No. 44031-8-II

IN THE COURT OF APPEALS OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

PATRICK JOHN MCALLISTER,

Appellant.

BRIEF OF RESPONDENT

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INTRODUCTION

Patrick McAllister has a history of bad relationships with women. The Department of Corrections' presentence investigation shows five different women obtained protection orders against him in 1987, 1996, 1999, 2002 and 2003. In 2006, he was found guilty of Assault 4, pled down from Rape in the Third Degree. CP.

In 2011, McAllister lured a girl from a rural village in Leyte, The Philippines, to Washington with a promise of marriage. Shortly after arrival she left him and accused him of raping and assaulting her. An investigation was conducted by local police and The Department of Homeland Security, ICE. Multiple charges of Rape in the Second Degree, Rape in the Third Degree, and Assault with Sexual Motivation were filed against Mr. McAllister by the Jefferson County Prosecuting Attorney. CP 1-12.

A jury trial was held on the stated charges in August of 2012, where Mr. McAllister was convicted of 13 counts of Rape in the Second Degree, 10 counts of Rape in the Third Degree, and 8 counts of Assault in the Fourth Degree – Domestic Violence. He was sentenced to 250 months incarceration, at the midpoint of the standard range. CP 13-28.

STATEMENT OF THE CASE

Restatement of Facts

Patrick McAllister lived alone in a house he owned in Brinnon, Washington. VRP 263, 512. His friend, Temur Perkins, had met and married a woman from the Philippines, Rosemarie (Lorega) Perkins. VRP 198-200, 231-233, 247.

During his visits to Temur and Rosemarie Perkins' home, McAllister struck up a friendship over the phone with Rosemarie's sister, Sherilyn Lorega. VRP 202-203. He called her often, sometimes three times a day. VRP 298. He talked about marrying her before they met in person. VRP 299.

In May of 2008, McAllister traveled to Ms. Lorega's village on Leyte Island in the Philippines to meet her and her family. VRP 240, 300, 518-519. The family home had two bedrooms, a packed dirt floor and a thatched roof; the house lacked running water. VRP 251-252, 522. Lorega had eight siblings. Only her older sister, Rosemarie Perkins, had moved away from the area. VRP 293-294.

Ms. Lorega and her parents were adamant that she and McAllister should not have sex until after they were married. VRP 302-05. When McAllister rented a room in a hotel on Leyte, for himself and Ms. Lorega, her father insisted on staying with them as a chaperone. VRP 303. McAllister proposed marriage, and Ms. Lorega accepted. VRP 306.

Ms. Lorega arrived in the United States on March 14, 2010. VRP 350. McAllister picked her up at the airport and took her to his home in Brinnon. VRP 350. Ms. Lorega was menstruating at the time. VRP 308.

On March 18, 2010, McAllister decided to have intercourse with Ms. Lorega. VRP 309. She objected and asked him to stop, but he ignored her. VRP 310-11.

McAllister had non-consensual intercourse with Ms. Lorega many times until April 26, 2010, when she moved to her sister's house. VRP 312. Ms. Lorega testified that McAllister repeatedly forced her to engage in oral and vaginal intercourse between March 18th and April 26, 2010, and kicked her while ignoring her protests. VRP 313-36. On April 28, 2010, Ms. Lorega reported her abuse to the police.

The state charged McAllister with 17 counts of Rape in the Second Degree, and 11 counts of Rape in the Third Degree. Each of these charges also carried an allegation that the offense was a domestic violence crime

committed with deliberate cruelty. The state also charged McAllister with 10 counts of Assault in the Fourth Degree - DV. CP 1-12.[1] McAllister denied all of the allegations.

At the start of trial, the defense asked the court to suppress testimony from Nurse Culbertson who had examined Lorega. The examination did not result in any findings. The defense argued that the nurse's title – "Sexual Assault Nurse Examiner" – would unfairly bolster Ms. Lorega's story. VRP 35-39; Defense Motions in Limine, Supp. CP. The court denied the motion, and allowed the state to use Nurse Culbertson's title in front of the jury. VRP 36, 39, 386-387.

Nurse Practitioner White did not remember Ms. Lorega, but testified from her notes. She said her notes indicated she saw Lorega on June 18, 2010, because Ms. Lorega was experiencing abdominal pain and bleeding. VRP 371. Nurse White testified that at the time of the examination, Ms. Lorega had vaginal bruising that was indicative of "some sort of trauma related to sexual abuse." VRP 373.

The defense also moved to prevent any mention that Ms. Lorega had stayed temporarily at "Dove House," a domestic violence and crime victim shelter in Port Townsend. Defense Motions in Limine, Supp. CP.

[1] The state dismissed Count 39, an assault charge, on the first day of trial. VRP 40-41; CP 12.

The court granted the motion. VRP 40. During his testimony when Mr. Temur Perkins was asked what he had done to support Ms. Lorega and his response mentioned contacting Dove House defense counsel objected and the court sustained the objections:

Q: Now you were aware that, I guess, that her fiancée visa was either getting ready to expire, or was going to, or had already expired. I'm not sure of the timeline there. Did you do anything to assist her in staying in the United States legally if she wanted to go ahead and pursue this case?

A: Yes. I called the, there's like an Asian Pacific Islander Domestic Violence Center and asked them, you know, what her options were. I called, uh, went to the Dove House, the domestic violence center and...

MR. ARBENZ: Objection, Your Honor.

COURT: Sustained.

Q: So you're calling around trying to get some information?

A: Yes.

Q: Okay. So, did you finally get the information that you were looking for?

A: Yes.

Q: As to what to do, or who to go talk to?

A: Yes.

Q: So who did you eventually, if you did, who did you eventually go talk to about making arrangements so that your sister-in-law could stay in the United States?

A: The Dove House, uh...

MR. ARBENZ: Objection, Your Honor.

Q: Okay, that's...

A: What should I say?

COURT: Sustained.

