SUPREME COURT NO. 100959-3

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RICHARD PLECHNER,

Petitioner.

ON DISCRETIONARY REVIEW
FROM THE COURT OF APPEALS, DIVISION THREE

Court of Appeals No. 38563-9-III
Mason County No. 19-1-00359-23

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner, RICHARD PLECHNER, by and through his attorney, CATHERINE E. GLINSKI, requests the relief designated in part B.

B. COURT OF APPEALS DECISION

Plechner seeks review of the May 3, 2022, unpublished decision of Division Three of the Court of Appeals affirming his convictions.

C. ISSUES PRESENTED FOR REVIEW

1. Where the record shows a complete breakdown in communication between Plechner and trial counsel which impacted the quality of the defense, does the court's refusal to appoint substitute counsel require reversal?

2. During closing argument the prosecutor gave his personal opinion of the case, impugned defense counsel, referred to facts outside the evidence, and misstated the law. Did the cumulative effect of this prosecutorial misconduct deny Plechner a fair trial?

3. Where trial counsel failed to advocate for Plechner's right of confrontation, failed to impeach the complaining witness with available evidence, and failed to object to prosecutorial misconduct, does ineffective assistance of counsel require reversal?

4. Do the issues raised in Plechner's statement of additional grounds for review require reversal?

D. STATEMENT OF THE CASE

The relevant facts are set out in the Brief of Appellant at 2-18 and are incorporate herein by reference.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. Whether the trial court sufficiently honored Plechner's right to counsel is a significant constitutional question this Court should address.

Both the federal and state constitutions guarantee the right to counsel in criminal proceedings. U.S. Const. amend VI; Wash. Const. art. I, § 22. The right to counsel is violated when a defendant is forced to proceed with an attorney with whom he

has an irreconcilable conflict, even if the attorney is competent. *Brown v. Craven*, 424 F.2d 1166, 1170 (9th Cir. 1970); *Nguyen*, 262 F. 3d at 1003-04. An irreconcilable conflict exists where there is a "serious breakdown in communications." *Nguyen*, 262 F.3d at 1003 (citing *United States v. Musa*, 220 F.3d 1096, 1102 (9th Cir. 2000)). Where "the relationship between lawyer and client completely collapses, the refusal to substitute new counsel violates the defendant's Sixth Amendment right to effective assistance of counsel," even if no actual prejudice is shown. *In re Personal Restraint of Stenson*, 142 Wn.2d 710, 722, 16 P.3d 1 (2001); *United States v. Moore*, 159 F.3d 1154, 1158 (9th Cir. 1998).

Substitution of counsel is warranted where the defendant shows good cause, "'such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication.'" *State v. Davis*, 3 Wash.App.2d 763, 790, 418 P.3d 199 (2018) (quoting *State v. Thompson*, 169 Wn. App. 436, 457, 290 P.3d 996 (2012)). When the court is made aware of a

conflict between the defendant and counsel, it must thoroughly investigate the factual basis of the defendant's dissatisfaction so that it can make an informed decision on the motion for substitution. *Id*.

In determining whether a motion for substitution of counsel was improperly denied, a reviewing court considers (1) the extent of the conflict, (2) the adequacy of the court's inquiry, and (3) the timeliness of the motion. *Stenson*, 142 Wn.2d at 724 (citing *Moore*, 159 F.3d at 1158-59). These factors all support the conclusion that the court erred in denying Plechner's request for new counsel.

First, the record shows a complete breakdown in communications between Plechner and trial counsel Austin, which constitutes a substantial conflict. The relationship between attorney and client bears on whether representation has been irrevocably poisoned. *State v. Cross*, 156 Wn.2d 580, 608, 132 P.3d 80 (2006).

The conflict between Plechner and Austin first presented as a strategy disagreement. Plechner wanted to call Jasmine Palma as a witness, and Austin decided not to do so. RP 29, 56-59, 64; *see Cross*, 156 Wn.2d at 606 ("[T]he choice of trial tactics, the action to be taken or avoided, and the methodology to be employed must rest in the attorney's judgment[,] *quoting State v. Piche*, 71 Wn.2d 583, 590, 430 P.2d 522 (1967)). The Court of Appeals concluded that the conflict between Plechner and Austin related solely to trial strategy, and there was no error by the trial court in refusing to appoint substitute counsel. Opinion, at 15. The record shows, however, that the conflict went much deeper than disagreement over strategy. There was in fact a breakdown in communication which irrevocably destroyed the attorney/client relationship.

Even the way Austin and Plechner described the strategy dispute to the court demonstrated that they were not able to communicate. Austin told the court that Plechner wanted to call Palma as a witness solely to invoke her Fifth Amendment rights.

RP 59. Plechner explained, however, that he thought Palma's potential testimony could be compartmentalized so that counsel could ask only questions which would not incriminate her. RP 70-71. Austin admitted Palma could provide some testimony that was not subject to Fifth Amendment protections, but he did not feel that testimony was necessary to the defense. RP 64. Plechner had no confidence that Austin was capable of making a sound strategic decision, however, because he felt Austin had not done the necessary research. RP 101-03. Austin was not even able to address this basic concern, due to his inability to communicate with Plechner. RP 107-09.

The record contains other examples of this breakdown in communication. On the day set for trial Austin moved for a continuance to conduct further investigation, explaining that his delay was in part due to his difficulty communicating with Plechner. RP 10. When the dispute as to Palma's testimony was brought to the court's attention, Austin told the court that Plechner wanted to make a motion for new counsel. Plechner had

to interject because Austin was not accurately representing his position. RP 56-59. Again, when Plechner raised his concern that Austin had not conducted the necessary research to adequately represent him, Austin told that court that he had tried to explain his position to Plechner, but communication had broken down and they were at an impasse. RP 107-09.

The communication breakdown continued to impact Austin's performance during trial. Tina Gumm, the accusing witness, testified that Plechner had gone to jail sometime prior to the alleged incident. RP 168. Outside the jury's presence Plechner complained that the jury heard that he had been in jail but not that the charge had been dismissed, and he asked for a curative instruction. RP 196. Austin was unable to understand Plechner's concern regarding Gumm's testimony, thinking Plechner was asking him to make a motion to dismiss this case. Even the trial judge, who could overhear this attorney/client conversation, understood what Plechner was asking, when his appointed trial counsel did not. RP 196, 205-08.

Then again, prior to the defense case, Plechner asked for a recess to retrieve some documents which he felt were important but had inadvertently left at home. Austin was unable to understand what the documents were or adequately describe their importance to the court. Plechner expressed his frustration with Austin on the record, and Austin admitted he was unable to follow Plechner's argument as to how the documents would be used in the defense. RP 263-64, 272-73.

While the disagreement about trial strategy is what brought the conflict to the court's attention, the record in fact shows a complete breakdown in communication. The defendant's Sixth Amendment right to counsel may be violated if a disagreement about strategy compromises the attorney's ability to provide adequate representation. *See Cross*, 156 Wn.2d at 611. If, as a result of a breakdown in communication, the client receives inadequate representation, prejudice is presumed. *Stenson*, 142 Wn.2d at 724 (citing *Brown*, 424 F.2d at 1166).

The record contains numerous indications that Plechner received inadequate representation. On the first day of trial, Austin admitted he did not even know the elements of the crime with which Plechner was charged, thinking the State had alleged forcible compulsion rather than inability to consent. RP 25-26. Next, when the State failed to elicit sufficient testimony from its witness to identify Plechner, Austin offered a suggestion to help the State prove that essential element. RP 268. Austin also failed to argue for admission of evidence pertaining to Gumm's bias, failed to impeach Gumm with statements she had made contradicting her trial testimony, and failed to object to prosecutorial misconduct in closing argument. RP 232-33, 377-78, 385-87, 455, 461-62.

