72619-6

NO. 72619-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

STEVEN L. COOK,

Appellant.

BRIEF OF RESPONDENT

MARK K. ROE
Prosecuting Attorney

MARA J. ROZZANO
Deputy Prosecuting Attorney
Attorney for Respondent

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. ISSUES

1. Did attempts by prosecutor to correct misstatement of burden of proof "beyond a reasonable doubt" amount to prosecutorial error?

2. If the prosecutor's remarks during closing argument were improper but not manifest constitutional error has the defendant waived any error by failing to object at trial?

3. Has the defendant shown he was denied his constitutional right to effective assistance of counsel because trial counsel did not object to alleged prosecutor error in closing argument where there were valid tactical reasons for counsel's actions?

II. STATEMENT OF THE CASE

On July 6, 2014, the defendant was a health care provider, a massage therapist. N.R. was his client. During a treatment session, while N.R. was lying face down on a massage table, the defendant placed his left hand on her lower back to prevent her from getting up and using his right hand digitally penetrated her vagina, touched her vaginal area, kissed her thigh and attempted to kiss her vaginal area. The State charged the defendant by amended information with one count of second degree rape and

one count of indecent liberties. The jury acquitted the defendant of second degree rape but convicted him of indecent. 9/23/13[1] RP 45, 47-48, 66-70; CP 54, 55, 57, 94-95.

In November of 2013, N.R. was injured in a car accident. In addition to other treatment, she was referred for massage therapy. In June of 2014, N.R. began receiving her message therapy from the defendant at Urgent Care Chiropractic Center in Lynnwood. N.R. was a registered nurse and the treatments were scheduled at odd times to accommodate her work schedule, for example 7:00 p.m. on a Sunday, when the clinic would normally be closed. 9/22/13 RP 44, 48-51.

The first four times the defendant massaged N.R., it was consistent with other massage therapy N.R. had received from other providers. The fifth time things were very different. The victim's fifth appointment was on Sunday, July 6, 2014, at 7:00 p.m. N.R. testified that on the 6th, the defendant greeted her and told her to go back to the massage room. The clinic was otherwise closed, so no one else was there. N.R. noticed the defendant's eyes were

[1]Although the first two volumes of the transcript indicate the testimony took place on September 22, 2013, and September 24, 2013, it is clear from the record as a whole that the year is a scrivener's error and should read 2014.

glassy. The defendant accompanied N.R. to the therapy room and told her he was going to do something a little bit different that day. The defendant told her to sit on the side of the massage table. N.R. asked if he wanted her to disrobe and put on the drape first. The defendant indicated he did, but then didn't leave the room. N.R. waited for him to leave and eventually he did. N.R. then got ready for the massage. 9/22/13 RP 48, 57-59.

When the defendant reentered the room, N.R. was seated on the side of the massage table, as directed, with the drape tucked under each arm to cover her breasts. The defendant told her they were going to do a "boxer's massage". The defendant then began massaging her back while she was seated. The defendant then told N.R. to hold both her arms straight out. N.R. held one arm out and used the other to hold the drape in place. The defendant then told her he needed her to hold the other arm out, so she switched arms. The defendant continued to ask for the arm holding the drape to be held out and N.R. kept switching arms to keep the drape in place. This happened a couple of times before the defendant chuckled and told N.R. to lie down on her stomach. N.R. complied, pulling the drape over her lower back so her back was exposed but her buttocks were covered. The defendant massaged her back for a

normal amount of time, moved down to her lower back and then moved quickly to her buttocks. 9/22/13 RP 59-60, 62-65.

The defendant did not massage N.R.'s buttocks but was touching them more softly. N.R. described it as being like her husband would do; a sensual caress. The defendant then quickly moved his right hand between her butt cheeks and down between her legs and on the labia. N.R. testified the defendant then put his finger in her vagina. With his left hand the defendant was pressing on the victim's lower back preventing her from getting off the table. The defendant told N.R. "your pussy's so hot". "Tell me it feels good." N.R. was trying to pull the defendant's arm away with her left hand and was kicking her legs. The defendant then tried to place his mouth on N.R.'s vaginal area. She put her legs together to try to stop the defendant. The defendant kissed the back of her leg. He was still holding her down with his left hand. He then softly rubbed the area right outside her labia. N.R. told the defendant the massage had to end. The defendant continued massaging her so she said it again. The defendant then stopped and N.R. got off the massage table. The defendant then wiped his hands on a towel and asked N.R. if she had a vibrator at home. When N.R. refused

to answer, the defendant left the room. N.R. leaned against the door as she got dressed. 9/22/13 RP 65-73.

