No. 98521-9

COA # 51752-3-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ZACKARY W. CALDWELL,

Appellant.

ON REVIEW FROM THE COURT OF APPEALS OF
THE STATE OF WASHINGTON,
DIVISION TWO

AND

THE SUPERIOR COURT OF
THE STATE OF WASHINGTON,
LEWIS COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PARTY

Zackary W. Caldwell, Petitioner, was the appellant in the court of appeals, Division Two.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b)(3), Petitioner seeks review of the unpublished decision of the court of appeals, Division Two, in State v. Caldwell, __ Wn. App. ___ (2020 WL 1651469) (No. 51752-3-II), a copy of which is attached as Appendix A.

C. OVERVIEW OF ARGUMENT SUPPORTING REVIEW

There was never any dispute that Zachary Caldwell and Morgan Jones, young adults who had dated at one time, had sex on his family's couch one morning. The only question was whether it was consensual and involved her active participation, as he testified, or was indecent liberties and had occurred when she was passed out, sleeping, or awake but pretending to be asleep, as Jones would alternatively say.

Ms. Jones' credibility was thus the only issue at trial, and that credibility had been challenged - by her admitted lies and omissions to police and a forensic nurse, by her changing her version of events between her early statements and trial, and by defense witnesses who saw her interacting with Caldwell and knew her negative reputation for truth in the community sufficiently that the trial court allowed the testimony at trial.

It was flagrant, ill-intentioned and prejudicial misconduct for

the prosecutor to repeatedly elicit testimony about and argue in closing that Jones had suffered a "living nightmare" not just because of the alleged crime but also because of the criminal justice process which followed. The prosecutor's arguments were far beyond the narrow argument this Court approved in State v. Gregory, 158 Wn.2d 759, 147 P.3d 1201 (2002), overruled on other grounds by, State v. W.R.,Jr., 181 Wn.2d 757, 336 P.3d 1134 (2014). Further, the prosecutor committed misconduct in rebuttal closing argument by telling jurors the defense had a mythical "guidebook" for how victims had to behave and the defense wanted jurors to hold to hold that anyone who did not exactly meet the unwritten rules in this mythical book would not be listened to or believed because "that's where we are." The prosecution rightly conceded that the community safety invocation was improper, but Division Two rejected that concession, again citing Gregory.

This Court should grant review under RAP 13.4(b)(3). Prosecutorial misconduct such as that which occurred here erodes public confidence in our criminal justice system and deprives the accused of their due process rights to a fair trial. This is especially true where, as here, the case depends wholly upon the credibility of the accuser. Division Two erred in stretching Gregory so far outside its bounds and refusing the State's concession. Further, Division Two then contradicted itself, saying on the one hand that some of the misconduct could have been cured by instruction but on the

other that counsel was not ineffective in failing to object because there was no misconduct. This Court should grant review under RAP 13.4(b)(3), because the issue of whether a prosecutor has engaged in serious, prejudicial and ill-intentioned misconduct is an issue of substantial public importance affecting the due process rights of the accused to receive a fair, impartial trial. To the extent the decision in Gregory can be viewed to allow the misconduct which occurred in this case, it should be overruled despite *stare decisis*, because the decision is both incorrect and harmful.

D. ISSUES PRESENTED FOR REVIEW

1. Does a prosecutor commit ill-intentioned, flagrant and prejudicial misconduct, bolstering the alleged victim's credibility, improperly invoking passions and prejudices by telling jurors the alleged victim had to go through a "living nightmare" after the alleged crime in part because she had to suffer through being interviewed by the defense and testifying at trial?

2. Does a prosecutor further commit serious, flagrant and prejudicial misconduct and improperly invoke community safety by telling jurors that the defense had a mythical "book" of how victims had to behave, characterizing any questions about the victim's credibility as requiring her to comply with this "book," then asking if that was "where we are?"

3. Should review be granted under RAP 13.4(b)(3) because the due process rights to a fair trial are fundamental and impacted directly by prosecutorial misconduct such as that which occurs in this case, and to address whether Gregory, supra, should be read so broadly as to allow the arguments here and, if so, should be overruled as incorrect and harmful?

