71631-0

71631-0

NO. 71631-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

THOMAS M. GAUTHIER,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE DOUGLASS NORTH

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Did the prosecutor commit such egregious misconduct in rebuttal closing argument that the defendant's complete failure to raise an objection should be excused, and his rape conviction reversed?

2. Did the defendant's prior felony convictions "wash" for purposes of his offender score while he was sitting in jail pursuant to felony charges that resulted in a felony conviction?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On April 22, ***2001***, TA reported that she was raped by an unknown male. CP 2-3. In October of ***2008***, the defendant was identified as a suspect based on DNA testing of semen recovered from the jacket worn by TA. CP 3. On March 13, 2009, the defendant was charged with rape in the second degree. CP 1. He was taken into custody on July 23, 2010 and arraigned on August 3, 2010. CP 109-10, 123. He remained in custody until he proceeded to trial on May 5, 2011. CP 124.

On June 2, 2011, a jury found the defendant guilty as charged. CP 125. He was sentenced on July 8, 2011. CP 6-15. With an offender score of five, he received a standard range

sentence of 120 months. CP 7, 9. His offender score included five prior class C felony convictions. CP 13.

The defendant filed an appeal and on April 1, 2013, this Court reversed the defendant's conviction and remanded the case for a new trial. CP 17-32. A mandate was issued on May 10, 2013. Id. On July 29, 2013, the defendant was then transferred back from the Department of Corrections to the King County Jail to face trial. CP 126-27. On November 6, 2013, the case was assigned out to trial before the honorable Judge Douglass North. CP 128-50. On November 26, 2013, a jury again found the defendant guilty as charged. CP 75.

The defendant was sentenced on February 14, 2014. CP 77-88. Just as before, the defendant's offender score was calculated as a five by using the same five prior class C felony convictions that were used to calculate his offender score at his prior sentencing. CP 78, 84, 151-62. The defendant received a standard range sentence of 120 months. CP 80.

2. SUBSTANTIVE FACTS

TA grew up in Yakima, trained as a medical assistant, and moved to King County for work some 23 years ago. 11/19 RP 378-381. In April of 2001, TA had to work two jobs to make ends meet.

She worked part time as a medical assistant and part time as a restaurant waitress at Rascal's Casino located just a few blocks from her South Seattle apartment. Id. at 381, 383.

TA did not own a car so she had to walk to work. 11/19 RP 385-87. With the casino being open 22 hours a day, sometimes this meant walking home alone at night along Des Moines Memorial Drive. 11/19 RP 385-87.

On April 22, 2001, TA worked a shift at the casino that ended at 10:45 p.m. 11/19 RP 391. She stayed at the casino until approximately 12:30 when she was driven home by her niece. 11/19 RP 392; 11/21 RP 437. She planned to return to the casino later to pick up a co-worker who was going to spend the night at TA's apartment because she had to work again the next day. 11/19 RP 396-98. Before TA left her apartment, she changed out of her work clothes. 11/19 RP 397, 416-18. Because of how cold it was outside, she put a jacket on and she wore one pair of pants over another pair of pants over a pair of leggings. 11/19 RP 397, 416-18. After bundling up, TA walked back to the casino. 11/19 RP 399.

When TA got to the casino she found out that her friend was not getting off work as planned. 11/19 RP 399. So, around 3:00

a.m., TA set off down Des Moines Memorial Drive to her apartment. 11/18 RP 393-94; 11/19 RP 399-400. As she proceeded down the roadway, TA did not observe anyone out on the street. 11/19 RP 401. As TA walked along, she was grabbed from behind without warning and pushed over a guardrail. 11/19 RP 402. TA tried to resist her attacker to no avail. 11/19 RP 402-04. She described being in a complete panic and with thoughts that she was going to die. 11/19 RP 402-04.

Her attacker ordered her to take off her pants. 11/21 RP 459. He also told her that if she resisted he would hurt her. 11/21 RP 459. TA's pants were taken off but she could not recall how that happened. 11/19 RP 404. In an attempt to get her attacker to stop, TA told the man that she was on her period – and she was. 11/19 RP 405. She pulled out her tampon to show that she was on her period. 11/19 RP 405. This, however, did not deter her attacker. 11/19 RP 406. Instead, her attacker, with a hand squeezing her neck, and a hand holding her head down, forced her to perform oral sex on him. 11/19 RP 406-07. He ejaculated, and as TA was "spitting all over the place," the attacker got up and fled. Id.

Although no cars were driving by at that hour to stop and help her, TA walked down the middle of the roadway until she got home. 11/19 RP 409. She then knocked on some doors of some apartments but nobody answered. 11/19 RP 409. She then went into her apartment, grabbed a knife and went back outside looking for her attacker. 11/19 RP 410. She admitted that day, and while testifying, that she grabbed a knife because she wanted to kill her attacker. 11/19 RP 410. After walking past the casino three times and not finding her attacker, she went back home. 11/19 RP 410. At some point, she washed her mouth out with peroxide. 11/19 RP 414.

