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Court of Appeals
Division I
State of Washington

SUPREME COURT NO. 94736-8

NO. 74663-4-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CORTNEY STAHL,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Jim Rogers, Judge
The Honorable William Bowman, Judge
The Honorable, Catherine Shaffer, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Cortney Stahl asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

The petitioner seeks review of the Court of Appeals' unpublished decision in State v. Cortney Stahl, filed June 5, 2017 ("Opinion" or "Op."), which is appended to this petition.

C. ISSUES PRESENTED FOR REVIEW

1. The petitioner's defense at trial was that two complainants' heroin use provided a motive for them to fabricate the allegations against him and affected the witnesses' perception of the events. In rebuttal, the prosecutor asserted that the defense had emphasized the women's heroin use in attempt to "dehumanize" them and to suggest they did not deserve the protection of the law. Did the State's argument, designed to appeal to the jurors' sympathies and prejudices, constitute incurably prejudicial misconduct, denying the petitioner a fair trial as to counts 1, 2, and 5?

2. Where, in rebuttal, the prosecutor also vouched for the "honest[y]" of each of the complaining witnesses, did prosecutorial misconduct deny the petitioner a fair trial?

3. Was counsel ineffective for failing to object to the foregoing misconduct?

D. STATEMENT OF THE CASE¹

1. Charges, verdicts, and sentences

The State charged Stahl with second degree rape and indecent liberties by forcible compulsion as to complainant J.S. (counts 1 and 2). Based on an incident the same day, the State also charged Stahl with assaulting José León and Alicia Nickerson (counts 3 and 4). The State also charged Stahl with indecent liberties by forcible compulsion as to N.W. (count 5). CP 1-8, 12-16, 38-39. Each of the four complainants was homeless and lived in, or frequented, the same north Seattle greenbelt encampment where Stahl resided.

The jury convicted Stahl as charged. CP 74-75. But the court vacated count 2, indecent liberties as to J.S., because the conviction violated the prohibition against double jeopardy. CP 105; 14RP 42.

The court sentenced Stahl to a mid-range indeterminate sentence of 129 months on count 1. CP 91, 94; RCW 9.94A.507. The court ran the remaining sentences concurrent to the count 1 term. CP 94.

¹ This petition refers to the verbatim reports as follows: 1RP – 10/6/15; 2RP – 10/13/15; 3RP – 11/24/15; 4RP – 11/25/15; 5RP – 11/30/15; 6RP – 12/1/15; 7RP – 12/2/15; 8RP – 12/3/15; 9RP – 12/7/15; 10RP – 12/8/15 (morning); 11RP – 12/8/15 (afternoon); 12RP – 12/9/15; 13RP – 12/18/15; and 14RP – 1/29/16.

2. Trial testimony

The afternoon of July 9, 2015, Seattle police responded to a report of a disturbance at a homeless encampment in a greenbelt south of 125th Street North and one block east of Aurora Avenue North. 7RP 120-22; 8RP 17-18. Improvised structures sheltered several residents. 7RP 123.

Police spoke with Alicia Nickerson and José León. 8RP 20. León resided in the encampment. 8RP 99-102. His friend Nickerson had been staying with him. 8RP 106-08. León and Nickerson showed police injuries they had suffered, which the police photographed. 8RP 20-24. Nickerson had a red mark on her leg. León had a bloody nose as well as a cut on his finger. 8RP 20. Nickerson and León reported that Stahl, a friend of León, had inflicted the injuries. 8RP 25. Police searched the area for Stahl and found him sleeping nearby. 8RP 25-26. Stahl was arrested. 8RP 27.

J.S. was also living in the greenbelt encampment on the day of the incident involving León and Nickerson. 9RP 174. A frequent heroin user, J.S. consumed between \$10 and \$50 worth of heroin per day. 9RP 175. J.S. said she got the money from her parents or friends. 9RP 210.

The day before the incident, Stahl offered J.S. \$20 worth of heroin and said she could pay him back. 9RP 180. J.S. later learned he had taken the heroin from N.W., a woman who visited the camp on occasion. 9RP 181-82.

That night, J.S. slept on a mattress in a shelter that belonged to another camp resident. 9RP 183-84, 204, 228. It was dark out when she fell asleep, but people were still gathered in the shelter. 9RP 184. J.S. may have ingested heroin before falling asleep. 9RP 203-04. When she awoke, however, the sun had risen, and the others were gone. 9RP 185. Stahl, who was not in the shelter the previous night, was attempting to put his penis in her mouth. 9RP 186, 211.

Surprised, J.S. attempted to get up to leave. 9RP 188. Somehow, Stahl and J.S.'s positions switched, and Stahl ended up lying on the mattress, with J.S. sitting on the ground with her back toward the mattress. 9RP 188, 212-13. Stahl masturbated and rubbed J.S.'s mouth, neck, and breasts. 9RP 191. J.S. feared Stahl would hurt her. 9RP 217. Stahl eventually ejaculated onto J.S.'s ear. 9RP 191-92.

Afterward, J.S. gathered her purse and clothing and left the shelter. 9RP.193. Stahl followed, whipping J.S. with his T-shirt. 9RP 196. Stahl shoved J.S. and she fell. 9RP 193, 195.