It is reasonable to presume that if Plechner had been represented by an attorney with whom he could communicate, the outcome of the trial would have been different. The substantial conflict resulted in a denial of Plechner's right to effective assistance of counsel. *See Brown*, 424 F.2d at 1169-70.

Next, the court's inquiry into the conflict was inadequate. "An adequate inquiry must include a full airing of the concerns (which may be done *in camera*) and a meaningful inquiry by the trial court." *Cross*, 156 Wn.2d at 610 (citing *Stenson*, 142 Wn.2d at 731). In *Cross*, the trial court repeatedly inquired as to the conflict and was fully apprised, it requested and received briefing on the issue, and it ultimately ruled the strategic conflict between Cross and counsel did not require intervention. This Court held that this careful review of the dispute was meaningful and full. *Cross*, 156 Wn.2d at 610.

The court in this case was not as thorough. Although Austin raised his inability to communicate with Plechner several times, and Plechner expressed his frustration with Austin's performance, the court never looked beyond the conflict regarding whether to call Palma as a witness. RP 109. The court's solution was to set up a procedure for determining whether Palma would be permitted to testify. RP 68-70, 104. But it never addressed the breakdown in communication between Austin and

Plechner, even though Austin told the court he and Plechner were working toward different ends. RP 115. At one point Plechner told the court he was worried about Austin's ability to represent him because he seemed to have headaches, he was shaking, and he seemed to be avoiding issues that might be stressful. RP 103. The court did not address those concerns or seek any further information. RP 104. The court abused its discretion in failing to investigate the conflict sufficiently.

As to timeliness, where the request for a change of counsel is made during the trial, or on the eve of trial, the court may, in the exercise of sound discretion, deny the request. *Stenson*, 142 Wn.2d at 732. Here, Austin raised the issue of breakdown in communication before and during jury selection. He informed the court that the relationship was not functioning properly and he could see it interfering with trial. RP 56, 67, 97-98. While the timing is not ideal, substitute counsel could have been appointed prior to the presentation of evidence. Given the nature and extent

of the breakdown in communication, denial of the motion to substitute counsel was not a sound exercise of discretion.

Whether the trial court violated Plechner's constitutional right to counsel by denying his request to discharge Austin and appoint substitute counsel, forcing him to either proceed pro se or with counsel with whom he had a serious breakdown in communication, is a significant constitutional question this Court should review. RAP 13.4(b)(3).

2. Whether prosecutorial misconduct in closing argument constituted a violation of Plechner's right to a fair trial is a significant constitutional question this Court should address.

The fundamental right to a fair trial is guaranteed by the federal and state constitutions. U.S. Const. amends. VI and XIV; Wash. Const. art. I, § 22. A prosecutor is a quasi-judicial officer who shares in the court's duty to ensure that every accused person receives a fair trial. *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011); *State v. Fisher*, 165 Wn.2d 727, 746, 202 P.3d 937 (2009); *State v. Huson*, 73 Wn.2d 660, 663, 440 P.2d

192 (1968). A prosecutor who subverts or evades the constitutional safeguards protecting the rights of accused persons can render a criminal trial unfair. *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012). In reviewing prosecutorial misconduct, courts consider the context of the entire trial. *Id*. at 704.

A prosecutor's misconduct in closing argument may deny a defendant his right to a fair trial. *Monday*, 171 Wn.2d at 676-77. "A '"[f]air trial" certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office ... and the expression of his own belief of guilt into the scales against the accused.'" *Glasmann*, 175 Wn.2d at 704 (quoting *Monday*, 171 Wn.2d at 677 (quoting *State v. Case*, 49 Wn.2d 66, 71, 298 P.2d 500 (1956))).

Although the prosecutor has wide latitude to argue reasonable inferences from the evidence, "'[i]t is unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or

the guilt of the defendant.'" *United States v. Young*, 470 U.S. 1, 8, 105 S. Ct. 1038, 84 L. Ed.2d 1 (1985) (quoting American Bar Association Standards for Criminal Justice 3-5.8(b)(2d ed. 1980)); *see also State v. Lindsay*, 180 Wn.2d 423, 437, 326 P.3d 125 (2014) (impermissible for prosecutor to express personal opinion on credibility or guilt); *State v. Reed*, 102 Wn.2d 140, 145-46, 684 P.2d 699 (1984) (misconduct for prosecutor to express personal opinion regarding credibility of witness or guilt of defendant). Prejudicial error occurs when it is clear and unmistakable that counsel is expressing a personal opinion rather than arguing an inference from the evidence. *State v. McKenzie*, 157 Wn.2d 44, 54, 134 P.3d 221 (2006).

Here, during closing argument the prosecutor told the jury to remember that the evidence in the trial came from the witnesses, not from him. He then clarified, "Right now I am just arguing what I believe, and what the State believes is the theory of the case." RP 455. By assuring the jury of his personal belief

that Gumm was credible and Plechner was guilty, the prosecutor abused his duty to ensure that Plechner receive a fair trial.

Washington courts have repeatedly denounced the type of argument made by the prosecutor in this case. It is well established that "a prosecutor cannot use his or her position of power and prestige to sway the jury and may not express an individual opinion of the defendant's guilt, independent of the evidence actually in the case." *Glasmann*, 175 Wn.2d at 706. A juror is likely to be impressed by what a prosecutor says given his position as representative of the State and the aura of special reliability he enjoys. *State v. Demery*, 144 Wn.2d 753, 763, 30 P.3d 1278 (2001). In a more strongly worded opinion, the Ninth Circuit held, "A prosecutor has no business telling the jury his individual impressions of the evidence. Because he is the sovereign's representative, the jury may be misled into thinking his conclusions have been validated by the government's investigatory apparatus." *United States v. Kerr*, 981 F.2d 1050, 1053 (9th Cir. 1992).

"Likewise, many cases warn of the need for a prosecutor to avoid expressing a personal opinion of guilt." *Glasmann*, 175 Wn.2d at 706-07 (citing *McKenzie*, 157 Wn.2d at 53 (improper for a prosecuting attorney to express his individual opinion that the accused is guilty); *State v. Dhaliwal*, 150 Wn.2d 559, 577, 79 P.3d 432 (2003) (prohibiting statements of personal belief of a defendant's guilt or innocence); *State v. Traweek*, 43 Wn. App. 99, 107, 715 P.2d 1148 (1986) (error for a prosecutor to tell the jury he "knew" the defendant committed the crime)).

This case law was available to the prosecutor in this case and clearly warned against the type of argument here. Although defense counsel failed to object to this improper argument, the misconduct, committed in the face of a well-established rule, constitutes a flagrant and ill-intentioned violation of the proper standards for a prosecutor's trial conduct. *See Glasmann*, 175 Wn.2d at 707.

The prosecutor also committed misconduct in misstating the law regarding assault. Despite the court's instruction that the

jury must apply an objective standard to determine whether an assault was committed, the prosecutor told the jurors that a touch is offensive if they would be offended by it. CP 80; RP 461-21. Again, defense counsel failed to object.

A prosecutor's argument must be confined to the law stated in the trial court's instructions. *State v. Walker*, 164 Wn. App. 724, 736, 265 P.3d 191 (2011) (citing *State v. Estill,* 80 Wn.2d 196, 199, 492 P.2d 1037 (1972)), *review granted, cause remanded* 175 Wn.2d 1022, 295 P.3d 728 (2012). A prosecutor's misstatement of the law has a grave potential to mislead the jury. *Id*. (citing *State v. Davenport,* 100 Wn.2d 757, 764, 675 P.2d 1213 (1984)). When the prosecutor mischaracterizes the law and there is a substantial likelihood that the misstatement affected the verdict, the defendant is denied a fair trial. *Id*. (citing *State v. Gotcher,* 52 Wn. App. 350, 355, 759 P.2d 1216 (1988)). The prosecutor's argument encouraging the jury to make its decision personal was improper.

