Supreme Court No. ____
(COA No. 74644-8-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOSE CORONADO,

Petitioner.

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

PETITION FOR REVIEW

TRAVIS STEARNS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711

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A. IDENTITY OF PETITIONER

Jose Coronado, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3 and RAP 13.4.

B. COURT OF APPEALS DECISION

Mr. Coronado seeks review of the Court of Appeals decision dated October 2, 2017, a copy of which is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the failure to make an adequate inquiry into Mr. Coronado's request to discharge his court-appointed attorney and the court's admonishment to Mr. Coronado that it would reject future discharge requests violated Mr. Coronado's Sixth Amendment right to counsel.

2. Whether the prosecutor's repeated attempts to shift the burden of proof to Mr. Coronado and to argue facts not in evidence regarding grooming of the alleged victim required a new trial.

D. STATEMENT OF THE CASE

1. After his third request for a new attorney, the trial court informed Mr. Coronado it would not entertain any more requests to discharge Mr. Coronado's appointed counsel.

Mr. Coronado was charged with assault in the second degree when J.J. alleged he had assaulted her after they had been in her apartment drinking and smoking marijuana. CP 1.[1] J.J. was an adult when Mr. Coronado was charged with this offense. CP 1.

J.J. later disclosed that Mr. Coronado had attempted to sexually assault her that evening. He was then charged with attempted rape in the second degree. CP 8. J.J. further alleged Mr. Coronado had sexually assaulted her as a child. This led to charges of child molestation in the second degree and rape in the second degree. CP 142.

Before trial commenced, Mr. Coronado moved to discharge his appointed attorney. He first asked for a new lawyer on February 18, 2015. 2/18/15 RP 3. Mr. Coronado told the court his attorney was improperly representing him, that although he had been in custody for five months, he did not know the status of his case. 2/18/15 RP 4. The Court made no other inquiry into why Mr. Coronado believed his

[1] Because the transcript volumes are not in numerical order, references to them will first by the date of the hearing and then the page number within that volume. E.g., 2/18/15 RP 3. Where more than one date is contained within the transcript volume, the volume will be referred to by the first date contained in the volume.

attorney should be discharged and found no basis for the discharge. 2/18/15 RP 4.

Mr. Coronado again moved to discharge his attorney on May 6, 2015. 2/18/15 RP 6. He stated he did not believe his attorney was effective, that his attorney had not even asked him about defenses to the charges, and had not investigated his case. 2/18/15 RP 6, 8. Mr. Coronado again alleged that he had limited contact with his attorney, who only visited him when he came to ask for a continuance. 2/18/15 RP 7. Mr. Coronado believed he had an inadequate relationship with his attorney and felt he was being "railroaded." 2/18/15 RP 7.

The trial court found Mr. Coronado had made clear he was not comfortable with his present lawyer, wanted a better lawyer, and did not believe he had an attorney who was willing to take his case to trial. 2/18/15 RP 9. Nevertheless, the trial court denied Mr. Coronado's motion to discharge, finding Mr. Coronado's attorney was a "very capable lawyer" who "handles cases of this magnitude all the time" and who was willing to take Mr. Coronado's case to trial. 2/18/15 RP 9. No findings were made about whether Mr. Coronado's relationship with his attorney had deteriorated to the extent that Mr. Coronado's right to effective assistance of counsel was being denied.

Mr. Coronado made a third attempt to have the court discharge his attorney on July 17, 2015. 2/18/15 RP 13. This time, Mr. Coronado stated his Sixth Amendment right to effective assistance had been denied. 2/18/15 RP 13. He also declared his attorney had not taken actions in his favor or attended to issues he believed should have been attended to. 2/18/15 RP 13.

The court again denied Mr. Coronado's motion to discharge his attorney, making no further inquiry into why new counsel was necessary. 2/18/15 RP 13-14. This time, the court told Mr. Coronado that his attorney was very competent and that the court would deny the motion on that basis. 2/18/15 RP 13-14. The court also informed Mr. Coronado that the court would continue to deny the motion to discharge. 2/18/15 RP 13-14. This was the last time Mr. Coronado asked for a new lawyer.

2. In closing argument, the prosecutor shifted the burden to Mr. Coronado, improperly commented on his right to remain silent, and argued facts not in evidence.

In closing arguments, the prosecutor argued there was "absolutely no different account of what happened" other than the prosecution's trial theory. 10/26/15 RP 912. Mr. Coronado objected to

this argument. 10/26/15 RP 912. The trial court sustained Mr. Coronado's objection. 10/26/15 RP 912.

Immediately after the objection had been sustained, the prosecutor made the same argument, stating "There's absolutely no different version put before you of what happened." 10/26/15 RP 911. Mr. Coronado again objected. The trial court sustained the objection, this time instructing the jury that the "burden rests upon the State." 10/26/15 RP 911.

