable.

The prosecutor's comments implying Mr. Skin previously subjected Ms. Ellenwood to other assaults—and the

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[2] Theft is a crime of dishonesty because this crime "reflects adversely on a [person's] honesty and integrity…the act of taking property is positively dishonest." *State v. Ray*, 116 Wn.2d 531, 545, 806 P.2d 1220 (1991); *see* Karl B. Tegland, Washington Practice Series: Evidence Law & Practice § 609.4 (6th ed. 2018).

court's overruling of Mr. Skin's objection to these comments—also prejudiced Mr. Skin. These comments falsely painted Mr. Skin as a repetitive abuser who had the propensity to abuse Ms. Ellenwood on the date in question. And these comments inappropriately bolstered Ms. Ellenwood's debatable credibility, as they suggested to the jury that Mr. Skin's previous assaults somehow explain Ms. Ellenwood's inconsistencies when reporting what supposedly happened to her on the date in question.

The prosecutor's misconduct deprived Mr. Skin of his right to a fair trial. The Court of Appeals should have reversed, but it did not. This Court should accept review. RAP 13.4(b)(1), (3), (4).

E. CONCLUSION

For the reasons stated in this petition, Mr. Skin respectfully requests that this Court accept review.

In compliance with RAP 18.7(b), counsel certifies the word processing software calculates the number of words in this document as 3,514 words.

DATED this 2nd day of March, 2022.

Respectfully submitted,

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. WILBUR DON SKIN, JR., Appellant.	No. 82193-8-I DIVISION ONE UNPUBLISHED OPINION

CHUN, J. — A jury found Wilbur Don Skin Jr. guilty of assault in the third degree, domestic violence. On appeal, Skin contends the prosecutor committed misconduct in two ways: (1) by trivializing and minimizing the burden of proof and (2) by asserting facts not in the record. For the reasons below, we affirm.

I. BACKGROUND

JoEllen Ellenwood and Skin planned to get married. While at Ellenwood's apartment, Skin provided her "technical support" and tried to transfer photos from her old phone to her new one. Ellenwood's cell phone plan included Skin's phone. When he tried to transfer Ellenwood's photos, his own photos and videos transferred to her new phone. The photos and videos included explicit content of other women. After Ellenwood saw the content, she and Skin began to argue. Ellenwood testified, "I didn't know who the woman was and we had problems with other girls before." She "couldn't take it anymore." Ellenwood tried to end the relationship, and Skin reacted by saying "he wanted to end his life." Skin retrieved a kitchen knife and called 911 to report he intended to kill himself.

Citations and pin cites are based on the Westlaw online version of the cited material.

Ellenwood joined the call “on speaker.” The 911 operator asked Ellenwood, “Have you guys been physical with each other at all?” Ellenwood responded, “Just verbally.” Law enforcement officers and firefighters arrived and noted that Ellenwood had a swollen left eye and cuts on her hands and back.

The State charged Skin with assault in the second degree and assault in the third degree, both charged as acts of domestic violence with a deadly weapon enhancement.

At trial, Ellenwood testified to the following: She did not know the women in the photos and videos. She said, “[I]it wasn’t like it was—not like it was the first time, you know. We had problems before, you know.” Before, relationship issues began when Ellenwood found out that Skin was texting another woman.

Ellenwood gave conflicting testimony about the timing and nature of the assault. The prosecutor asked, “[A]t some point, did he get physical with you?” and she said, “Yes.” She said he stabbed and kicked her, and pulled her hair. The prosecutor asked if the physical altercation “happened prior to the 911 call,” and she said, “[H]e called after all this stuff had happened.” When the prosecutor asked why she told the 911 operator the fight was not physical, Ellenwood said that at that point, Skin had not hit her and they “were just arguing.” Then she said that the physical assault happened before the call. She also said, “I didn’t even realize that . . . I had gotten stabbed. But before, we were just . . . verbally talking to each other.”