A short time later, her sister's partner, Donald Brown, called TA. 11/19 RP 412. Brown had known TA since they were kids in school together growing up in Yakima. 11/21 RP 500-03. While TA would not tell Brown what had happened to her, she was crying on the phone and asked Brown to come over. 11/21 RP 507-9. Brown testified that he had never heard TA like that before. 11/21 RP 508.

Brown immediately drove over to TA's apartment. 11/21 RP 509. When TA opened the door for Brown, he found her crying and shaking as she disclosed to him that she had been raped. 11/21

RP 510-11. Brown could see scratch marks on TA's neck. 11/21 RP 532. The two then got into Brown's car and went looking for TA's attacker. 11/21 RP 512-13. Unsuccessful, Brown and TA returned to TA's apartment where Brown tried to get TA to call the police. 11/21 RP 516-17. Although she was initially too scared and embarrassed to do so, TA did end up calling 911.[1]

When the police arrived, they obtained all of the clothing that TA had been wearing and submitted it to the crime lab for testing. 11/18 RP 443, 11/18 RP (afternoon session) 256, 267; 11/19 RP 414. TA also showed detectives where she had been raped. 11/18 RP 394. Detectives observed an area in the foliage where the grass had been matted down. 11/18 PR 398-99, 444-45. Detectives also recovered a tampon that was lying on the ground. 11/18 RP 400, 445.

TA's jeans had grass stains on the right leg, upper right pocket, a back pocket, and brown dirt stains on the lower leg. 11/19 RP 294, 416. There was also grass on her leggings, leggings that she had been wearing under her pants. 11/19 RP 288, 417-18. TA had bruises on her upper arms and on her hip.

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[1] The 911 tape was played for the jury. 11/19 RP 413. Trial Exhibit 53 is the CD of the call. Trial Exhibit 52 is a transcript of the call that was provided to the jury. 11/19 RP 413.

11/18 RP 442; 11/19 RP 420. TA quit her job at the casino just a few weeks after the rape because she was too scared to walk home at night. 11/19 RP 423.

After the rape a police artist worked with TA and created a composite sketch that detectives began showing around the neighborhood. 11/18 RP 405; 11/21 RP 469, 473, 476. On June 28, 2001, detectives happened to observe the defendant walking on Des Moines Memorial Drive about a mile south of the rape. 11/18 RP 412-13. The detectives contacted the defendant, told him they were investigating a rape and showed him the composite sketch. 11/18 RP 414-15. The defendant told the detectives that he had just been released from jail. 11/18 RP 418. He also provided his current address, an address that was about a mile from the rape scene. 11/18 RP 416-17.

On August 29, 2001, TA's clothing was subjected to testing by the crime lab. 11/19 RP 298-300. Semen was found on TA's jacket. 11/19 RP 298, 302. On October 5, 2001, the DNA report came back with no match found to the DNA profile obtained from the semen. 11/19 RP 298, 302.

Over the next several months, TA met with detectives who showed her a number of montages created as the police received

various tips regarding possible suspects. 11/19 RP 312-15, 422. TA did make a tentative pick of one suspect but that person's DNA did not match the DNA from the semen on TA's jacket. 11/19 RP 314-15. After a while, the calls from the detectives stopped coming and TA assumed the police had stopped looking for her rapist. 11/19 RP 422.

Years later, in 2008, there was a CODIS DNA database hit showing that the DNA from the semen on TA's jacket matched the defendant. 11/21 RP 479-84.[2] The defendant was located in Arizona and was returned to Washington to face charges. 11/21 RP 485-86.

The defendant testified that back in 2001 he had a "major issue" with crack cocaine. 11/25 RP 14. He said it affected virtually every aspect of his life and that it made "room for bad decisions." 11/25 RP 14. Although he claimed he never possessed an "impulse to rape," he admitted that to him, sex and smoking crack cocaine went "hand in hand." 11/25 RP 15, 31.

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[2] The parties agreed that in lieu of live testimony from the DNA expert, a transcript of the expert's testimony from the first trial would be read to the jury. 11/21 RP 426, 494; trial exhibit 62. The testimony showed that semen and sperm cells were found on both the right and left sleeve of TA's jacket. Exhibit 62 at 119-26. A DNA profile was obtained and entered into CODIS in December of 2001 with no hit. Exhibit 62 at 132-33. A CODIS hit was made in September of 2008. Exhibit 62 at 133. Further testing confirmed a match for the defendant with a population statistic of one in 81 quadrillion. Exhibit 62 at 128, 134.

"Pretty much when you are out smoking crack and you have a car and you have money, if opportunity arises, you take advantage of what's there." 11/25 RP 32.