In addition, the prosecutor unfairly impugned defense counsel by suggesting to the jury that counsel had impermissibly coached a defense witness. RP 478. Defense counsel objected, but the court overruled the objection. *Id*.

Maligning counsel is prosecutorial misconduct. *State v. Lindsay*, 180 Wn.2d 423, 432, 326 P.3d 125 (2014). Comments by the prosecutor that invite the jury to nurture suspicions about defense counsel's integrity violate the rights to a fair trial and to effective assistance of counsel. *Bruno*, 721 F.2d at 1195; *State v. Neslund*, 50 Wn. App. 531, 562, 749 P.2d 725 (1988).

The prosecutor's argument here unfairly maligned the integrity of defense counsel. There was no evidence that the witness had been "coached" by the defense attorney. The State never asked the witness that question. Yet the prosecutor's argument suggested to the jury that defense counsel was knowingly presenting false testimony. By allowing that argument over defense objection, the court unfairly damaged

Plechner's opportunity to present his case before the jury. *See Bruno*, 721 F.2d at 1195.

The prosecutor also disparaged the defense with reference to facts outside the evidence. In rebuttal argument the prosecutor noted that Gumm had described Plechner as controlling and manipulative. He then informed the jury that Plechner had exhibited those characteristics in the course of the trial: "That's what Mr. Plechner … wanted to do in this trial. He tried to control, he tried to influence." RP 480. Defense counsel objected that the prosecutor was referencing delays in the trial and telling the jury they were caused by Plechner. RP 480, 485. The court overruled the objection. RP 481, 485.

It is error to submit evidence to the jury that has not been admitted at trial. *Glasmann*, 175 Wn.2d at 705. "A prosecutor has no right to call to the attention of the jury matters or considerations which the jurors have no right to consider." *State v. Belgarde*, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1998).

The jury was aware there had been delays in the trial. They had been sent out at the close of the State's case around 9:30 a.m. on January 14, and trial did not resume before the jury until 11:30 a.m. the following day. *See* RP 274, 289. The prosecutor's argument not only informed the jury that these delays were caused by Plechner but also suggested that they were improper, a waste of time, an attempt to manipulate the court and the jury to get what he wanted. The argument constitutes misconduct.

Prosecutorial misconduct requires reversal of the conviction when the prosecutor's argument was improper and there is a substantial likelihood the misconduct affected the verdict. *Glasmann*, 175 Wn.2d at 703-04. Even when there was no objection at trial, reversal is required when the misconduct was so flagrant and ill-intentioned as to be incurable by instruction. *Id*. The focus of this inquiry is on whether the effect of the argument could be cured. *State v. Pierce*, 169 Wn. App. 533, 552, 280 P.3d 1158 (2012) (citing *State v. Emery*, 174 Wn.2d 741, 759-61, 278 P.3d 653 (2012)). "The criterion always

is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?" *Emery*, 174 Wn.2d at 762 (quoting *Slattery v. City of Seattle*, 169 Wn. 144, 148, 13 P.2d 464 (1932)).

As noted above, defense counsel failed to object when the prosecutor gave his opinion about the evidence and encouraged the jury to apply a subjective standard for assault rather than the objective one required by law. Even if there had been objections to these improper arguments, it would be difficult for the jury to disregard what amounts to the assurance of the State, with its superior investigative means, that the evidence was sufficient for conviction. Moreover, the prosecutor made further improper arguments to which counsel did object. The court overruled counsel's objections to the prosecutor's remarks that defense counsel and Plechner were trying to disrupt the course of trial by coaching a witness and causing unnecessary delays. Whether the fairness of the trial was tainted by this cumulative prosecutorial

misconduct is a significant constitutional question this Court should address. RAP 13.4(b)(3).

3. Whether trial counsel's errors amounted to ineffective assistance of counsel is a significant constitutional question this Court should review.

The Sixth Amendment to the United States Constitution guarantees "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense." U.S. Const. amend. VI. The Washington State Constitution similarly provides "[i]n criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel...." Wash. Const. art. I, § 22 (amend.10). This constitutionally guaranteed right to counsel is not merely a simple right to have counsel appointed; it is a substantive right to meaningful representation. *See Evitts v. Lucey*, 469 U.S. 387, 395, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985) ("Because the right to counsel is so fundamental to a fair trial, the Constitution cannot tolerate trials in which counsel, though present in name,

is unable to assist the defendant to obtain a fair decision on the merits."); *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) ("The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled.") (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275, 276, 63 S.Ct. 236, 87 L.Ed. 268, 143 A.L.R. 435 (1942)).

A defendant is denied his right to effective representation when his attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." *State v. Benn*, 120 Wn.2d 631, 663, 845 P.2d 289 (citing *Strickland*, 466 U.S. at 687-88), *cert. denied*, 510 U.S. 944 (1993). Only legitimate trial strategy or tactics constitute reasonable performance. *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999).

In this case, counsel's deficient performance was apparent throughout the trial. Counsel failed to advocate for Plechner's right to confront Gumm with evidence of bias, he failed to impeach Gumm with statements that were inconsistent with her trial testimony, and he failed to object to the prosecutor's misconduct in closing argument. This deficient representation prejudiced Plechner's defense and denied him effective assistance of counsel.

The State's case against Plechner rested entirely on Gumm's testimony, and the defense sought to challenge her credibility. Counsel argued to the court Gumm's motivation for going to Plechner's house on the night in question, and for her whole course of actions surrounding the alleged incident, was relevant to the defense. RP 229-30. When Plechner made a record that he wanted to ask Gumm about charges that she stole a truck to explore potential bias, however, counsel did not advocate for Plechner's right to confront Gumm about whether her pending charges impacted her testimony. Instead, he deferred

to the prosecutor's argument that that evidence was inadmissible. RP 231-33.

A reasonable attorney would be expected to understand that bias evidence is always relevant. *State v. Spencer*, 111 Wn. App. 401, 408, 45 P.3d 209 (2002) (citing *Davis v. Alaska*, 415 U.S. 308, 3116-18, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). An accused person must be allowed to cross-examine a witness regarding any expectation that his testimony might affect the resolution of other unrelated charges involving the witness. *United States v. Martin*, 618 F.3d 705, 727 (7th Cir. 2010). A witness with such expectations may have "a desire to curry favorable treatment." *Martin*, 618 F.3d at 727.

It is clear that counsel's failure to argue that he should be allowed to cross examine Gumm about bias stemming from her existing charges was not a sound strategic decision. In fact, counsel made it clear that the defense strategy rested on showing Gumm's motive to lie. Cross examination of Gumm to demonstrate her bias would have only enhanced that strategy.

Failing to expose Gumm's bias was not a sound strategic decision; it was error which constitutes deficient performance.

Counsel's performance was similarly deficient when he failed to impeach Gumm with a prior inconsistent statement. Following her testimony in the State's case, Gumm sent a text message to Jasmine Palma stating, "Then the only thing I'm left to believe is that I could be wrong about Richard hurting me." RP 334. Defense counsel argued that the statement should be admitted to show Gumm's then existing mental, emotional, or physical condition, but the court excluded it as hearsay. RP 336-37, 342. The defense then called Gumm as a witness. When Gumm started to mention the text message in response to a question about whether she had ever said she was mistaken, the court sustained the State's hearsay objection. RP 377-78.

On cross examination the State went through the allegations Gumm made in her earlier testimony point by point, asking her over and over if she was wrong about that. Each time, Gumm answered that she was not wrong. RP 385-87. Despite

this testimony, defense counsel made no attempt to impeach Gumm with the inconsistent text message.