In closing argument, the prosecutor said, “I have the burden of proving Mr. Skin guilty beyond a reasonable doubt on each of the charges.” He also said

that “there is a specific legal definition of what ‘reasonable doubt’ is and what ‘beyond a reasonable doubt’ is.” The prosecutor said that “for doubt to be reasonable, it needs to be based on a reason, based on evidence, or based on lack of evidence,” which is “distinguish[ed] from beyond all doubt.” The prosecutor then gave this example of unreasonable doubt:

> When I was in college – and I won’t tell you how long ago that was—I had one of these really, really old coffee machines. And all it does—there’s no on/off switch. It’s literally—it’s one of these pots you plug into the wall and it heats water and it percolates water and makes coffee. When you’re done with it, you unplug it, that’s—it’s simple, it’s easy. I think I bought it at a garage sale for $2. Okay. One day, as I was rushing to class, I forgot to unplug it. And for, literally, the next three week[s], my room smelled of burnt coffee and I could not get rid of that smell. That incident is so strong in my mind now that no—every day I leave my home, just as I’m getting to my car or walking out the door, I have this nagging feeling: Did I turn off my coffee machine? Okay. I still have that doubt now, even though I have a completely automated coffee machine that turns itself off after, like, 30 minutes of unattendance. My doubt on whether I turned off my coffee machine is not reasonable because I don’t have any reason for it. It’s my personal neurosis.

Defense counsel objected to the prosecutor’s statement for “[d]iminishing and misstating the burden of proof.” The court overruled the objection. On rebuttal, the prosecutor reiterated the burden, “The legal standard is: Have I provided enough evidence to prove him guilty beyond a reasonable doubt?”

Also during closing argument, the prosecutor discussed Ellenwood’s testimony about her relationship with Skin,

> There’s clearly a lot of emotional baggage prior to this incident. You heard—Ms. Ellenwood said she finally just got sick and tired of it. It’s not—here, we’re going to ask you a little bit of common sense a little bit, right? Domestic violence (inaudible) isn’t a one-day thing.

Defense counsel objected, citing ER 702, and saying “Facts not in evidence.”

The trial court overruled the objection. And the prosecutor explained there were multiple prior incidents of arguments.

The jury found Skin guilty of (1) the lesser included crime of assault in the fourth degree on the assault in the second degree charge and (2) assault in the third degree. Citing double jeopardy concerns, the trial court dismissed the assault in the fourth degree count.

Skin appeals.

II. ANALYSIS

Skin contends the prosecutor committed prejudicial misconduct in two ways: (1) by trivializing and minimizing the State's burden of proof, and (2) asserting facts not in the record by saying, "Domestic violence (inaudible) isn't a one-day thing." He says the trial court erred in overruling Skin's objections to those statements. We conclude the court acted within its discretion.

Prosecutorial misconduct may deprive a defendant of their constitutional right to a fair trial under the Sixth and Fourteenth Amendments to the U.S. Constitution and article I, section 22 of the Washington State Constitution. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 703–04, 286 P.3d 673 (2012). To establish misconduct, the defendant must "show that in the context of the record and all of the circumstances of the trial, the prosecutor's conduct was both improper and prejudicial." Id. at 704. As is the case here, when the defendant objects at trial, to show prejudice on appeal, they must show "a substantial likelihood that the misconduct affected the jury verdict." Id. To determine prejudice, we consider the prosecutor's comments "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. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). We review a trial court's rulings on claims of prosecutorial misconduct for abuse of discretion. State v. Wang, 5 Wn. App. 2d 12, 30, 424 P.3d 1251 (2018).

A. Coffee Machine

Skin says the prosecutor trivialized and minimized the burden of proof during closing argument by misstating the law and comparing the beyond a reasonable doubt standard "to everyday decision making." We conclude the trial court acted within its discretion in overruling Skin's objection. And even if it did not, Skin does not show prejudice.

The trial court's jury instructions matched WPIC 300.04. It instructed the jury as follows:

> The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

It also provided the following instruction, matching WPIC 4.01:

> The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.
>
> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence.