Q: Okay. Um, did you eventually, I guess, get hooked up with somebody that could help with the immigration papers?

A: Yes.

Q: And who was that?

A: An immigration attorney in Seattle.

Q: All right. And is this one that you eventually located on your own, or with some assistance?

A: With assistance from the unsayable word.

VRP 244-45.

Before testimony began, the defense had obtained a ruling excluding reference to Lorega's request for a restraining order against McAllister. VRP 32. During the state's redirect examination of Lorega, the prosecutor brought up the hearing on the restraining order. VRP 363-364. The trial judge overruled a defense objection, and Lorega gave information about what she had said during that hearing. VRP 364.

The court dismissed five counts of Rape 2 and two counts of assault after the state rested. VRP 392-394.

Ms. Lorega testified that McAllister could walk fine and used exercise equipment in the garage. VRP 603.

The prosecutor argued in closing that McAllister's behavior was that of a domestic violence abuser:

> And he becomes physically abusive (inaudible). Because that's what happens in a domestic violence situation. You've got that mental abuse, mental abuse and physical abuse to go ahead and keep that person in line. You control them by fear and by intimidation. "I'm afraid of what you're going to do next" Or, "I'm intimidated. I don't want to do anything to displease you," or whatever. And you dehumanize that person and you devalue that person. Like, you know, "I didn't want to do it. I don't want to do anything to upset or make you mad." And I hear her say that at one point. She said, "What have I done? What do I need to do differently?" "Why are you mad at me?" "Don't worry about it. You'll be fine." Okay. RP 648.

> We talked about it in voir dire. Some people talk about how either they or a loved one just took it and took it and took it for years and years and years before they finally told somebody. It's just, if it's never happened to you it's hard to fathom that it could happen to somebody, somebody else. But, it does and it did. RP 657-658.

Defense counsel did not object to any of these arguments.

Defense counsel, in closing argument, argued Ms. Lorega had an incentive to lie:

> [Defense Counsel] And he said as a result you have to keep in mind that this is a "he said, she said" case. Okay? So let's, um, and he also -- I'll also remind you that he said the defense would show Patrick's innocence in three ways. Through pictures, the benefit of the trip that included a number of pictures, as well as the photobooth pictures and some pictures all the way from the Philippines, inconsistencies, and an incentive to tell something other than the truth. An incentive to lie. VRP 664-65.

In the defense's closing argument, counsel argued that Ms. Lorega had an incentive to lie about the abuse because it was the only way to stay in the U.S. after the relationship had broken up (RP 675-676), argued it was reasonable behavior [for McAllister] to leave Ms. Lorega at his home when he went to his doctors' appointments (RP 679), argues that McAllister thought Ms. Lorega was a willing participant in sexual intercourse (RP 679-680), argues McAllister would not have kicked Ms. Lorega (RP 680),

The prosecutor rebutted the defense counsel's arguments:

> So, you know, it's just part of that control and it's one of those things that we've seen in our personal experience. It's what I -- you know, I mean, I've had friends that were Catholics that were miserable in their marriage but because they were good solid Catholics, I'm sorry, I can't get divorced. (inaudible) husband died on her because she was, you know (inaudible). They got divorced but she wouldn't remarry as long as he was alive. And she didn't get remarried until after her husband, her ex-husband died. To some people it's just like, well once you're married, you

know, you're married for life. You know, that kind of thing. So, it's all part of that control thing. RP 687.

[Prosecutor]: ... And I'll, and then they, they talk about her incentive to lie. Well, she has an incentive to lie because she wants to stay here. This is all part of her, her very, very clever plan to get here and stay. Well, you know, that's okay except there's a little problem with that. Her sister is a United States citizen. She came from the Philippines. She told you she took the test. She said she had to study in English all the things about our country that probably some of us don't even know, or have forgotten. Her sister could sponsor her, you know? Ms. Li didn't tell you that, you know? So that's another one. VRP 687-688.

[Defense Attorney]: Objection, Your Honor. This is outside of anything in evidence in this case and it's untrue. VRP 688.

[Prosecutor]: Well, because...

COURT: Ladies and gentlemen of the jury, I'll remind you, the attorney's remarks, statements and arguments are not evidence. VRP 688.

[Prosecutor]: Well, I'll say (inaudible). We'll get to that part where they're talking about Ms. Li. How Ms. Li on the stand told you all the ways she could legally stay in this country. But she didn't tell you about the other way. VRP 687-688.

[Prosecutor]: But she didn't tell us about how many people do come to this country through normal channels. They apply for entry into the United States. They're sponsored by family members. People who are other citizens. She didn't tell us that. She said, you know, the question to her was, you know, how do they come here and what are their options? What are their options? VRP 694.

> [Prosecutor]: Well, I'm pretty sure that's probably taken care of at the U.S. Embassy before they even granted her a K visa to come over here. They're just not going to allow somebody to come into the country that may have some sort of contagious disease. So I think that was already taken care of. RP 694-695.
>
> [Prosecutor]: And Li even said, Ms. Li even said, that Sherilyn doesn't need to stay to get a conviction in order for her to stay here on this new visa. So, you know, she could refuse to cooperate. She could refuse to testify. She could say, you know, I just can't do this. Please don't make me testify. Please don't make me do this. I don't want to get up in front of a room full of strangers and tell them this stuff. I just can't do it. And that happens all the time in courtrooms around this country. VRP 697.

The prosecutor argued that the absence of medical corroboration of McAllister's injuries should be held against him:

> [Prosecutor]: But let's talk about those medical records. Oh, wait, there are no medical records. Wouldn't you expect there to be medical records? Who controls the medical records? I don't control the medical records. No testimony from the defendant as to what he was operated on. He told you, "I've had a knee replacement." Did he tell you the date? Was it last year? Was it six months ago? Was it six years ago? He didn't tell you that. Who controls that information? Not me.
>
> No doctor to come testify about his mobility. Oh, yes. I was the doctor treating Mr. McAllister back in 2010 and I'm here to testify and tell you as his doctor...
>
> [DEFENSE]: Your Honor I have to object to the burden shifting arguments that are contrary to our state constitution.