The defendant testified that he had had an "interaction in the past" with TA that occurred before the alleged rape. 11/25 RP 25. He testified that he and his girlfriend had been in a store parking lot waiting to score some crack from a drug dealer who was late, when he spied TA. 11/25 RP 25. The two nodded at each other, indicating that they could do a drug deal. 11/25 RP 25-26. TA told the defendant she could get him some dope so he fronted her $60. 11/25 RP 26. According to the defendant, TA stiffed him, taking his money and not returning. 11/25 RP 26.

The defendant testified that on a later date he was walking through South Park in the middle of the night looking into dumpsters for scrap metal after having had a few drinks and having smoked some crack. 11/25 RP 27. He was "coming down big time" and was looking to score some more drugs. 11/25 RP 27. He then just happened to notice a woman walking down the street a couple blocks away from him. 11/25 RP 28. His first thought was, "maybe I can get some drugs" from her. 11/25 RP 27. He yelled at the woman to slow down. 11/25 RP 28.

When the defendant caught up to her, using street language, he asked the woman if she had any crack she could sell him. 11/25 RP 29. The woman said that she did not but that she could get some for him. 11/25 RP 30. Not wanting to front the woman any money, he decided that he wanted to have sex with her instead. 11/25 RP 30. He asked her if she "dated," which meant he want to know whether she would have sex with him for money.[3] 11/25 RP 30. He then asked the woman if she would have sex for $20, to which she said "no." 11/25 RP 33. He then asked if she would have sex for $50, to which she said "yes." 11/25 RP 33.

At this point, the defendant claimed that the two of them stepped over the guardrail into the grass where he laid down his jacket for the woman to kneel down on. 11/25 RP 33. He then unzipped his pants, took out his penis, and the woman performed oral sex on him until he ejaculated. 11/25 RP 34, 36.[4]

After he ejaculated, the woman stood up and asked for her money. 11/25 RP 37. The defendant testified that he zipped up his pants, picked up his jacket and told the woman she was "burnt," meaning he wasn't going to pay her. 11/25 RP 37. He did this, he

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[3] The defendant testified that he picked up prostitutes all the time. 11/25 RP 31-32.

[4] According to the defendant, the woman never took her pants off. 11/25 RP 36.

testified, because at some point during their sexual encounter, he recognized the woman as the woman who had stiffed him before. 11/25 RP 37, 59. He then quickly walked away as the woman yelled at him. 11/25 RP 38.

On cross examination, the defendant admitted that he had never told anyone this version of the incident before. 11/25 RP 40. He admitted that a detective had asked him if he had had any bad experiences with a prostitute and that he had said he had not. 11/25 RP 71. His explanation was that this wasn't a bad experience "because I actually got even with somebody that had ripped me off." 11/25 RP 71.

In rebuttal, Detective Chris Knudsen testified that when he spoke to the defendant about the rape, the defendant initially said nothing about his propensity for hiring prostitutes. 11/25 RP 112-13, 117, 119-20. The defendant only mentioned that he hired prostitutes after the detective told him that his semen had been found on the victim's jacket and that he would like to provide an explanation to the prosecutor when he filed the case. 11/25 RP 117, 119. It was only then that the defendant said he routinely hired prostitutes, but he never told the detective that he had a bad experience with a prostitute or that he ripped off a prostitute. Id.

Also in rebuttal, Deputy Jesse Anderson testified that there was nothing in the course of his investigation that caused him to believe TA was engaged in a prostitution lifestyle. 11/25 RP 108. He also testified that the area this incident occurred was not a high prostitution area, nor are there many people or customers out in that area at that time of night. 11/25 RP 106. He added that a prostitute would not normally bundle up like TA was because prostitutes generally want to wear clothing they can quickly and easily remove. 11/25 RP 108.

At trial, TA testified that she had never worked as a prostitute. 11/19 RP 424. She stated that it made her feel nasty to even be asked such questions. 11/19 RP 424. She said she had not been using drugs, that the defendant had not asked her for drugs, and that he did ask her to have sex for money. 11/21 RP 455.

Additional facts are included in the sections they pertain.

C. ARGUMENT

1. THE DEFENDANT HAS FAILED TO SHOW THAT MISCONDUCT OCCURRED IN HIS TRIAL AND THAT HIS RAPE CONVICTION SHOULD BE REVERSED

The defendant contends that the prosecutor committed such flagrant and egregious misconduct in closing argument that his own complete failure to object should be excused, and his rape conviction reversed. Specifically, the defendant asserts that the prosecutor committed misconduct by appealing to the passions and prejudices of the jury. The defendant's claim is without merit. The whole defense in this case was the TA was a prostitute, a drug user, a liar and a thief who had it coming; she agreed to engage in a sex act for money and deservedly got ripped off by the defendant because she had previously ripped him off. The State was permitted to address this defense. Further, even if this Court were to find that the prosecutor's comments were improper, the defendant can show neither prejudice nor why he should be excused from having failed to object below.

a. The Law Regarding Claims of Misconduct

The law governing claims of misconduct is well-settled. When a defendant alleges that the prosecutor's arguments

prejudiced his right to a fair trial, he bears the heavy burden of establishing (1) the impropriety of the prosecutor's arguments and (2) that there was a "substantial likelihood" that the challenged comments affected the verdict. State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940 (2008); State v. Reed, 102 Wn.2d 140, 145, 685 P.2d 699 (1984).