The Court of Appeals stated in its opinion that the Brief of Appellant "fails to address whether the hearsay rule precluded admission or use of the text message to impeach the complaining witness. Without Plechner's demonstration of the admissibility of the text message, we cannot find counsel's representation ineffective." Opinion, at 23. Contrary to the court's statement, on appeal Plechner argued that a witness's prior inconsistent statement is admissible for impeachment to allow the jury to compare the prior statement with the witness's testimony, in order to ascertain the witness's credibility. ER 613(b)[1]; *Spencer*,

[1] ER 613 provides as follows:

> ER 613. PRIOR STATEMENTS OF WITNESSES
> (a) Examining Witness Concerning Prior Statement. In the examination of a witness concerning a prior statement made by the witness, whether written or not, the court may require that the statement be shown or its contents disclosed to the witness at that time, and on request the same shall be shown or disclosed to opposing counsel.
> (b) Extrinsic Evidence of Prior Inconsistent Statement of Witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).

111 Wn. App. at 409. Such inconsistencies are important because they "raise serious questions about [the declarant's] credibility and perceptions." *State v. Newbern*, 95 Wn. App. 277, 295, 975 P.2d 1041, *review denied*, 138 Wn.2d 1018 (1999). Where prior inconsistent statements are offered to challenge the witness's credibility in this way, and not for the truth of the matter asserted, the statements do not constitute hearsay. *See* ER 801(c).

A competent lawyer would have recognized the critical importance of seeking to impeach the witness with her prior inconsistent statement and make the appropriate argument. *See United States v. Tucker*, 716 F.2d 576, 586 (9th Cir. 1983) (Counsel's failure to make use of prior inconsistent statements on cross examination was a "critical blunder" which prevented the jury from making an accurate determination as to the truth of the key witness's testimony.)

Counsel also failed to object to the prosecutor's misconduct in closing argument. As argued above, the prosecutor committed misconduct by expressing his opinion of

the evidence and misstating the law regarding assault during closing argument. Because counsel did not object, the court did not attempt to contain the damage caused by these improper arguments with curative instructions. There can be no sound strategic reason for failing to minimize the effect of this prosecutorial misconduct.

The cumulative effect of counsel's errors was to weaken the defense. If counsel had not made these errors the jury would have had reason to question Gumm's bias and credibility and would have been reminded not to consider the prosecutor's personal assurances regarding the evidence and law. Whether counsel's errors amounted to ineffective assistance of counsel is a constitutional question this Court should address. RAP 13.4(b)(3).

4. This Court should review issues raised in the statement of additional grounds for review.

Plechner raised several arguments in his statement of additional grounds for review, which the Court of Appeals rejected. Those arguments are incorporated herein by reference.

F. CONCLUSION

For the reasons discussed above, this Court should grant review and reverse Plechner's convictions.

I certify that this document contains 4946 words as calculated by Microsoft Word.

DATED this 2nd day of June, 2022.

Respectfully submitted,

GLINSKI LAW FIRM PLLC

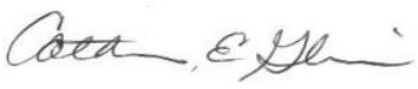
_____
CATHERINE E. GLINSKI
WSBA No. 20260
Attorney for Petitioner

Certification of Service by Mail

Today I caused to be mailed a copy of the Petition for Review in *State v. Richard Plechner,* Court of Appeals Cause No. 38563-9-III, as follows:

Richard Plechner, DOC#975117
Washington State Penitentiary
1313 North 13th Avenue
Walla Walla, WA 99362

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



_____
Catherine E. Glinski
Done in Manchester, WA
June 2, 2022

FILED
MAY 3, 2022
In the Office of the Clerk of Court
WA State Court of Appeals Division III

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

STATE OF WASHINGTON, Respondent, v. RICHARD ANTHONY PLECHNER, Appellant.	)	No. 38563-9-III consolidated with No. 38755-1-III UNPUBLISHED OPINION
In the Matter of the Personal Restraint of: RICHARD ANTHONY PLECHNER	)	

FEARING, J. — In attacking his convictions for indecent liberties and assault in the fourth degree with sexual motivation, Richard Plechner forwards numerous assignments of error by way of an appeal, statement of additional grounds (SAG), and a personal restraint petition. We reject all contentions and affirm his conviction.

FACTS

We gather the facts from the trial testimony of Tina Gumm, the victim. Tina Gumm met Richard Plechner while she resided at the home of Leslie Ellerbrock. Gumm

described Plechner as neither friend nor sexual partner. After departing from the Ellerbrock home, Gumm dwelled in other homes and shelters, and occasionally saw Plechner. At some unidentified time, the car of Jasmine Palma, Plechner's girlfriend, struck Gumm's car.

On September 17, 2019, Tina Gumm encountered Richard Plechner on the street outside a domestic violence shelter. Plechner informed Gumm that her car had been damaged. Gumm had yet to see the damage. She had slept the previous two nights in another car she owned.

Between the hours of 11 p.m. and 3:30 a.m. on September 17-18, Tina Gumm visited Plechner's house to inquire about the car. After speaking with Plechner, Gumm fell asleep on a bed in his house. At 7:30 a.m., Gumm awoke to feel Plechner's hands inside her pants and in contact with her vagina.

Despite the nonconsenting and intimate contact, Tina Gumm drove Richard Plechner that morning to WalMart and an AM/PM mart. She then accompanied Plechner to the domestic violence shelter to view the damage to Gumm's car.

In late September 2019, Tina Gumm lodged at Jasmine Palma's house for two days. At 10:00 a.m. on one of these mornings, Palma and Richard Plechner, while inside Palma's residence, locked Gumm outside as she smoked a cigarette. Either Plechner or Palma called the police. The police arrived at the residence and directed Gumm to leave Palma's address. On October 3, 2019, two or more days after her expulsion from

Palma's residence, Gumm reported the touching of her vagina by Plechner to the Shelton Police Department.

PROCEDURE

The State of Washington charged Richard Plechner with one count of indecent liberties with a victim incapable of consent by reason of being physically helpless to have sexual contact and one count of assault in the fourth degree with sexual motivation. Eugene Austin represented Richard Plechner at trial, and Tyler Bickerton represented the State. The jury trial began on January 8, 2020.

Before voir dire on January 8, defense counsel Eugene Austin expressed confusion about the indecent liberties charge. He commented to the trial court that he had believed the State based the charge on forcible compulsion under RCW 9A.44.100(1)(a). The information instead alleged, under RCW 9A.44.100(1)(b), that the victim could not consent by reason of being physically helpless.

Attorney Eugene Austin contemplated calling Jasmine Palma as a trial witness. As a result, the court appointed attorney Peter Jones to represent Palma because of pending charges against her stemming from the damage to Tina Gumm's vehicle. Palma's trial testimony could implicate her. Jones advised that Palma intended to invoke her Fifth Amendment to the United States Constitution right if asked any questions at trial.

After Jasmine Palma's announcement about invoking her right to remain silent, defense counsel Eugene Austin interjected that Richard Plechner wished for replacement trial counsel. Plechner directly addressed the trial court and insisted he had a right to subpoena witnesses. Plechner added that he directed Austin to call Palma to testify, but that Austin now refused. Plechner desired Palma's testimony that Tina Gumm had blackmailed Palma with threats to report a hit-and-run accident to the police.

Peter Jones, who also served as public defense administrator for Mason County, commented that no other public defender would be able to otherwise address Richard Plechner's concerns about the refusal to summon Jasmine Palma to testify. After questioning by the trial court, Plechner concluded he did not wish to fire Eugene Austin as his trial counsel. The court invited Plechner to relay any future impasse with Austin.

After jury voir dire, Eugene Austin informed the trial court anew that Richard Plechner wished new counsel or to proceed pro se. Plechner complained to the court that Austin failed to aggressively advocate on Plechner's behalf and that he suffered ineffective assistance of counsel. The trial court declined to appoint new counsel.