> COURT: Once again ladies and gentlemen of the jury, the attorneys' remarks, statements and arguments (inaudible) to apply the facts and understand the law.
>
> [PROSECUTOR]: When, uh, when Mr. Hester is asking Mr. McAllister on the stand, on the direct, I mean he is his witness. And they're talking about this injury. I don't recall any questions from Mr. Hester, when did you have this operation? RP 689-690.

The prosecutor went on to highlight other evidence the defense should have brought:

> And they talk about, well, you know, the letter, the letters that she left behind. Remember what Sherilyn had said, you know? Well, there were other letters. There were other letters. Where are the other letters? Who controls this? Who controls those letters? Where are they? You know, that's called (inaudible), you know? And in some people who have been through an experience like this, they have to write that stuff down to express their thoughts or their feelings, okay? And when she, she writes all these things down and flees, and leaves with only the clothes that she came in a garbage bag, and leaves that behind. Well, they find the one letter.
>
> But like she asked you, where are the other letters? Who controls that? I don't control that. I don't control that. RP 691.

The jury voted to convict on all remaining charges, and they endorsed each alleged aggravator. VRP 705-715.

Mr. McAllister's attorneys moved for a new trial based on prosecutorial misconduct, alleging that the state unlawfully shifted the

burden to the defense during its closing argument. VRP 723-731; Revised Motion and Memorandum for New Trial, Supp. CP. The court denied the motion. VRP 731. Motion to File for New Trial, Supp. CP; Motion and Affidavit for New Trial, Supp. CP; Memorandum in Support of New Trial, Supp. CP; State's Response, Supp. CP; Revised Motion and Memorandum for New Trial, Supp. CP.

After noting a basis for an exceptional sentence, the court imposed a standard range prison term of 250 months. VRP 749; CP 13-28.

McAllister timely appealed. CP 32-33.

ARGUMENT

I. NO PROSECUTORIAL MISCONDUCT OCCURRED

A. Standard of Review.

If the defense does not object at trial, "[r]eversal is not required if the error could have been obviated by a curative instruction which the defense did not request." *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). Failure to object to an allegedly improper remark constitutes waiver unless the remark is "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997) (citing *State v. Gentry*, 125 Wn.2d 570, 596, 888 P.2d

1105 (1995)). If the defense does object to a prosecutor's comment, we review the trial court's ruling on the objection for abuse of discretion. *Id.* at 718, 940 P.2d 1239. This standard of review recognizes that the trial court is in the best position to determine whether prosecutorial misconduct actually prejudiced the defendant's right to a fair trial. *Id.* at 718–19, 940 P.2d 1239.

McAllister argues the prosecutor committed misconduct by stating facts not in evidence during closing argument and by shifting the burden of proof to him.

Prosecutorial misconduct may deprive a defendant of his right to a fair trial. See, *State v. Jones*, 144 Wn.App. 284, 290, 183 P.3d 307 (2008). A defendant claiming such misconduct must show both improper comments and resulting prejudice. *State v. McKenzie,* 157 Wn.2d 44, 52, 134 P.3d 221 (2006). We review a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). If defense counsel fails to object to the misconduct at trial, we consider the issue waived on appeal unless the misconduct is so flagrant and ill-intentioned that it

evinces an enduring prejudice the trial court could not have cured by an instruction. *State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006).

A prosecutor may not refer to evidence not presented at trial. *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 *(1994).* But, in closing argument, a prosecutor has wide latitude to draw reasonable inferences from the evidence and to express such inferences to the jury. *State v. Stenson*, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997). A prosecutor's remarks should be viewed in "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) (citing *Russell*, 125 Wn.2d at 85–86, 882 P.2d 747).

To be prejudicial, a substantial likelihood must exist that the misconduct affected the jury's verdict. *State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359 (2007).

Although an attorney may not make prejudicial statements in closing argument that are not supported by the record, counsel is given latitude to argue the facts and reasonable inferences from the facts. *State v. Dhaliwal*, 150 Wn.2d 559, 577, 79 P.3d 432 (2003). A prosecutor may encourage the jury to draw an unfavorable inference from a defendant's failure to produce evidence that is properly part of the case and is within

the control of the defendant in whose interest it would be to produce it, unless the prosecutor's comments infringe on the defendant's constitutional rights. *State v. Blair*, 117 Wn.2d 479, 485–91, 816 P.2d 718 (1991).

B. Closing Statement.

McAllister argues the prosecutor improperly inserted "facts" into his closing argument that had not been introduced into evidence.

1. Domestic violence behavior.

Domestic violence behavior was addressed many times during *voir dire* when members of the jury panel discussed their experiences. VRP 48-59.

Ms. Lorega testified that McAllister refused to let her accompany him to his physical therapy appointments. VRP 604-5. McAllister argues that the prosecutor's closing statements that typical domestic violence abuser behavior is a possible explanation for his refusal to take her with him.

Defense counsel did not object to the prosecutor's statements. VRP 648.

Because McAllister did not object to the prosecutor's closing argument, he must show that any improper comment was so flagrant or ill-

intentioned that an instruction could not have cured the prejudice. *State v. Charlton*, 90 Wn.2d 657, 661, 585 P.2d 142 (1978).

In addition, the prosecutor's closing argument discussing the dynamics of domestic violence relationships as they were discussed in *voir dire* is proper. *State v. Magers,* Wn.2d 174, 191-92, 189 P.3d 126 (2008).

Also, the prosecutor properly summarized relevant aspects of the behavior of domestic violence abusers as previously discussed in *voir dire*. McAllister has failed to demonstrate that a curative instruction could not have cured any resulting prejudice. Accordingly, he has waived his prosecutorial misconduct claim.

This appeal is without merit and should be denied.