When asked why she didn't fight the defendant, N.R. explained that he weighed at least twice as much as she did and was about a foot taller. N.R. said she didn't call the police because she just wanted to get out of there. As she was leaving, N.R. had to walk past the defendant who was in the reception area smoking a cigarette. The defendant told the victim, "I am so embarrassed. I'm really attracted to you. I couldn't help myself. I have special appointments for special clients. I want to get to know you better. I want to take you for drinks and dinner." N.R. made excuses about being on vacation for the next week. Her focus was on getting out the door without a confrontation. 9/22/13 RP 73-75.

N.R. did not immediately report the incident to the police. She likely would not have reported it at all if the defendant hadn't started repeatedly calling her at home. The defendant called the next day and told N.R. he needed to know she forgave him and again asked her to dinner and drinks. N.R. was going through a divorce at the time and had three young boys at home. She became worried for her and her children's safety when the defendant kept calling her. N.R. used an App on her phone that

sent calls from the defendant's phone numbers immediately to voicemail. The jury was allowed to hear the messages the defendant had left on the victim's voicemail. After talking with a friend about it, N.R. reported the incident to the police four days later. 9/22/13 RP 75-81, 87-97.

The defendant was interviewed by Det. Arnett and Det. Jorgensen of the Lynnwood Police Department. The defendant admitted to being attracted to the victim, and to having asked her out, but claimed he did that on the third massage and when she did not answer him, he took that as a decline. The defendant claimed it was N.R. who was acting oddly on the final massage. The defendant said N.R. just allowed the drape to fall, exposing her breasts and that he simply didn't say or do anything in response, but continued to provide the massage. The defendant claimed N.R. was a client who was comfortable being naked. N.R. remained naked and uncovered for the remainder of the massage. Later in the interview, the defendant contradicted himself saying N.R. appeared to be more quiet, withdrawn and her body language appeared to be uncomfortable during the massage. 9/23/13 RP 162-65, 168.

The defendant admitted to the detectives that he thought N.R. was uncomfortable because he had touched her vagina during the massage. The defendant told Det. Arnett that he was rubbing the inside of the victim's leg when his hand moved up the inside of her thigh and his fingers touched her vagina. He said he knew he touched her vagina because he saw his hand touch her vagina and N.R. visibly flinched. When asked about his intent, the defendant backtracked and said he might have touched her vagina and if he did, it was accidental. The defendant claimed to have only called N.R. twice since the last appointment. The victim's call history and the results of a search warrant served on the defendant's phone show that he had called N.R. three times the day he was contacted by police alone plus the additional times right after the incident. 9/23/13 RP 168-69, 170-71, 175-76.

The defendant testified that N.R. let the drape drop twice, the first time he gave it back to her, the second time he told her this form of massage wasn't working out and had her lay face down on the table. He commented that her dropping the drape made him embarrassed, but later said he was comfortable with N.R. being naked. The defendant claimed the massage continued as normal except that when N.R. was lying on her back, as he was massaging

her leg she flinched slightly. The defendant testified he had no idea why she flinched; he was watching his hands the entire time. The defendant admitted to asking N.R. out to get something to eat but claimed it was just a friendly thing, that he was not attracted to her except as a potential client. 9/23/14 RP 221, 225, 230-34, 236, 239-40.

There was testimony from a forensic nurse that although not highly likely, it was likely that she would find DNA from a finger penetration on a swab of the victim's vagina four days after the incident. The defendant's DNA was not found on the swabs taken from N.R. 9/23/14 RP 208-210.

The jury was instructed on the law in this case. In particular, the jury was instructed as to the standard of proof. The court's instruction to the jury number 3 states:

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

> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 64.

During closing argument, the defendant's attorney pointed to the different burdens of proof, beginning with probable cause and concluding by saying,

> The State's burden here is higher than that. And it's higher than that for a reason, and it's a bit of an intelligent twist because you may think he's guilty by clear, cogent, and convincing evidence. But if you have reason to doubt the State hasn't proven to you beyond a reasonable doubt that he's guilty, you have to acquit him.

9/25/14 RP 32.