After completion of voir dire, trial resumed on Friday, January 10, 2020. The State called Tina Gumm as its first witness. Gumm identified Richard Plechner as the one who placed his hand in her pants and on her vagina. Gumm added that Plechner previously resided in jail while she resided in Leslie Ellerbrock's domicile. In the absence of the jury, Eugene Austin, on behalf of Plechner, requested a curative

instruction for the jury to ignore Gumm's statement that Plechner had been in jail. Plechner, on behalf of himself, demanded a curative instruction that told the jury that the State dismissed the prosecution, for which he had resided in jail. Attorney Austin misunderstood Plechner's request and believed Plechner wanted to ask for the current case to be dismissed. The trial court correctly heard Plechner's request and rejected the giving of Plechner's preferred instruction. Austin withdrew the request for a more limited curative instruction.

Tina Gumm's testimony resumed. She related a history of domestic violence and experiences with posttraumatic stress disorder (PTSD) stemming from the violence. The court excused the jury to hear contentions between defense counsel and the State's attorney relating to Gumm's testimony on these topics. Defense counsel remarked:

> Mr. Plechner believes that—that [Gumm]—she went back the last time to meet with—with [her ex-boyfriend] Steve so that she could steal his truck. And that she could—then after—and if I'm—she stole the truck. And that she then wanted Jasmine to assist her in—in her case, but Jasmine was—was with Mr. Plechner and she needed Mr. Plechner—and she ends up—they have a falling out and she needs Mr. Plechner to get her—her back into good—good graces.
>
> I think even if we went down that line she would have to take the Fifth and it would—my—my—my—my interest was just to understand her motivation behind doing what she—her actions—her whole course of actions.

Report of Proceedings (RP) at 229-30. The prosecuting attorney voiced frustration:

> —for the record, it appears Mr. Austin is proceeding ethically and following the rules. However he's making a record of his client who seems to not understand the rules, who is not an attorney. And I—I—I appreciate

> him putting it on the record for purposes of appeal. But perhaps this needs to be a conversation with Mr. Plechner that that's inadmissible. I don't see how that comes in, regardless of—I don't think that there's any foundation that could be set that gets to that end result of answering—asking the question, having—did you steal a car, were you charged with, because I'm objecting to all that.
>
> . . . It seems each issue that is causing delay in this trial and causing conflict is Mr. Plechner interjecting with inadmissible and improper questions or argument.

RP at 231-32. The court deferred to defense counsel about whether he wished to pursue further questioning relating to Gumm stealing a car. Counsel did not pursue this line of questioning. The court recessed for the weekend.

The State rested on Tuesday, January 14, 2020, after interrogating the police officer who interviewed Tina Gumm. The State asked the officer to identify Richard Plechner. After the officer commented that Plechner was present at counsel table, attorney Eugene Austin asked that the officer clarify which of the two people sitting at defense counsel was Plechner. The officer replied that Plechner wore a blue striped collared shirt.

Outside the presence of the jury on January 14, defense counsel Eugene Austin informed the court that Richard Plechner told Austin that someone left a note on Plechner's door during the weekend. Plechner claimed he discovered the note on Monday night outside his door and that Tina Gumm had written the note. The note declared: "have your attorney put Tina back on the stand. Have him ask her one question." RP at 274; see also SAG at 38. Austin had not yet located Gumm to demand

her return for further testimony. The court recessed the trial until the next morning to afford the defense time to locate Gumm.

The court reconvened on January 15, 2020. In the absence of the jury, Eugene Austin notified the court of another communication from Tina Gumm. Jasmine Palma had forwarded to Richard Plechner a text message from Gumm. Attorney Austin called Palma to testify as an offer of proof of the contents of the text message. Palma testified that Gumm wrote about uncertainty of whether to continue with the prosecution against Plechner and that she was unsure about the events of the night in question. Palma related that the text message had been deleted from her phone, but that she had forwarded the original message to Plechner. Palma then read to the court the contents of the lengthy text message from Gumm:

> I didn't think you'd answer. I wanted Richard's attorney [sic] phone number. The prosecutor gave it to me and I forgot it. I'm in Bremerton having a nervous breakdown on my way to my neighbor's—to my neighbor's house—apartment. I already missed twice. Nothing can ever be simple. Everything had to be something big fucking production.
>
> I'm so fucking angry and my life plans, my dreams, my opportunities, my ability to function, my personal belongings, my beautiful innocent little dogs, my relationship, my credibility, and my sense of belonging, my trust, my sense of safety and my identity—not my name, but who I am has all been violated and decimated. There isn't anything about me or my life that I recognize anymore, or that's worth claiming.
>
> The sheriff's already told me I was wrong about what [Gumm's abusive ex-boyfriend] Steve has done to me. And they said I was mentally ill. The DV shelter said I was wrong about Steve and said I'm emotionally sick. Mason General Hospital and the clinics told me I had psychiatric issues and that I was wrong about thinking I've been abused and exposed to

> toxins, and told me I needed to leave; that they would not treat me for any physical issues until I see a psychiatric doctor first.
>
> Then the only thing I'm left to believe is that I could be wrong about Richard hurting me. I need the attorney's number. I cannot make it to court until tomorrow.

RP at 333-34.

The State's attorney objected to the court's consideration of the text message based on the grounds of lack of authentication, the best evidence rule, and hearsay. The court ruled that the text message constituted hearsay not subject to an exception.

Eugene Austin, on behalf of Richard Plechner, moved for a witness warrant to compel the attendance of Tina Gumm to testify again since the trial court had not released her as a witness. The State responded:

> It seems every step of the way what defense has tried to accomplish within the past two days, going from this alleged note that was placed on the Defendant's door, to this alleged text message that was sent to Ms. Palma, is that it's all speculation. There is nothing that they have from the mouth of Tina Gumm in regards to anything that they would put on to the case. There is no materiality here, and nothing has been asserted to the Court by the defense.

RP at 344-45. Before the State finished its argument, Gumm arrived at the courthouse ready to testify.

Before the jury entered the courtroom to hear additional testimony, defense counsel Eugene Austin informed the trial court that Richard Plechner wished for him to pursue a line of questioning in potential violation of a motion in limine. The court recognized the disagreement but informed Austin that he remained responsible for

deciding the line of questioning to pursue. Austin next informed the court that Plechner wished to fire him. The court asked Plechner if he wished to proceed pro se. Plechner responded that he still wanted a lawyer.

Tina Gumm assumed the witness stand. Gumm then testified:

> Q [ATTORNEY AUSTIN] Okay. Have you ever indicated to anyone that you—that you were mistaken?
> A [TINA GUMM] I sent a text message to Jasmine where I was trying to—so I've been to the sheriff's office so many times about my ex and—and nothing's ever happened. So I feel like I'm being brainwashed to believe that I can't trust myself. So—so in the text message I said that—
> [TYLER] BICKERTON: I'm going to object to—as hearsay in the text message.
> THE COURT: Sustained.

RP at 377-78. Austin did not pose any further questions about the text message. Austin successfully introduced the handwritten note into evidence, and Gumm admitted that she had left the note at Plechner's door. On cross-examination, the State's attorney asked Gumm whether she had been mistaken in relating any of the events that occurred when she slept on the bed at Plechner's home. Gumm responded that she had not been mistaken.

Defense counsel called Leslie Ellerbrock as the defense's final witness. Ellerbrock declared that Tina Gumm and Richard Plechner had met while Gumm resided in Ellerbrock's spare bedroom and that Gumm exhibited hostility toward Plechner. Ellerbrock testified that Gumm had lived in her household for eight months before Ellerbrock expelled her.

One jury instruction read: "A touching is offensive if the touching would offend an ordinary person who is not unduly sensitive." Clerk's Papers at 80.