During closing argument, the prosecutor said, "I have the burden of proving Mr. Skin guilty beyond a reasonable doubt on each of the charges." The prosecutor elaborated that "for doubt to be reasonable, it needs to be based on a reason, based on evidence, or based on lack of evidence." The prosecutor then provided the coffee machine example. He said, "[E]ven though I have a completely automated coffee machine that turns itself off after, like, 30 minutes of unattendance [sic]. My doubt on whether I turned off my coffee machine is not reasonable because I don't have any reason for it." On rebuttal, he reiterated, "The legal standard is: Have I provided enough evidence to prove him guilty beyond a reasonable doubt?"

"A prosecuting attorney commits misconduct by misstating the law." State v. Allen, 182 Wn.2d 364, 373–74, 341 P.3d 268 (2015). "Such misstatements have 'grave potential to mislead the jury.'" In re Det. of Urlacher, 6 Wn. App. 2d 725, 746, 427 P.3d 662 (2018) (quoting State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984)). "Statements as to the law in closing argument are to be confined to the law set forth in the instructions." Id. at 746–47.

"Due process requires that the State bear the burden of proving every element of the crime beyond a reasonable doubt." State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940 (2008). In State v. Lindsay, 180 Wn.2d 423, 436, 326 P.3d 125 (2014), our Supreme Court determined that certain analogies to everyday experiences trivialize the State's burden of proof and are improper. There, in

closing, the prosecutor said that, beyond a reasonable doubt, a pedestrian can walk confidently across the street when they have the walk sign, make eye contact with the driver in an approaching car, and the driver nods. Id. The Supreme Court determined that the prosecutor's comparison "'improperly minimizes and trivializes the gravity of the standard and the jury's role.'" Id. at 436 (quoting State v. Lindsay, 171 Wn. App. 808, 828, 288 P.3d 641 (2012)).

Relying on Lindsay, Skin says the coffee machine example involved everyday decision making like crossing the street, so the prosecutor improperly minimized and trivialized the State's burden of proof. But Lindsay is readily distinguishable. There, the prosecutor compared an example of "everyday decision making"—i.e., to cross a crosswalk—to the jury's decision that the State has proved the defendant committed the crime beyond a reasonable doubt. By contrast, here, the prosecutor focused on explaining what would make a doubt unreasonable, and provided an example of a doubt not grounded in fact. His statements neither trivialized nor minimized the burden of proof and did not amount to misconduct. The trial court acted within its discretion in overruling the objection.

Assuming the trial court abused its discretion, Skin does not establish prejudice. As discussed above, we consider the prosecutor's comments "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." Brown, 132 Wn.2d at 561.

Skin contends that the prosecutor's coffee machine example was prejudicial because it implied that the jury's reasons to doubt were unreasonable.

He says the jury could have doubted Ellenwood's story because she provided inconsistent testimony about when the argument became physical. And he says the jury could have doubted Ellenwood's credibility because she has a criminal history of theft, which is a crime of dishonesty. But the coffee machine example explained the concept of a doubt not grounded in fact. We cannot see how it could have prevented the jury from weighing the inconsistencies in Ellenwood's testimony or from assessing her credibility based on her criminal history.

Also, there was significant evidence in addition to Ellenwood's testimony that Skin assaulted her. For example, a responding officer and firefighter testified to finding Ellenwood with swelling and cuts. And during the 911 call, Skin had a knife and threatened to kill himself. Defense counsel acknowledged in closing that, during the call, Skin's "emotions are clearly up and down. He's in a moment of crisis."

Additionally, during closing argument, the prosecutor acknowledged the State's burden to prove the crimes beyond a reasonable doubt. The trial court properly instructed the jury on the burden. Those instructions explained that "[t]he lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law," and that "[t]he law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions." We presume juries follow instructions. State v. Kirkman, 159 Wn.2d 918, 928, 155 P.3d 125 (2007). So even if the prosecutor misstated the law, Skin has not shown a substantial likelihood that misconduct affected the jury verdict.