In regards to the first prong of the test, a prosecutor is an advocate and is free to argue all reasonable inferences based upon the evidence introduced at trial, and may respond to the arguments made by defense counsel. State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 24 (1994). Considering the fluid nature and purpose of closing argument, generally greater latitude is given in closing argument than elsewhere during trial when assessing whether a particular statement constitutes misconduct. State v. Stover, 67 Wn. App. 228, 232, 834 P.2d 671 (1992), rev. denied, 120 Wn.2d 1025 (1993). A prosecutor is entitled to make a fair response to the arguments of defense counsel. United States v. Hiett, 581 F.2d 1199, 1204 (5th Cir. 1978). Prejudicial error does not occur until such time as it is "*clear and unmistakable*" that counsel has committed misconduct. State v. Sargent, 40 Wn. App. 340, 344, 698 P.2d 598, rev. denied, 111 Wn.2d 641 (1985).

In regards to the second prong of the test, even where misconduct has occurred, a conviction will not be reversed unless the defendant can show that the misconduct actually resulted in prejudice. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). Specifically, the defendant must prove that there was a "substantial likelihood" that the challenged comments actually affected the verdict. Warren, 165 Wn.2d at 26. In making this determination, the prejudicial effect of alleged improper comments is not determined by looking at the comments in isolation, rather, the prejudicial effect is determined by placing the remarks in the context of the total argument, consideration of the issues in the case, the evidence addressed in the argument, and the instructions given to the jury. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). The court will also look at whether the comments were of an isolated nature. State v. Negrete, 72 Wn. App. 62, 67, 863 P.2d 137 (1993), rev. denied, 123 Wn.2d 1030 (1994).

Finally, and of particular relevance to the case at bar, a defendant's failure to object to alleged misconduct at trial constitutes waiver of the issue on appeal unless the misconduct was "so flagrant and ill-intentioned that it causes an *enduring and resulting prejudice that could not have been neutralized by a*

curative instruction to the jury." State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997) (emphasis added); Fisher, 165 Wn.2d at 747. In other words, even if misconduct occurred at trial, reversal is not required if the error could have been obviated by an objection and curative instruction that the defense did not request. Russell, 125 Wn.2d at 85.

One of the reasons for placing the burden on the defense to object is that the defendant and defense counsel are the persons most acutely attuned to perceive the possible prejudice of the prosecutor's remarks. State v. Klok, 99 Wn. App. 81, 85, 992 P.2d 1039, rev. denied, 141 Wn.2d 1005 (2000). The absence of an objection indicates that the comments did not strike trial counsel or the defendant as improper or particularly prejudicial. Klok, 99 Wn. App. at 85; State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990). Additionally, "[c]ounsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal." Swan, 114 Wn.2d at 661. As this Court has said, RAP 2.5 creates

> a relatively small category of errors that a trial judge must watch for and guard against even when the parties fail to point them out. An argument of a

> prosecutor does not readily fall into this category. . .Trial judges have a variety of options available to deal with prosecutorial misconduct in argument.

Klok, 99 Wn. App. at 83-84. The trial judge must be given the opportunity to remedy any alleged misconduct.

b. The Alleged Misconduct

The defendant has selected out a few sentences made during the State's rebuttal closing argument to argue that his conviction should be reversed.

With semen found on the sleeves of TA's jacket, and the DNA evidence showing the semen was from the defendant, this was not a "who done it" case. Rather, the defense theme in closing argument was that this was a case drugs, prostitution, theft, revenge and angry retribution. Counsel told the jury the case boiled down to witness credibility and TA was a liar, this was not a violent rape but a consensual sexual encounter with a prostitute that happened to turn bad because of the defendant's act of revenge and TA's angry attempt at retribution?

"We are not disputing the identity here," defense counsel told the jury, and "[w]e are not disputing that it was him who engaged in a sexual encounter with TA." 11/25 RP at 592. The defendant "knows what drug dealers look like," counsel told the jury, and "he

knows what prostitutes look like." Id. RP 576. Counsel then told the jury just what the defendant claimed when he testified, that the defendant was looking to buy drugs from TA and then decided to have sex with her for money. Id. at 567-77. Counsel said that the defendant then recognized TA as the person who had ripped him off in a drug deal a few weeks prior and "[n]ow was the time to get back to her." Id. at 577. Counsel claimed that this is exactly what happened and that the evidence did not support TA's version of events. Id. at 578. "This case," counsel told the jury, is about "the credibility of the witnesses," and that "when you boil it down, there are two witnesses at the center: Tom Gauthier and TA." Id. at 582. The evidence, counsel said "does not corroborate TA's versions of events." Id. at 578. In other words, TA was a liar.