2. Visa requirements.

Rosemarie Perkins, Ms. Lorega's sister, testified that she was married to a U.S. citizen, Temur Perkins and had resided in Jefferson County for 5 years. VRP 198.

McAllister argues that the prosecutor stated facts not in evidence and was misleading. However, under Title 8 CFR Mrs. Perkins is legally a citizen since she is married to a citizen. Also under Title 8 CFR, she may sponsor a sibling to immigrate to the United States.

The prosecutor properly argued the facts and reasonable inferences from the facts to rebut a defense counsel argument.

This argument was proper and the appeal should be denied.

3. Victim's medical exam.

McAllister argues that the prosecutor's closing statement questioning his reason for having Ms. Lorega take a medical exam is improper because there was no evidence to support the allegation that McAllister lied.

The prosecutor was properly rebutting defense counsel's argument that McAllister's behavior was not unusual. Also, the prosecutor's argument is supported by Immigration law because Title 8 CFR § 245.5 Medical examination, in pertinent part, requires that a foreign immigrant to the United States who is a fiancée of a U.S. citizen must have a medical exam either at the time of immigration or show a prior medical exam done within one year of immigration.

The prosecutor was making a reasonable inference based on the testimony and existing law. This appeal is without merit and should be denied.

4. Crime victim visa requirements.

McAllister argues the prosecutor provided "facts not in evidence" when he argued that Ms. Lorega's crime victim visa application did not require her continued participation in his prosecution.

This interpretation of the testimony is incorrect. Ms. Li testified only in reference to scenarios beginning with a K-1 visa (fiancé). She did not testify about the other visas permitted in U.S. immigration law. The prosecutor was correct that a permanent U.S. citizen may sponsor a sibling.

Here, the court repeatedly told the jury that these arguments were not evidence and the prosecutor was clearly rebutting allegations of motive made by defense counsel.

This argument is without merit and the appeal should be denied.

C. Shifting the Burden of Proof.

McAllister argues that the prosecutor's closing remarks regarding the lack of any corroborating information showing he actually had an artificial knee and that, as a result, he did not have the ability to kick the victim was an improper shifting of the burden of proof. He argues the "missing witness" criteria have not been met, however, this is not a "missing witness" situation. McAllister raises this issue with respect to

two of the prosecutor's arguments, his knee operation and letters received from Ms. Lorega.

In the case of the knee operation, McAllister testified on direct examination that he had an operation to install an artificial knee but his testimony did not specify when, where, or give any means of corroborating the statement. VRP 551. This might have been a truthful statement or a self-serving fabrication. Since it is a statement intended to show he was unable to kick the victim as she alleged, it is "properly part of the case" and "within the control of the defendant." *Blair* at 485-91.

In the case of the letters from Ms. Lorega, it is exactly the same situation and argument. McAllister claimed to have letters from Ms. Lorega and failed to produce any of them.

The prosecutor did not improperly shift the burden of proof and this appeal should be denied.

D. Referencing Juror's Voir Dire Comments.

McAllister argues the prosecutor, in closing, improperly referred to the juror's personal experiences with domestic violence expressed during voir dire. His comments are shown in VRP 657-58, 687. McAllister did not object to these statements and they are but a part of the common knowledge already possessed by the jurors.

McAllister has failed to show these comments are either flagrant or prejudicial.

E. Cumulative Effect.

McAllister argues the cumulative effect of all of these alleged instances of misconduct rises to the level where reversal is required. While this may occur, there must be several instances of minor misconduct for a cumulative effect to occur. Here, McAllister has not shown any misconduct, trivial or great, occurred.

This appeal is without merit and should be denied.

II. MCALLISTER WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL

A. Standard of Review.

Review of a challenge to effective assistance of counsel is de novo. *State v. White,* 80 Wn.App. 406, 410, 907 P.2d 310 (1995). We start with the strong presumption that counsel's representation was effective. *State v. Studd*, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999) (citing *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995)). This requires the defendant to demonstrate from the record the absence of legitimate strategic or tactical reasons to support counsel's challenged conduct. State v. *McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).

Reversal is required if defense counsel provides deficient performance and the accused is prejudiced. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). Ineffective assistance of counsel is an issue of constitutional magnitude that can be raised for the first time on appeal. *Kyllo*, 166 Wn.2d at 862; RAP 2.5(a)(3).

B. Was Defense Counsel Ineffective by Failing to Object to Some of the Prosecutor's Comments that Appellate Counsel Now Deems Misconduct?

McAllister again alleges that some of the prosecutor's closing comments were improper. He has failed to show that any of these comments were improper. See arguments on prosecutorial misconduct above. Since he has not shown these comments were improper, this argument is inapposite and the appeal should be denied.

C. Was Defense Counsel Ineffective For Not Offering McAllister's Medical Records to Rebut the Claim That He Had Fabricated His Medical Problems?

Failure to investigate and argue available defenses can comprise ineffective assistance of counsel. See e.g. *State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010); *In re Hubert*, 138 Wn. App. 924, 932, 158 P.3d 1282 (2007).

A motion for a new trial was heard after McAllister was found guilty. In that hearing the prosecutor informed the judge that the medical evidence McAllister provided showed he had a knee replacement in March, 2011, one year after the assault he was found guilty of committing. VRP 725-26.

No evidence was presented to show defense counsel had access to information to support McAllister having a disability prior to the assault.

The court denied the motion for a new trial based on the fact that "other people other than Mr. McAllister could have supported his, his position that his knee disailment, uh, disabled-- his disabled knee would have prevented him from doing what the alleged victim, the victim described." VRP 731.

There was no prosecutorial misconduct and McAllister has not shown there was any evidence available to show he was unable to kick Ms. Lorega on the day of the assault. This appeal should be denied.

1. Was defense counsel ineffective when he failed to make an offer of proof regarding impeachment evidence at trial?

The right to confrontation includes the right to impeach adverse witnesses with evidence of bias. *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002); *Davis v. Alaska,* 415 U.S. 308, 326-18, 94 S.Ct. 1105,

39 L.Ed.2d 347 (1974). An accused person may establish bias through independent evidence, and not merely through cross-examination. *State v. Spencer*, 111 Wn. App. 401, 408, 45 P.3d 209 (2002).