In rebuttal argument the prosecutor responded to this argument saying,

> Of course there are many standards of proof, but there's one thing that I take issue with and the instructions do. Beyond a reasonable doubt is not a reason to doubt. The instructions define it a little differently. It's not a reason to doubt. It says what beyond a reasonable doubt is also: an abiding belief in the truth of the charges. That's your standard.
>
> Ms. Silbovitz talked about – and I explained briefly – probable cause and preponderance of the evidence and clear, cogent, and convincing, and then beyond a

> reasonable doubt. But beyond a reasonable doubt is not absolute certainty because the only one that's absolutely certain what happened is the defendant and [N.R.]. The law doesn't require that.
>
> The law simply requires, "A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt" - - and these are to an element of the offense – "as would exist in the mind of a reasonable person after fully, carefully – fairly, and carefully considering all of the evidence or lack of evidence. But if you have – if from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt."
>
> So it is not a reason to doubt. Gee, I guess there was a small chance that the DNA could have been recovered on the swab that was also used to test whether she had any sexually transmitted diseases. It's not a doubt to an element of the offense. It's not a reasonable doubt. It may be for you, but that's for your determination.

9/25/14 RP 44-45.

The jury convicted the defendant of count 2 Indecent Liberties, but acquitted him of count 1 second degree rape. CP 54, 55.

III. ARGUMENT

A defendant claiming prosecutorial misconduct[2] bears the burden of establishing that the challenged conduct was both

[2] "'Prosecutorial misconduct' is a term of art but is really a misnomer when applied to mistakes made by the prosecutor during trial." State v. Fisher, 165 Wn.2d 727, 740 n. 1, 202 P.3d 937 (2009). Recognizing that words pregnant with meaning carry repercussions beyond the pale of the case at hand and can

improper and prejudicial. State v. Cheatam, 150 Wn.2d 626, 652, 81 P.3d 830 (2003). Prejudice occurs only if "there is a substantial likelihood the instances of misconduct affected the jury's verdict." State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995). We review a prosecuting attorney's allegedly improper remarks in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury. State v. Anderson, 153 Wn. App. 417, 427, 220 P.3d 1273, 1279 (2009).

A. THE PROSECUTOR'S REMARKS IN CLOSING ARGUMENT WERE NOT ERROR.

In the current case, the prosecutor's remarks were not improper. The prosecutor's remarks responded to the defendant's

---

undermine the public's confidence in the criminal justice system, both the National District Attorneys Association (NDAA) and the American Bar Association's Criminal Justice Section (ABA) urge courts to limit the use of the phrase "prosecutorial misconduct "for intentional acts, rather than mere trial error. *See* American Bar Association Resolution 100B (Adopted Aug. 9-10, 2010), http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/100b.authcheckdam.pdf (last visited Aug. 29, 2014); National District Attorneys Association, Resolution Urging Courts to Use "Error" Instead of "Prosecutorial Misconduct" (Approved April 10 2010), http://www.ndaa.org/pdf/prosecutorial_misconduct_final.pdf (last visited Aug. 29, 2014). A number of appellate courts agree that the term "prosecutorial misconduct" is an unfair phrase that should be retired. *See, e.g.*, State v. Fauci, 282 Conn. 23, 917 A.2d 978, 982 n. 2 (2007); State v. Leutschaft, 759 N.W.2d 414, 418 (Minn. App. 2009), review denied, 2009 Minn. LEXIS 196 (Minn., Mar. 17, 2009); Commonwealth v. Tedford, 598 Pa. 639, 960 A.2d 1, 28-29 (Pa. 2008). In responding to appellant's arguments, the State will use the phrase "prosecutorial error." The State urges this Court to use the same phrase in its opinions.

assertion that any reason to doubt required acquittal, changing the burden of proof from beyond a reasonable doubt to absolute certainty. The prosecutor's response, albeit in-artful, was to remind the jury the State's burden of proof required proof beyond a reasonable doubt, not any doubt, not absolute certainty, and that the State's burden applied to the elements of the crime only. The prosecutor did not argue that the jury had to convict unless they could state a reason. The prosecutor's argument did not shift the burden to the defendant in any way. The prosecutor's argument included reading the 'reasonable doubt" instruction to the jury to correct the mischaracterization of the burden of proof by the defendant.