J.S. did not contact the police immediately. 9RP 197-98. But she saw police officers in the greenbelt about eight hours later. 9RP 198-99. An officer collected a sample of ejaculate from J.S.'s ear. 9RP 202. Testing

revealed a DNA profile that matched a cheek swab submitted by Stahl. 8RP 7-8; 9RP 154-56, 240.²

Count 5 complainant N.W. also testified. She had been homeless about three years and stayed in the greenbelt encampment on occasion. 8RP 54; 9RP 178. N.W. knew Stahl, who frequented the area. 8RP 61. Like J.S., N.W. acknowledged she was a regular heroin user, and she consumed about \$10 to \$20 of heroin per day. 8RP 55. She bought her heroin or got it from friends. 8RP 79. On direct examination, N.W. acknowledged she had been convicted of theft several times, and that her criminal activity supported her drug use. 8RP 60-61, 77-78.

N.W. remembered the day the police came to the greenbelt but she did not know the date. 8RP 65, 90. A few days earlier, N.W.'s supply of heroin had been stolen while she was sleeping. 8RP 62. She later overheard Stahl bragging about stealing the heroin and giving it to others. 8RP 62-63.

The day the police arrived, N.W. was sleeping in a low structure located under some bushes. Stahl came in and woke N.W. 8RP 59, 65, 90. N.W. was unsure of the time but it was "still light out." 8RP 66. Once in the structure, Stahl claimed he had beat up six people and stolen their money. 8RP 65. Noticing a syringe cap on the ground, Stahl berated N.W.

² Over defense objection, J.S. testified that she did not want to get Stahl in trouble and she had not "press[ed] charges." 9RP 218.

about syringes being left around the camp. 8RP 68. For emphasis, Stahl threw the contents of N.W.'s purse at her. 8RP 69.

N.W. attempted to crawl past Stahl to leave. As she did, Stahl first grabbed N.W. by the leg, then grabbed her crotch. According to N.W., it felt as if Stahl was attempting to put his finger in her vagina through her pants. 8RP 70-71. N.W. kicked at Stahl until he let go. 8RP 72.

N.W. did not contact the police that day even though she knew police were in the camp and Stahl had been arrested. 8RP 72-73, 91. N.W. decided to contact the police after learning "there were other girls." 8RP 74, 76. Upon defense objection, the court instructed the jury that this testimony could only be used to evaluate N.W.'s state of mind. 8RP 74.

3. Closing arguments

In closing, the prosecutor argued that homeless individuals living in the greenbelt had formed a community, and that Stahl had bullied and threatened members of his community. 10RP 268-69. Moreover, although many witnesses led difficult lives and were unable to remember certain details, the emotions during their testimony indicated they should be believed. 10RP 297-99. Regarding witness bias, the State argued jurors should reject any argument by the defense that the witnesses fabricated the charges simply because Stahl stole N.W.'s heroin. 10RP 299.

In closing, defense counsel argued, in part, that J.S. fabricated the allegation against Stahl after he humiliated her following their consensual sexual encounter. 10RP 308-10. Defense counsel pointed out that J.S. did not contact police until eight hours after the alleged rape. 10RP 307. N.W. also fabricated her allegation. She too was angry with Stahl. He had stolen her heroin and then bragged about it. Contrary to N.W.'s testimony, which downplayed her anger over the theft,³ it was clear that heroin was very important to N.W. 10RP 315.

In rebuttal, the prosecutor argued that there were several reasons a sexual assault victim, particularly a homeless person, might not report an incident immediately. 10RP 324-25. Moreover, the complainants in the case were "pretty honest . . . that they weren't here trying to get Mr. Stahl into trouble." 10RP 324.

The State concluded its rebuttal as follows:

There was a lot of talk about — you know what phrase I heard a lot in [defense counsel's] closing was heroin addict, right, not calling [J.S.] by her name, but a heroin addict, a homeless heroin addict. Maybe even worse, you know, [N.W.], a heroin addict, they've chosen heroin over everything else. *Designed to dehumanize them, so you think of them as just homeless addicts, people who don't deserve your consideration, people who don't deserve the protection of the law.* Well, that's not who they are. They are people. They told you about how they ended up in this situation, about their families, about their community, and they are

³ E.g. 8RP 83.

people just as deserving of the protection of the law as anyone else. We talked a lot in voir dire about the difficulties of being homeless, how they're susceptible to victimization and how they deserve and how they need the very same protections that we all deserve. These are the people that Mr. Stahl bullied and assaulted. . . . Mr. Stahl is guilty of these crimes.

12RP 325-26 (emphasis added). Defense counsel did not object.

4. Appeal

Stahl appealed, arguing that he was denied his right to a unanimous verdict on the fourth degree assault charge, that the prosecutor committed misconduct, and that his counsel was ineffective for failing to object to the misconduct. The Court of Appeals affirmed. Op. at 3-10.

E. REASONS REVIEW SHOULD BE ACCEPTED

THIS COURT SHOULD ACCEPT REVIEW UNDER RAP 13.4(b)(1) AND (2) BECAUSE THE COURT OF APPEALS' OPINION CONFLICTS WITH ESTABLISHED CASE LAW FROM THIS COURT AND THE COURT OF APPEALS.

This Court should accept review under RAP 13.4(b)(1) and (2) because the Court of Appeals' opinion conflicts with case law from this Court and the Court of Appeals regarding prosecutorial misconduct.

1. Stahl was denied a fair trial as to counts 1, 2, and 5 because the State committed incurably prejudicial misconduct in closing argument.

