SUPREME COURT NO. 97715-1
COURT OF APPEALS NO. 51389-7-II

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON,

TANNER BIRDSALL,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable F. Mark McCauley, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Tanner Birdsall, appellant below, ask this Court to review the decision of the court of appeals referred to in Section B below.

B. COURT OF APPEALS DECISION

Division Two of the court of appeals affirmed Tanner's conviction for Rape in the Second Degree under the incapacity prong. *State v. Tanner Birdsall,* (Slip Op. No. 51389-7-II, filed August 27, 2019).

C. INTRODUCTION TO THE CASE AND ISSUES PRESENTED

The case involves three friends from high school that had sex together after drinking. The defense argued that it was consensual, while the complaining witness said she was too intoxicated to have knowingly consented to sex. It took the State three tries to obtain a conviction. The jury hung in the first trial. The jury hung in the second trial as well, with more favoring acquittal than conviction.

In the third trial, the State took no chances. Tapping into recent national headlines from earlier that week, the prosecutor turned the case into a referendum on sexual harassment and treatment of women. She talked about double standards in society and how "women should be allowed to dress how they want and act how they want…" None of this was relevant, but all of it inflammatory. The prosecutor also violated an important motion in limine relating to drugs, and then misrepresented the defense expert's testimony in closing argument.

Defense counsel unwittingly assisted the State when he failed to object to the misstatement of the evidence and failed to maintain his objection to the prosecutor's inflammatory comments regarding women and society. Most significantly, he also neglected to seek a reasonable belief instruction.

The following issues are presented for review:

1. The defense presented evidence that Tanner reasonably believed S.C. consented to sex through her actions, and that he had no idea she was incapable of consenting. He raised an ineffective assistance of counsel argument for failure to request a "reasonable belief" instruction. The court of appeals agreed the evidence and the law supported the defense, but denied relief based on *State v. Coristine*, 177 Wn.2d 370, 300 P.3d 400 (2013). Did the court of appeals err in concluding that *Coristine* applies to ineffective assistance of counsel claims?

2. In closing argument, the prosecutor invoked social issues to bolster her case, treating the jury's verdict as a way to correct the double standard that exists in society. The court of appeals believed any error from this emotional appeal could have been cured by an instruction from the court. This holding is contrary to the long-standing recognition that some misconduct cannot be ignored regardless of the court instructions to the jury? Should this Court establish better guidelines to assist the lower courts in determining

3. The court of appeals recognized that the prosecutor misrepresented the defense's expert testimony during rebuttal closing. However, the court declined

to reverse on prosecutorial misconduct or ineffective assistance of counsel, believing the misrepresentation was of little consequence. Where the unsupported degradation of the defense expert's testimony undercut the expert's credibility with the jury, was Tanner deprived of a fair trial?

4. Because there was no evidence to suggest Tanner had drugged S.C., the court ordered the prosecutor to avoid talking about drugs. In the third trial, the prosecutor violated this ruling, just as she had done before in the first two trials. The judge expressed concern at the violation but stated he would wait to see the jury verdict. After the guilty verdict, however, the court denied the motion because the defense had not interviewed the jury to determine if this evidence had an impact on their verdict. Did the denial of the motion for a new trial deprive Tanner of a fair trial?

5. Defense counsel failed to inform the trial court that Tanner's age, 19 years old at the time of the incident, was a mitigating factor. The court of appeals denied Tanner's claim of ineffective assistance of counsel. Given that this challenge reappears in multiple appeals, should this Court grant review to finally resolve this issue?

D. STATEMENT OF FACTS

S.C. and Joel Krubs dated for close to two years while in high school. She was older than him. When she was 18, but still in high school, she invited Joel to

move into a trailer with her on her parents' property. RP 705. Two days after she graduated, however, she broke up with Joel and moved to Tacoma. RP 629, 705.

Because they had friends in common, S.C. and Joel often found themselves at the same parties. They were cordial with each other and S.C. kept Joel as part of her Snapchat community. RP 633, 336-37.

On February 9, 2016, S.C. sent a message via Snapchat that she would be home soon and asked if anyone wanted to get together. RP 635-37. Joel responded he would be with Tanner Birdsall that evening and asked if S.C. wanted to join them at Tanner's house. S.C. accepted the invitation. RP 638-39.

S.C. had been friends with Tanner since she first arrived at high school. She had moved from Tacoma in her freshman year and felt out of place. Tanner was among several students who welcomed her to the new school. RP 625-27. They were "really good friends in high school." RP 626-27. He was popular, involved in sports, and her family liked him. RP 627; 762.

S.C. arrived at Tanner's house on February 9, 2016, around 8:30 PM. RP 642-44, 702-703. A ping-pong table was set up to play beer pong, and it appeared both guys had been drinking before she arrived. RP 645. S.C. typically likes to drink *Mike's Hard Lemonade*, because it doesn't taste like alcohol. RP 646. *Mike's* has an alcohol content of 5%, similar to a bottle of beer. RP 934. Tanner and Joel offered S.C. a *Mike's* from the fridge while they continued to play beer pong. She sipped her drink and talked to them while they played. RP 646-67.

After 45 minutes to an hour, S.C. finished her drink and went for a second. RP 701. She began playing beer pong with Tanner and Joel, switching from side to side. After a while, S.C. asked the boys if they had ever played strip beer pong. They said no but asked if she would like to play. S.C. said, "not now", but maybe later. Ex 8. They eventually did play, leaving Tanner in his underwear and socks, and S.C. down to her underwear. *Id;* RP 652.. The friends seemed to be enjoying themselves, with S.C. raising her arms in the air and telling everyone that she was having fun.

S.C. went back to the refrigerator for more *Mike's*. She believes she had three drinks over two hours and was starting her fourth. RP 652. Not long after, she fell when she went to bathroom. RP 655. Joel picked her up and carried her to the bedroom. She vomited into a bowl and Joel wiped her face. Ex 8. at 2. A short while later, she sat up and let everyone know she was feeling fine. *Id.*

Joel and S.C. started kissing. After a moment, Tanner started kissing her stomach and moving his mouth down towards her legs. S.C. was smiling. She turned on her side and Tanner began having vaginal intercourse with her from behind. At the same time, S.C. was engaged in oral sex on Joel. When Tanner stopped, Joel began having vaginal sex with her. S.C. began moaning. She made no attempt to move away or ask them to stop. After a while, Tanner began having sex with her again. Joel put music on the speaker. When a particular song came on, S.C. began

to cry. She said the song was hers and Joel's song. This made Tanner uncomfortable and he left. Joel stayed inside the room with S.C.[1]

The next morning, Joel and Tanner worried their girlfriends would find out about them having sex with S.C. Ex. 8. So when S.C. asked Joel what happened the night before, he only told her that she had drank too much and fallen down. Tanner, wishing to support Joel, agreed with what he told S.C. Ex. 8.