An offer of proof serves three purposes: (1) it informs the court of the legal theory under which the offered evidence is admissible; (2) it informs the judge of the specific nature of the offered evidence so that the court can assess its admissibility; and, (3) it creates a record adequate for review. *Mad River Orchard Co. v. Krack Corp.*, 89 Wn.2d 535, 537, 573 P.2d 796 (1978); *State v. Negrin*, 37 Wn.App. 516, 525, 681 P.2d 1287, review denied, 102 Wn.2d 1002 (1984). See also *State v. Williams*, 34 Wn.2d 367, 384, 386–87, 209 P.2d 331 (1949). The offer of proof allows the trial court to properly exercise its discretion when reviewing, "revaluating [sic]", and, if necessary, revising its rulings. *Cameron v. Boone*, 62 Wn.2d 420, 425, 383 P.2d 277 (1963). It is the duty of a party offering evidence to make clear to the trial court what it is that he offers in proof, and the reason why he deems the offer admissible over the objections of his opponent, so that the court may make an informed ruling. *Mad River Orchard Co. v. Krack Corp.*, 89 Wn.2d 535, 537, 573 P.2d 796 (1978) (quoting *Tomlinson v. Bean*, 26 Wn.2d 354, 361, 173 P.2d 972 (1946)).

Here, McAllister argues that there was evidence Ms. Lorega had attempted to influence a witness. According to the Defense Sentencing Memorandum, this evidence consisted of a card with Mr. Sabiniano's address in the Philippines that he had previously provided to Ms. Lorega, which one of her relatives had in his possession when he was threatened him with harm if he testified against her.

Since there was no offer of proof, the only evidence McAllister offers to show his defense counsel was ineffective is that his witness thinks Ms. Lorega gave his address card to her relatives and convinced them to try and tamper with his testimony. There is no indication the card he saw with his address is the same one he gave to her. There is no evidence that she asked her relatives to influence him. In light of the lack of corroborating evidence mentioned after trial, it is likely that none was available to offer as proof during trial. It is likely that defense counsel determined that Mr. Sabiniano's testimony on this issue would simply undermine his credibility and did not pursue the issue during trial.

McAllister has provided no evidence that his trial attorney had any proof to offer to corroborate the inferences of Mr. Sabiniano. Since there was no offer of proof, there is insufficient evidence on the record to

determine whether defense counsel was ineffective. This appeal is without merit and should be denied.

2. Was defense counsel ineffective when he failed to object to testimony that was not hearsay?

McAllister argues that defense counsel was ineffective because of his failure to properly object to certain testimony. First, when Detective Garrett was asked about her interview with Ms. Lorega. VRP 276. Second, when Ms. Lorega testified that her sister told her that her vagina did not appear normal. VRP 341. Third, when Nurse Culbertson gave her job title. VRP 387. Fourth, when "Dove House" was mentioned in testimony. VRP 245, 249.

a. Detective Garrett testimony. VRP 275-76.

When a declarant makes a statement to law enforcement a court uses the "primary purpose" test to determine whether the statement is testimonial, for Confrontation Clause purposes: statements are "nontestimonial" when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency, but are "testimonial" when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the

interrogation is to establish or prove past events potentially relevant to later criminal prosecution. *State v. Hurtado,* 173 Wn.App. 592, 294 P.3d 838 (2013).

In direct examination Detective Garrett was asked how she became involved with this case in the following testimony:

> Q: How did you get involved in whatever was alleged to have occurred down on Seamount Drive?
>
> A: It was Mr. Perkins called me and, um, he said that after Sherilyn arrived at their home and had an opportunity to talk to her sister, Rose, she confided in her sister that, um, McAllister had raped her repeatedly.
>
> Q: And being apprised of that information, what, what did that prompt you to do as far as your job is concerned?
>
> A: Then I had to conduct an interview with Sherilyn.

It is clear that Detective Garrett's testimony here was not being offered for the truth of the statement, but only to describe how she became involved in the investigation. Since it was not offered for the truth of the statement, it is not hearsay. Clearly, the statement to her was made to seek police assistance and was not made to establish or prove past events.

There was nothing objectionable in the testimony and an objection would have been overruled.

b. Ms. Lorega's testimony.

McAllister argues his defense counsel was ineffective because he did not object to Ms. Lorega's testimony that her sister told her that her vagina did not look right. Ms. Lorega gave the following testimony:

> Q: After you left his house did you still feel pain?
>
> A: Yes.
>
> Q: What kind of pain did you feel?
>
> A: I don't know. It's like (inaudible) the time that I live in his house I have menstruation and then it's like I'm still bleeding. And then I don't know what's wrong with me. And then I just talk to my sister because my sister just confused why almost every day I have menstruation. And then my sister, "What happened to you?" And then my sister just take my vagina and she said it's not normal. And then that time, I don't know what my sister she doing and then she said maybe you need to go to the doctor.
>
> Q: So, did you go to a doctor?
> A: Yes. In Jefferson Health. VRP 340-41

When out-of-court assertions are not introduced to prove the truth of the matter asserted, they are not hearsay and no Confrontation Clause concerns arise. *State v. Mason,* 127 Wn.App. 554, 561, 126 P.3d 34 (2005); *citing Crawford v. Washington*, 124 S.Ct. 1354, 1369 n. 9 (citing *Tennessee v. Street*, 471 U.S. 409, 414, 105 S.Ct. 2078, 85 L.Ed.2d 425 (1985)).

Here, Ms. Lorega's statement was only made to show why she contacted a medical service provider, not for the truth of the matter asserted. It was not hearsay, not a violation of Crawford, and not objectionable. The defense counsel was not ineffective for not objecting to it.

c. Nurse Culbertson's job title.