The prosecutor committed misconduct on two occasions in rebuttal argument. First, contrary to the Court of Appeals opinion,⁴ the prosecutor mischaracterized the defense argument and, in doing so, improperly appealed to the sympathies and prejudices of jurors rather than focusing on the evidence. Although there was no objection, based on the nature and timing of the remarks, the comments were incurably prejudicial. Second, the prosecutor improperly vouched for the credibility of each of the State's civilian witnesses. Because the first type of misconduct focused only the complainants as to the sex crimes, the cumulative misconduct likely affected the verdicts on those counts. Thus, this Court should reverse Stahl's convictions on counts 1 and 5 and find the count 2 verdict was affected as well.⁵

⁴ See Op. at 7 ("The prosecutor's remarks were not an improper straw man. They were an attempt to protect favorable witnesses' credibility in the face of the defense's numerous remarks on their heroin usage."); Op. at 8 ("The prosecutor also asked the jury not to accept the defense's attempt to "dehumanize" the victims. But, this too is an attempt to push back on the defense's attack on the victims' credibility.").

⁵ Count 2 was vacated on double jeopardy grounds. CP 105; 14RP 42.

- a. *The State misrepresented the defense argument and, in the process, improperly appealed to jurors' sympathies and prejudices.*

In its rebuttal argument, the State misrepresented the defense argument and, in the process, improperly appealed to jurors' sympathies and prejudices.

“A prosecutor must enforce the law by prosecuting those who have violated the peace and dignity of the state by breaking the law.” State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). At the same time, a prosecutor “functions as the representative of the people in a quasijudicial capacity in a search for justice.” Id. A prosecutor fulfills neither role by securing a conviction based on proceedings that violate a defendant's right to a fair trial. Rather, such convictions undermine the integrity of the entire criminal justice system. State v. Walker, 182 Wn.2d 463, 476, 341 P.3d 976 (2015).⁶ When a prosecutor commits misconduct, he may deny the accused a fair trial. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 704, 286 P.3d 673 (2012); U.S. CONST. Amend. 14; CONST. art. 1, § 3.

A prosecutor's latitude in closing argument is limited to arguments “based only on probative evidence and sound reason.” Glasmann, 175 Wn.2d at 704 (quoting State v. Casteneda-Perez, 61 Wn. App. 354, 363,

⁶ This petition cites to two cases captioned State v. Walker. They are not related.

810 P.2d 74 (1991)). The tactic of misrepresenting defense counsel's argument in rebuttal, effectively creating a straw man, does not comport with the prosecutor's duty to "seek convictions based only on probative evidence and sound reason." State v. Thierry, 190 Wn. App. 680, 694, 360 P.3d 940 (2015) (quoting Casteneda-Perez, 61 Wn. App. at 363), review denied, 185 Wn.2d 1015 (2016). "Because the jury will normally place great confidence in the faithful execution of the obligations of a prosecuting attorney, [a prosecutor's] improper insinuations or suggestions are apt to carry more weight against a defendant." United States v. Solivan, 937 F.2d 1146, 1150 (6th Cir. 1991).

Here, in rebuttal, the prosecutor misrepresented the defense argument and, in doing so, urged the jury to convict Stahl of counts 1, 2, and 5 (involving complainants J.S. and N.W.) on improper grounds. First, the prosecutor claimed that defense counsel's emphasis on the women's heroin usage was designed to dehumanize them. This premise is false. The defense emphasis on the complainants' heroin use was designed to (1) establish the women had a motive for to fabricate their allegations and (2) suggest there was confusion about what occurred (J.S. in particular). See 10RP 306-09, 314-15 (Stahl's closing argument).

The theory that the defense propounded in closing was supported by the evidence introduced at trial, evidence which the court explicitly found

relevant and admissible. 3RP 23-26; 7RP 112-14. As for N.W., the testimony indicated that Stahl had stolen her heroin and then bragged about it, providing reason to be biased against Stahl. 8RP 62-63. As for J.S., the defense established through cross-examination that she had used heroin relatively close in time to the incident, increasing the likelihood that her memory of events upon waking was inaccurate. 9RP 203-04 (cross-examination of J.S.); 9RP 230-31 (cross-examination of detective regarding his interactions with J.S. after he woke her on another occasion). Stahl also used the fact of J.S.'s heroin dependency to argue that she felt indebted to Stahl for supplying her with heroin, which supported an argument that J.S. consented. E.g. 9RP 181 (cross-examination of J.S.); 10RP 306, 310 (defense closing argument). Considering this, Stahl's counsel reasonably emphasized the women's heroin use in closing argument. Indeed, given the defense theory, counsel would have been ineffective if he had failed to emphasize such evidence. The State seriously mischaracterized defense counsel's closing argument in this respect.

The State did not stop with mischaracterization of defense counsel's argument. After suggesting Stahl was merely attempting to dehumanize the complaining witnesses, the prosecutor then went a step further, arguing that to accept the defense theory was to accept the notion that homeless individuals or drug addicts were less deserving of the society's protection.

See 10RP 326 (“Designed to dehumanize them, so you think of them as just homeless addicts, people who don’t deserve your consideration, people who don’t deserve the protection of the law. . . . [T]hey are people just as deserving of the protection of the law as anyone else.”).

But, as discussed above, the premise that the defense was merely attempting to dehumanize N.W. and J.S. was a false one. Stahl’s counsel was not attempting to dissuade the jury from convicting Stahl because the complainants lived at society’s margins, and therefore did not deserve protection. Rather, Stahl’s attorney was emphasizing the women’s heroin use to focus the jury on issues of witness credibility and bias.

Instead of marshalling the facts and the law to urge conviction, the State used its mischaracterization in a manner like the “send a message” arguments that Washington courts have routinely condemned.