Despite having been told twice this was an improper argument, the prosecutor immediately returned to this argument, this time declaring there was only "one version of what happened" and no witnesses were brought forward to contradict the prosecutor's theory. 10/26/15 RP 912. For a third time, the trial court sustained Mr. Coronado's objection. 10/26/15 RP 912.

The prosecutor also argued in her closing that Mr. Coronado had engaged in "grooming" J.J. by teaching her to "be reliant, to be dependent, to trust him. . ." 10/16/15 RP 901. Mr. Coronado objected to this argument. 10/16/15 RP 901. The court sustained Mr. Coronado's objection. 10/16/15 RP 901. No evidence was introduced at trial to describe what "grooming" was or whether Mr. Coronado had engaged

in it. The first time the word was used was when the prosecutor argued grooming in her closing argument. 10/16/15 RP 901.

E. ARGUMENT

1. This Court should accept review of whether Mr. Coronado's Sixth Amendment right to assistance of counsel was violated by the trial court's failure to adequately inquire into whether his attorney should have been discharged.

The Court of Appeals held that the trial court did not abuse its discretion in discharging Mr. Coronado's trial counsel. Slip Op. at 6. In making this finding, the Court of Appeals failed to address the trial court's admonishment that it would not consider further requests from Mr. Coronado. 2/18/15 RP 13-14. This Court should accept review of this question because the question of whether the trial court's failure to properly inquire of Mr. Coronado's dissatisfaction and then the declaration it would not consider any further motions is a significant question of constitutional law and involves an issue of substantial public interest that should be determined by this Court. RAP 13.4(b).

a. A timely motion to discharge should be granted where the defendant is able to demonstrate a conflict which is so great it prevents and adequate defense.

When an indigent defendant requests new court-appointed counsel, the trial court must consider (1) the timeliness of the

substitution motion and the extent of resulting inconvenience or delay; (2) the adequacy of the inquiry into the defendant's complaint; and (3) whether the conflict between the defendant and his attorney was so great that it prevented an adequate defense. *United States v. Rivera-Corona*, 618 F.3d 976, 978 (9th Cir. 2010) (citing *United States v. Mendez-Sanchez*, 563 F.3d 935, 942 (9th Cir.2009)). This test helps determine whether the conflict between the defendant and attorney has resulted in a "constructive denied of counsel." *See Daniels v. Woodford*, 428 F.3d 1181, 1198 (9th Cir.2005).

This Court has held that the trial court must address (1) the extent of any conflict, (2) the adequacy of the trial court's inquiry into reasons for the conflict, and (3) the timeliness of the motion. *State v. Cross*, 156 Wn.2d 580, 607, 132 P.3d 80 (2006). An adequate inquiry requires a full airing of the defendant's concerns and a meaningful inquiry by the court. *Cross*, 156 Wn.2d at 610. A defendant must demonstrate good cause to warrant substitution of counsel, such as a conflict of interest or a complete breakdown in attorney-client communications. *State v. Stenson*, 132 Wn.2d 668, 734, 940 P.2d 1239 (1997). A court's denial of a motion for substitution of counsel is

reviewed for abuse of discretion. *United States v. Adelzo-Gonzalez*, 268 F.3d 772, 777 (9th Cir.2001); *Cross*, 156 Wn.2d at 607.

b. Mr. Coronado's motions to discharge his attorney were timely.

Mr. Coronado moved to discharge his attorney on February 18, 2015, May 6, 2015, and July 17, 2015. 2/18/15 RP 3, 6, 13. Pre-trial hearings did not commence until September 21, 2015. 9/21/15 RP 2. Mr. Coronado's motions to discharge were timely and would not have delayed his trial.

c. Mr. Coronado's complaints regarding his attorney demonstrated a breakdown in communication between Mr. Coronado and his attorney.

Mr. Coronado moved to discharge because of the breakdown in their relationship and inability to communicate. The trial court denied all his requests, telling Mr. Mr. Coronado's on his final motion that the trial court would continue to deny future motions to discharge if they were brought by Mr. Coronado.

Mr. Coronado first moved to discharge his attorney on February 18, 2015. 2/18/15 RP 3. Mr. Coronado told the court "I believe I was improperly represented." 2/18/15 RP 3. He further stated:

> I've been in here five months, sir, I mean, I don't know anything what's going on with my case or whatever.

2/18/15 RP 4.

The court made no further inquiry into why Mr. Coronado felt there was a conflict. Instead, the court found there was "absolutely no basis to discharge counsel." 2/18/15 RP 4.

This is an inadequate inquiry. Instead of inquiring into whether there was a conflict of interest between Mr. Coronado and his attorney or a complete breakdown in attorney-client communications, the court almost immediately found there was no basis for the discharge. 2/18/15 RP 4. At a minimum, the court is required to make an inquiry into why Mr. Coronado believed his Sixth Amendment rights were being violated. *See Stenson*, 132 Wn.2d at 734.