S.C. drove the 20 to 25 minute trip home without incident. RP 736. Once home, she felt sick to her stomach. It was unusual for her to be that sick while drinking. RP 633. Her mom just thought she was hung over. RP 784. According to S.C., she began to have flashbacks of sex but remained unsure of what happened.

S.C. went with her mom to a hospital where a rape test could be administered. A blood test found no alcohol or drugs in her system. Ex 9. At the hospital, she still did not have a clear recollection of what had occurred the previous night.

S.C. testified that over time her memories returned. By the third trial, she said she remembered Joel and Tanner carrying her to the bedroom and lying down next to her. She doesn't remember what they said, but she remembers they took her bra and panties off. RP 674. S.C. She testified she was "under the effects of alcohol, and was having a hard time speaking or really moving or doing anything." RP 675.

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[1] The above facts are taken from Tanner's statement, admitted as Ex. 8.

She claimed she was slipping in and out of consciousness and that she wanted them to stop but she was unable to speak. RP 678.

Following his arrest, Tanner gave a statement to the police in which he acknowledged that both he and Joel had sex with S.C. that night. He noted everyone was somewhat intoxicated, but that S.C. was clearly a willing participant. Ex. 8. This statement was played for the jury.

The State and defense each called their own toxicologists. Because there had been no alcohol in S.C.'s system at the hospital, both toxicologists had to estimate S.C.'s BAC that night. This was not easy to do, because there was uncertainty as to the number of drinks and the speed at which they were consumed. The experts also disagreed as to the burn off rate. The defense expert, Mr. Predmore, pointed out that the State had failed to take into consideration the burn-off rate after the first drink. RP 942. He estimated that three *Mike's* over a two-hour period would produce a BAC near .09. RP 944. If S.C. had consumed five *Mike's* over a four-hour period, her BAC would only be .14. RP 941.

Prior to the first trial, there was a motion to exclude speculation that Tanner may have drugged S.C. The court agreed it was too speculative and excluded the reference to drugs. RP 9-10. Ignoring the ruling, the prosecutor asked the State's expert about testing for drugs in each of the first two trials. RP 182, 438-39. Both times the court sustained the defense objection. RP 185, 538-39. The court issued a written order after the third trial to prevent future violations. CP 53.

The prosecutor violated the order again the third trial, asking the toxicologist on whether she would have been able to test for other "substances" in the empty alcohol bottles. RP 897-98. The defense moved for a mistrial. RP 906-07. The trial court recognized that this was a violation but deferred ruling "because - we'll see what the verdict is." RP 907-08. The judge indicated he needed to think about it more, "but I – I wish it wasn't put that way, because I did order no reference to other drugs or substances." *Id.*

Following the guilty verdict, the defense brought the motion to set aside the verdict based on the above described incident. RP 1017. The defense pointed out that the prosecutor carefully worded her question for the greatest impact by asking if the bottles could be tested for any "substance". RP 1020. The jury instruction defining mental incapacity specifically refers to "the influence of a substance." *Id.*, *See* CP 68.

The judge appeared to rethink whether this was really a violation. The court asked defense counsel whether he had spoken to any jurors about this issue. RP 1022. Defense counsel stated he had not. *Id.* The judge told him that he had been perfectly free to talk to jurors. "I mean you would have been welcome to go and talk to any juror and your motion would have been much stronger." RP 1023. When defense counsel stated that he talked to jurors from the previous trials, the judge interrupted him: "No. I'm talking about this jury. To get one of those jurors to say this issue came up in our short deliberations and it affected us in some way." RP

1023-24. The judge continued, "it would have been potentially much [more] pervasive [sic] bolstering of that motion if there were, in fact, was some discussion of it. You're just asking me to speculate that they even talked about it." RP 1024. The judge told defense counsel he was being "hypersensitive." RP 1033.

E. WHY REVIEW SHOULD BE ACCEPTED

1. The court of appeals wrongly applied this Court's decision in *State v. Coristine*, a case involving a defendant's right to control his or her defense, to ineffective assistance of counsel claims.

The trial court instructed the jury that a person is guilty of rape in the second degree if he engaged in sexual intercourse with a person who is mentally incapacitated. CP 68. The instructions defined mental incapacity as a condition that prevented the other person from "understanding the nature or consequences of the act of sexual intercourse." CP 69. The instructions defined consent to mean "that at the time of the act of sexual intercourse there are actual words or conduct indicating freely given agreement to have sexual intercourse." CP 68.

Under these instructions, a defendant who believes he has received valid consent to engage in sexual intercourse is nonetheless guilty if the jury concludes that the woman was not capable of meaningfully understanding the nature of sexual intercourse. In order to ameliorate the harshness of the law, the legislature created an affirmative defense which allows the defendant to establish his reasonable belief that the other personwas capable of consent. *State v. Powell,* 150 Wn. App. 139, 206 P.3d 703 (2009). This defense is set forth in RCW 9A.44.030(1):

> In any prosecution under this chapter in which lack of consent is based solely upon the victim's mental incapacity or upon the victim's being physically helpless, it is a defense which the defendant must prove by a preponderance of the evidence that *at the time of the offense the defendant reasonably believed that the victim was not mentally incapacitated and/or physically helpless.*

(emphasis added). Hence a defendant may explain that while he knew someone was intoxicated, he did not know that that person was incapable of consent.This is evaluated from the standpoint of a reasonable person standing in the defendant's shoes that night.

While Tanner's statement establishes he knew they were all intoxicated, he believed S.C. was consenting to sex. She was not passed out, she was smiling while he kissed her down her legs, and she recognized a particular song that was playing through the stereo. Ex. 8. Tanner described how they started by just lying in bed talking about "high school and stuff," and one thing led to another. He described their cuddling and kissing and how S.C. was engaged and enjoying it. The evidence was sufficient to obtain a reasonable belief instruction. *Id*.

During examination of the toxicologist, the defense established that the blackout would not necessarily be apparent to others, and that "a person can talk and walk and look just fine, but their brain is just not recording the memories." RP 921-22. Defense counsel argued Tanner had no way of knowing that S.C. was in a blackout condition, and that there are no visible signs for when someone has a blackout. The problem is what Tanner knew or did not know was irrelevant to the

charges without this reasonable belief instruction. Including the affirmative defense would have been consistent with the defense theory and would have provided a means by which the jury could find Tanner not guilty, even if they concluded that S.C. was too intoxicated to meaningfully consent. This was a serious lapse in performance by defense counsel. *State v. Thomas,* 109 Wn.2d 222, 223, 226-29, 743 P.2d 816 (1987) (failure to raise a valid affirmative defense constitutes deficient performance.); *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) right to effective assistance of counsel guaranteed by Sixth Amendment)

On appeal, the State argued that the evidence did not support the affirmative defense unless Tanner testified, and that the decision not to call Tanner to the stand was a tactical one. The court of appeals quickly disposed of that argument, noting that the evidence fully supported the instruction. The appellate court concluded, however, that without a declaration from defense counsel that he was unaware of this defense, the decision not to request this instruction could have been tactical.