In State v. Bautista-Caldera, for example, the Court of Appeals held that an argument that “exhorts the jury to send a message to society about the general problem of child sex abuse” constitutes an improper emotional appeal. 56 Wn. App. 186, 195, 783 P.2d 116 (1989).

Likewise, in State v. Ramos, the Court determined the prosecutor’s argument “that the jury should convict in order to protect the community from drug dealing” was an improper appeal to the jury’s passions and prejudices. 164 Wn. App. 327, 338, 263 P.3d 1268 (2011).

Like the misconduct in Bautista-Caldera, the prosecutor here exhorted the jury to convict Stahl to avoid succumbing to defense counsel's (and by extension, Stahl's) "dehumaniz[ing]" attitudes. This argument was calculated to prejudice the jury against Stahl. The argument was also intended to invoke a sense of societal shame and guilt among the jurors, encouraging them to render a verdict on their emotions rather than the evidence. See Thierry, 190 Wn. App. at 691 (State's argument that if the jury did not believe the child's complainant's testimony "then the State may as well just give up prosecuting these cases, and the law might as well say that [t]he word of a child is not enough," improperly invited jury to decide case on emotional basis rather than the merits).

Where defense counsel fails to object, prosecutorial misconduct is, nonetheless, reversible error when the misconduct is incurable by corrective instruction. State v. Walker, 164 Wn. App. 724, 730, 736, 265 P.3d 191, as amended (Nov. 18, 2011). In this respect, a reviewing court's analysis of the prejudicial impact of misconduct does not rely on a review of sufficiency of the State's evidence. Walker, 182 Wn.2d at 479.

Here, the State committed incurably prejudicial misconduct by mischaracterizing the defense argument in such a way as to invoke jurors' sympathies toward the complainants, and to provoke their prejudices against Stahl. It then relied on this mischaracterization to make a familiar,

yet routinely condemned, “send a message” argument, urging conviction to protect vulnerable individuals. The prosecutor’s argument was of a type that has been held to be incurably prejudicial. See State v. Powell, 62 Wn. App. 914, 816 P.2d 86 (1991) (reversing, despite lack of objection, to State’s improper “send a message” argument in child molestation case).

In addition, when the State frames its improper remarks as a response to defense counsel’s argument, the prejudice flowing from the misconduct is exacerbated. See Thierry, 190 Wn. App. at 694 (condemning prosecutor’s mischaracterization of defense argument as “children can’t be believed,” where defense counsel had, instead, emphasized the complaining witness’s inconsistent statements and motive to lie).

Moreover, the prosecutor’s remarks were the last thing the jury heard before commencing deliberations. Comments made at the end of a prosecutor’s rebuttal argument are more likely to cause prejudice. State v. Lindsay, 180 Wn.2d 423, 443, 326 P.3d 125 (2014).

For the foregoing reasons, the prosecutor’s remarks were improper. Based on the character and timing of the remarks, they were incurably prejudicial. This Court should therefore reverse the convictions related to N.W. and J.S.

- b. *The State also committed misconduct by improperly vouching for the honesty of the complaining witnesses.*

In addition to the misconduct described above, the prosecutor improperly vouched for each of the civilian witnesses' credibility by expressing a personal opinion that their testimony was "honest."

Closing argument provides an opportunity to draw the jury's attention to the evidence presented, but it does not give a prosecutor the right to express personal opinions on the defendant's guilt. Walker, 182 Wn.2d at 478 (quoting Glasmann, 175 Wn.2d at 706-07); State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). Indeed, RPC 3.4(e) expressly prohibits an attorney from vouching for any witness's credibility or stating a personal opinion "on the guilt or innocence of an accused."

In addition to the improper argument described above, the prosecutor argued in rebuttal that each of the complainants were "pretty honest . . . that they weren't here trying to get Mr. Stahl into trouble." 10RP 324. This suggested to jurors that the balance of the witnesses' testimony was "honest" as well.

Thus, the prosecutor, to whom the jury was more likely to attribute honorable motives, responded to the defense argument by vouching for the witnesses' honesty. He then went on to misrepresent the defense theory and then to use the mischaracterization to urge conviction to protect vulnerable

individuals. Taken in conjunction with the first form of misconduct described above, the prosecutor's improper vouching denied Stahl a fair trial. For this reason, as well, counts 1 and 5 should be reversed. Although count 2 was vacated, the verdict on that count was affected as well.

2. Counsel provided ineffective assistance by failing to object to the prosecutor's misconduct, thereby denying Stahl a fair trial.

In addition, defense counsel provided ineffective assistance by failing to object to the misconduct described above.

Every accused person is guaranteed the right to the effective assistance of counsel under the Sixth Amendment and Article 1, Section 22 of the state constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987).

A person asserting ineffective assistance must show (1) his counsel's performance fell below an objective standard of reasonableness and, if so, (2) that counsel's poor performance prejudiced him. State v. A.N.J., 168 Wn.2d 91, 109, 225 P.3d 956 (2010) (citing Strickland, 466 U.S. at 686; State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)). This Court reviews claims of ineffective assistance de novo, as they present mixed questions of law and fact. A.N.J., 168 Wn.2d at 109.

With respect to the deficient performance prong, “[t]here is a strong presumption that defense counsel’s conduct is not deficient,” but an accused rebuts that presumption if “no conceivable legitimate tactic explain[s] counsel’s performance.” State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). To meet the prejudice prong, an accused person must show a reasonable probability “based on the record developed in the trial court, that the result of the proceeding would have been different but for counsel’s deficient representation.” McFarland, 127 Wn.2d at 337.