E. STATEMENT OF THE CASE

Zackary Caldwell and Morgan Jones met in high school, had a

sexual relationship, then had similar encounters when they ran into each other from time to time. 3RP 57.[1] In college, Jones and Caldwell became best friends, doing everything together such as going to classes, skipping school, going to car "meets" and confiding in each other. 2RP 60. One observer said that even though they were not always dating, the two usually appeared to be "friends with benefits." 3RP 60, 227, 232.

Indeed, Ms. Jones admitted performing oral sex on Caldwell even when Jones was in a girlfriend/boyfriend relationship with Caldwell's friend. 3RP 67-80, 254-56.

In December of 2015, Ms. Jones was fighting with her mom and needed to move out, so Caldwell's family let her move in and Jones began sleeping on their couch. 3RP 69-70. It was there, Jones would later claim, that she and Caldwell had nonconsensual sex. 3RP 74-80; see CP 26-27.

At trial, Jones would testify that it happened when she, her boyfriend, Caldwell and others held a party at the home a few days after she had started living there. 3RP 70, 90-91. At trial, Jones admitted that all of the people there were underage but illegally smoking "pot" and drinking. 3RP 70, 90–91. Ms. Jones would tell jurors she was "way too high," doing such a large quantity of drugs and drinking so much alcohol that she got sick in the bathroom. 3RP

[1]Explanation of the references to the verbatim report of proceedings is contained in Appellant's Opening Brief ("AOB") at 2 n. 1.

70-79. Ms. Jones would testify that she laid down on the couch and either passed out or fell asleep, waking up to feel Caldwell on top of her, his penis in her vagina. 3RP 77. Ms. Jones said it was over in a few seconds and he used the blanket to wipe the mess, then pulled up her pants and left. 3RP 78. Ms. Jones called a friend and ultimately ended up going to a hospital to get a "rape" kit done, reporting it to police after about a day. 3RP 82-83.

On cross-examination, however, Jones conceded that she had previously told a different version of events to the state. 3RP 96-100. Indeed, she admitted, she lied to police and the forensic nurse who did the rape kit exam, both by omission and by telling them a different version of how the sex act occurred. 3RP 96-100. With first the nurse and then police, Jones said nothing about a party or other people being there who might have been interviewed as witnesses. 3RP 96-98. Ms. Jones also admitted lying to the nurse and police when they asked her how much pot she had smoked and how much alcohol she had imbibed. 3RP 94-98.

Unlike when she was under oath at trial, when she spoke to the nurse and then police Jones did not claim she had passed out alone on the couch and been awakened and surprised by Caldwell being there, unexpected. 3RP 96-98. Instead, in the version of events Jones gave right after the sex act occurred, Jones admitted to both the forensic nurse and police that she and Caldwell had been "cuddling" together - voluntarily - on the couch, watching movies,

when she fell asleep. 3RP 96-98, 157.

Ms. Jones would explain at trial that her memory of the events was not very clear because she had ingested so much alcohol and pot. 3RP 93-94. She also admitted telling the forensic nurse that Jones had a medical disorder which caused her to suffer memory loss and frequent headaches. 3RP 165-66.

At trial, Jones she would say she was awake but pretended to be asleep when the sex act occurred. 3RP 77-78. Also at trial, she would first say she was too afraid to fight back, but conceded she had not raised any such fears with police. 3RP 100. Instead, with police, Jones had said she had stayed still during the sex because she was "not a morning person." 3RP 100. Ms. Jones also said there was a size difference which was why she had not fought back. 3RP 78. Ultimately, however, Jones would admit at trial that she had not really been frightened, just surprised. 3RP 94-100.

Like Jones, Caldwell told officers that he and Jones had been snuggling and watching movies and she had fallen asleep. 3RP 203. Ms. Jones had started undressing in her sleep so he had woken her up and asked her what she was doing. 3RP 203. She had then reached over and started fondling his penis, so he had moved her leg and they had then engaged in consensual sex. 3RP 203. Mr. Caldwell was clear that she seemed a willing participant and he would have stopped if she had not. 3RP 203.