The prosecuting attorney remarked during closing:

> I want to start this off by saying there's nothing I say right now for the next 10, 15 minutes, or when I come back in rebuttal, that will be evidence. You're not to consider anything I say as evidence. The evidence came from that chair and that chair alone. That goes for Mr. Austin as well. If I say something that doesn't sound right, or I mis-remembered, remember, you guys have that instruction as well. Maybe I wrote something down, maybe I misheard something, or maybe I'm mis-analyzing something. This is all up for you to decide. Everything that came out of the mouth of the witness[es] is for you to decide. Right now I am just arguing *what I believe*, and what the State believes is the theory of the case.

RP at 455 (emphasis added). Defense counsel did not object to these introductory remarks.

The State's attorney analyzed the law of assault during closing:

> An assault is an intentional touching or—or touching of another person that is harmful or offensive, regardless of whether any physical injury is done to that person. So it's going to be up to you 12 individuals to decide, would the touching of an individual's intimate area be harmful or offensive. *Would any one of you be offended if your intimate area was touched?* That is the question of this assault. I submit to you absolutely.
>
> And the definition further goes, *a touching is offensive if the touching would offend an ordinary person who is not unduly sensitive*. So the question is once again, would an ordinary person be sensitive to the fact of letting another man, if you were a female, touch their vagina? Or perhaps if you were a man having a woman touch your penis? Or any way of this axis, it doesn't matter. . . .
>
> I submit to you the touching of an intimate area is offensive. And it is not—and it is not to the level of an ordinary person who would be

> sensitive, 'cause I'd submit to you each and every one of us would be the same.

RP at 461-62 (emphasis added). Defense counsel did not object to the prosecutor's characterization of the law of assault.

The State's attorney attacked the defense's theory:

> The defense wants you to believe that Ms. Tina Gumm made up this whole story; that she fabricated it, because of past instances with Richard Plechner. But at the same time, they're attacking her retelling stories, remembering facts. With all due respect to counsel, I'd submit to you, *he's talking out of both sides of his mouth.* On one hand he's putting down Ms. Gumm stating she can't remember anything, she's lived a tough life, she has PTSD, she has anxiety. But then on the other hand he's telling she has been able to concoct this whole story, to fabricate this story, all just to convict Richard Plechner. Does that make sense to you? That's going to be something I want you to consider.
>
> On one hand Ms. Gumm who, by all accounts has had difficulties, could she come up with this whole story? And he's basing it on three instances. He's basing it on an incident with the Ellerbrocks who—she lived at her house. And you heard Ms. Ellerbrock said I kicked her out. I want you to think about her testimony, think about her credibility. I'd submit to you, she was a smug and non-caring individual with the world.
>
> And I'll also submit to you, *that was a rehearsed, coached testimony*. Every point of her testimony—
>
> MR. AUSTIN: Your Honor, I'm going to object to that—that comment.
>
> M ,MR. BICKERTON: It's argument.
>
> MR. AUSTIN: I know, but she—he—she's—he's impugning defense counsel, as well as the—as—as the witness without any sort of basis on it.
>
> MR. BICKERTON: It's argument. I'm getting to the basis.
>
> THE COURT: It's argument, overruled.
>
> MR. BICKERTON: Witness took that stand, and every question I asked, what'd she do? She paused waiting for an objection, or actually was trying to think of legal objections in her head, and making comments herself, or looking to the Judge, can I ask—can I answer, can I—can I not

> answer this? I asked a question, nothing was answered, and she still paused. She didn't even want to answer. Why? I submit to you because she didn't know how she was supposed to answer. No, instead the whole time she stared directly at these two. She stared at her friend. She stared at her friend, the same person who she said she would invite over for dinner tonight. She said that last night. She would have invited him over for dinner. Do you want to take her story into question? Call her into question?
>
> And they want you to believe that because Ms. Gumm was kicked out of the house of the Ellerbrock's in July, that August, September, October—August, September, sorry, two months later she concocted a story that he sexually assaulted her because of that? No. I submit to you no.

RP at 477-79 (emphasis added).

During closing, the prosecuting attorney discussed Richard Plechner's and Tina Gumm's interactions:

> You heard her testify how scared she was, how she stated that she had PTSD, mental trauma, she's in fear, she's scared, she has anxiety of stalking. That's the life she's lived. She also stated that Mr. Plechner talks a lot, he's loud, he talks fast, he's controlling, he gives directions, he manipulates, he causes friction, and he causes distrust—distrust. She testified that anyone Mr. Plechner talks to, he attempts to control, attempts to influence.
>
> That's what Mr. Plechner wants to do—wanted to do in this trial. He tried to control, he tried to influence. And I submit to you, it didn't work. And that the 12 of you are going to find him guilty—
>
> MR. AUSTIN: Objection, Your—Your Honor—
>
> MR. BICKERTON: —of two counts—
>
> THE COURT: Just a moment, there's an objection.
>
> MR. AUSTIN: Objection. I—I—I think, you know, asserting that—that—could we—could we discuss this outside the jury? 'Cause I'm going to be—
>
> MR. BICKERTON: Can we have a quick side bar?
>
> THE COURT: Side bar.
>
> MR. AUSTIN: That's fine.

> SIDE BAR CONFERENCE
> Side bar at the request of defense counsel off the record.
> THE COURT: Overruled.

RP at 480-81. After excusing the jury to begin their deliberations, the court explained that it had overruled defense counsel's objection at the side bar. Defense counsel had complained during the side bar that the prosecuting attorney had referenced the delays of trial as being Plechner's fault.

The jury returned guilty verdicts on both charges.

LAW AND ANALYSIS

On appeal, Richard Plechner asserts numerous assignments of error in his appellate counsel's brief, his statement of additional grounds, and a personal restraint petition. He contends the trial court infringed on his constitutional rights to counsel, effective counsel, and to confront his accusers and the prosecuting attorney engaged in misconduct. We separate arguments asserted in the three filings, starting with appellate counsel's brief.

Right to Counsel

Richard Plechner first contends that the trial court failed to honor his constitutional right to counsel when refusing to appoint him a new attorney when effective communications between attorney Eugene Austin and himself ended. Plechner adds that the trial court failed to conduct a sufficient investigation into the nature and impact of the conflict between his counsel and him. We note that, when questioned by the trial court,

Plechner stated he wanted an attorney and never expressly asked for a new attorney. We review this argument anyway.

An indigent defendant does not have the inexorable right to be represented by a lawyer of his choosing. *Wheat v. United States*, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988). But when the relationship between lawyer and defendant completely collapses, the refusal to substitute new counsel violates the defendant's Sixth Amendment right to effective assistance of counsel. *In re Personal Restraint of Stenson*, 142 Wn.2d 710, 722, 16 P.3d 1 (2001). When an indigent defendant fails to provide legitimate reasons for the assignment of substitute counsel, the court may require the defendant to either continue with current counsel or to proceed pro se. *State v. DeWeese*, 117 Wn.2d 369, 376, 816 P.2d 1 (1991). The factors considered in determining whether an irreconcilable conflict exists include (1) the extent of the conflict, (2) the adequacy of the trial court's inquiry, and (3) the timeliness of the motion. *United States v. Moore*, 159 F.3d 1154, 1158-59 (9th Cir. 1998); *In re Personal Restraint of Stenson*, 142 Wn.2d 710, 724 (2001). An adequate inquiry must include a full inquiry of the differences between the accused and his counsel. *State v. Cross*, 156 Wn.2d 580, 610, 132 P.3d 80 (2006), *abrogated on other grounds by State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018). When the request for change of counsel comes during the trial, or on the eve of trial, the court may, in the exercise of its sound discretion, refuse to delay the trial to obtain new

counsel and therefore may reject the request. *United States v. Williams*, 594 F.2d 1258, 1260 (9th Cir. 1979); *In re Personal Restraint of Stenson*, 142 Wn.2d 710, 732 (2001).