Mr. Coronado again moved to discharge his attorney on May 6, 2015. 2/18/15 RP 6. The court stated it had reviewed Mr. Coronado's written request to discharge his attorney. 2/18/15 RP 6. The court then asked Mr. Coronado for any additional comments. 2/18/15 RP 6.

Mr. Coronado made clear the attorney-client relationship had broken down. Mr. Coronado stated:

> I just believe that he will not be effective counsel for me. I mean, I have not had counsel with him that much that even in talking, I mean, he never gives me any support of any kind, let alone tell me -- asking me what my side of the story or anything.

…

> I've never even had an effectiveness of talking with him. It's always seeing him is here I am, I need a continuance, bam, he's gone. A month later, he's back again for another continuance, bam, he's gone for another month. I mean, I've never known anything that's going on.

2/18/15 RP 6-7.

Mr. Coronado then told the court that he did not understand "what's going on" and that he felt he was being "railroaded." 2/18/15 RP 7. Mr. Coronado told the court he had given his attorney the names of witnesses and that witnesses had called his attorney, but that his attorney had been "having issues evidently calling [them] up or contacting them when they all live in the same house." 2/18/15 RP 8.

In denying Mr. Coronado's request, the court focused on whether Mr. Coronado was entitled to an appointed lawyer of his choosing. 2/18/15 RP 9. Rather than address the conflict, the trial court informed Mr. Coronado that his present counsel was a "very capable lawyer" who "handles cases of this magnitude all the time" and who was willing to take Mr. Coronado's case to trial. 2/18/15 RP 9. The inquiry the court should have made was whether a conflict existed or whether there was a breakdown in attorney-client communication. *See*

Stenson, 132 Wn.2d at 734. The failure of the court to make the proper inquiry was an abuse of discretion.

Mr. Coronado again asked to have his attorney discharged on July 17, 2015. 2/18/15 RP 13. Mr. Coronado stated his Sixth Amendment right to effective assistance had been denied to him. 2/18/15 RP 13. He further stated his attorney had not taken actions in his favor or attended to issues he believed should be attended to 2/18/15 RP 13.

The court conducted the following colloquy with Mr. Coronado.

> THE COURT: We have a lot more cases to go, Mr. Coronado, so anything else you want to tell me?
>
> THE DEFENDANT: Well, if you're not willing to grant the dismissal of counsel, your Honor –
>
> THE COURT: Yeah, I've denied your motion to discharge, and I told you previously, Mr. Ewers is very competent counsel, so I've denied that. I'm going to continue to deny that.

2/18/15 RP 13-14. No further inquiries were made regarding Mr. Coronado's conflicts with his attorney.

Again, the trial court failed to inquire into whether Mr. Coronado's Sixth Amendment rights were violated. This time the court cut Mr. Coronado short, denying his motion and informing him that he would continue to deny future motions to discharge. 2/18/15 RP 13-14.

Of all the motions, this one is the greatest concern as new facts may have risen since Mr. Coronado's previous motion to discharge. Additionally, admonishing Mr. Coronado from making further motions was also improper. This failure of the court to conduct an inquiry was an abuse of discretion.

d. The trial court abused its discretion in failing to discharge Mr. Coronado's attorney.

A trial court conducts an adequate inquiry into whether counsel should be discharged when the court allows the defendant and counsel to express their concerns fully. *State v. Schaller*, 143 Wn. App. 258, 271, 177 P.3d 1139 (2007). At a minimum, this requires the court to allow a defendant to state his reasons for his dissatisfaction with his attorney and to create a record for appeal that the trial court had the information required to assess the merits of the defendant's requests. *State v. Varga*, 151 Wn.2d 179, 200-01, 86 P.3d 139 (2004).

Mr. Coronado began to alert the court regarding the breakdown in attorney-client communication well before trial. Of his three motions to discharge the most concerning is the failure of the court to make inquiries about why counsel should be discharged on July 17, 2015. 2/18/15 RP 13-14. At this hearing, the court also made clear it would not entertain Mr. Coronado's future requests regarding his inability to

communicate or work with his attorney. 2/18/15 RP 13-14. This chilling statement made it impossible for Mr. Coronado to exercise his Sixth Amendment right of for the court to ensure Mr. Coronado received adequate assistance of counsel.

Conflict between an attorney and client can become so extreme as to constitute a constructive denial of counsel. *Rivera-Corona*, 618 F.3d at 979; *see also Woodford*, 428 F.3d at 1198. The court abused its discretion when it failed to inquire into or appoint new counsel, especially about Mr. Coronado's final request to discharge his attorney on July 17, 2015. This violation of Mr. Coronado's Sixth Amendment right to counsel is a significant question of constitutional law and involves an issue of substantial public interest that should be determined by this Court. RAP 13.4(b). This Court should accept review.

2. This Court should accept review of whether the prosecutor's misconduct in closing arguments requires a new trial.

a. Improper and prejudicial prosecutorial misconduct impairs the right to a fair trial.