McAllister argues his defense counsel was ineffective because he did not object to Nurse Culbertson giving her job title. He argues that he objected to her title in a motion in limine that was denied and that his counsel was ineffective by not again objecting when she testified. McAllister objected to the jury hearing her job title – Sexual Assault Nurse Examiner (SANE). VRP 38-39.

The decision whether to admit expert testimony under ER 702 is within the discretion of the trial court and will not be disturbed absent a showing of an abuse of that discretion. *State v. Swan*, 114 Wn.2d 613, 655, 790 P.2d 610 (1990). It is an abuse of discretion to admit such testimony if it lacks an adequate foundation. *Safeco Ins. Co. v. McGrath*, 63 Wn.App. 170, 179, 817 P.2d 861 (1991).

The court denied the motion and explained "[the] motion was to prohibit referring to their occupations as sexual assault nurse examiner. I

think (inaudible) refer to their occupation. That's what they are. And they come up and they'll testify to it." VRP 39.

Defense counsel did not object when Ms. Culbertson testified as to her job and qualifications. VRP 386-387. It is quite likely that the court convinced counsel that Ms. Culbertson needed to testify to her qualifications and job responsibilities in order to lay a proper foundation for her testimony.

This appeal is without merit and should be denied.

d. Dove House.

McAllister argues his defense counsel did not object to Mr. Perkins' references to Dove House in his testimony.

Reference to Ms. Lorega's residency at Dove House was excluded in a motion in limine. VRP 39-40.

In fact, Dove House was inadvertently mentioned three times in testimony and it was objected to three times and the objection was sustained three times.

In fact, defense counsel objected the first time Mr. Perkins used the phrase "Dove House" in his testimony. Direct examination by prosecutor:

Q: Okay. And did you allow her to stay at your house?

A: Yes.

Q: For how long did she stay at your house?

A: Until now.

Q: Until now?

A: Yeah. She's...

Q: I mean, has she stayed other places over the last couple of years?

A: Um, she stays at, um, Dove House. She stayed before.

MR. HESTER: Your Honor, objection. This is a subject of motions in limine.

COURT: Sustained. VRP 213.

Q: Now you were aware that, I guess, that her fiancée visa was either getting ready to expire, or was going to, or had already expired. I'm not sure of the timeline there. Did you do anything to assist her in staying in the United States legally if she wanted to go ahead and pursue this case?

A: Yes. I called the, there's like an Asian Pacific Islander Domestic Violence Center and asked them, you know, what her options were. I called, uh, went to the Dove House, the domestic violence center and...

MR. ARBENZ: Objection, Your Honor.

COURT: Sustained. VRP 244-45.

Q: Okay. So, did you finally get the information that you were looking for?

A: Yes.

Q: As to what to do, or who to go talk to?

A: Yes.

Q: So who did you eventually, if you did, who did you eventually go talk to about making arrangements so that your sister-in-law could stay in the United States?

A: The Dove House, uh...

MR. ARBENZ: Objection, Your Honor.

Q: Okay, that's...

A: What should I say?

COURT: Sustained.

When Mr. Perkins finally learned he could not say "Dove House," but the question required a noun, he used "unsayable word" or "unmentionable word" as surrogates without defense objection. Quite properly for there was no motion in limine preventing him from answering questions requiring a person, place, or institution where Ms. Lorega received help, or resided.

Defense counsel was not ineffective and this appeal should be denied.

III. McALLISTER WAS NOT DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO CONFRONTATION, TO PRESENT A DEFENSE, OR TO A FAIR TRIAL.

A. Standard of Review.

Under RAP 2.5(a)(3), an issue first raised on appeal may be reviewed by an appellate court where it is a manifest error affecting a constitutional right. The burden is on the defendant to make the required showing. *State v. McDonald*, 138 Wn.2d 680, 691, 981 P.2d 443 (1999). In *State v. Lynn*, 67 Wn.App. 339, 835 P.2d 251 (1992), the court concluded the proper approach in analyzing alleged constitutional error raised for the first time on appeal involves four steps:

> First, the reviewing court must make a cursory determination as to whether the alleged error in fact suggests a constitutional issue. Second, the court must determine whether the alleged error is manifest. Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case. Third, if the court finds the alleged error to be manifest, then the court must address the merits of the constitutional issue. Finally, if the court determines that an error of constitutional import was committed, then, and only then, the court undertakes a harmless error analysis.
> ....
>
> However, it is not sufficient when raising a constitutional issue for the first time on appeal to merely identify a constitutional error and then require the State to prove it harmless beyond a reasonable doubt. The appellant must first make a showing how, *in the context of the trial*, the alleged error *actually* "affected" the defendant's rights. Some reasonable showing of a likelihood of *actual prejudice* is what makes a "manifest error affecting a constitutional right."

Lynn, 67 Wn.App. at 345–46, 835 P.2d 251 (emphasis added) (quoting RAP 2.5(a)(3)).

We question whether [the defendant] establishes manifest constitutional error when he makes no showing that the claimed error actually prejudiced his rights in the context of the trial. *State v. Humphries*, 170 Wn.App. 777, 285 P.3d 917 (2012).

B. The Judge Did Not Allow Inadmissible Evidence to be Presented to the Jury.

McAllister argues that the trial court erred when it permitted Mrs. Perkins, Ms. Lorega's sister, to testify that she told Ms. Lorega to go back to the Philippines because she would not be happy in the U.S. VRP 215. McAllister argues the statement is hearsay under ER 801 because it is an out of court statement offered for its truth. However, this is incorrect.

Whether a prior statement is admissible under ER 801(d)(1)(ii) is within the trial court's discretion and will not be reversed absent a showing of manifest abuse of discretion. *State v. Dictado*, 102 Wn.2d 277, 290, 687 P.2d 172 (1984); *State v. Osborn*, 59 Wn.App. 1, 5, 795 P.2d 1174, review denied, 115 Wn.2d 1032, 803 P.2d 325 (1990). ER 801(d)(1)(ii) provides:

> A statement is not hearsay if—
>
> (1) Prior Statement by Witness. The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is ... (ii) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive[.]