Disagreement about trial strategy does not violate a defendant's constitutional rights, unless the disagreement actually compromises the attorney's ability to provide adequate representation. *State v. Cross*, 156 Wn.2d 580, 611 (2006). Although a client decides the goals of litigation and whether to exercise some constitutional rights, the attorney determines the means. *State v. Cross*, 156 Wn.2d at 606.

Richard Plechner and his counsel, Eugene Austin, encountered a strained relationship. Nevertheless, the conflict related to trial strategy. Plechner disputed his attorney's refusal to call a witness, attempted to direct specific questions to ask a witness on the stand, and hoped to introduce new evidence at trial. Each time a conflict arose, the trial court conducted adequate inquiries into the attorney-client relationship. The court repeatedly heard concerns from both Plechner and Austin and concluded that the differences did not implicate a disagreement of constitutional magnitude. Each conflict fell into territory allocated to defense counsel for decision-making. Plechner's complaints were untimely. Thus, we discern no error.

Our Supreme Court has found no irreconcilable conflict with more substantial disagreements between counsel and defendant. In *State v. Cross*, 156 Wn.2d 580 (2006), defense counsel's decision not to present a substantive defense and instead focus on arguments regarding the defendant's mental capacity did not create irreconcilable

conflict. In *In re Personal Restraint of Stenson*, 142 Wn.2d 710 (2001), defense counsel's determination that the guilt phase of a case "could not be won" because of overwhelming evidence did not justify a finding of irreconcilable conflict.

Right of Confrontation

Richard Plechner next contends that the trial court denied his right of confrontation by improperly excluding evidence of the complaining witness's bias. Amendment VI of the United States Constitution and article I, section 22 of the Washington Constitution protect a defendant's right to confront an adverse witness. Primarily, the confrontation right protects a defendant's ability to cross-examine witnesses. *Douglas v. Alabama*, 380 U.S. 415, 418-19, 85 S. Ct. 1074, 13 L. Ed. 2d 934 (1965). Through cross-examination, a defendant may test the perception, memory, and credibility of witnesses, which helps assure the accuracy of the fact-finding process. *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002).

Richard Plechner argues that the trial court violated his right to confrontation by limiting cross-examination about Tina Gumm's pending auto theft charges. Nevertheless, the court never limited cross-examination on this topic. Plechner's trial counsel did not pursue questioning relating to the auto theft charges, but only informed the trial court that Plechner wished to pursue the questions. Without a trial court ruling on the matter, this court has no basis to find error. We address Plechner's contention that

his trial counsel should have questioned Gunn on pending charges in his assignment of ineffective assistance of counsel.

Prosecutorial Misconduct

Richard Plechner contends the State's attorney engaged in misconduct with four categories of remarks during closing statement: when declaring his personal opinion regarding Plechner's guilt, when misstating the law of assault, when impugning defense counsel, and when referencing evidence outside the record. Plechner also requests that we view the cumulative impact of the misconduct when determining whether to reverse his conviction.

To establish prosecutorial misconduct, a defendant must show that the prosecuting attorney's remarks were both improper and prejudicial. *State v. Allen*, 182 Wn.2d 364, 373, 341 P.3d 268 (2015). The burden to establish prejudice requires a defendant to prove a substantial likelihood that the instances of misconduct affected the jury's verdict. *State v. Thorgerson*, 172 Wn.2d 438, 442-43, 258 P.3d 43 (2011).

Trial defense counsel did not object to any of the challenged comments by the prosecuting attorney. When a defendant fails to object to improper remarks at trial, the defendant waives review of the error unless the remarks were so flagrant and ill intentioned that they caused an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. *State v. Slater*, 197 Wn.2d 660, 681, 486 P.3d 873 (2021). The "flagrant and ill intentioned" standard sets a higher bar for reversal than

the "improper and prejudicial" standard and applies only in a narrow set of cases when the court holds concern about the jury drawing improper inferences from the evidence. *State v. Loughbom*, 196 Wn.2d 64, 74, 470 P.3d 499 (2020). Under this heightened standard, the defendant must show (1) no curative instruction would have obviated any prejudicial effect on the jury and (2) there is a substantial likelihood that the misconduct affected the jury's verdict. *State v. Emery*, 174 Wn.2d 741, 761, 278 P.3d 653 (2012).

Richard Plechner first argues that the prosecutor gave a personal opinion of Plechner's guilt when he intoned: "Right now I am just arguing what I believe, and what the State believes is the theory of the case." RP at 455. A prosecutor should avoid expressing a personal opinion of guilt. *In re Personal Restraint of Glasmann*, 175 Wn.2d 696, 706, 286 P.3d 673 (2012). Nevertheless, we conclude that the State's attorney expressed no personal opinion as to the guilt of Richard Plechner. When read in context, his mentioning of what he believed referenced what he believed to be theories of the case, not what he personally believed to be the facts or the validity of the prosecution against Plechner. The State's attorney had earlier stated that his representations concerning the facts did not constitute facts.

Richard Plechner next argues that the prosecutor misstated the law of assault to the jury when he asked jurors to determine whether each would have been offended if he or she was touched in intimate areas. Such a subjective standard conflicts with the law's

requirement that a touching be offensive to an ordinary person who is not unduly sensitive. *State v. Smith*, 159 Wn.2d 778, 781, 154 P.3d 873 (2007).

A prosecutor's argument to the jury must be confined to the law stated in the trial court's instructions. *State v. Estill*, 80 Wn.2d 196, 199, 492 P.2d 1037 (1972). A misstatement of the law may constitute prosecutorial misconduct. *State v. Davenport*, 100 Wn.2d 757, 761-65, 675 P.2d 1213 (1984). When the prosecutor mischaracterizes the law and there is a substantial likelihood that the misstatement affected the jury verdict, the accused is denied a fair trial. *State v. Gotcher*, 52 Wn. App. 350, 355, 759 P.2d 1216 (1988).

State v. Walker, 164 Wn. App. 724, 265 P.3d 191 (2011), *adhered to on remand*, 173 Wn. App. 1027 (2013) (unpublished), informs our decision. During closing in a prosecution against Aquarius Walker for first degree murder, the State's attorney informed the jury that the defense of others standard would be met if the jury would have taken the same action in defense. This remark misstated the law establishing an objective test for defense of others. The law and the jury instruction did not allow the jury to substitute subjective belief with an objective test or standard based on a reasonable person. The prosecuting attorney repeated his theme of a subjective standard seven times, once after an objection by defense counsel. A PowerPoint slide instructed the jury that the test to apply was whether "'I would do it too, if I knew what he knew.'" *State v. Walker*, 164 Wn. App. 724, 735-36 (2011). This court ruled that the prosecuting attorney

committed misconduct. The cumulative effect of this misconduct with other improper arguments required a reversal.

We agree with Richard Plechner that the State's attorney misstated the law. We decline reversal, however, because we conclude the error did not likely affect the verdict. The prosecutor only uttered the mistake once, and we rule that he did not commit other misconduct. Practically all persons would consider touching of private parts to be offensive. The critical question for the jury was whether the touching occurred, not whether the touching of the vaginal area constituted offensive behavior to a reasonable person.

Richard Plechner argues that the prosecutor unfairly impugned defense counsel. Plechner complains that the prosecuting attorney accused trial counsel of coaching a witness on her testimony. The State's attorney's intoned: "that was a rehearsed, coached testimony." RP at 478. Plechner does not complain about the State's attorney's accusation toward defense counsel of "talking out of both sides of his mouth." RP at 477.

A prosecutor must not impugn the role or integrity of defense counsel. *State v. Lindsay*, 180 Wn.2d 423, 431-32, 326 P.3d 125 (2014). Our Supreme Court has found prejudice when a prosecutor impugned opposing counsel by describing defense tactics as "'bogus'" and "'sleight of hand.'" *State v. Thorgerson*, 172 Wn.2d 438, 450-52 (2011).