Several witnesses who knew both Jones and Caldwell at the

relevant time testified on Caldwell's behalf. 3RP 225-38, 240-45. One confirmed that he had seen Jones and Caldwell kiss and "make out" in front of him and with others around, often initiated by Jones. 3RP 228-38. The friend who had taken Jones to get the rape kit done had stayed with her all the following day and described her as seeming more mad with herself than upset as if she had been assaulted. 3RP 243-44. That friend had experience with several close to him who had been so assaulted and he said her behavior was different and just dismissive, like nothing had happened. 3RP 243-44.

Mr. Caldwell was charged by amended information with indecent liberties for having "knowingly. . cause[d] another person to have sexual contact with him. . .[w]hen the other person is incapable of consent by reason of being . . . physically helpless." CP 26-27; RCW 9A.44.100(1)(b). At trial, the prosecutor elicited testimony from Jones about how traumatic it was for her to have to go through not only the crime but all of the criminal justice procedures which followed such as talking to police, giving an interview to the defense, and going through the rape kit exam.

In initial closing argument, the prosecutor used the theme that Jones had experienced a "living nightmare" not in just being the victim of a crime but in the subsequent trauma of having to report the crime and have examinations which were "invasive" and potentially humiliating. 3RP 325-26. The prosecutor used this idea of the second "victimization" at length, asking jurors,

> And what did all this get her? Well, she's been subjected to multiple interviews, **had to talk to the defense attorney, came in here and told her story to a group of 14 strangers, talked about this experience, which was obviously upsetting to her.** And you got to witness Morgan. Morgan sat right here in this chair, right here. You heard her. You saw into her eyes. You saw her emotion. She was upset as she got up there and talked about this.
>
> This was difficult, I submit to you, for her to say. This has been a process for her, she explained. She lost her relationship with her boyfriend, **she has had to talk to multiple people. She has had to go through this process since 2015**.

3RP 328 (emphasis added). Counsel did not object.

The prosecutor also told the jurors that they had to decide, "ultimately," between believing what Jones said and what Caldwell said, "look at both versions and decide which one makes more sense[.]" 3RP 36.

In closing argument, counsel challenged Jones' credibility, as expected, noting the different versions of events she had given and her behavior after the incident. In rebuttal, the prosecutor then faulted counsel for making these arguments, claiming that counsel had created some kind of "guide book" for how a victim of sexual assault has to behave and then dismissing those who do not do "A, B, C, D, E" from the book. 3RP 250. The prosecutor went on:

> Is there a guide book for how a young lady, a female, a woman acts as a victim of sexual assault? Is there a guide book that [Ms.] . . . Jones should carry around, "How Do I Behave After I've Been Sexual[ly] Assaulted?" Are there rules for how a lady, a woman, is supposed to behave after being sexually assaulted? And if she doesn't meet the standards that other people impose and say that's the way you should act, then you are not a victim? **Is that how it works? That if you don't**

> **act a certain way that someone else says you should then you are not victim of sexual assault? Is that how it works around here?**

3RP 350-51 (emphasis added). Counsel did not object.

A few moments later, the prosecutor returned to this theme, telling jurors that the defense was arguing that Jones had not done things in "the right order" to be taken seriously and that "she violated the handbook, essentially." 3RP 352-53.

The prosecutor framed the juror's job as having to ask whether it made sense that the alleged victim would go through all of the things alleged victims suffer in a criminal case if the claims she was making were not true and she just "felt like calling it sexual assault" even though it was consensual. 3RP 361.

On review, Caldwell argued to Division Two of the court of appeals that these arguments were flagrant, ill-intentioned and prejudicial misconduct, by invoking the passions and prejudices of jurors in order to create sympathy for Jones and how awful it was for her to have to suffer through the normal processes used in criminal investigation such as interviews by the defense and testifying. Brief of Appellant ("BOA") at 23-24. He also argued that these comments further impinged on his rights to trial by jury and to have counsel interview and conduct cross-examination, by urging jurors to draw a negative from exercise of those rights. Id. Further, he argued that the prosecutor's arguments in rebuttal closing about the fake defense "guidebook" invoked community safety and concerns by suggesting

that accepting the defense amounted to saying that "if you don't act a certain way that someone else says you should" you are not a victim. Id. He also argued that making these arguments after first telling jurors that their decision would ultimately come down to picking which side made more sense was especially troubling, because making such arguments effectively invoke not the required burden of proof beyond a reasonable doubt but "who do you believe" comparative analysis which can lead to convictions on 51-49 percent "belief." BOA at 30-31. Finally, he argued in the alternative that counsel was ineffective in failing to object below, if the court found that the prejudice could have been cured by instruction. BOA at 39-46.