The State may argue that it was a trial strategy decision to not seek the affirmative defense. But the question is whether this was a *reasonable* strategy. *Jones v. Wood*, 114 F.3d 1002, 1010 (9th Cir. 1997). "A decision is not permissibly tactical or strategic if it is not reasonable." *Roe v. Flores-Ortega*, 528 U.S. 470-471 (2000). This Court's reasoning in *State v. Powell*, *supra*, is helpful.

The defendant in *Powell* faced a similar situation. The woman he had sex with later stated she was too intoxicated to have consented. *Powell,* 150 Wn. App.

149. She had a BAC of .13, which is higher than the BAC estimated by Predmore in Tanner's case. There was some evidence that the complaining witness was highly intoxicated, but Mr. Powell testified that he did not think she was as intoxicated as she claimed. He testified that the sex was consensual. *Id.* at 149-50. The woman stated that soon after they began having sex, she acted like she was a willing participant because she was fearful of Powell. The Court concluded that because the statutory defense was entirely consistent with the defense theory, defense counsel provided ineffective assistance in failing to propose a reasonable belief instruction.

It is well established that the failure to raise a reasonable belief affirmative defense in cases where the facts warrant an instruction constitutes ineffective assistance of counsel. *In re Hubert*, 138 Wn. App. 924, 158 P.3d 1282 (2007). The court of appeals acknowledged that the evidence and the law supported the instruction. However, the court concluded that without a declaration from defense counsel stating that this was not a tactical decision, this Court's decision in *State v. Coristine* prevented a finding of ineffective assistance of counsel.

This was error as *Coristine* was not an ineffective assistance of counsel case. Rather, this Court examined the extent to which a defendant has the right to control his own defense. In *Coristine,* the trial court instructed the jury as to the "reasonable belief" defense over defense counsel's objection. 177 Wn.2d at 373. At issue was whether the Sixth Amendment allows a defendant to waive a valid defense. *Id.* at 38-39. This Court explained, "Once a trial court determines that a *defendant's*

waiver of an affirmative defense is voluntary and intelligent, it cannot direct the defense it believes is necessary to ensure constitutionally effective counsel at the expense of the defendant's right to control a chosen defense." 177 Wn.2d at 379 (emphasis added). This Court concluded that there had been a valid waiver, and as such, the trial court violated the Sixth Amendment in instructing the jury on the affirmative defense over Mr. Coristine's objection. *Id.*

The *Coristine* court did not disapprove of *Powell*, *Thomas*, *In re Hubert*, 138 Wn. App. 924, 158 P.3d 1282 (2007,) or the ineffective assistance of counsel reasoning in those cases. Rather, *Coristine* addressed the situation where the defendant performs a valid waiver of an affirmative defense. No such waiver exists here. Review is necessary because of the court of appeals decision which violates the Sixth Amendment right to effective assistance of counsel. RAP 13.4(b)(3). But of equal importance, it is necessary for this Court to clarify that *Coristine* does not change the law as it applies to ineffective assistance claims. RAP 13.4(b)(1).

2. The prosecutor's rampant misconduct in closing, along with defense counsel's failure to object deprived Petitioner of a fair trial.

Prosecutors may not "use arguments calculated to inflame the passions or prejudices of the jury." *Glassmann,* 175 Wn.2d 696, 704, 286 P.3d 673 (quoting American Bar Ass'n, Standards for Criminal Justice, std. 3-5.8(c) (2nd ed. 1980)). Improper appeals to passion or prejudice prevent calm and dispassionate appraisal

of the evidence. *State v. Elledge,* 144 Wn.2d 62, 85, 26 P.3d 271 (2001). Here, the prosecutor began her closing argument by telling the jury:

> The facts of this case are what every girl fears. What every woman fears. What every parent's worst nightmare is. We talk to our girls about be careful how you dress, right. Be careful how you act, what you say. We tell our girls don't give boys the wrong impression. And why do we do that? The potential juror we heard from the other day said it right, because there's a double standard.

RP 973. The defense objected to this argument about non-empaneled jurors and noted that the State's argument was not based on the evidence in the case. The Court sustained the objection, telling the State to limit her argument to the evidence in the case. *Id.* The prosecutor did not do so. She continued, "Women should be allowed to dress how they want and act how they want. But that's not how society is, right, unfortunately." *Id.* She reiterated that "while there's a double standard, we don't blame the victim. That's not what we do." RP 973-74.

In making this argument, the prosecutor attempted to capitalize on recent events in the media. On November 29, 2017, three days before closing argument, the national headlines were of Matt Lauer's firing for sexual misconduct.[2] Just hours later, Garrison Keillor, the radio host of A Prairie Home Companion, was fired for similar reasons. *Id*. The prosecutor was tapping into the national outrage to obtain a conviction she was unable to attain in the first two trials.

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[2] New York Times, 11/30/2017, *"The #MeToo Moment: When the Blinders Come Off."* https://www.nytimes.com/2017/11/30/us/the-metoo-moment.html.

A prosecutor must not suggest that a conviction is needed in order to protect the community. *State v. Ramos*, 164 Wn. App. 327, 338, 263 P.3d 1268 (2011). see *State v. Echevarria,* 71 Wn. App. 595, 860 P.2d 420 (1993) (associating trial with national "war on drugs."). The reason is obvious: "The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence. Jurors may be persuaded by such appeals to believe that, by convicting a defendant, they will assist in the solution of some pressing social problem." *Id.*

Here, the prosecutor's argument during closing was that jurors are responsible for addressing the culture of double standards for men and women, where girls have to be careful what they wear or say for fear of giving the wrong impression. This Court has properly noted that arguments involving race are unlikely to be cured by an admonishment from the Court. *See State v. Monday*, 171 Wn.2d 667, 257 P.3d 551 (2011). Given the polarizing nature of the "Me Too" movement, and the strong feelings it has engendered, arguments relating to women and double standards in society are similarly likely to produce feelings that cannot be easily disregarded by a curative instruction. A curative instruction would have no impact here.