Richard Plechner's prosecuting attorney directed the contested comments at witness Leslie Ellerbrock because she purportedly tailored her testimony to be favorable

to Plechner. When doing so, the prosecutor highlighted aspects of the Ellerbrock's behavior during testimony and suggested those behaviors diminished her credibility. The State's attorney never identified defense counsel as the coach of Ellerbrock. Thus, we conclude that the prosecutor's accusations did not target defense counsel.

Richard Plechner next contends that the prosecutor referred to evidence outside of the record when the State's attorney mentioned that Plechner sought to control and manipulate Tina Gumm. Plechner contends that this argument by the State implicated him for repeatedly delaying the trial. A prosecutor may not remark on facts not in evidence, although he may argue reasonable inferences from the evidence. *State v. Russell*, 125 Wn.2d 24, 87-88, 882 P.2d 747 (1994). Although the prosecutor had expressed earlier concern about Plechner causing delays in trial, the closing argument was untethered from any trial continuances. The prosecutor could reasonably draw inferences from other evidence of the manipulative nature of Plechner.

Finally, Richard Plechner assigns cumulative error given the volume of prosecutorial misconduct at trial. He does not cite to any case supporting his argument that this court may find cumulative error even if no individual instance of misconduct prejudiced the jury against him. The cumulative error doctrine does not apply when the errors are few and have little or no effect on the outcome of the trial. *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006). We find one instance of misconduct that did not impact the jury verdict.

Ineffective Assistance of Counsel

To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation fell below an objective standard of reasonableness and (2) defense counsel's deficient representation prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Vazquez*, 198 Wn.2d 239, 247-48, 494 P.3d 424 (2021). Courts indulge a strong presumption that counsel is effective. *State v. Vazquez*, 198 Wn.2d 239, 247.

A defendant must first show that trial counsel's performance fell below an objective standard of reasonableness based on consideration of all the circumstances. When doing so, the defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel. *State v. Vazquez*, 198 Wn.2d 239, 248 (2021); *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).

Richard Plechner faults his trial counsel for failing to impeach the credibility of accuser Tina Gumm with a text message in which she questioned her memory of the events comprising the alleged crime. Gumm began to testify about the text message. The State's attorney objected on hearsay grounds, and the trial court sustained the objection. Defense counsel did not further attempt to impeach Gumm with the text message.

Richard Plechner's briefing on appeal fails to address whether the hearsay rule precluded admission or use of the text message to impeach the complaining witness. Without Plechner's demonstration of the admissibility of the text message, we cannot find counsel's representation ineffective.

Richard Plechner also argues that defense counsel performed ineffectively for failing to impeach Tina Gumm with a pending auto theft charge. A party may impeach a witness with a crime only after a criminal conviction. ER 609(a). Plechner does not establish that his defense counsel could have employed a pending charge for impeachment.

Richard Plechner assigns error to defense counsel's failure to object to prosecutorial misconduct for expressing a personal opinion and misstating the law of assault. We already ruled that the State's attorney did not express a personal opinion. Assuming defense counsel performed inadequately for failing to object to the prosecutor arguing a subjective standard for offensive touching, we have already ruled that Plechner shows no prejudice.

Richard Plechner highlights his trial counsel's confusion on the first day of trial over the indecent liberty charge. Plechner does not establish that any confusion affected the trial strategy or prejudiced him. Richard Plechner further argues that defense counsel assisted in Plechner's in-court identification by requesting the police officer to clarify whether counsel or Plechner was the defendant. Given that the jury witnessed defense

counsel making legal arguments, the jury would have assumed that Plechner was the defendant. Tina Gumm had also identified Plechner.

Finally, Richard Plechner also asserts that multiple attorney/client conversations within the hearing of others in the courtroom prejudiced him. The record does not support a conclusion that these interactions occurred in the presence of the jury.

Statement of Additional Grounds

We address eight assignments of error asserted in Richard Plechner's statement of additional grounds. First, Plechner maintains that a photograph not introduced at trial proved his innocence. Because this argument arises from new evidence not introduced at trial, we address this contention when responding to Plechner's personal restraint petition. The accused may attach or reference only documents contained in the record in a statement of additional grounds. RAP 10.10(c). The accused must assert errors involving facts or evidence not in the record through a personal restraint petition, not a pro se statement of additional grounds. *State v. Calvin*, 176 Wn. App. 1, 26, 316 P.3d 496 (2013), *remanded on other grounds*, 183 Wn.2d 1013, 353 P.3d 640 (2015).

Second, Richard Plechner contends the trial court denied him his Sixth Amendment right to confrontation. This argument duplicates his appellant counsel's briefing.

Third, the trial court failed to permit his calling Jasmine Palma as a witness. Nevertheless, Plechner possessed no such right. His attorney's decision not to call Palma as a witness fell within the attorney's reasonable judgment in determining trial strategy.

Fourth, the State and the Shelton Police Department failed to collect and preserve materially exculpatory evidence. Plechner cites to materials outside of the trial record contrary to the rules of a statement of additional grounds.

Fifth, according to Richard Plechner, the State committed prosecutorial misconduct. Plechner's appellant's brief raised the issue of prosecutorial misconduct, but Plechner identifies additional conduct of the prosecuting attorney in his statement of additional grounds as grounds for reversal. Plechner argues that the prosecutor should not have commented about Plechner's supposed beliefs and Tina Gumm's credibility. Nevertheless, a prosecutor may make reasonable inferences from the evidence and make arguments regarding witness credibility. Plechner argues that the prosecutor's polite interactions with Tina Gumm constituted prosecutorial misconduct. We disagree, and Plechner cites no law to support this contention. Finally, Plechner complains that the prosecutor argued that Plechner was fabricating evidence throughout Plechner's attempts to introduce new evidence at trial. These arguments, outside the presence of the jury, could have had no prejudicial effect on the jury's verdict.

Sixth, Richard Plechner maintains that insufficient evidence supported his conviction. The test for sufficiency of evidence is whether, after viewing the evidence in

the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). A reviewing court defers to the fact finder on issues of witness credibility, testimony, and persuasiveness of the evidence. *State v. Rodriguez*, 187 Wn. App. 922, 930, 352 P.3d 200 (2015). The jury could have reasonably credited Tina Gumm's testimony in convicting Richard Plechner.

Seventh, Richard Plechner argues his trial counsel performed ineffectively. These contentions duplicate appellant counsel's briefing. To the extent they are not duplicative, Plechner's arguments are inscrutable or request this court to consider materials outside of the trial court record.

Eighth, the trial court committed an abuse of discretion when allowing Eugene Austin to continue to represent him at trial despite an irreconcilable conflict. This argument also echoes contentions raised in the appellant's brief.

Personal Restraint Petition

In a personal restraint petition, Richard Plechner argues that a photograph not introduced at trial proves his innocence.

To obtain relief with a personal restraint petition, a petitioner must establish either constitutional error that caused actual and substantial prejudice or a nonconstitutional error that constituted a fundamental defect resulting in a complete miscarriage of justice. *In re Personal Restraint of Davis*, 152 Wn.2d 647, 671-72, 101 P.3d 1 (2004). The

photograph forwarded by Richard Plechner depicts a woman lying down. The purported date and time of the photograph, September 18, 2019 at 8:23 a.m., floats above the photograph. Plechner contends he snapped the photograph.

Assuming admissibility of the photograph, Richard Plechner does not establish a complete miscarriage of justice. The jury could have interpreted the photograph to support Tina Gumm's testimony. Assuming Plechner took the photograph of Tina Gumm on the day of the alleged crime, the photograph supports Gumm's testimony that she and Plechner were together that morning and that Plechner enjoyed the opportunity to commit the crime before taking the photo.

CONCLUSION

We affirm Richard Plechner's conviction and dismiss his personal restraint petition.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Fearing, J.

WE CONCUR:

Siddoway, C.J.

Staab, J.

GLINSKI LAW FIRM PLLC

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