In affirming, the court of appeals recognized that it was improper for a prosecutor to make deliberate appeals to the jury's passions and prejudices. App. A at 6. Division Two then declared that the case was controlled by this Court's holding in Gregory, supra; App. A at 6. The court of appeals interpreted Gregory as broadly holding that "testimony of the difficulty of testifying was not an improper appeal to the jury's sympathy" or a violation of "constitutional rights" whenever the defendant was claiming the victim was not credible and the jury was instructed not to let sympathy guide their decision. App. A at 6-7. Division Two also relied on Gregory for holding that there was no improper comment on the rights to cross-examination or jury trial. App. A at 8.

This Petition follows.

F. ARGUMENT WHY REVIEW SHOULD BE GRANTED

REVIEW SHOULD BE GRANTED UNDER RAP 13.4(b)(3)

This case involves the serious question of prosecutorial misconduct in already emotionally charged sex offense cases where there is no dispute that sex occurred but only a question of credibility as to consent.

Under RAP 13.4(b)(3), review will be accepted if a "significant question of law" under the state or federal constitution is involved. In this case, there is a significant question of law involved, because Division Two's expansion of Gregory directly affects the due process rights of defendants to a fair trial before a fair and impartial jury. Further, to the extent that Gregory could be construed to allow the arguments here, Gregory should be reconsidered because it is both incorrect and harmful.

In Gregory, the defendant was convicted in two separate cases: one for three counts of first-degree rape and one for aggravated first-degree murder committed in the course of rape. 156 Wn.2d at 777. In the murder case, the death penalty was imposed after jurors determined there were not sufficient mitigating circumstances to merit leniency. 156 Wn.2d at 777. On review this Court held, *inter alia,* that the prosecutor's misconduct during the penalty phase independently required reversal of the death sentence. 158 Wn.2d at 777-78.

In reaching its conclusions, the Court addressed, *inter alia,* testimony elicited about how the alleged victim felt about having to testify and the prosecutor's subsequent use of that testimony in closing. 158 Wn.2d at 805-807. Mr. Gregory argued that this amounted to an improper comment on his constitutional rights to cross-examination and to go to trial, and that the arguments were improper appeals to the jury's sympathy, passion or prejudice. 158 Wn.2d at 808.

This Court first held that the comments did not unnecessarily "chill" or "penalize" the assertion of a constitutional rights. 158 Wn.2d at 806-807. The prosecution's comments were limited to rebutting the challenges on credibility by showing that she did not "relish" testifying as a way of showing it was unlikely that she would have put her through trial based on a broken condom.

But in Gregory, unlike here, the state did not specifically criticize or even mention the cross-examination by the defense. 158 Wn.2d at 807. The Gregory Court concluded that a "generalized discussion of the emotional cost" of being a victim used to support the victim's credibility did not amount to "an improper comment on the right to confrontation." Id. But it then *concluded*, without more, that the "**rights to trial** and to confrontation" were not violated. 158 Wn.2d at 808 (emphasis added).

In Gregory, the testimony and the prosecutor's arguments were far different than those here. The prosecutor in Gregory asked

one question about how the alleged victim felt when she had to come to court to testify and be cross-examined." 158 Wn.2d at 805-806. The victim referred to the crime as a "horrific experience" she had tried to forget about ands said she was really upset and having nightmares because of trial. 158 Wn.2d at 805-806. In closing, the Gregory prosecutor simply read back that question and answer, then pointed out that the alleged victim would not have put herself through the experience just to vindicate a broken condom, as the defense had claimed. 158 Wn.2d at 806-807.