"The failure to object will not prevent a reviewing court from protecting a defendant's constitutional right to a fair trial." *State v. Walker,* 182 Wn.2d 463, 477, 341 P.3d 976 (2015). To protect a defendant's right to a fair trial, the court must

review the type of prosecutorial misconduct that took place and determine what, if any, instruction could have un-rung the bell. The court of appeals did not engage in this kind of review and simply reiterated that jurors are presumed to follow the law. *See State v. Anderson*, 153 Wn. App. 417, 428, 220 P.3d 1273 (2009).

Curative instructions are not "one size fits all." Some misconduct is easily cured by instruction. For instance, in *State v. Emery*, 174 Wn.2d 741, 763, 278 P.3d 653 (2012), the Supreme Court found the prosecutor's misstatements regarding burden of proof and reasonable doubt were not of the type usually considered inflammatory. Consequently, the defendant in *Emery* could not establish a curative instruction would have been ineffective. *Id. at 764.*

Misconduct that is not so easily cured by instruction are those in which the prosecutor invites the jury to decide the case on "an emotional basis, relying on a threatened impact on other cases, or society in general, rather than on the merits of the State's case." *State v. Thierry*, 190 Wn. App. 680, 691, 360 P.3d 940 (2015); *see also*, *State v. Powell,* 62 Wn. App. 914, 919, 816 P.2d 86 (1991) (No curative instruction could effectively combat this emotionally charged misconduct, and reversal was required.) The failure to object under these facts does not waive review.

In addition to the emotional appeal, the prosecutor misrepresented the toxicology testimony. The prosecutor told the jury that the figures Mr. Predmore used produced an inaccurate result because he was treating S.C. as an overweight woman. The opposite was true. He rejected the higher "average" number relied

upon by the State's toxicologist because that number was more appropriate for a heavier woman. RP 934-936. The prosecutor used this to argue that Mr. Predmore's testimony was not credible.

It is misconduct for a prosecutor to mislead the jury in summarizing evidence during closing argument. *State v. Reeder*, 46 Wn.2d 888, 892, 285 P.2d 884 (1955). The court of appeals recognized that the prosecutor misstated the evidence but concluded the error was harmless because there was little difference in the figures the two toxicologists used. This is incorrect. Ms. Knoy estimated S.C.'s BAC as high as 2.4, while Mr. Predmore estimated the BAC at between .09 and .14. A jury which accepted the State's expert testimony would have been much more inclined to find S.C. was incapable of consent.

"Trained and experienced prosecutors presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case." *State v. Fleming*, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996). The court of appeals erred in concluding the misconduct was harmless. Review is appropriate under RAP 13.4(b)(1) and (b)(3).

3. The prosecutor's violation of a motion in limine encouraged the jury to engage in unfair and prejudicial speculation. .

The purpose of the prosecutor's questions were clear. She wanted to establish that there was no test which could establish the presence of a controlled

substance in S.C.'s drink. The *only* reason for wanting to introduce that evidence was to raise the possibility that Tanner had spiked the drink. The prosecutor wanted the jury to do the very thing that the court's order had been designed to prevent, that is, to speculate the defendant had given her drugs so as to take advantage of her when she could not meaningfully object.

The judge realized this in the first two trials when he sustained the defense objections. He realized it in the third trial as well when he noted the violation and said that he would decide after the verdict if a mistrial should be granted. Only after the trial did the judge begin to ponder whether the order had been violated. However, the judge combined this inquiry with his concern that the defense had not produced any declarations from the jury stating that this evidence had an impact on their deliberations.

The judge believed that in the absence of declarations from the jurors, he was required to speculate on whether the evidence had an impact on the jury's verdict. The Court was mistaken. Declarations from jurors as to the evidence they considered in reaching their verdict cannot be used to attack the verdict. *See State v. Elmore*, 139 Wn.2d 250, 985 P.2d 289 (1999) Because the Court's decision was based on untenable grounds, the trial court abused its discretion. *In re Morris*, 176 Wn.2d 157, 170, 288 P.3d 1140 (2012).

The court of appeals recognized that the judge erred in reaching this conclusion but upheld the ruling on alternative grounds that there was no violation.

Although it was clear to the Court at the time of the testimony that the prosecutor's question related directly to whether there might have been drugs in the bottle, at the post trial motion, the Court accepted the State's post-hoc claim that its question was responsive to defense counsel's earlier questions about whether the bottles had been tested for DNA evidence.

This holding is manifestly unreasonable for many reasons, the most important of which is context. These questions were asked regarding the toxicology report, which specifically referred to drug analysis. The prosecutor first asked about whether she would expect to see drugs in S.C.'s system more than 24 hours later. When defense counsel objected, the prosecutor tried a different approach. She mentioned the alcohol bottles collected were empty and dry, and then asked whether there would "have been any ability for the lab to have tested those for *any substance* that might have been there or anything like that." RP 897-98. It is simply not credible that the prosecutor was referring to DNA when she asked about other substances, nor would the question have been interpreted that way by the jury.

The judge also suggested that the evidence was cumulative of Tanner's earlier recorded statement, "Are you accusing me of drugging you?" RP 1025. This misses the point. Tanner's question to S.C., combined with the absence of any drugs in her system, was exculpatory evidence. By contrast, eliciting testimony that there could have been undetected drugs in the bottles was inculpatory evidence. The Court's reasoning was manifestly unreasonable.

S.C.'s description of how she seemed to have passed out and couldn't move or speak after starting her fourth drink was questionable. Hearing there could have been something in the bottles which was no longer traceable easily could have influenced some jurors who might otherwise have questioned the reliability of S.C.'s story. Review is appropriate under RAP 13.4(b)(1), (3).

4. Tanner Birdsall was denied effective assistance of counsel when defense counsel failed to argue Tanner's youth as a mitigating factor.

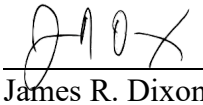
Tanner was 19 years old at the time of this incident. In *State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015), the Court recognized that youthfulness could be a mitigating factor. Defense counsel's failure alert the court to this mitigating factor that could justify a low-end sentence or even a departure below the standard range, constitutes a deficient performance in violation of the Sixth Amendment.

As this Court is aware, the failure of defense counsel to address *O'Dell* and the defendant's tender age is an issue repeatedly raised in appellate briefs. This case, with Amicus briefing from all sides, provides the Court with an opportunity to clarify this area of law. Review is appropriate under RAP 13.4(1)(3) and (4).

IV. CONCLUSION

Petitioner respectfully asks this Court to accept review.