B. "[O]ne-day thing"

Skin says the prosecutor improperly referenced facts not in evidence by suggesting in closing argument that Skin had previously assaulted Ellenwood. We conclude the trial court did not abuse its discretion in overruling Skin's objection. And even if it did, Skin does not show prejudice.

During closing, the prosecutor discussed Ellenwood's conflicting testimony about her injuries. Then the prosecutor sought to explain the incident in the context of the relationship between Skin and Ellenwood, saying,

> There's clearly a lot of *emotional baggage prior to this incident*. You heard—Ms. Ellenwood said she *finally just got sick and tired of it*. It's not—here, we're going to ask you a little bit of common sense a little bit, right? *Domestic violence (inaudible) isn't a one-day thing*.

(Emphasis added.) After the trial court overruled Skin's objection, the prosecutor said Skin and Ellenwood had arguments prior to the incident.

"A prosecutor commits misconduct by encouraging the jury to decide a case based on evidence outside the record." State v. Teas, 10 Wn. App. 2d 111, 128, 447 P.3d 606 (2019), review denied, 195 Wn.2d 1008, 460 P.3d 182 (2020). But "a prosecutor has wide latitude to argue reasonable inferences from the evidence." Glasmann, 175 Wn.2d at 704. A prosecutor also commits misconduct when they "appeal[] to the jury's passion and prejudice and encourage[] the jury to base the verdict on the improper argument." Id. at 711.

Skin contends the prosecutor's statement was improper because there was no evidence that Skin previously assaulted Ellenwood. The State responds that, looking at its statement in the context of the record and trial, the

prosecutor's "one-day thing" statement referenced Skin and Ellenwood's history of relationship issues. We agree. The prosecutor did not reference other assaults, nor did he encourage the jury to decide the case based on evidence of other assaults. Instead, the prosecutor emphasized that Skin and Ellenwood had arguments leading up to the alleged crime.

Even assuming the trial court abused its discretion in overruling Skin's objection, he does not show prejudice. As discussed above, we consider the prosecutor's comments "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." Brown, 132 Wn.2d at 561.

Here, as discussed above, the prosecutor made the "one-day thing" statement while explaining Ellenwood and Skin's previous arguments and "emotional baggage." Also, as discussed above, there was significant evidence that Skin assaulted Ellenwood.[1]

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[1] Skin also says the prosecutor's statement that domestic violence is not a "one-day thing" prejudiced him because the statement was inflammatory and likely to invoke an emotional response. A prosecutor commits misconduct when they "appeal[] to the jury's passion and prejudice and encourage[] the jury to base the verdict on the improper argument." Glasmann, 175 Wn.2d at 711. But as discussed above, this statement was made in the context of explaining the history of Skin's relationship with Ellenwood. And Skin does not show how it appealed to the jury's passion and prejudice.

Skin also says the statement was prejudicial because it bolstered Ellenwood's credibility and "allowed the jury to improperly infer Mr. Skin was a repetitive [abuser] with a propensity for assaulting Ms. Ellenwood." But again, the prosecutor was explaining the history of the relationship. And we cannot see how it could have prevented the jury from weighing the inconsistencies in Ellenwood's testimony or from assessing her credibility based on her criminal history.

Skin says that when the court overruled his objection, it gave the prosecutor's statement an aura of legitimacy. But the trial court instructed the jury as follows:

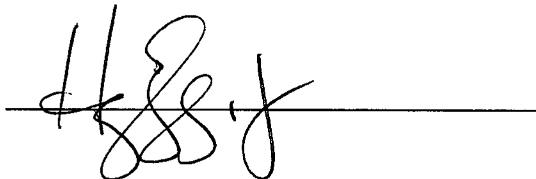
> You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

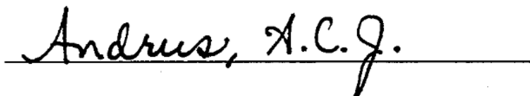
We presume juries follow instructions and Skin has not shown otherwise here.

Skin has not shown a substantial likelihood that any misconduct affected the jury verdict and thus has not established prejudice.

We affirm.

WE CONCUR:





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