Unlike in Gregory, here the prosecutor did not just ask one question and make one remark. Ms. Jones was asked about the "absolutely terrible" and painful physical exam multiple times. 3RP 82-84. The nurse was asked about how "invasive" it was. 3RP 152. And the prosecutor used the theme that Jones had experienced a "living nightmare" in what she had to go through in order to report to police, and that being a victim had "g[o]t her" having to be "subjected to multiple interviews, had to talk to the defense attorney," had to come to trial and testify "to a group of 14 strangers," lost her relationship with her boyfriend, and had to go through the process "since 2015." 3RP 328. That was in *initial* closing, *before* counsel had done anything to "invite" such argument.

Further, in Gregory, the prosecutor did not, as here, declare that the defense was requiring that victims of sexual assault had to behave a certain way and comply with a mystical "guidebook" or they

were not actual victims or to be believed. Nor did the Gregory prosecutor include interviews with the defense and testifying at trial as a continuation of the "living nightmare" of the alleged sexual assault. And the Gregory prosecutor only read the question and answer and made one quick argument in closing. Here, the "living nightmare" theme was used in the initial closing argument, as was the emphasis on how invasive and humiliating and awful the rape kit procedure was (3RP 325-26), how difficult it was for her to be interviewed by the defense, to lose her relationship, to testify and to hve to "go through this process since 2015 (3RP 328), and then, in rebuttal, there was the invocation of a fake defense "guide book" that had standards "other people impose and say that's the way you should act" or the defense was saying "you are not a victim." 3RP 349-51. The Gregory prosecutor did not tell jurors that the defense was that Jones had "violated the handbook," nor did that prosecutor ask, as the prosecutor did here, "[i]s that how it works? That if you don't act a certain way that someone else says you should, then you are not a victim of sexual assault? Is that how it works around here?" 3RP 350-51.

In Gregory, this Court approved a very limited, general comment and question regarding the difficulties of going through reporting a crime, that decision was based on the fact that neither the question nor the closing specifically mentioned the defense cross-examination. 158 Wn.2d at 807. Review should be granted

under RAP 13.4(b)(3), because the court of appeals erred in stretching the holding of Gregory to apply to this case and in rejecting the state's concession about the improper "book" comments, again relying on Gregory. See App. A. at 9. The misconduct of a public prosecutor in a close case such as this one affects the due process rights of the accused to a full, fair trial. It also impacts the public's confidence in the criminal justice system. And Division Two's ruling on ineffective assistance makes no sense. First, the court of appeals found that a "curative instruction could have been effective, but defense counsel failed to object." App. A at 10-11. A moment later, inconsistently, Division Two rejected Caldwell's argument that his counsel's failure to object to the prosecutors alleged misconduct was ineffective assistance, reaching that holding "because no prosecutorial misconduct occurred[.]" App. A at 14.

In the alternative, even if the holding of Gregory could be stretched to fit this case, that holding should be overruled as both incorrect and harmful. While this Court does not lightly "set aside" precedent under the doctrine of *stare decisis*, it will do so if the precedent meets those standards. See Lunsford v. Saberhagen Holdings, Inc., 166 Wn.2d 264, 278, 208 P.3d 1092 (2009). The factors applying to determining whether precedent should be overruled depend upon its "workability," "the antiquity of the precedent, the reliance interests at stake, and of course, whether the decision was well reasoned." See Montejo v. Louisiana, 556 U.S. 778, 792, 129 S.

Ct. 2079, 173 L.Ed.2d 955 (2009) (overruling a precedent "only two decades old" because it has not created "expectations" in that short time, finding the decisions "marginal benefits are dwarfed by its substantial costs").

The holding of Gregory should be construed as limited to its unique facts, not applied to every case where there is a "he said/she said" between young adults about whether there was consent. If not, under the expanded view of Gregory, in every case the state will be allowed to bolster the credibility of an accuser by invoking the jury's sympathy for how hard the criminal justice process can be when a defendant chooses to go to trial. This is because in every case there is a claim that someone would not put themselves through the hard situation of being a witness or accuser in our system unless what they were saying was true. Further, it throws the weight of the prosecutor's office behind the alleged victim, because presumably no prosecutor would put someone through a "living nightmare" unless the prosecutor was *sure* of guilt, and because the bolstering by a prosecutor has a specific, increased impact on a jury.