Although counsel tried to temper his harsh allegations about TA by saying, "I am not saying that her life-style is that she was acting as a prostitute...I am saying that night she was acting as a prostitute," he turned around and told the jury there was no yelling because she was not raped, the tampon at the scene may have been planted by TA after the incident had occurred, and that she was dressed in so many layers of clothing because she was walking the strip as a prostitute. Id. at 582-83, 586, 590-91. Her

motivation to lie about being raped, counsel claimed, was because she was angry at not getting paid for giving the defendant a blowjob. Id. at 582-83.

Counsel added that while there was testimony "from Detective Anderson, about delay in reporting and how some individuals who have been sexually assaulted will delay going to the police," and testimony from Donald Brown that TA delayed calling the police because she was "too terrified to call the police," the reality was, according to counsel, she was not to terrified of the defendant. Id. at 585. Instead, "she was going after him to get her money." Id. In short, counsel repeatedly called TA's credibility into question, telling the jury over and over again that this was a consensual encounter by a prostitute / drug user / dealer who stole the defendant's money in a previous drug deal and was lying about being raped because she did not get paid for having sex with the defendant.

In rebuttal, the prosecutor addressed the defense argument. She started by telling the jury that "[t]here is not one iota, one piece, one shred of evidence, besides the testimony of this man [the defendant], that TA worked as a prostitution on April 22nd or any other day of her life." Id. at 606. Counsel followed up by

discussing the evidence that indicated TA was not a prostitute, that she worked two jobs to support herself, and that the Sexual Assault Unit Detective testified that he found no evidence indicating TA was acting as a prostitute. Id. at 606-07. The prosecutor then addressed the defense claim directly:

> The defense is almost like a cliché: She is a slut, she is a prostitute, she was out there, you know what, she had it coming. That is what this man is saying. She looked like a prostitute. Why? What about the way that she was dressed in jeans, and white tennis shoes, and big puffy jacket, makes her look like she is out there, working the streets? And you can tell it from behind? Three blocks away, in the dark. She looked like a drug dealer, she looked like a prostitute? That is laughable.
>
> She was standing, because she was walking in the dark by herself? She must have wanted it. She had it coming. This is why people don't report, because they are called sluts, whores, and prostitutes. And counsel says she had motivation.
>
> Twelve people sitting in the box are going to decide [are] you looking at a prostitute that night? Well, that's just an absurd belief that that is what motivated TA to get up on this stand and talk about the most humiliating, degrading and violent thing that ever happened to her.
>
> You saw those tears. You think that is because she is afraid that somebody thinks she is a prostitute...where is her motivation for the last twelve and-a-half years...[w]here is her motivation to get up on that stand and lie, lie about what this man did not her, if it's not true.

11/15 RP 607-08. Counsel added that:

> He saw his opportunity in TA when she was alone, when she was isolated, when she was vulnerable on that street. And he took advantage of her. And he thinks that if he calls her a slut and a prostitute, that you are going to be distracted and think, well, maybe she did have it coming, to be out there. Maybe there is something else going on. But there is no evidence of that.

11/25 RP 609-10.

The defendant claims that the prosecutor's rebuttal remarks constitute misconduct, that she was inviting the jury to convict the defendant based on emotions and "the ongoing battle against sexism." Def. br. at 8. The problem with the defendant's argument on appeal is that the defendant in his testimony, and defense counsel in his closing, said TA was acting as a prostitute, that she was involved in the drug world and had committed theft in ripping the defendant off on a prior occasion. Defense counsel told the jury this was a consensual sexual encounter that went bad when the defendant sought revenge for being ripped off, and that TA was a liar, back in 2001 and at trial -- with her motivation being that she was angry at not getting her money.

A prosecutor is free to comment on the credibility of a witness and argue inferences about credibility based on the

evidence in the record. State v. Millante, 80 Wn. App. 237, 250-51, 908 P.2d 374, rev. denied, 129 Wn.2d 1012 (1995). Once a defendant testifies at trial, he is subject to having his credibility explored just like any other witness. State v. Scott, 58 Wn. App. 50, 791 P.2d 559 (1990), accord, State v. Day, 51 Wn. App. 544, 551, 754 P.2d 1021, rev. denied, 11 Wn.2d 1016 (1988).

A prosecutor is also "an advocate [and] is entitled to make a fair response to the arguments of defense counsel." Russell, 125 Wn.2d at 87. "It is not misconduct ... for a prosecutor to argue that the evidence does not support the defense theory." Russell, at 87.