Respectfully submitted: September 25, 2019



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Washington State
Court of Appeals
Division Two

August 27, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. TANNER JAMY SCOTT BIRDSALL, Appellant.	No. 51389-7-II UNPUBLISHED OPINION

MELNICK, P.J. — Tanner Birdsall appeals his conviction for rape in the second degree. The charge arose after a night in which Birdsall, his friend, and the victim, SC, drank alcohol, and then Birdsall and his friend sexually assaulted SC.

Birdsall argues that the trial court abused its discretion when it denied his motions for a mistrial and for a new trial. He also contends that the prosecutor committed misconduct and that he received ineffective assistance of counsel.

We affirm.

FACTS

The State charged both Birdsall and Joel Krebs with rape in the second degree of SC. The State tried Birdsall and Krebs separately.[1]

[1] We affirmed Krebs's conviction. *State v. Krebs*, No. 49396-9-II (Wash. Ct. App. Dec. 4, 2018), http://www.courts.wa.gov/opinions/, *review denied*, 193 Wn.2d 1004 (2019).

I. SC'S TESTIMONY

In high school, SC dated Krebs. She considered Birdsall a good friend. Shortly after high school, SC and Krebs had a contentious break up. SC then moved away, but she would often return home to see friends and family. When seeing friends, SC would often run into Krebs, and eventually, they became cordial.

On one visit, SC agreed to hang out with Krebs and Birdsall. By the time SC arrived at Birdsall's house, Krebs and Birdsall had set up a beer pong table. They also provided Mike's Hard Lemonades for SC. After she had one drink, SC decided to stay the night, knowing she could sleep on the couch. SC, Krebs, and Birdsall then began playing beer pong. At one point, the game changed to strip beer pong.

Later in the evening, SC walked out of the bathroom and fell, but either Krebs or Birdsall caught her and carried her to Birdsall's bedroom. She had limited memory at this time. However, SC believes that she had finished her third alcoholic lemonade and started her fourth.

When SC awoke in the morning, her whole body, including her vagina, was sore. When SC asked Krebs and Birdsall about it, they laughed and told her that she had fallen and hit her crotch against the corner of the couch. Their story did not make sense to SC. She asked Krebs and Birdsall whether either had sex with her. They both denied that they had.

When SC arrived at her mom's home, she felt very ill and vomited until about noon. SC began to remember bits and pieces from the previous evening.

Fearing what may have happened, SC called her mom and asked her to come home from work. SC and her mom decided that she should go to the hospital. By the time the nurse conducted a sexual assault evaluation at the hospital, over 24 hours had passed since the time SC had been drinking with Krebs and Birdsall.

Over time, more memories came back to SC. She remembered that, after she fell and was taken to the bedroom, Krebs and Birdsall laid on the bed next to her. They were talking to her, touching her, and eventually began taking her remaining clothes off. Because of her intoxication, SC could not move or speak.

SC remembered Birdsall having sexual intercourse with her while Krebs touched her body. At some point, Krebs left the bedroom, and then Birdsall left. After Birdsall left, Krebs reentered and began having sexual intercourse with SC.

The morning after the sexual assault evaluation, SC talked to the police. After she gave her statement, SC called Birdsall, and the police recorded the conversations. SC also confronted Birdsall in person and recorded their conversation. The jury heard the recorded conversations. Birdsall did not object to the admission of the tapes.

During one conversation, SC stated that she was "more sick than [she] should have been from just having Mike's" and also stated that she "left [her] drink alone." Ex. 4, *audio recording*, at 8 min. through 8 min., 23 sec. In response, Birdsall asked SC whether she was suggesting that he drugged her. SC said she did not know. Birdsall said he did not drug her.

II. BIRDSALL'S STATEMENTS

After being arrested, Birdsall gave an oral and written statement to the police. They are as follows.

When they were playing beer pong, SC asked whether Krebs and Birdsall had ever played strip beer pong. Krebs and Birdsall said no but asked if she wanted to play. SC initially said no but eventually agreed to play. Throughout the night, SC had fun.

SC eventually became too intoxicated and began falling down. As a result, Krebs carried her to Birdsall's bedroom so she could lay down. Birdsall got a bowl for SC in case she vomited, which she later did. After a short while, SC sat up and said she felt fine.

After they sat and talked for a period of time, SC and Krebs started kissing, and then Birdsall began kissing her stomach. He took her underwear off. Birdsall eventually began having intercourse with SC. SC did not tell Birdsall to stop. At one point, the stereo came on and played a song that caused SC to begin crying. Birdsall asked why she was crying, and SC stated that the song was her and Krebs's song from when they dated. When SC began crying, Birdsall stopped having intercourse with her. At no point in time was SC unconscious.

Birdsall said that the morning after the incident, he told SC that they did not have sex because Krebs initially denied it. Birdsall simply went along with Krebs. Krebs and Birdsall were concerned about their girlfriends finding out.

III. DRUG EVIDENCE

Before trial, Birdsall filed a motion in limine to exclude "[e]vidence that [SC] may have ingested prescription drugs." Clerk's Papers (CP) at 53. The court granted the motion. The court's order stated: "the State shall not introduce any evidence or make any argument related to the assertion that . . . Birdsall introduced or provided prescription drugs to [SC]. References made in the . . . 'confrontation tape' are permissible."[2] CP at 79.

During trial, the prosecutor asked the State's toxicologist, Lyndsey Knoy, whether she tested SC's "blood in this case for both alcohol and drugs." 5 Report of Proceedings (RP) at 897. Knoy responded that she had and that she had detected neither. The prosecutor then asked: "With the information you just provided, if the blood was taken 24 hours after, would this be results that

[2] The "confrontation tape" is the recorded conversations SC had with Birdsall.

you would expect to see regardless of what a BAC level would be or drugs in the system?" 5 RP at 897. Birdsall objected, and the court sustained the objection. The prosecutor followed up: "So were the results what you would . . . have expected based on [a 24-hour] time frame." 5 RP at 897. Birdsall again objected, and the court sustained the objection. The prosecutor then asked: "And if . . . bottles of alcohol were collected in this case, but they were empty, they were dry . . . would there have been any ability for the lab to have tested those for any substance that might have been there or anything like that?" 5 RP at 898. Knoy responded, "No. We cannot test empty anything." 5 RP at 898.

Birdsall moved for a mistrial based on the prosecutor's line of questioning. The court denied the motion. The court stated that it had concerns with the line of questioning and would allow Birdsall to make a post-verdict motion if he "want[ed] to research the law and make a motion." 5 RP at 909. However, the court did not want to grant a mistrial because it wanted to "see what the verdict is." 5 RP at 910.

IV. BLOOD ALCOHOL CONTENT EVIDENCE

Knoy testified that Widmark's equation estimates a person's blood alcohol content (BAC). It relies on the person's sex and weight, and the amount and type of alcoholic beverages consumed. Widmark's equation also requires using a rho factor. Knoy used a rho factor of 0.55 for SC, which was an estimate. This estimate is not accurate for all women.