As this Court has noted, prosecutors are extremely persuasive simply by virtue of their vaunted role:

> [A] prosecutor's argument is likely to have significant persuasive force with the jury. Accordingly, the scope of argument must be consistent with the evidence and marked by the fairness that should characterize all of the prosecutor's conduct. Prosecutorial conduct in argument is a matter of special concern because of the possibility that the jury will give special weight to the prosecutor's arguments, not only because of the prestige associated with the prosecutor's office

> but also because of the fact-finding facilities presumably available to the office.

In re Glassman, 175 Wn.2d 696, 706, 286 P.3d 673 (2012), quoting, ABA Standards for Criminal Justice, std. 3-5.8 cmt.

Here, Division Two's ruling stretched Gregory beyond its limits, thus allowing the state to incite strong sympathy in jurors for the accuser and against the accused. This Court should grant review under RAP 13.4(b)(3), because the decision of the court of appeals allows serious, flagrant and prejudicial misconduct in violation of the due process rights of the accused, in an extremely close case. In addition, review should be granted on the issue of whether counsel was ineffective in failing to object and seek curative instruction.

G. CONCLUSION

For the reasons stated herein, this Court should grant review.

DATED this 11th day of May, 2020.

Respectfully submitted,

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ZACKARY WIXON CALDWELL, Appellant.	No. 51752-3-II UNPUBLISHED OPINION

GLASGOW, J.—Zackary Wixon Caldwell appeals his conviction for indecent liberties, alleging that reversal is required based on prosecutorial misconduct, ineffective assistance of counsel, and cumulative error. The State concedes that the prosecutor improperly evoked community safety concerns during closing arguments, but argues that no other misconduct occurred. In addition, any prosecutorial errors were insufficiently flagrant, ill intentioned, or prejudicial to constitute misconduct. The State also argues that Caldwell received effective assistance of counsel during his trial and that there was no cumulative error.

We reject the State's concession, holding that no prosecutorial misconduct or ineffective assistance of counsel occurred, and we affirm Caldwell's conviction.

FACTS

Caldwell was convicted of indecent liberties in 2018. He appeals, seeking reversal of his conviction.

Caldwell and the victim, had an on-again, off-again consensual sexual relationship. The victim was staying with Caldwell in December 2015. One night, she and Caldwell smoked marijuana and drank alcohol together at Caldwell's house. She fell asleep on the living room couch at around 4:00 a.m. It is undisputed that Caldwell had sexual intercourse with her on the couch a

couple of hours later. He testified that she was awake and the encounter was consensual. She testified that she awoke to him raping her and that she did not resist because she was shocked and she knew resistance was futile. It is undisputed that as soon as he finished and left the room, she called a mutual friend to pick her up, went to the hospital, and asked for a sexual assault examination. She then called the police to report the assault the following day.

Caldwell's and the victim's testimony conflicted about the nature of their relationship and the circumstances surrounding the incident. The victim testified that she had only two consensual sexual encounters with Caldwell, the most recent of which occurred several months before the offense. Caldwell testified that he and the victim had an ongoing sexual relationship that persisted even though she was dating a mutual friend and that their encounter that morning was typical for their relationship. The victim testified that she consumed large amounts of alcohol and marijuana at a party the night before. Caldwell testified that there was no party and that he saw the victim drink one alcoholic beverage and smoke a small amount of marijuana, but she was "[b]asically sober." 2 Verbatim Report of Proceedings (VRP) (Feb. 22, 2018) at 260.

At trial, the prosecutor asked the victim and Lisa Curt, the sexual assault nurse who examined her, about the physical details of the sexual assault exam. Except for one hearsay objection, defense counsel did not object to the victim's testimony. Similarly, the prosecutor's direct examination of Curt asked for details about sexual assault exams generally, and specifically about the victim's exam. Defense counsel did not object to this testimony.

In addition to testifying himself, Caldwell called two of his friends to testify about the victim's demeanor in the days following the incident and her reputation for truthfulness in the community. One friend said that she was "calm and collected" when he saw her a day or two after

the incident. *Id.* at 230. The other friend said that she acted happy the next day and that this was unlike other women he knew who had been sexually assaulted.