The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and art. I, § 22 of the Washington State Constitution. *Estelle v.*

Williams, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976). The Court of Appeals held that based on the evidence presented, Mr. Coronado faield to demonstrate that there was a substantial likelihood the prosecutor's comments, if improper affected the jury's verdict. Slip. Op. at 11. This Court should accept review of whether the misconduct required a new trial, as this is a significant question of constitutional law and involves an issue of substantial public interest. RAP 13.4(b).

Prosecutorial misconduct deprives an accused person of this fundamental right. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). "As a quasi-judicial officer representing the people of the State, a prosecutor has a duty to act impartially in the interest only of justice." *State v. Warren*, 165 Wn.2d 17, 27, 195 P.3d 940 (2008); *State v Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). It is the prosecutor's duty to "seek a verdict free of prejudice and based on reason." *State v. Huson*, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), *cert. den'd*, 393 U.S. 1096 (1969); *see also State v. Walker*, 182 Wn.2d 463, 476, 341 P.3d 976 (2015), *cert. denied*, 135 S. Ct. 2844 (2015).

Prosecutorial misconduct which denies a defendant a fair trial violates the constitutional right to due process. *State v. Belgarde*, 110 Wn.2d 504, 512, 755 P.2d 174 (1988). Misconduct is established where

the defense demonstrates the prosecutor's conduct was both improper and prejudicial. *State v. Thorgerson*, 172 Wn.2d 438, 448, 258 P.3d 43 (2011). Reversal is required where there is a substantial likelihood the misconduct affected the jury verdict. *Id.*; *State v. Ish*, 170 Wn.2d 189, 195, 241 P.3d 389 (2010).

b. The prosecutor committed misconduct by shifting the burden of proof and commenting on the right to remain silent multiple times in her closing argument.

The suggestion that a defendant must produce evidence in support of the defense theory disregards "the bedrock upon which the criminal justice system stands." *Walker*, 182 Wn.2d at 480 (citing *State v. Bennett*, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007)). Every defendant is entitled to a presumption of innocence, which is overcome only when the prosecution proves guilt beyond a reasonable doubt as determined by an impartial jury based on evidence presented at a fair trial. *Id*. Because the defense has no duty to present evidence, a prosecutor cannot comment on the lack of defense evidence. *State v. Cheatam*, 150 Wn.2d 626, 652, 81 P.3d 830 (2003). Arguments by the prosecution that shift the burden of proof constitute misconduct. *State v. Lindsay*, 180 Wn.2d 423, 434, 326 P.3d 125 (2014) (citing *State v. Gregory*, 158 Wn.2d 759, 859–60, 147 P.3d 1201 (2006)).

The prosecutor attempted to shift the burden in her closing argument. She deliberately ignored the court and made the same argument two more times, even after being instructed to stop.

She first argued:

> I want to point out that what's also important is that you are to find whether or not we proved these charges to you beyond all reasonable doubt based off all of the evidence presented, and I believe lack of evidence. You have absolutely no different account of what happened than what [J.J.] said. That is the only proof that you have. There is no other variation.

10/16/15 RP 911.

Mr. Coronado objected this this statement. 10/16/15 RP 911. The court sustained his objection. 10/16/15 RP 911.

Immediately after being instructed to refrain from this argument, the prosecutor made the same argument to the jury stating:

> There's absolutely no different version put before you of what happened. You don't have any other witness saying, "No. [J.J.] said she lied. She wasn't raped." Nothing else.

10/16/15 RP 912.

Again, Mr. Coronado objected to this misconduct. 10/16/15 RP 912. The court sustained the objection and instructed the jury to disregard the argument. 10/16/15 RP 912.

Ignoring this instruction, the prosecutor made the same argument a third time. This time the prosecutor argued:

> The State could have brought in witnesses that contradicted each other. We could have done that. I think you heard a little bit about Cathy and [J.J.], that their details sometimes don't measure up. But what you don't have before you is one version of what happened, one.

10/16/15 RP 912.

Mr. Coronado again objected to this misconduct, which the trial court again sustained. 10/16/15 RP 912.

This continued burden shifting and comment on Mr. Coronado's choice to remain silent constituted misconduct. *Walker*, 182 Wn.2d at 480. Although Mr. Coronado's objections were sustained, and the jury was instructed to disregard the argument, the flagrant and continued attempts by the prosecutor to shift the burden to the defense could not have been ignored by the jury. The misconduct committed by the prosecutor requires a new trial. *Id.*

c. The prosecution's argument Mr. Coronado had "groomed" J.J. was based on facts not in evidence and constituted misconduct.

Although prosecutors have latitude to argue facts and inferences from the evidence, they are not permitted to make prejudicial statements unsupported by the record. *State v. Jones*, 144 Wn. App.

284, 293, 183 P.3d 307 (2008) (citing *State v. Weber*, 159 Wn.2d 252, 276, 149 P.3d 646 (2006), *cert. denied*, 551 U.S. 1137 (2007)).