When a prosecutor resorts to improper argument, defense counsel has a duty to interpose a contemporaneous objection “to give the court an opportunity to correct counsel, and to caution the jurors against being influenced by such remarks.” State v. Emery, 174 Wn.2d 741, 761-62, 278 P.3d 653 (2012) (quoting 13 WASHINGTON PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 4505, at 295 (3d ed. 2004)).

Counsel’s failure to preserve error constitutes ineffective assistance and justifies examining the error on appeal. State v. Ermert, 94 Wn.2d 839, 848, 621 P.2d 121 (1980). If objections are necessary to preserve error, no reasonable strategy or tactic explains failure to object on the record. Even if declining to object is a reasonable tactic, to avoid drawing attention to the misconduct, defense counsel may still object to misconduct outside the presence of the jury, after arguments have concluded. See Lindsay, 180

Wn.2d at 441 (adopting exception to contemporaneous objection rule in prosecutorial misconduct cases to avoid repeated interruptions to closing arguments). Here, counsel rendered ineffective assistance by failing to object to the prosecutor's vouching and improper "send a message" arguments. No tactic explains counsel's failure to preserve the error.

Defense counsel's failure to object to each instance of prosecutorial misconduct prejudiced Stahl. The defense argued that N.W. and J.S. had clear motives to fabricate the allegations against Stahl. The women's heroin addiction also supplied a reason to doubt the women's perception of events. But the prosecutor, to whom the jury was more likely to attribute altruistic motives, responded by vouching for the witnesses' honesty. The prosecutor then went on to mischaracterize the defense theory and to use the mischaracterization to urge the jury to protect those at the margins of society by convicting Stahl. This was particularly prejudicial because it turned Stahl into a scapegoat for serious social problems related to homelessness and drug addiction. As emphasized above, these remarks were the very last words the jury heard from either party before deliberations. In summary, and as argued above, the State's improper argument was likely to have a substantial effect on the jury's verdict.

Because Stahl demonstrated both deficient performance and prejudice, counsel's ineffective assistance denied Stahl a fair trial on counts 1, 2, and 5.

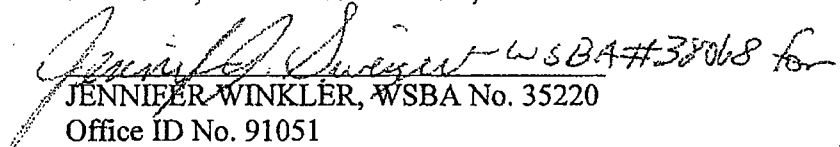
F. CONCLUSION

Because prosecutorial misconduct and ineffective assistance of counsel affected the verdicts on counts 1, 2, and 5, this Court should accept review under RAP 13.4(b)(1) and (2) and reverse.

DATED this 3rd day of July, 2017.

Respectfully submitted,

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent,

v.

CORTNEY JAMES STAHL,

Appellant.

No. 74663-4-1

DIVISION ONE

UNPUBLISHED OPINION

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APPELWICK, J. — Stahl was convicted of second degree rape, indecent liberties, assault in the third degree, and assault in the fourth degree. Stahl argues that he was denied his right to a unanimous verdict, that the prosecutor committed misconduct, and that his counsel was ineffective. He also makes numerous arguments in a statement of additional grounds for review. We affirm.

FACTS

Cortney Stahl resided in a greenbelt where a number of homeless people resided. On July 9, 2015, camp resident Jose Leon left the greenbelt briefly for roughly 30 to 40 minutes. When he returned, Leon observed his friend, Alicia Nickerson, shaking and crying. Nickerson told Leon that Stahl had been “manhandling her” and grabbing her throat.

Leon confronted Stahl about Nickerson’s accusations. Stahl then hit both Leon and Nickerson. After Leon asked him to stop, Stahl then appeared to calm down and left the scene.

But, Stahl returned 20 to 30 minutes later and was more aggressive. He began using a piece of wood, similar to a two by four, to destroy Leon's shelter. He then began beating both Leon and Nickerson with the wood. Police arrived at the scene.

Police were informed about a separate incident involving Stahl and another resident, J.S. J.S. knew Stahl, and had received heroin from Stahl the day before. J.S. testified that she had woken up when Stahl attempted to put his penis in her mouth. She tried to get up, but Stahl grabbed her and held her down as he masturbated.

Another camp resident, N.W. reported an incident involving Stahl to the police. N.W. testified that Stahl had become angry with her, and threw a thermos and juice at her while the two were in a tent. As N.W. tried to crawl away from Stahl, he grabbed her between her legs by her vagina. N.W. testified that it felt like Stahl was trying to insert his fingers into her vagina. N.W. was able to get away.

The State charged Stahl with five crimes: indecent liberties and rape in the second degree for his acts against J.S., assault in the third degree for his acts against Leon, assault in the fourth degree for his acts against Nickerson, and indecent liberties for his acts against N.W. The jury found Stahl guilty on all counts, but the indecent liberties conviction involving J.S. was vacated for double jeopardy reasons. Stahl appeals.

DISCUSSION

Stahl makes three arguments in his brief. First, he argues that he was denied his right to a unanimous jury verdict. Second, he argues that the prosecutor committed misconduct. Third, he argues that defense counsel was ineffective for failing to object to the prosecutor's statements that he claims amounted to misconduct. He also makes various arguments in a statement of additional grounds for review (SAG).