At the same time, a prosecutor should not argue that the jury should convict a defendant to "protect the community," or "send a message" to other rapist. See, State v. Finch, 137 Wn.2d 792, 841–42, 975 P.2d 967 (1999); State v. Ramos, 164 Wn. App. 327, 338–39, 263 P.3d 1268 (2012). Where the intent is to inflame the passions and prejudices of the jury, misconduct has occurred. See, State v. Powell, 62 Wn. App. 914, 918–19, 816 P.2d 86 (1991) (prosecutor's argument that acquittal would send a message

that children who reported sexual abuse would not be believed, "thereby declaring open season on children," was prejudicial misconduct[5]), rev denied, 118 Wn.2d 1013 (1992).

The defendant contends that this is what the prosecutor was doing here. However, a fair reading of the record does not reflect that the prosecutor's comments were calculated or intended to inflame the passions or prejudices of the jury. Rather, the prosecutor was attempting to address all the allegations about TA as directly testified to by the defendant and argued to the jury by defense counsel – that she was working as a prostitute, was a drug dealer or user, a theft and that she was an angry vengeful liar.

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[5] In rebuttal of a child molestation case, the prosecutor in Powell told the jury the following:

> But, ladies and gentlemen, what happens when we refuse to believe the children when we tell them, yes, if something happens you're supposed to tell? And then when they do, in fact, tell something has happened to them, what do we do? We don't believe them. We refuse to believe them. What does that tell the kids? What does that tell the children? It tells them it's fine. Yeah. You can go ahead and tell, but don't expect us to do anything because if it's an adult, we're sure as heck going to believe the adult more than we believe the child. I mean, we know adults don't lie; but, yeah, we know kids lie in things of that sort. Is that what we're going to be telling these kids here? Isn't that what we're telling them with regard to this? Are we opening—or having—declaring open season on children to say: Hey, it's all right. You can go ahead and touch kids and everything because—

Powell, 62 Wn. App at 918 n.4.

The prosecutor was perfectly permitted to explain why the evidence did not support the defendant's allegations about TA. While it could be argued that calling the defendant's story a cliché or that it is why people don't report, were comments that suggested evidence not admitted at trial, it is not "clear and unmistakable," that counsel was intending to inflame the jury. The comments were minimal and certainly not statements akin to the damnable comments in Powell, supra, or the other cases cited by the defendant wherein the misconduct was overt and the intent obvious. Here, the intent was to show indignation at the direct allegations by the defendant about TA that the State argued were not supported by the record.[6]

Nowhere in closing did the prosecutor argue anything about the credibility of the witnesses that was not based upon the testimony from the trial. The prosecutor appropriately argued that TA was credible based upon the facts known to the jury and the evidence of the case. The prosecutor also argued that the defendant's version of

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[6] "A prosecutor is not muted because the acts committed arouse natural indignation." State v. Borboa, 157 Wn.2d 108, 123, 135 P.3d 469 (2006) (citing State v. Fleetwood, 75 Wn.2d 80, 84, 448 P.2d 502 (1968)).

events and his allegations about TA were not supported by any evidence outside of his testimony, and that his testimony was not credible. This type of argument is perfectly permissible. Prejudicial error does not occur until such time as it is "clear and unmistakable" that counsel has committed misconduct. Sargent, 40 Wn. App. at 344. The defendant has failed to meet that burden.

c. The Defendant's Failure to Object

A defendant's failure to object to misconduct at trial constitutes waiver on appeal unless the misconduct was so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice incurable by an instruction to the jury. Fisher, 165 Wn.2d at 747. In other words, even if misconduct occurred at trial, reversal is not required if the error could have been obviated by an objection and curative instruction that the defense did not request. Russell, 125 Wn.2d at 85.

For example, in Swan, the defendant's challenge to the prosecutor's closing argument wherein the prosecutor told the jury that the child witnesses were being truthful, was waived by the defendant's failure to object. Swan, 114 Wn.2d at 660-662. In Warren, the prosecutor's complete misstatement of the law

regarding the burden of proof, an error of constitutional magnitude, was sufficiently cured by the trial judge after the defendant raised an objection. Warren, 165 Wn.2d at 24-28. These two cases demonstrate both the need to object and the trial court's ability to cure misconduct that does occur.

Here, the defendant failed to raise an objection or ask for a curative instruction. The defendant failed to give the trial judge the opportunity to cure any misconduct. Here, given the opportunity, the court, for example, could have admonished the prosecutor and ordered the jury to disregard the comments deemed improper. Jurors are presumed to follow the court's instructions. State v. Lough, 125 Wn.2d 847, 864, 889 P.2d 487 (1995). There is simply nothing so egregious about the alleged misconduct in this case that could not have been easily cured or stopped by a simple objection and request for a curative instruction. Thus, the defendant's misconduct claim is waived.

d. The Failure to Prove Prejudice

A conviction will be reversed upon a claim of misconduct only upon the defendant showing that there is a substantial likelihood that the alleged misconduct affected the verdict. Russell, 125 Wn.2d at 86. Here, the defendant can prove no such thing.