When the prosecutor argued Mr. Coronado had groomed J.J., despite there being no evidence presented at trial regarding grooming, the prosecutor again committed misconduct.

The prosecutor argued that:

> Now, what else [J.J.] didn't realize, because she was too simple-minded at 12 to understand, and mom was too high and drunk to understand, is that Jose Coronado, during this entire time, was grooming [J.J.], setting her up, building opportunities to be alone with her, building opportunities to take advantage of her, and building opportunities for people not to believe her.

10/16/15 RP 894.

The prosecutor then developed this argument by stating that Mr. Coronado had "groomed [J.J.] to be reliant, to be dependent, to trust him. . ." 10/16/15 RP 901.

Mr. Coronado objected to this argument. 10/16/15 RP 901. The court sustained the objection. 10/16/15 RP 901.

There was no evidence Mr. Coronado had groomed J.J. The use of this term describes a predatory relationship between J.J. and Mr. Coronado for which there was no testimony. "Grooming" is a highly prejudicial term which should only be admitted in limited

circumstances such as when the defense claims the perpetrator's conduct is inconsistent with the behavior of a person who might commit rape. *See e.g. State v. Braham*, 67 Wn. App. 930, 938, 841 P.2d 785 (1992). The use of this term without a basis for it in evidence constituted misconduct.

d. There is a substantial likelihood the misconduct affected the verdict.

"[W]hen the cumulative effect of repetitive prejudicial error becomes so flagrant that no instruction or series of instructions can erase it and cure the error." *State v. Case*, 49 Wn.2d 66, 73, 298 P.2d 500 (1956). The prosecutor's decision to repeatedly cross over a line the trial court set to shift the burden to Mr. Coronado by commenting on his right to remain silent and his choice to not present evidence demonstrates such misconduct. Despite the fact the prosecutor was told to cease from making the burden shifting argument, she continued to make the argument two more times.

The prejudicial impact of this misconduct is compounded by the prosecutor's decision to argue facts not in evidence. The prosecutor's argument Mr. Coronado had "groomed" J.J. was not based on testimony. This misconduct also justifies a new trial.

The misconduct committed by the prosecutor constituted misconduct. *Lindsay*, 180 Wn.2d at 444. While one attempt to shift the burden, sustained by the court, could arguably be excused, the continued flagrant misconduct should not be. This Court cannot have confidence the prosecutor's misconduct did not affect the verdict. *Walker*, 182 Wn.2d at 485. This Court should accept review of this issue as it is a significant question of constitutional law and involves an issue of substantial public interest. RAP 13.4(b).

F. CONCLUSION

Based on the foregoing, petitioner Jose Coronado respectfully requests this that review be granted pursuant to RAP 13.4(b).

DATED this 31st day of October, 2017.

Respectfully submitted,

TRAVIS STEARNS (WSBA 29935)
Washington Appellate Project (91052)
Attorneys for Appellant

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. JOSE LUIS CORONADO, Appellant.	No. 74644-8-I DIVISION ONE UNPUBLISHED OPINION FILED: October 2, 2017

MANN, J. — Jose Coronado appeals his conviction for rape in the second degree for having sex with the 14-year-old daughter of his then-girlfriend in 2004. He argues that the trial court abused its discretion when it denied his motion to substitute appointed counsel and that the prosecutor committed reversible misconduct during closing argument.

We affirm Coronado's judgment and sentence.

FACTS

In 2001, 12-year-old J.J. lived with her alcoholic and drug addicted mother, two older siblings, and periodically Coronado. Beginning in 2001, and over several years, J.J. testified that Coronado had sexual intercourse with her on multiple occasions. In March 2004, when J.J. was 14, she was brought home from the hospital suffering from

kidney stones. When she got home she was given something to help her sleep. J.J. woke up to find Coronado lying next to her. Her pajama bottoms and underwear were pulled down and she was wet. Coronado admitted to J.J. that he had ejaculated inside her. He also left her a pregnancy test kit and a note saying that he was trying to impregnate her. J.J. wrote a note saying that Coronado raped her in her sleep and gave it to her boyfriend who in turn gave it to J.J.'s mother. J.J.'s mother kicked Coronado out of the house.

Years later, J.J. reconnected with Coronado and the two became friends. In October 2014, the State charged Coronado with assault in the second degree (Count II) after J.J. alleged that Coronado assaulted her during a night of drinking and smoking marijuana. When J.J. told the investigators during the investigation that Coronado tried to have sex with her on that same evening, the State added a charge for attempted rape in the second degree (Count I). When J.J. alleged that Coronado sexually assaulted her when she was a child, the State added two more counts: rape in the second degree for the alleged rape occurring on March 30, 2004 (Count III), and child molestation in the second degree for an incident occurring sometime during 2001 (Count IV).

The jury found Coronado guilty of count III, rape in the second degree, for the incident that occurred in March 2004. The jury deadlocked on the other three charges.

Coronado appeals.