1. Right to a Unanimous Jury

Stahl first argues that, with respect to the conviction on count four, the assault on Nickerson, his right to a unanimous jury verdict was violated. He claims this is so, because the State did not identify which of the two violent acts constituted the alleged assault, and the trial court did not give a unanimity instruction.

A defendant may be convicted only when a unanimous jury concludes that the criminal act charged in the information has been committed. State v. Crane, 116 Wn.2d 315, 324-25, 804 P.2d 10 (1991), overruled on other grounds by In re Pers. Restraint of Andress, 147 Wn.2d 602, 56 P.2d 981 (2002). When the prosecutor presents evidence of several acts that could form the basis of one count charged, either the State must tell the jury which act to rely on in its deliberations, or the court must instruct the jury to agree on a specified criminal act. Id. at 325. The failure to instruct the jury on the required unanimity is reversible error unless the failure is harmless. State v. Bobenhouse, 143 Wn.

App. 315, 325, 177 P.3d 209 (2008). Since this is an error of constitutional magnitude, it may be raised for the first time on appeal. Id.

However, a unanimity instruction is not necessary where the evidence indicates a " 'continuing course of conduct.' " State v. Garman, 100 Wn. App. 307, 313, 984 P.2d 453 (1999) (quoting State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988)). To determine whether criminal conduct constitutes one continuing act, we evaluate the facts in a " 'commonsense manner.' " Id. (quoting State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989)). A continuing course of conduct requires an ongoing enterprise with a single objective. Id. But, where evidence involves conduct at different times and places, or different victims, then the evidence tends to show distinct acts. Id.

Leon testified that Stahl hit Nickerson while in the encampment.¹ Stahl then left the scene for approximately 20 to 30 minutes. Upon Stahl's return, he again started hitting Leon and Nickerson. Stahl claims that this is not a continuing course of conduct.

But, we need not decide whether any error occurred, because any such error would have been harmless. An error that violates a defendant's right to a unanimous verdict will not be upheld unless the error is harmless beyond a reasonable doubt. State v. Coleman, 159 Wn.2d 509, 512, 150 P.3d 1126 (2007). The presumption of error is overcome only if no rational juror could have a reasonable doubt as to any of the incidents alleged. Id. And, here, the

¹ Stahl notes that Nickerson did not testify, and the only testimony regarding the specifics of the assault came from Leon.

evidence that the two assaults occurred went uncontroverted. Regarding the first instance, Leon testified that Nickerson told him that Stahl had been "manhandling" her on her neck and back, and that she appeared distraught. And, before Stahl first left the scene, Leon saw Stahl beat Nickerson. Regarding the second incident, Leon testified that he saw Stahl beat Nickerson with a piece of wood similar to a two by four.

In addition, corroborating Leon's testimony about the incident, a neighbor whose property bordered the encampment testified that he heard a woman yelling and saw a scuffle in the encampment and called the police. The neighbor testified that the scuffle involved two men and a woman. He testified that one man was the aggressor. The woman was screaming in distress. The woman later came to the neighbor for help, and told the neighbor that a man was beating her up. Stahl points to no evidence that controverts the testimony from Leon or the neighbor. Any error was harmless.

We hold Stahl's right to a unanimous jury verdict was not violated.

II. Prosecutorial Misconduct

Fuller next argues that the prosecutor committed misconduct during his closing argument.

The defendant bears the burden of proving that the prosecutor's alleged misconduct was both improper and prejudicial. State v. Emery, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). The burden to establish prejudice requires the defendant to prove that there is a substantial likelihood that the instances of misconduct affected the jury's verdict. State v. Thorgerson, 172 Wn.2d 438, 442-

43, 258 P.3d 43 (2011). The failure to object to an improper remark constitutes a waiver of error unless it is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. Id. at 443. Stahl concedes that he did not object to any of the statements he alleges were misconduct. Therefore, his arguments are waived unless the remarks were flagrant, ill-intentioned, and unable to be cured by a supplemental instruction. Thorgerson, 172 Wn.2d at 443.

A. Mischaracterization of Defense's Argument

Stahl argues that the prosecutor committed misconduct by mischaracterizing Stahl's argument so as to appeal to jurors' prejudices. Creating straw man arguments does not comport with the prosecutor's duty to seek convictions based on probative evidence and sound reason. State v. Thierry, 190 Wn. App. 680, 694, 360 P.3d 940 (2015), review denied, 185 Wn.2d 1015, 368 P.2d 171 (2016).

In his closing argument, Stahl repeatedly referred to victims J.S. and N.W. He stated that J.S. had "chosen this life of the heroin and the living outside as opposed to getting treatment." As part of the defense's narrative that N.W. had fabricated her allegations due to Stahl stealing N.W.'s heroin, defense counsel stated:

She tells us that, well, she uses heroin not daily but not too much. That again, I mean can you -- would a heroin addict minimize how much they use? How important is heroin to her? Well, she's chosen heroin over everything else in her life. Heroin is more important to her than anything.

In rebuttal, the prosecutor stated that the defense had attempted to dehumanize the victims through such statements. Stahl claims that he did no such thing and that the prosecutor's statements mischaracterized the defense's arguments.

But, the prosecutor's rebuttal was responsive to the defense's statements. The prosecutor stated, accurately, that the defense referenced that the victims had chosen a life of heroin. The prosecutor's rebuttal asked the jury to reject any inference that the victims "don't deserve your consideration." The prosecutor's remarks were not an improper straw man. They were an attempt to protect favorable witnesses' credibility in the face of the defense's numerous remarks on their heroin usage. The prosecutor did not commit misconduct by mischaracterizing the defense's argument.