Using Widmark's equation, Knoy estimated SC's BAC based the facts presented and concluded that her BAC was between 0.20 and 0.26. Knoy estimated that SC's BAC increased by 0.043 per drink.

Knoy said that during an alcoholic blackout, people around the person would not necessarily know that the person was in an alcoholic blackout. Knoy clarified that a person would "appear normal drunk." 5 RP at 922.

Birdsall's toxicologist, David Predmore, also used Widmark's equation to estimate SC's BAC. When discussing why he did not use 0.55 for SC's rho factor, Predmore explained that alcohol is water soluble, not fat soluble, and muscle stores water. Therefore, more muscle per pound equates to a higher rho factor because there is a greater volume of water for the alcohol to disperse into. Additionally, according to Predmore, a rho factor of 0.55 is only accurate for women who tend to have more fat per pound than the average woman. Because SC had an athletic build, Predmore used a rho factor that reflected her build. While it is not entirely clear from the record, it appears that Predmore used approximately 0.61 as SC's rho factor. As a result, Predmore estimated that SC's BAC increased by 0.040 per drink.

Predmore discussed how Knoy's calculations were incorrect because she did not account for metabolism from the time someone consumed their first drink. According to Predmore, a more accurate prediction for SC's BAC after three Mike's Hard Lemonades over two hours was 0.09, and five drinks over four hours was 0.14.

V. CLOSING ARGUMENT

During closing argument, the prosecutor stated:

> The facts of this case are what every girl fears. What every woman fears. What every parents worse nightmare is [sic]. We talk to our girls about be careful how you dress, right. Be careful how you act, what you say. We tell our girls don't give boys the wrong impression. And why do we do that? The potential juror we heard from the other day said it right, because there's a double standard[].

5 RP at 973. Birdsall objected based on the prosecutor's use of evidence outside the record. The court sustained the objection. The prosecutor continued, and she discussed how a woman cannot

consent and does not consent to sexual intercourse when she is so drunk that she cannot walk and when she is so drunk that she is vomiting. She next stated that "there's a double standard, [but] we don't blame the victim. That's not what we do." 5 RP at 974.

The prosecutor also discussed how Predmore used the wrong rho factor for calculating SC's BAC because he made her a heavy-set woman.

In his closing argument, Birdsall focused on the fact that SC's story was not credible. He argued that SC had in fact consented to the sexual encounter and that she was not as drunk as she now claimed. Birdsall also discussed how SC made sexual advances on him, how SC flirted with him, how SC was "cheery" when they began kissing on the bed, and how she never denied that she consented. 5 RP at 1001.

On two occasions during her rebuttal, the prosecutor argued that Birdsall was "victim blaming." 5 RP at 1005, 1007.

VI. MOTION FOR NEW TRIAL

After the jury convicted Birdsall of rape in the second degree, he moved for a new trial pursuant to CrR 7.5. He based the motion on the prosecutor's line of questioning regarding drug evidence. The court asked whether Birdsall interviewed any jurors about whether they thought drugs potentially explained SC's severe intoxication. Birdsall said he had not. The court then reflected that the jury did not deliberate for a long period of time and stated to Birdsall:

> Well, without you talking to a juror, my impression was they were thoroughly convinced that he committed the alleged crime and didn't need much time to come to that conclusion. . . .
>
> . . . .
>
> . . . I mean you would have been welcome to go and talk to any juror and your motion would have been much stronger.

5 RP at 1023.

The court denied the motion, reasoning that, without evidence that the prosecutor's line of questioning affected a juror's decision, Birdsall was "asking [it] to speculate that they even talked about [drugs]." 5 RP at 1024.

VII. SENTENCING

The State asked for an identical sentence to the sentence Krebs had received. Birdsall asked the court to sentence him to the low end of the standard sentencing range.

Birdsall, his mom, and his aunt spoke on his behalf. In asking the court to give him the lowest possible sentence, Birdsall's mom stated that Birdsall "is a young man" who had goals and the work ethic to achieve them. RP (Dec. 22, 2017) at 6.

In rendering its decision, the court recognized that "[Birdsall] is young, and he can make up his mind to change." RP (Dec. 22, 2017) at 9. The court sentenced Birdsall to the same sentence Krebs received, 90 months. Birdsall appeals.

ANALYSIS

I. MOTION FOR MISTRIAL

Birdsall argues that the trial court abused its discretion when it denied his motion for a mistrial based on the prosecutor's line of questioning regarding drug evidence. We disagree.

We review a trial court's decision to deny a request for a mistrial for an abuse of discretion. *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). A "court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly." *Lewis*, 130 Wn.2d at 707. The trial court "is best suited to judge the prejudice of a statement." *Lewis*, 130 Wn.2d at 707.

Here, the trial court did not abuse its discretion in denying Birdsall's motion for a mistrial because the prosecutor's line of questioning did not violate the motion in limine. The order

granting the motion in limine stated: "the State shall not introduce any evidence or make any argument related to the assertion that . . . Birdsall introduced or provided prescription drugs to [SC]. References made in the . . . 'confrontation tape' are permissible." CP at 79.

During the line of questioning Birdsall identifies as improper, the State did not introduce evidence or make arguments related to the assertion that Birdsall provided SC with prescription drugs. Instead, the line of inquiry addressed the lack of evidence and the evidence introduced on the confrontation tape. Thus, the prosecutor did not violate the motion in limine.

II. MOTION FOR NEW TRIAL

Birdsall argues that the trial court abused its discretion when it denied his motion for a new trial based on the prosecutor's line of questioning regarding drug evidence. He contends that the court denied his motion because it relied on an erroneous view of the law. We agree that the trial court relied on an erroneous legal interpretation, but we affirm the denial of the motion because the prosecutor did not violate the motion in limine.

A trial court may grant a new trial "when it affirmatively appears that a substantial right of the defendant was materially affected . . . [by m]isconduct of the prosecution." CrR 7.5. To show prosecutorial misconduct, the "defendant must show 'that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial.'" *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008) (quoting *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003)).

In deciding a CrR 7.5(a)(2) motion based upon alleged prosecutorial misconduct, "the trial court applies the same standard as an appellate court reviewing such claims." *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). That is, the trial court determines whether the defendant has met his burden to show that the prosecutor's comments were improper and prejudicial.

McKenzie, 157 Wn.2d at 52. We then review the trial court's determination for an abuse of discretion. *McKenzie*, 157 Wn.2d at 51.