The defendant contends by emphasizing the "abiding belief" portion of WPIC 4.01, the prosecutor called on the jury to search for the truth. But WPIC 4.01 does not tell the jury to find the truth; it tells the jury to acquit the defendant unless the government convinces the jury of the truth of the charge.

B. EVEN IF THE COURT FINDS THE COMMENTS WERE ERROR, THE PROSECUTOR'S REMARKS DURING CLOSING ARGUMENT WERE NOT MANIFEST CONSTITUTIONAL ERROR AND THEREFORE THE DEFENDANT HAS WAIVED ANY ERROR BY FAILING TO OBJECT AT TRIAL.

It is an established rule of appellate review that a party generally waives the right to appeal an error if that party did not object at trail. RAP 2.5(a). One exception is that "a party may raise ... manifest error affecting a constitutional right" for the first time on appellate review. State v. Lamar, 180 Wn.2d 576, 582, 327 P.3d 46, 49 (2014). However, the exception is not intended as a method of securing a new trial whenever there is a constitutional issue that was not raised at trial. Id. 'Manifest' in RAP 2.5(a)(3) requires a showing of actual prejudice. State v. O'Hara, 167 Wn.2d 91, 99, 217 P.3d 756, 761 (2009), as corrected (Jan. 21, 2010). If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest. Id. Appellate courts will not approve a party's failure to object at trial that could identify error which the trial court might correct (through striking the testimony and/or curative jury instruction). State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125, 134 (2007).

If the defendant did not object at trial, the defendant is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill-intentioned that an instruction

could not have cured the resulting prejudice. State v. Emery, 174 Wn.2d 741, 760-61, 278 P.3d 653, 664 (2012).

In Emery, the prosecutor's argument was significantly worse than the argument here. In that case, the prosecutor's argument denied the defendant the presumption of innocence by arguing that "In order for you to find the defendant not guilty, you have to ask yourselves or you'd have to say, quote, I doubt the defendant is guilty, and my reason is blank" and told the jury they needed to search for the truth. State v. Emery, 174 Wn.2d 741, 750-51, 278 P.3d 653, 659 (2012). Although the court found the prosecutor's statements in closing argument improper, that they "mischaracterized the trial as a search for truth and undermined the presumption of innocence, it found any prejudice had been cured by an imperfect curative instruction. The court further found that "while the prosecutor's attempted explanations are certainly and seriously wrong, there is no evidence that the prosecutor was acting in bad faith or attempting to inject bias." Emery, 174 Wn.2d at 758. As the defendant did not object, he has waived any error and his claim fails. Emery, 174 Wn.2d at 764. "[I]f flagrantly improper truth statements that undermine the burden of proof can

be cured by an *imperfect* instruction, as in State v. Warren[3], the remarks by the prosecutor in Emery were also curable." State v. Berube, 171 Wn. App. 103, 121, 286 P.3d 402, 412 (2012).

In the present case, the prosecutor was merely attempting to correct a mischaracterization of beyond a reasonable doubt presented in the defendant's closing argument. There is no indication the prosecutor was acting in bad faith or attempting to inject bias. His arguments were not so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. On the contrary, unlike the argument in Emery, the prosecutor in this case did not shift the burden by telling the jury they "could only acquit if..." The court has found that argument that references the jury to the actual language of the instruction is not error. State v. Fuller, 169 Wn. App. 797, 812-13, 282 P.3d 126, 135 (2012). The prosecutor in the present case, like the prosecutor in the Fuller case turned to the actual language of the instruction during his rebuttal argument in his attempt to correct the defendant's mischaracterization of that burden of proof. There was no error on the part of the prosecutor, but even if there had been, it could easily have been cured by instruction from the court eliminating any

[3] 165 Wn.2d 17, 195 P.3d 940 (2008).

potential prejudice to the defendant. As the court pointed out in Emery, if the defendant had objected at trial, the court could have reiterated that the State bears the burden of proof and the defendant bears no burden, eliminating any possible confusion and curing any potential prejudice. As the defendant did not object, he has waived any error and his claim fails.

C. THE DEFENDANT HAS NOT SHOWN HE WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BASED ON THE FAILURE TO OBJECT TO THE PROSECUTOR'S REBUTTAL ARGUMENT.