B. Appeal to Jurors' Sympathies

Stahl also contends that the prosecutor improperly told the jury that policy considerations should inform their verdict. Specifically, Stahl argues that, by stating that the defense dehumanized the homeless victims, and that they were "just as deserving of the protection of the law as anyone else," the prosecutor asked the jury to reach its verdict based on policy concerns. This, Stahl contends, mischaracterized his argument and appealed to jurors' sympathies.

Stahl equates this case to previous cases that have overturned convictions due to "send a message" closing arguments. For example, in State v. Bautista-Caldera, , the court found reversible error when the prosecutor asked the jury to convict to let " 'children know that you're ready to believe them and [e]nforce the law on their behalf.' " 56 Wn. App. 186, 195, 783 P.2d 116 (1989)

(alteration in original). State v. Ramos, 164 Wn. App. 327, 338, 342, 263 P.3d 1268 (2011) was similar. The court overturned after the prosecutor told the jury: "This is also why we are here today, so people can go out there and buy some groceries . . . or go to a movie . . . and not have to wade past the coke dealers in the parking lot." Id. at 338. Stahl claims that the prosecutor's statements in his case were analogous.

But, here the prosecutor's statements were the opposite. In Ramos and Bautista-Caldera, the prosecutors asked the jury to use policy concerns to inform their decision. But, here the prosecutor stated that homeless victims were "just as deserving of the protection of the law." He did not state or suggest that homelessness should give the victims more protection under the law, or that finding Stahl guilty would send a policy message regarding concern for homeless individuals. The prosecutor also asked the jury not to accept the defense's attempt to "dehumanize" the victims. But, this too is an attempt to push back on the defense's attack on the victims' credibility. The prosecutor's comments were not improper "send a message" comments. Rather, they were acceptable attempts to address the credibility issues raised by the defense.

C. Vouching for Witness Credibility

Finally, Stahl argues that the prosecutor vouched for witness credibility. He points to the prosecutor's comment in closing arguments that J.S. and N.W. were forthcoming in their motives for testifying. Specifically, the prosecutor stated: "But, you know, they were pretty honest too that they weren't here trying

to get Mr. Stahl into trouble, you know. To some of them he's still a friend, and really they hope that he can just get some help."

It is misconduct for a prosecutor to personally vouch for the credibility of a witness. State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). But, a prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and may freely comment on witness credibility based on the evidence. State v. Lewis, 156 Wn. App. 230, 240, 233 P.3d 891 (2010). And, courts review comments made by a prosecutor during closing argument in the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

Although the prosecutor described the witnesses' actions as "honest," the context shows that he was not personally vouching for their credibility. The prosecutor used the term when addressing the witnesses' delay in reporting the crimes. The defense's theory was that this delay suggested a lack of credibility. The prosecutor described the witnesses as honest one sentence after conceding that the victims did not immediately report Stahl to the police. The "honest" comment was a reference to the witnesses acknowledging they delayed in reporting the crimes, and testifying, as J.S. did, that she did not want to get Stahl in trouble. The prosecutor did not vouch for the credibility of the witnesses by merely highlighting that their actions and testimony were consistent.

Because we conclude that none of the prosecutor's comments were improper, we need not decide whether they were prejudicial. The prosecutor did not commit misconduct.²

III. Statement of Additional Grounds for Review

We discern five legal arguments from Stahl's SAG. First, he argues that counsel was ineffective for failing to investigate and failing to propose a lesser included offense jury instruction. Second, he argues that he was denied his right to testify in his own defense. Third, he argues that he was denied his right to a speedy trial. Fourth, he argues that he was denied his right to conflict free counsel. Finally, he argues that cumulative error warrants reversal.

A. Ineffective Assistance of Counsel

In his SAG, Stahl argues that his attorney was ineffective for failing to adequately investigate potential witnesses and the alleged crime. Defense counsel has a duty to make reasonable investigations or to make a reasonable decision that particular investigations are unnecessary. In re Pers. Restraint of Rice, 118 Wn.2d 876, 889, 828 P.2d 1086 (1992). But, Stahl fails to identify the specific exculpatory information that such investigations would have revealed. He speculates that employing an investigator might have been helpful. But,

² Stahl contends that his counsel was ineffective by failing to object to the prosecutor's remarks that he argues were misconduct. To prevail on an ineffective assistance of counsel claim, the defendant must show that (1) defense counsel's representation was deficient in that it fell below an objective standard of reasonableness and (2) the deficient performance prejudiced the defendant. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). But, because we hold that the prosecutor's comments were not improper, there was neither deficient performance, nor prejudice to Stahl as a result of deficient performance. Stahl did not receive ineffective assistance of counsel.

courts apply a strong presumption that counsel was effective. In re Pers. Restraint of Davis, 152 Wn.2d 647, 673, 101 P.3d 1 (2004). Stahl's speculations that other actions might have helped his defense do not overcome this strong presumption.

Stahl next claims his counsel was ineffective for failure to propose lesser included offense jury instructions. But, Stahl fails to identify what lesser included offense his counsel could have or should have proposed instructions for. Stahl therefore has not overcome the strong presumption that counsel was effective.

B. Right to Testify

Stahl also claims that his attorney denied Stahl his right to testify in his own defense. A defendant has a fundamental constitutional right to testify in his or her own defense. Rock v. Arkansas, 483 U.S. 44, 51-53, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987). On a federal level, the right to testify is implicitly based in the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. Id. The Washington constitution explicitly protects the right to testify. WASH. CONST. art. I, § 22.