ANALYSIS

Substitution of Counsel

Coronado argues first that the trial court abused its discretion when it denied his three motions to substitute his attorney, John Ewers. We disagree. We review a trial

court's decision to deny new court appointed counsel for abuse of discretion. State v. Varga, 151 Wn.2d 179, 200, 86 P.3d 139 (2004).

A. Motions to Discharge

Ewers was appointed to represent Coronado, who was indigent. On February 18, 2015, Coronado moved to discharge Ewers for another lawyer. The court invited Coronado to explain why new counsel was warranted:

> The Court: Can you just tell me very briefly why it is that you think you want a new attorney other than Mr. Ewers?
>
> [Coronado]: I believe that I was improperly represented.
>
> The Court: Anything else, sir?
>
> [Coronado]: I've been in here five months, sir, I mean, I don't know anything what's going on with my case or whatever. During the whole time, I've been doing—I've been spending my time with basic life skills, which I've completed over the 21 hours and 14 sessions and everything, sir.
>
> So I was hoping I would be released on my own recognizance, being here five months and never been committed (sic) for any crime or, you know, and I was hoping I'd get waivered or whatever, first-time felony or something or—whoops, excuse me.[1]

The court then asked the prosecutor and Ewers whether they wished to add anything. The court then denied Coronado's motion: "Okay. Based on the record that Mr. Coronado just made, there is absolutely no basis to discharge counsel. Mr. Coronado, frankly, Mr. Ewers is a very good lawyer. Mr. Ewers, I just would encourage you to continue having conversations with Mr. Coronado. I'm going to deny the motion."[2]

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[1] Report of Proceedings (RP) (Feb. 18, 2015) at 3-4.
[2] RP (Feb. 18, 2015) at 4-5.

On May 6, 2015, Coronado moved again to discharge Ewers, submitting a six-page handwritten letter to the court. The court reviewed the letter and at the hearing on Coronado's motion, asked Coronado if he wished to add anything. Coronado explained that he felt uncomfortable with Ewers, that he believed him to be an ineffective lawyer, and that he wanted a better lawyer because he wanted to "go to trial for this." The court assured Coronado that Ewers "is more than capable of taking this case to trial. He's a very good trial attorney, and . . . that's not a problem if that's what you wish."[3]

After asking Ewers whether he wanted to respond to Coronado's complaints, the court explained why it was denying the motion. The court reiterated that it spent a "great deal of time" reviewing Coronado's letter and restated Coronado's concerns: that Coronado was uncomfortable with Ewers, that he wanted a better lawyer, and that he wanted a lawyer who would take his case to trial. The court denied his motion:

> Frankly, Mr. Coronado, you're not entitled to an appointed lawyer of your choosing. You are entitled to an appointed lawyer if you're indigent. Secondly, Mr. Ewers frankly is a very good lawyer, he's a very capable lawyer. He handles cases of this magnitude all the time, and frankly he's willing to take your case to trial if it doesn't resolve and it's your wish to take your case to trial. Then that's what is going to happen.
> So for all those reasons, I'm going to deny your motion.[4]

On July 17, 2015, Coronado moved a third time to discharge Ewers:

> The Court: So, Mr. Coronado, good morning. What is it you want to say briefly, sir?
>
> [Coronado]: Your Honor, I have not been effectively—under the Sixth Amendment, my right to have effective counsel which encompasses due process. My rights have been violated numerous times. Plus the courtroom rules of 3.3 has been violated to a certain point. Also the

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[3] RP (May 6, 2015) at 7.
[4] RP (May 6, 2015) at 9.

> Constitution of the Amendment of the Fourteenth has also been violated as well as violation of courtroom rules 8.3, sir.
>
> There have been certain situations that I have been asked and wished for from my attorney to do in my favor and stuff which are not attended to. So I feel like I am not being effective—I mean, my attorney has not been totally effective.
>
> The Court: We have a lot more cases to go, Mr. Coronado, so anything else you want to tell me?
>
> [Coronado]: Well, if you're not willing to grant the dismissal of counsel, your Honor—
>
> The Court: Yeah, I've denied your motion to discharge, and I told you previously, Mr. Ewers is very competent counsel, so I've denied that. I'm going to continue to deny that.

Coronado did not move again to substitute Ewers. The case proceeded to trial.

B. Coronado was not Entitled to New Counsel

"A defendant does not have an absolute, Sixth Amendment right to choose any particular advocate." State v. Stenson, 132 Wn.2d 668, 733, 940 P.2d 1239 (1997). To warrant substitution of counsel, a criminal defendant must show good cause, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant. Generally, the defendant's loss of trust or confidence in the defendant's counsel is not a sufficient reason to appoint a new counsel. Stenson, 132 Wn.2d at 734.