1. Even If The Prosecutor's Remarks in Rebuttal Closing Were Error, There Was A Valid Tactical Reason Not To Object.

To prevail in a claim of ineffective assistance of counsel, the defendant must demonstrate that (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) this deficient performance resulted in actual prejudice. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Both "prongs" must be established to prevail on the claim. Under the latter prong, the defendant must show a reasonable probability that, except for

counsel's unprofessional errors, the results of the proceedings would have been different. Hendrickson, 129 Wn.2d at 78.

To establish the first prong, a defendant alleging ineffective assistance must overcome a strong presumption that counsel's performance was reasonable. State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260, 1268 (2011). A reviewing court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland v. Washington, 466 U.S. at 689. The threshold for the deficient performance prong is high, given the deference afforded to decisions of defense counsel in the course of representation. When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient. State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). A court may not sustain a claim of ineffective assistance if there was a legitimate tactical reason for the allegedly incompetent act. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). An ineffective assistance claim on direct appeal must be based upon, and cannot go outside, the record before the appellate court. State v. McFarland, 127 Wn.2d 322, 338, 899 P.2d 1251 (1995).

In the case at bar, the court properly instructed the jury on the presumption of innocence and the burden of proof. The defendant's argument to the jury attempted to shift the burden of proof from beyond a reasonable doubt to beyond any doubt or absolute certainty. In rebuttal argument, the prosecutor attempted to redirect the jury to the instruction and emphasized the abiding belief language of the instruction. The defendant's trial counsel did not object. The defendant now claims his trial counsel's failure to object amounted to ineffective assistance of counsel. "Failure to object deprives the trial court of this opportunity to prevent or cure the error. The decision not to object is often tactical. If raised on appeal only after losing at trial, a retrial may be required with substantial consequences." State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125, 134 (2007). Under the facts and circumstances of this case, it was a very reasonable trial tactic to not to object. An objection to the prosecutor's characterization of the burden of proof would likely have resulted in the trial court re-stating or emphasizing the proper burden of proof to the jury, thereby undermining the defendant's attempt at shifting that burden in his argument.

2. The Defendant Has Not Established That Any Alleged Deficient Performance Resulted In Actual Prejudice.

"In making the determination as to whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law." Strickland, 466 U.S. at 694, 104 S.Ct. 2052. The defendant argues this court should assume that the jury did not hold the State to its burden even though the comments did not call for a shifting or lessening of that burden.

Our Supreme Court has recently ruled that a court erroneously instructing the jury during opening remarks that "a reasonable doubt is a doubt for which a reason can be given, rather than the correct jury instruction that a reasonable doubt is a doubt for which a reason exists", although manifest constitutional error, was harmless because it did not lower the State's burden of proof or affect the outcome of the trial." State v. Kalabaugh, ___ Wn.2d ___, No. 89971-1 July 9, 2015. In Kalabaugh, the trial court orally advised the jury of the correct burden of proof three times and provided the correct written instruction to the jury.

Even though the error in Kalabaugh was a manifest constitutional error because it was an instructional error, the court found it was harmless error. The court reasoned, the jury was provided the correct burden three times including in writing for deliberations. This overcame any potential prejudice of the one erroneous oral instruction. Jurors are presumed to follow the instructions provided by the court. Id. (citing State v. Grisby, 97 Wn.2d 493, 499, 647 P.2d 6 (1982)).

In the present case, the claimed error in the prosecutor's closing argument. "[C]losing argument cannot be likened to instructional error. Because jurors are directed to disregard any argument that is not supported by the law and the court's instructions, a prosecutor's arguments do not carry the imprimatur of both the government and the judiciary." Emery, 174 Wn.2d at 759 (internal citations omitted). As jurors are presumed to follow the instructions provided by the court, and there is no indication in this case they did not, the defendant has failed to establish actual prejudice.

IV. CONCLUSION

For the reasons stated above, the State respectfully requests this Court to affirm defendant's conviction.

Respectfully submitted on July 14, 2015.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: _____
MARA J. ROZZANO, WSBA #22248
Deputy Prosecuting Attorney
Attorney for Respondent

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

THE STATE OF WASHINGTON,

Respondent,

v.

STEVEN L. COOK,

Appellant.

No. 72619-6-I

DECLARATION OF DOCUMENT FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 14th day of July, 2015, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and Jennifer J. Sweigert, Nielsen, Broman & Koch, SweigertJ@nwattorney.net and Sloanej@nwattorney.net.

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

Dated this 14th day of July, 2015, at the Snohomish County Office.

Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office