To begin, the court instructed the jury, orally and in writing, that:

> It is your duty to decide the facts in this case based upon the evidence presented to you during this trial...Your decisions as jurors must be made solely upon the evidence presented during these proceedings. The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses and the exhibits that I have admitted during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict....As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

CP 62-64. Jurors are presumed to follow the court's instructions. Lough, 125 Wn.2d at 864.

Whatever minor prejudice the defendant can ascribe to the alleged misconduct, he cannot show that the verdict was based on anything but a careful evaluation of the evidence, including the forensic evidence that supported TA's testimony and the incredulous testimony of the defendant.

The prosecutor did not discuss evidence that had not been admitted and did not misstate the law in any way. None of the challenged comments here were of such significance or of such

gravity that the defendant can prove that but for the comments, he likely would not have been found guilty.

e. A Misconduct Claim cannot be so Easily Transformed into a Claim of Ineffective Assistance of Counsel

To establish ineffective assistance of counsel, a defendant must first prove that counsel's performance was deficient, and second, he must prove that the deficient performance prejudiced him. Strickland v. Washington, 466 U.S. 668, 687-68, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The first element is met by showing that when considering all the circumstances of trial, counsel's conduct fell below an objective standard of reasonableness. Id. The second element is met by showing that there is a reasonable probability the outcome of trial would have been different if the attorney had performed adequately. Id. If either element is not proven by the defendant, the inquiry must end. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). The court begins with the strong presumption that a defendant received effective representation. State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995).

Likely knowing his misconduct claim has been waived, the defendant alleges that this trial counsel's failure to raise an

objection below resulted in deficient performance by counsel that was so severe as to render his trial fundamentally unfair under the due process clause. However, an error that does not directly implicate a constitutional right shall not be transformed into an error of constitutional magnitude simply by claiming ineffective assistance of counsel. State v. Davis, 60 Wn. App. 813, 823, 808 P.2d 167 (1991), aff'd, 119 Wn.2d 657 (1992). See also Murray v. Carrier, 447 U.S. 478, 91 L.Ed.2d 396, 106 S.Ct. 2639 (1986) (where counsel failed to recognize a factual or legal basis for an alleged error at trial, or failed to raise the claim despite recognizing it, and where counsel is otherwise competent, review will be denied).

In addition, the failure to object is rarely sufficient to raise an ineffective assistance of counsel claim. An attorney cannot be said to be incompetent if, in the exercise of his professional talents and knowledge, he fails to object to every item of evidence to which an objection might successfully be interposed. State v. Mode, 57 Wn.2d 829, 360 P.2d 159 (1961). Defense counsel's failure to object will amount to ineffective assistance of counsel "[o]nly in egregious circumstances" where the improper conduct was central to the State's case." State v. Neidigh, 78 Wn. App. 71, 77, 895

P.2d 423 (1995). Often there are strategic reasons not to object to misconduct. Id. This may include not wanting to draw undue attention to the alleged improper argument.

Here, the alleged failure to object pertained to only a few passages closing argument. An examination of the record as a whole demonstrates that the defendant's attorney performed commendably. The defendant should not be allowed to transform a failure to object argument into an ineffective assistance claim under these facts.

In any event, the defendant suffers from the same problem under either a claim of misconduct or a claim of ineffective assistance of counsel – the failure to prove prejudice. The defendant fails to prove that but for the alleged incompetence of his attorney -- the failure to object to a few instances of alleged misconduct in closing, there is a reasonable probability that the outcome of trial would have been different.

2. THE DEFENDANT'S OFFENDER SCORE WAS PROPERLY CALCULATED AS A FIVE

Class C prior felony convictions are not included in a defendant's offender score if since the last date of release from confinement pursuant to a felony conviction or entry of the

judgment and sentence, the offender spent five consecutive years "***in the community***" without committing any crime that subsequently results in a conviction. RCW 9.94A.525(2) (since amended).[7] The defendant has five prior felony class C convictions, with his last date of release occurring in June of 2007. CP 84, 91.[8] Thus, if the defendant had remained in the community for five year after June of 2007, and remained crime free for those five years, his prior class C felony convictions would not count in his offender score after June of 2012. This did not occur.

On March 13, 2009, the defendant was charged with raping TA. CP 1. On July 23, 2010, he was taken into custody on the rape charge. CP 109-10, 123. He remained in custody through his

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[7] The version of the statute in 2001, and the current version codified at RCW 9.94A.525(2)(c), contains the same pertinent language:

> [C]lass C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction.

[8] The defendant's five prior class C felony convictions are as follows:

(1) Possession of Cocaine 961055162 (sent. 12/20/96)
(2) Taking Motor Vehicle without Permission (TMV) 011027375 (sent. 6/15/01)
(3) TMV (count I) 06-1-00611-5 (sent. 3/17/06)
(4) TMV (count II) 06-1-00611-5 (sent. 3/17/06)
(5) TMV 07-1-01864-2 (sent. 4/13/07)

CP 84.

first trial on this offense, a trial that occurred in May of 2011, with a conviction on June 2, and a sentencing on July 8, 2011. CP 6-15, 124-25.