To determine whether Coronado was entitled to new counsel, we examine three factors: (1) the extent of the conflict, (2) the adequacy of the court's inquiry into the conflict, and (3) the timeliness of the motion to substitute counsel. State v. Cross, 156 Wn.2d 580, 607, 132 P.3d 80 (2006). Here, Coronado only argues that the trial court failed to make adequate inquiries into the conflict. "[A] trial court conducts adequate

inquiry by allowing the defendant and counsel to express their concerns fully." State v. Shaller, 143 Wn. App. 258, 271, 177 P.3d 1139 (2007). A trial court must inquire into "(1) the reasons given for the dissatisfaction, (2) the court's own evaluation of counsel, and (3) the effect of any substitution upon the scheduled proceedings." Stenson, 132 Wn.2d at 734.

Here, the court did not abuse its discretion. First, the record shows that, at best, there was a minor conflict: communication was strained and Coronado was not confident with Ewers's ability as a lawyer. This conflict did not constitute good cause to warrant the substitution of Ewers. The record, including Coronado's six-page letter submitted with his second motion to substitute, showed absolutely no basis for discharging Ewers. The court's instructions to Ewers and Coronado to keep communicating and its assurance to Coronado that Ewers was well-qualified to defend Coronado mitigated the conflict.

Second, the trial court adequately inquired into the conflict by allowing Coronado and his attorney to express their concerns fully. The court asked Coronado to explain why substitution was warranted three times, and each time Coronado—the moving party—failed to provide any cogent reason for why the court should substitute Ewers. When Coronado raised a concern about Ewers's ability, the court reiterated that Ewers was "a very good" and "very capable" lawyer.

On this record, we cannot say that the court failed to adequately inquire into conflict. The court did not abuse its discretion when it denied Coronado's motions to substitute counsel.

Prosecutorial Misconduct

To prevail on a claim of prosecutorial misconduct, the defendant must establish "'that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial.'" State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011) (quoting State v. Magers, 164 Wn.2d 174, 194, 189 P.3d 126 (2008)). Improper comments become prejudicial "if there is a substantial likelihood that the prosecutor's comments affected the jury's verdict." State v. Sundberg, 185 Wn.2d 147, 152, 370 P.3d 1 (2016).

A. Grooming

Coronado argues first that the prosecutor committed prejudicial misconduct by arguing that Coronado "groomed" J.J. without evidence. We disagree.

During closing argument, the prosecutor used the term "grooming" three times to explain Coronado's interactions with J.J.:

> Now, J.J. may not have realized that was what was happening there, but [Coronado] came into her life to fill the role of a responsible, dependable, reliable adult. Now, what else J.J. didn't realize, because she was too simple-minded at 12 to understand, and mom was too high and drunk to understand, is that Jose Coronado, during this entire time, was grooming Jessica, setting her up, building opportunities to be alone with her, building opportunities to take advantage of her, and building opportunities for people not to believe her.
>
> Because you heard [J.J.'s mother] sit here on the stand that, even today, "He's a good guy," even today, "He shouldn't be in trouble." And that, ladies and gentlemen, is why, in 2014, J.J. still trusted him, still hung out with him, and still was around him.
>
> So how did we end up here? It's, really, very simple. We just talked about that a little bit, the grooming of J.J. This was the most reliable, dependable adult in her household. Mom was high and drunk; dad really wasn't there. It was him. He walked her to school; he played video games with her; he hung out with her; he did everything that no other adult had done in her

> life. That's how you ended up here today. So let's talk about the taking of J.J., the taking of her innocence, the taking of her body, and the taking of her trust.[5]

Coronado did not object to these first two uses of "grooming."

Soon after the prosecutor used the word again, this time to explain why J.J. reconnected with Coronado after he raped her:

> So, after [Coronado] was kicked out [of J.J.'s mother's house in 2004], you would think that would be the end of that. No. [J.J.] reconnected with him three years later. But that might be the next time you're asking: Why? He's proven himself that he can't stop attacking you. Why would you reconnect with him if you had a choice[?]
>
> That answer, too, is simple: She's still a child. She's still 17 years old. And remember we talked about he groomed her to be reliant, to be dependent, to trust him, and I want you all to think about—[6]

Coronado objected to "the grooming language" because there was "no testimony to that effect." The objection was sustained. The prosecutor rephrased her argument:

> I want you all to think about a relationship you had with someone really close. How long did it take you to break that relationship, if you did? How long did it take for you to become angry with them? Now I want you to think back in the mind of a 17-year-old who grew up in a dysfunctional home, where the only reliable, dependent adult in her life was him, because when he wasn't raping her, when he wasn't molesting her, he was a good guy.
>
> So, maybe, if he's not touching me, maybe he's not raping me, we can be okay again. I could have that relationship that I initially wanted with him. That's how you end up reconnecting with him. And it makes sense.[7]

Coronado did not object to this argument.

In general, a prosecutor is an advocate and is free to argue all reasonable inferences based upon the evidence introduced at trial. State v. Russell, 125 Wn.2d 24,

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[5] RP (Oct. 26, 2015) at 894 (emphasis added).
[6] RP (Oct. 26, 2015) at 901 (emphasis added).
[7] RP (Oct. 26, 2015) at 901-02.