While the witness' prior consistent statements are not admissible to prove that the in-court allegations are true, the statements are admissible to rebut a suggestion of recent fabrication. *State v. Bargas*, 52 Wn.App. 700, 702, 763 P.2d 470 (1988), *review denied*, 112 Wn.2d 1005 (1989). Recent fabrication is inferred when counsel's examination "raise[s] an inference sufficient to allow counsel to argue the witness had a reason to fabricate her story later." *Bargas*, 52 Wn.App. at 702–03, 763 P.2d 470.

In defense's opening statement, McAllister said, "The third defense in this case is that Ms. Lorega has every incentive to lie so as to stay in America." VRP 195.

Mrs. Perkins direct examination testimony focused on Ms. Lorega's desire to remain in the U.S. and her mental, emotional, and physical state. VRP 198-217. The prosecutor argued his question and her response were in answer to defense counsel's opening statement alleging that Ms. Lorega had lied about her abuse in order to stay in the U.S. The court agreed and overruled the defense objection:

> Q: Um, during this time period when she was in your house and she was upset and emotional, and I think you said she wanted to kill herself, um, was, did she express any concerns as to what people would think about her?
>
> A: She did.

MR. HESTER: Same objection. That question calls for hearsay.

Q: This would be under the influence of the traumatic experience.

A: Uh, yes.

COURT: Well the question was, did she express any concerns about what people thought of her or what people would think of her?

Q: Yes.

COURT: She can answer that yes or no.

Q: And did she express any concerns as to what she would think people would think about her?

A: Yes.

Q: Okay. Now she's here on a temporary visa. Did she talk to you about staying or going back to the Philippines?

A: Oh, uh, yes. The day we pick...

MR. HESTER: Okay. This question also calls for hearsay.

COURT: Mr. Rosekrans?

Q: Okay. Just goes to the decision that she made and basically in response to their opening statement that she had to exercise her options. And according to their opening statement the option that she chose was to get a U visa to stay here.

COURT: I'll sustain the objection. Go ahead.

Q: Okay. Did you talk to your sister about going back to the Philippines or staying in the United States?

A: Sorry, I can't understand?

Q: Did you have a conversation with Sherilyn, your sister, about either going to the Philippines or staying in the United States?

A: Yes.

Q: And what did you encourage her to do?

A: Oh um, really, I told her, you know, you can go home. You can stay. You can go home. I don't, I know you're not going to be happy to because of what happened...

MR. HESTER: Your Honor, I object. This is all hearsay.

COURT: Overruled. She's saying what she told her.

MR. HESTER: Which I-- respectfully is hearsay.

COURT: I don't think it-- overruled.

The statement was not hearsay and this appeal should be denied.

C. Motions in Limine Were Not Violated.

McAllister argues the trial court first granted a motion in limine excluding testimony regarding restraining orders and then permitted a witness to give testimony mentioning a restraining order. The motions in limine hearing is shown on the record at VRP 27 and there is no mention

of restraining orders, except possibly the statement, " No reference to procedural history."

The testimony herein objected to occurred during rebuttal direct examination of Mrs. Perkins:

Q: Describe for the jury what you saw him doing, or his movements?

A: He was pacing angrily back and forth in the driveway.

Q: All right. Was he favoring either one of his legs?

A: No, he was walking just fine.

Q: Okay.

A: Pivoting on it, walking back and forth. Pivoting.

Q: Okay.

A: Angry. Talking on the cell phone.

Q: And, and when was the third time?

A: At a, uh, initial restraining order hearing here at the courthouse.

MR. HESTER: Objection, Your Honor.

Q: Um...

COURT: The objection?

MR. HESTER: The objection is, uh, subject to motions in limine. That evidence is, that testimony is wrong.

COURT: Okay.

MR. HESTER: Excluded.

COURT: He asked when he saw him and he said at a hearing.

Q: Okay. So, uh, was...

COURT: I'll overrule the objection. VRP 581-82.

Here, the prosecutor was inquiring into the conditions where the witness observed McAllister walking. That the third time occurred after a court hearing was not the object of the questioning, nor was it excluded in a motion in limine. The court properly overruled the objection. No error occurred and this appeal should be denied.

D. The Trial Court Properly Excluded Irrelevant and Immaterial Evidence.

McAllister argues the court erred when it excluded testimony from Mr. Sabiniano that he believed Ms. Lorega tried to coerce him into not testifying. However, defense counsel did not make an offer of proof, when the prosecution's objection was sustained.

Since there was no offer of proof, there is insufficient evidence on the record to determine whether anyone, let alone Ms. Lorega, tried to influence Mr. Sabiniano not to testify. This appeal is without merit and should be denied.

E. No Cumulative Error Occurred.

McAllister argues the cumulative effect of many erroneous rulings prejudiced him.

Under the cumulative error doctrine, the court may reverse a defendant's conviction when the combined effect of errors during trial effectively denied the defendant his right to a fair trial, even if each error standing alone would be harmless. *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006); *State v. Hodges*, 118 Wn.App. 668, 673–74, 77 P.3d 375 (2003). The doctrine does not apply where the errors are few and have little or no effect on the trial's outcome. See *Weber*, 159 Wn.2d at 279, 149 P.3d 646.

Here, McAllister has failed to show that any errors occurred, or that the errors they claim had any effect on the jury. This appeal is meritless and should be denied.

IV. THE EVIDENCE WAS SUFFICIENT TO CONVICT MR. MCALISTER OF SECOND DEGREE RAPE.

A. Standard of Review.

A conviction must be overturned for insufficient evidence if, after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found each element of the offense beyond a reasonable doubt. *In re Martinez*, 171 Wn.2d 354, 364, 256 P.3d 277 (2011) (*quoting Jackson v. Virginia*, 443 US 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)).