At the time of his sentencing on July 8, 2011, the sentencing court found that the defendant's offender score was a five based on the defendant's five prior class C felony convictions. CP 7, 9. The defendant agreed that the trial court's calculation was correct. CP 91. His standard range was thus 120 to 158 months. CP 7. He received a sentence of 120 months, with credit for time served back to July of 2010. CP 6-15.

The defendant appealed his conviction and on April 1, 2013, this Court reversed the defendant's conviction and remanded the case for a new trial. CP 17-32. The mandate was issued on May 10, 2013. Id.

On July 29, 2013, the defendant was transferred back from the Department of Corrections to the King County Jail to face trial. CP 126-27. On November 6, 2013, the case was assigned out to trial before the honorable Judge Douglass North. CP 128-50. On November 26, 2013, a jury again found the defendant guilty as charged. CP 75.

The defendant proceeded to sentencing on February 14, 2014. CP 77-88. Contrary to his sentencing that occurred in July of 2011, this time the defendant claimed that his five prior class C felony convictions did not count in his offender score because he had spent more than five years "in the community" without being convicted of an offense. CP 90-95. This, despite the fact that the defendant had spent only 37 months out of custody, followed by spending the next 43 months in custody on this offense. In short, he argued that under the statute, being "in the community" included his 43 months he spent in custody. Thus, the defendant asserted that his offender score went down while he was in custody, from a score of five to a score of zero. 2/24/14 RP 476.

The trial court rejected the defendant's argument, finding that the defendant's five prior class C felony convictions counted in his offender score, just as before. 2/24/14 RP 484; CP 78, 84 151-62. The defendant again received a 120 month term of confinement, with credit for time served back to July 2010. CP 80.

The defendant relies on State v. Ervin,[9] to support his argument that his offender score should be a zero. However, the defendant takes the holding of Ervin too far. In Ervin, the parties

[9] 169 Wn.2d 815, 239 P.3d 354 (2010).

were arguing about whether 17 days Ervin spent in custody during a 6 year, 3 month period of time "interrupted" the five year washout period. Ervin, 169 Wn.2d 818-20. Specifically, the parties were in agreement that Ervin's five year washout period began on April 15, 1999. Id. at 819. The parties were also in agreement that Ervin did not commit another crime until July 28, 2005, 6 years and 3 months after the beginning of his washout period. Id. The State argued that the 17 days Ervin spent in custody for a misdemeanor probation violation in January of 2002 "interrupted" Ervin's washout period, essentially starting the clock all over again. Id. This was the issue decided by the Court, with the Court stating "we hold that time spent in jail pursuant to violation of probation stemming from a misdemeanor does not interrupt the washout period." Id. at 826.[10]

The defendant attempts to extend the holding of Ervin and asks this Court to find that in-custody time actually equals "in the community" time. That is not the holding of Ervin, and such an interpretation would lead to absurd results.

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[10] The Court cited with approval In re Nichols, 120 Wn. App. 432, 85 P.3d 955 (2004). In Nichols, the court was asked to determine whether 20 days spent in custody on a misdemeanor interrupted the washout period that began in 1989 and otherwise would have continued until 1999. The court held that the 20 days did not "interrupt" the five year washout period.

Ervin spent over six years actually in the community, well past the five years required. In contrast, the defendant spent just over three years actually in the community. This is not a case of whether the washout period has been interrupted by some event -- the question in Ervin; the question here is whether the defendant has even met the threshold of five years. He has not.

Under the defendant's interpretation, an absurd situation would exist, the exact situation before the court here. Under the defendant's interpretation, a defendant's offender score will actually go down while he is in custody pending trial or pending sentencing on the offense to be scored. Here, under the defendant's interpretation of the statute, he admitted that when he was first sentenced, the court properly included his five prior class C felony convictions because five years had not passed. However, because this conviction took longer to obtain, his offender score would be reduced to zero. This is an absurd result that would allow a savvy defendant to actually lower his offender score while in custody on a charge or conviction by simply delaying his trial or his sentencing. Courts interpret statutes to avoid absurd results. State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003). This would be an absurd result.

D. CONCLUSION

For the reasons cited above, this Court should affirm the defendant's conviction and sentence.

DATED this 5 day of January, 2015.

RESPECTFULLY submitted,

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By: _____
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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorneys for the appellant, Jennifer Sweigert at Nielsen Broman & Koch, containing a copy of the Brief of Respondent, in STATE v. GAUTHIER, Cause No. 71631-0-I, in the Court of Appeals, Division I, for the State of Washington.

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

Name

01-05-15
Date

Done in Seattle, Washington