A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or for untenable reasons, or if no reasonable judge would have reached the same conclusion. *State v. Emery*, 174 Wn.2d 741, 765, 278 P.3d 653 (2012); *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). "A trial court necessarily abuses its discretion if it bases its ruling on an erroneous view of the law." *State v. Harvill*, 169 Wn.2d 254, 259, 234 P.3d 1166 (2010).

"We may affirm the trial court's ruling on any basis supported by the record." *State v. Streepy*, 199 Wn. App. 487, 500, 400 P.3d 339, *review denied*, 189 Wn.2d 1025 (2017).

When determining whether to grant a motion for a new trial, a court cannot consider evidence which inheres in the jury's verdict. *State v. Jackman*, 113 Wn.2d 772, 777-78, 783 P.2d 580 (1989). Such evidence includes "the mental processes by which individual jurors arrived at the verdict, the effect the evidence may have had on the jurors, and the weight particular jurors may have given to particular evidence." *Long v. Brusco Tug & Barge, Inc.*, 185 Wn.2d 127, 131-32, 368 P.3d 478 (2016).

Here, the trial court based its decision on an erroneous legal basis. Because jurors' mental processes and the length of a jury's deliberations both inhere in the jury's verdict, a court's decision in granting or denying a mistrial cannot take either into account. However, it is clear that both types of inadmissible evidence heavily influenced the court's decision here. Therefore, the court's reliance on this type of evidence constituted an abuse of discretion.

However, as discussed previously, we conclude that the prosecutor did not violate the motion in limine. Therefore, because we can affirm the trial court's ruling on any basis supported by the record, we nonetheless affirm the trial court's denial of Birdsall's motion.

III. PROSECUTORIAL MISCONDUCT

Birdsall argues that the prosecutor committed misconduct at various points throughout trial. We disagree.

A. Legal Principles

"Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial." *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012). To prevail on a claim of prosecutorial misconduct, a defendant must "show that in the context of the record and all of the circumstances of the trial, the prosecutor's conduct was both improper and prejudicial." *Glasmann*, 175 Wn.2d at 704.

We review the prosecutor's conduct and whether prejudice resulted therefrom "by examining that conduct in the full trial context, including the evidence presented, 'the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.'" *State v. Monday*, 171 Wn.2d 667, 675, 257 P.3d 551 (2011) (internal quotation marks omitted) (quoting *McKenzie*, 157 Wn.2d at 52).

During closing argument, a prosecutor has "wide latitude in drawing and expressing reasonable inferences from the evidence." *State v. Hoffman*, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991). But a prosecutor may not argue facts not in evidence or make arguments appealing to a jury's passion that prejudices the defendant. *State v. Belgarde*, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988); *State v. Boehning*, 127 Wn. App. 511, 519, 111 P.3d 899 (2005).

In a prosecutorial misconduct claim, a defendant who fails to object to improper conduct may be deemed to have waived the issue on appeal unless the prosecutor's statements are so flagrant and ill-intentioned that the resulting prejudice could not be corrected by a jury instruction. *Emery*, 174 Wn.2d at 760-61. The defendant must show that (1) no curative instruction would

have eliminated the prejudicial effect, and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the verdict. *Emery*, 174 Wn.2d at 761. The focus of this inquiry is more on whether the resulting prejudice could have been cured, rather than the flagrant or ill-intentioned nature of the remarks. *Emery*, 174 Wn.2d at 761-62.

B. Drugging of Victim

Birdsall argues that the prosecutor's line of questioning, discussed previously, violated the motion in limine prohibiting drug evidence and constituted prosecutorial misconduct. Because we conclude that the prosecutor did not violate the motion in limine, we disagree.

C. Gender Double Standard

Birdsall argues that the prosecutor committed misconduct in her closing argument because she encouraged the jury's decision to reflect a referendum on gender equality by arguing that they were "responsible for addressing the culture of double standards for men and women." Br. of Appellant at 33-34. Birdsall concedes that he did not continuously object but argues that the prosecutor's conduct was so flagrant and ill-intentioned that no curative instruction could have erased the prejudice. We disagree.

The prosecutor briefly discussed the double standard between genders. She then discussed how "we don't blame the victim." 5 RP at 974. Based on the context of the argument as a whole, we conclude that the prosecutor's comment was neither improper nor prejudicial. But even if it was improper, Birdsall cannot show how any resulting prejudice could not have been corrected by a jury instruction. Accordingly, his claim fails.

D. Misrepresented Evidence

Birdsall argues that the prosecutor committed misconduct when she misrepresented evidence in her closing argument. Birdsall contends that the prosecutor erroneously stated that his

expert was inaccurate because he treated SC as a heavy-set woman. We conclude that Birdsall waived this argument.

It appears Birdsall's expert, Predmore, used a higher than average rho factor in his calculations. In Predmore's experience, women with an athletic build have a higher rho factor than the average woman. Because SC had an athletic build, Predmore used a higher rho factor of 0.61. Accordingly, the prosecutor misstated the evidence when she stated that Birdsall's expert used the rho factor of a heavy-set woman. He did the opposite.

However, because Birdsall did not object to the prosecutor's argument, he is deemed to have waived the issue unless he can show that no curative instruction would have eliminated the prejudicial effect and that the misconduct resulted in prejudice which had a substantial likelihood of affecting the verdict.

Birdsall cannot make such a showing. The experts' differences in rho factors led to calculations that differed by 0.003. In fact, whether SC's BAC increased by 0.040, as Predmore stated, or 0.043, as Knoy stated, per alcoholic beverage, was of marginal importance because SC testified about how she felt and how intoxicated she was both leading up to and during the time in which she was raped. Because the prosecutor's error likely did not affect the jury's verdict and in any event could have been cured by an instruction, we conclude that Birdsall waived his argument.

E. Cumulative Error

Birdsall claims that the multiple instances of prosecutorial misconduct constituted cumulative error, which requires a new trial. Because we conclude that no unwaived prosecutorial misconduct occurred, we reject Birdsall's argument.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Birdsall argues that he received ineffective assistance of counsel at various times throughout trial. We disagree.

A. Legal Principles

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution guarantee the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011).

We review claims of ineffective assistance of counsel de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To prevail on a claim of ineffective assistance of counsel, the defendant must show both (1) that defense counsel's representation was deficient and (2) that the deficient representation prejudiced the defendant. *Grier*, 171 Wn.2d at 32-33. If either prong is not satisfied, the defendant's claim fails. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 673, 101 P.3d 1 (2004). There is a strong presumption that counsel's representation was effective. *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995).