B. The Evidence was Sufficient to Convict McAllister of Second Degree Rape.

In order to obtain a *conviction* for second degree rape, the state must prove beyond a reasonable doubt that sexual intercourse took place. RCW 9A.44.050. Sexual intercourse:

> (a) has its ordinary meaning and occurs upon any penetration, however slight, and
> (b) Also means any penetration of the vagina or anus however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex, except when such penetration is accomplished for medically recognized treatment or diagnostic purposes, and
> (c) Also means any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.
> RCW 9A.44.010(1).

In count 18, the prosecution charged McAllister with second degree rape on or about April 3, 2010. CP 5. McAllister argues that "Regarding that date, however, Lorega testified only that McAllister's "penis was strong and he attacked [her]." VRP 325. The state presented no other evidence in support of charge 18." Appellant's brief page 46.

During direct examination Ms. Lorega testified to daily instances of unwanted sexual intercourse by McAllister:

1. March 18 – vaginal intercourse. VRP 313-14.
2. March 19 – vaginal and oral sex. VRP 315.
3. March 20 – vaginal sex. VRP 317.
4. March 21 – vaginal sex. VRP 319.

5. March 22 – vaginal sex, twice. VRP 320.
6. March 23 – vaginal sex. VRP 321.
7. March 25 – vaginal sex. VRP 321.
8. April 1 – vaginal sex. VRP 323.
9. April 2 – oral sex. VRP 324.
10. April 3 – After he took his medicine "and then his penis strong and he just attacked me." VRP 325.

McAllister asserts that "No rational trier of fact could have found beyond a reasonable doubt that Mr. McAllister was guilty of second degree rape as charged in count 18." Appellant's brief 47.

This is incorrect. Ms. Lorega's testimony showed a continuing pattern of McAllister taking some medication then forcing sexual activity upon her. The jury's conclusion that he committed rape on April 3, 2010, was a rational finding based on his pattern of activity over the immediately preceding period.

V. THE TRIAL COURT PROPERLY ALLOWED THE JURY TO CONSIDER A DOMESTIC VIOLENCE AGGRAVATING FACTOR WITH REGARD TO EACH COUNT OF THIRD-DEGREE RAPE UNDER RCW 9.94A.535(3).

The state charged McAllister with 17 counts of Rape in the Second Degree, and 11 counts of Rape in the Third Degree. Each of these charges also carried an allegation that the offense was a domestic violence crime committed with deliberate cruelty. The state also charged McAllister with 10 counts of Assault in the Fourth Degree. CP 1-12. The court dismissed two

counts of Rape in the Second Degree and the prosecution dropped one count of assault. VRP 40-41, CP 12.

The jury found McAllister guilty of all charges and endorsed a domestic violence aggravating factor on all charges.

McAllister argues that the aggravating domestic violence factor should not apply to his Rape in the Third Degree convictions because RCW 10.99.020(5) does not list that crime as one of those to be considered domestic violence crimes. However, RCW 10.99.020(5) states," "Domestic violence" includes but *is not limited to* any of the following crimes when committed by one family or household member against another:... (Emphasis added).

RCW 9.94A.390(2)(h)[2] provides in relevant part that an act of domestic violence, as defined by RCW 10.99.020, can be an aggravating factor provided "[t]he offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim." RCW 9.94A.390(2)(h)(iii). Thus, the determinative inquiry is whether the crime constituted an act of "domestic violence." *State v. Garnica*, 105 Wn.App. 762, 20 P.3d 1069 (2001).

[2] Recodified as RCWA 9.94A.535

RCW 9.94A.535(3) Aggravating Circumstances -- Considered by a Jury -- Imposed by the Court, states:

> Except for circumstances listed in subsection (2) of this section, the following circumstances are an exclusive list of factors that can support a sentence above the standard range. Such facts should be determined by procedures specified in RCW 9.94A.537.
>
> (a) The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim.
> ...
>
> (f) The current offense included a finding of sexual motivation pursuant to RCW 9.94A.835.
>
> (g) The offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time.
>
> (h) The current offense involved domestic violence, as defined in RCW 10.99.020, or stalking, as defined in RCW 9A.46.110, and one or more of the following was present:
>
> (i) The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time;
> ...
> (iii) The offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim.
> ...

Here, the jury found McAllister committed acts of domestic violence during his intimidation and attacks on Ms. Lorega. The words

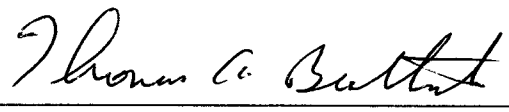
used in RCW 10.99.020(5) make it clear the legislature did not intend the list of crimes therein to be exclusive. The trial court had the authority under RCW 10.99 and RCW 9.94A.535(3)(a), (f), (g), and (h) to employ a domestic violence aggravating factor to each of McAllister's convictions for Rape in the Third Degree.

CONCLUSION

The State respectfully requests that this Court affirm the trial court and that Appellant be ordered to pay costs, including attorney fees, pursuant to RAP 14.3,18.1 and RCW 10.73.

Respectfully submitted this 4th day of September, 2013.

SCOTT ROSEKRANS, Jefferson County
Prosecuting Attorney



By: Thomas A. Brotherton, WSBA # 37624
Deputy Prosecuting Attorney

PROOF OF SERVICE

I, Janice N. Chadbourne, certify that on this date:

I filed the State's BRIEF OF RESPONDENT electronically with the Court of Appeals, Division II, through the Court's online filing system.

I delivered an electronic version of same using the Court's filing portal to:

Backlund & Mistry
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And to Defendant via U.S. Mail, postage prepaid:

Patrick John McAllister, DOC #360256
Washington Corrections Center
2321 West Dayton Airport Road
P.O. Box 900
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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Port Townsend, Washington on September 4, 2013.

Janice N. Chadbourne
Lead Legal Assistant

JEFFERSON COUNTY PROSECUTOR

September 04, 2013 - 4:42 PM

Transmittal Letter

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