Mere allegations by a defendant that his attorney prevented him from testifying are insufficient to justify reconsideration of the defendant's waiver of the right to testify. State v. Robinson, 138 Wn.2d 753, 760, 982 P.2d 590 (1999). Defendants must show some particularity to give their claims sufficient credibility to warrant further investigation. Id.

Stahl claims that his attorney's inadequate preparation forced Stahl to refuse to testify. In a declaration filed below, Stahl stated that his attorney

directly asked him if he would like to testify at trial, and even told Stahl that he had "credibility." Stahl admitted in that declaration that he explicitly declined to testify when asked, because he felt that his attorney had not adequately prepared him to testify. Given that Stahl admitted below that his attorney offered him the opportunity to testify, he was not denied his right to testify in his own defense. Any arguments about inadequate preparation go to ineffective assistance of counsel, which we addressed above.

C. Speedy Trial

Stahl argues that the trial court's grant of continuances violated CrR 3.3, and he was denied his constitutional right to a speedy trial. CrR 3.3(b)(1)(i) generally requires that trial occurs within 60 days of arraignment if the defendant is detained in jail. CrR 3.3 accords with the United States Supreme Court's determination that states can prescribe reasonable periods for commencement of trials consistent with constitutional standards. State v. Ollivier, 178 Wn. 2d 813, 823, 312 P.3d 1 (2013).

The scheduling order below originally set Stahl's trial date for September 23, 2015, which was within 60 days of arraignment. On September 3, 2015, after the State indicated that it would be adding two additional charges against Stahl, Stahl's attorney requested a continuance so that he could be adequately prepared for trial. Stahl personally objected to his lawyer's request, but the trial court was persuaded by trial counsel's need to prepare to defend against the new charges, and it set a new trial date for October 5, 2015. On September 30, 2015, the State added amended the charges. The trial court ordered a two week

trial continuance for good cause to October 19, 2015. Stahl's attorney was granted this second continuance in order to adequately prepare, but Stahl himself opposed this continuance.

On appeal, a trial court's grant or denial of a motion for continuance will not be disturbed absent a showing of manifest abuse of discretion. State v. Campbell, 103 Wn.2d 1, 14, 691 P.2d 929 (1984). A trial court properly exercises its discretion under CrR 3.3 when it grants counsel's request to waive trial in 60 days, over a defendant's objection, to ensure effective representation at trial. See id. at 15. That was the case here. The trial court made clear that the new charges filed against Stahl would require additional preparation for defense counsel, and that this warranted a continuance to October 5, and again to October 19. Stahl notes that trial did not actually occur until roughly six weeks after the October 19 trial date. But, he fails to identify any part of the record that shows whether this was requested by one party, both parties, caused by the court's calendar, or for any other reason. He therefore has not demonstrated that the trial court violated CrR 3.3.

Stahl also argues that his constitutional right to a speedy trial was violated. Compliance with CrR 3.3 does not guarantee that constitutional rights were not violated. State v. Ollivier, 161 Wn. App. 307, 313, 254 P.3d 883 (2011) aff'd, 178 Wn.2d 813, 312 P.3d 1 (2013). We review constitutional speedy trial claims de novo. State v. Shemesh, 187 Wn. App. 136, 144, 347 P.3d 1096, review denied, 184 Wn.2d 1007, 357 P.3d 665 (2015).

As a threshold matter, to show a violation of constitutional speedy trial rights, a defendant must show that the length between the accusation and trial crossed a line from ordinary to presumptively prejudicial. Ollivier, 178 Wn.2d at 827. The passage of time, complexity of charges, and reliance on eyewitness testimony are relevant to whether a delay was presumptively prejudicial. State v. Iniguez, 167 Wn.2d 273, 292, 217 P.3d 768 (2009). Stahl was arraigned on July 25, 2015. But, the State amended the charges against Stahl on September 30, 2015. Trial occurred in late November and early December 2015. Thus, roughly four months passed between the initial accusations against Stahl and his trial, and roughly two months passed between the filing of additional charges and his trial. This is a reasonable timespan between accusations and trial, and is not presumptively prejudicial. See State v. Corrado, 94 Wn. App. 228, 233-34, 972 P.2d 515 (1999) (surveying decisions and concluding that delays of eight months to one year are typically the threshold for delays to be deemed presumptively prejudicial.). And, this delay was in part caused by the difficulty in completing witness interviews, and the amendment of charges over two months after the original charges were filed. Stahl's constitutional right to a speedy trial was not violated.

D. Right to conflict free counsel

Stahl argues that his appointed counsel had an apparent or actual conflict that effectively denied Stahl's right to counsel. The Sixth Amendment right to counsel includes the right to conflict free counsel. Dhaliwal, 150 Wn.2d at 566. But, Stahl does not explain the specific conflict, actual or apparent, that his

counsel had. His argument primarily discusses his dissatisfaction with counsel's actions, not any conflicts of interest that were present. We therefore reject his arguments on this issue.

E. Cumulative Error

Stahl also argues cumulative error. Cumulative error warrants reversal when there have been several trial errors that standing alone may not be sufficient to justify reversal, but when combined may deny a defendant a fair trial. State v. Grieff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). But, because we do not find multiple errors, there can be no cumulative error.

We affirm.

WE CONCUR:

Trickey, ACJ

Appelvik, J

COX, J.

NIELSEN, BROMAN & KOCH P.L.L.C.

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