Representation is deficient if, after considering all the circumstances, the performance falls "'below an objective standard of reasonableness.'" *Grier*, 171 Wn.2d at 33 (quoting *Strickland*, 466 U.S. at 688). "The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below." *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). We do not consider matters outside the trial record. *State v. Linville*, 191 Wn.2d 513, 525, 423 P.3d 842 (2018). Legitimate trial strategy or tactics cannot serve as the basis for a claim of ineffective assistance of counsel. *State v. Kyllo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009).

To show prejudice, a defendant must establish that "there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different." *Kyllo*, 166 Wn.2d at 862. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

B. Failing to Object During Closing Argument

Birdsall argues that he received ineffective assistance of counsel based on his counsel's failure to object to the previously discussed instances of prosecutorial misconduct in the prosecutor's closing argument. We disagree.

Birdsall first contends that he received ineffective assistance of counsel when his attorney failed to object to the prosecutor's argument in closing regarding societal double standards and victim blaming. Because we conclude that the argument was not improper, Birdsall cannot demonstrate deficient performance. In addition, as we already discussed, Birdsall also cannot show prejudice.

Birdsall next argues that he received ineffective assistance of counsel when his attorney failed to object to the prosecutor's mischaracterization of his expert's calculations. We also reject this argument because Birdsall cannot show prejudice. As discussed above, the prosecutor did misstate the evidence introduced by Birdsall's expert. However, the experts' slight differences of SC's estimated BAC increase per alcoholic drink, based on differences in rho factors, likely had no effect on the outcome of trial because SC testified about how intoxicated she was on the night of the incident. Thus, whether SC's BAC increased by 0.040 or 0.043 per alcoholic beverage was of relatively little importance. Accordingly, Birdsall has not shown prejudice.

Because Birdsall cannot show prejudice for either instance of alleged misconduct, his ineffective assistance of counsel argument fails.

C. Failing to Request a Reasonable Belief Jury Instruction

Birdsall argues that he received ineffective assistance of counsel when his attorney failed to request a reasonable belief affirmative defense jury instruction. We disagree.

"[I]t is a defense which the defendant must prove by a preponderance of the evidence that at the time of the offense the defendant reasonably believed that the victim was not mentally incapacitated and/or physically helpless." RCW 9A.44.030.

Based on the evidence presented, we note that Birdsall would have been entitled to an instruction based on this statutory defense if his counsel had requested it. However, to prevail on his ineffective assistance of counsel claim, Birdsall must also show that the failure to request the instruction constituted deficient performance which prejudiced him.

Here, counsel's choice to not request a reasonable belief instruction, and instead argue that the State failed to meet its burden to prove SC was physically helpless or mentally incapacitated, was objectively reasonable.[3] *See State v. Coristine*, 177 Wn.2d 370, 378-79, 300 P.3d 400 (2013) (recognizing that it can be a valid tactical decision to not assert an affirmative defense because defenses carry with them the burden of proof). Birdsall has not shown that the record establishes anything to the contrary. "The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below." *McFarland*, 127 Wn.2d at 335.

[3] *State v. Powell*, 150 Wn. App. 139, 206 P.3d 703 (2009), is distinguishable because there, the failure to request the reasonable belief affirmative defense instruction was not objectively reasonable.

Unlike in *In re Personal Restraint of Hubert*, 138 Wn. App. 924, 158 P.3d 1282 (2007), there is nothing in the record showing Birdsall's counsel's strategic or tactical decisions.[4] *See Linville*, 191 Wn.2d at 525. Because his counsel's strategic or tactical decisions are not presented in the record, Birdsall cannot prevail on his claim of ineffective assistance of counsel at this stage.

D. Failing to Argue Youth as Mitigating Factor

Birdsall argues that because he was 19 years old on the date of the crime, under *State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015), he received ineffective assistance of counsel at sentencing when his attorney failed to argue for an exceptional downward sentence based on his youth. We disagree.

In *O'Dell*, the court reversed a defendant's sentence because the trial court erroneously believed that it could not consider youth as a mitigating factor when the defendant was 18 years old at the time of the crime. 183 Wn.2d at 696-97. Here, however, the court did not believe that it was precluded from using Birdsall's youth to impose an exceptional downward sentence. Therefore, the issue is different than that presented in *O'Dell*.

Instead, the issue here is more analogous to the issue presented in *State v. Hernandez-Hernandez*, 104 Wn. App. 263, 15 P.3d 719 (2001). In *Hernandez-Hernandez,* the court sentenced the defendant to a standard range sentence, and on appeal, the defendant made a similar argument to Birdsall's argument here. Specifically, the defendant argued that his trial counsel was ineffective for failing to request an exceptional downward sentence based on applicable case law. *Hernandez-Hernandez,* 104 Wn. App. at 265-66.

[4] In contrast, counsel in *Hubert* stated he did not request a reasonable belief instruction because "he 'was not familiar' with the statutory defense until [the defendant's] appellate counsel brought it to his attention." 138 Wn. App. at 929. The failure to investigate statutory defenses constitutes deficient representation. *Hubert*, 138 Wn. App. at 929-30. Here, there is nothing to show Birdsall's counsel was unaware of the reasonable belief affirmative defense.

The court rejected the argument and concluded that the defendant could not prove the prejudice prong of his ineffective assistance of counsel claim. *Hernandez-Hernandez*, 104 Wn. App. at 266. The court reasoned that, even without his counsel's argument, the trial court had the discretion to impose an exceptional sentence downward. *Hernandez-Hernandez*, 104 Wn. App. at 266. Thus, it was "not convinced the outcome would have been different had defense counsel argued [the relevant case law] to support an exceptional sentence." *Hernandez-Hernandez*, 104 Wn. App. at 266.

The trial court had similar discretion here. *In re Pers. Restraint of Light-Roth*, 191 Wn.2d 328, 336, 422 P.3d 444 (2018) ("[The Sentencing Reform Act of 1981] has always provided the opportunity to raise youth for the purpose of requesting an exceptional sentence downward, and mitigation based on youth is within the trial court's discretion."). Birdsall's counsel argued that he should receive a sentence at the low end of the standard range. And, in rendering its decision, the court specifically acknowledged Birdsall's youth. It nonetheless decided to impose a midrange sentence because it felt Birdsall and Krebs should receive equal sentences.

There is a possibility that the trial court would have given Birdsall a different sentence if his attorney had argued that he should receive an exceptional sentence downward under *O'Dell*. However, "mere possibilities do not establish a prima facie showing of actual and substantial prejudice." *In re Pers. Restraint of Meippen*, 193 Wn.2d. 310, 317, 440 P.3d 978 (2019). Accordingly Birdsall has failed to prove he was prejudiced, and therefore, his ineffective assistance of counsel argument fails.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Melnick, P.J.

We concur:

Sutton, J.

Glasgow, J.

DIXON CANNON, LTD

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