86, 882 P.2d 24 (1994). The prosecutor may not, however, make prejudicial statements that are not supported by the record. State v. Dhaliwal, 150 Wn.2d 559, 577, 79 P.3d 432 (2003). A prosecutor argues facts not in evidence when arguing that a defendant groomed a victim without first providing expert testimony regarding the grooming process. In re Pers. Restraint of Phelps, 197 Wn. App. 653, 676, 389 P.3d 758 (2017) ("expert testimony is required if the State intends to rely on the grooming process to prove and argue its case").

Here, however, after Coronado's objection was sustained, the prosecutor restated her argument based on the evidence presented, and in a manner easily understood by the jury. The argument was not improper and therefore not misconduct.

B. Comment on Lack of Evidence

Coronado argues second that the prosecutor committed misconduct by commenting on the lack of evidence presented by Coronado.

During closing argument, the prosecutor stated:

> I want to point out that's what also important is that you are to find whether or not [the State] proved these charges to you beyond all reasonable doubt based off all of the evidence presented, and I believe lack of evidence. You have absolutely no different account of what happened than what [J.J.] said. That is the only proof you have. There is no other variation.[8]

Coronado objected on the grounds that the prosecutor was shifting the burden. The trial court sustained the objection.

The prosecutor continued:

> The State has a burden, as I stated, to prove these charges to you beyond a reasonable doubt. And that burden is completely on the State and the

[8] RP (Oct. 26, 2015) at 911.

> State welcomes that burden. But what you are to look at is the evidence that's been presented in this case. There's absolutely no different version put before you of what happened. You don't have any other witness saying, "No. [J.J.] said she lied. She wasn't raped." Nothing else.[9]

Coronado objected again, and the court sustained the objection and instructed the jury to disregard "anything inconsistent with the jury instructions. The burden rests with the State."

The prosecutor continued:

> The State could have brought in witnesses that contradicted each other. We could have done that. I think you heard a little bit about [J.J.'s mother] and [J.J.], that their details sometimes don't measure up. But what you don't have before you is one version of what happened. One.[10]

Coronado objected a third time and the court sustained his objection.

As an initial matter Coronado argues that we analyze these statements under the constitutional harmless error standard because they implicated his Fifth Amendment right to silence. But a "prosecutor may say that certain testimony is undenied as long as he or she does not refer to the person who could have denied it." State v. Ramierez, 49 Wn. App. 332, 336, 742 P.2d 726 (1987). Because the prosecutor's statement did not directly implicate Coronado's Fifth Amendment right, we do not apply the heightened constitutional harmless error standard of review.

The State must prove "beyond a reasonable doubt . . . every fact necessary to constitute the crime with which [a defendant] is charged." Sundberg, 185 Wn.2d at 152-53 (alterations in original) (internal citations omitted). Because the defendant has no duty to present evidence, "a prosecutor may not comment on a defendant's lack of

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[9] RP (10/26/15) at 912.
[10] RP (10/26/15) at 912.

evidence." Sundberg, 185 Wn.2d at 153. Here, the prosecutor's repeated remarks that there was only one version of events presented created an improper inference that Coronado failed to present an alternative version of events.

But Coronado must also prove that any misconduct was "prejudicial in the context of the entire record and the circumstances at trial." Thorgerson, 172 Wn.2d at 442. He fails to do so. The State presented overwhelming evidence that Coronado raped J.J. in March 2004. For example, J.J. testified that when she awoke, Coronado was behind her, her pajama pants and underwear were pulled down, and her vagina was wet with Coronado's semen. J.J. testified that when she confronted Coronado about what happened, he admitted to her that he had sex with her because he "was trying to impregnate [her]." He also left her a pregnancy test kit. J.J. testified that she wrote a note detailing the event and gave it to her boyfriend at the time who in turn gave it to J.J.'s mother, C.C. C.C. testified that she remembered receiving J.J.'s note, confronting Coronado about the incident, and kicking him out of the house because of it. Coronado admitted to C.C. that he "was in love with [J.J.]," had sex with her while she was asleep, and left her a pregnancy test kit. A police detective testified that he took a statement from both C.C. and J.J. just days after the rape and obtained the pregnancy kit and booked it into evidence. A second police detective testified that when he took statements from C.C. and J.J. shortly after the rape neither exhibited confusion or impairment.

Based on the evidence presented, Coronado fails to demonstrate that there is a substantial likelihood that the prosecutor's comments, if improper, affected the jury's verdict. Sundberg, 185 Wn.2d at 152.

We affirm Coronado's judgment and sentence.

Mann, J.

WE CONCUR:

Dwyer, J.

Cox, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 74644-8-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Dennis McCurdy, DPA
[PAOAppellateUnitMail@kingcounty.gov]
[dennis.mccurdy@kingcounty.gov]
King County Prosecutor's Office-Appellate Unit

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

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