In closing, the prosecutor retold the State's version of events, including the sexual assault examination, followed by a summary of the victim's experience participating in the prosecution:

> And what did this all get her? Well, she's been subjected to multiple interviews, had to talk to the defense attorney, came in here told her story to a group of 14 strangers, talked about this experience, which is obviously upsetting to her. And you got to witness [her]. [She] sat right here in this chair, right here. You guys are right here. She was this close to you. You heard her. You saw into her eyes. You saw her emotion. She was upset as she got up there and talked about this.
>
> This was difficult, I would submit to you, for her to say. This has been a process for her, she explained. She lost her relationship with her boyfriend, she has had to talk about this with multiple people. She has had to go through this process since 2015.

3 VRP (Feb. 23, 2018) at 327-28. The prosecutor ended with, "I submit to you at the end of this whole process you will be convinced beyond a reasonable doubt that the defendant committed the crime of indecent liberties." *Id*. at 333.

Defense counsel responded to the prosecution's narrative by contending that the victim had "buyer's remorse" about consensual sex and fabricated the assault to preserve her relationship with her boyfriend. *Id.* at 346. Counsel noted inconsistencies between the story she told police and the testimony that she gave at trial. He emphasized that "really this case boils down to credibility, because you are going to have to weigh what you believe." *Id.* at 336. He also highlighted that the victim waited a day to make a report to police, saying, "If you are sexually assaulted, you want to call the police, especially if you are going to go and get a sexual assault kit done. You are going to go to the hospital. It just makes sense. Any other alternative doesn't make sense." *Id.* at 347.

In rebuttal, the prosecutor argued:

> [The victim] got up here and told you how she felt. Now the defense is telling you, she didn't act properly for a victim of sexual assault. If she was a victim of sexual assault, she would do A, B, C, D, E. She would call the police on her way to Centralia [Hospital]. Is there a guide book for how a young lady, a female, a woman acts as a victim of sexual assault? Is there a guide book that [she] would carry around, "How Do I Behave After I've Been Sexual[ly] Assaulted"? Are there rules for how a lady, a woman, is supposed to behave after being sexually assaulted? And if she doesn't meet the standards that other people impose and say that's the way you should act, then you are not a victim? Is that how it works? That if you don't act a certain way that someone else says you should, then you are not a victim of sexual assault? Is that how it works around here? No.

Id. at 350-51. The prosecutor closed his rebuttal argument by reaffirming that the case involved dueling narratives, arguing the impracticality of the defense's story, and asking the jury to return a guilty verdict:

> Something must have happened that night, something very serious, something that would make her say, I was assaulted, call some person to pick her up, take her to a hospital--two hospitals, tell her boyfriend something that probably wasn't easy to tell him, and then to report this to the police.
>
> You have to look at both versions of events and decide which one makes more sense, and I submit to you when you look at the defendant's version of events, it's not reasonable. It doesn't make sense. He's added things that are so crucial late in the game that he never told law enforcement to begin with. It just doesn't make sense. So ultimately you need to ask yourself, does this make any sense to you that a woman, a young lady, with a boyfriend would one night all of a sudden have consensual sex with her boyfriend's friend, her friend, then submit herself to an invasive, uncomfortable physical examination, interviews with law enforcement, defense attorneys, testify in front of all of you just because on December 2, 2015, she felt like calling it a sexual assault. Does that make any sense? I submit it does not. And I'm going to ask you to go back there and weigh the evidence, use your common sense, think about all the flaws in the defendant's version of events and story, the facts that he omitted earlier, and I'm going to ask you ultimately to return a verdict of guilty, because the state has proven each and every element of indecent liberties beyond a reasonable doubt. Thank you for your time and attention.

Id. at 361-62. Defense counsel did not object to the prosecutor's arguments during closing.

The jury instructions directed the jury to decide the case based on the evidence, including an instruction explaining that the attorneys' statements are not evidence. The instructions reminded

jury members to "not let [their] emotions overcome [their] rational thought process." Clerk's Papers (CP) at 91. The instructions also stated that the State must carry the burden to prove guilt beyond a reasonable doubt, that a defendant is presumed innocent, and that a "reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence." CP at 92.

The jury found Caldwell guilty of indecent liberties, and he appeals.

ANALYSIS

I. PROSECUTORIAL MISCONDUCT

A. Burden for Establishing Prosecutorial Misconduct

A defendant alleging prosecutorial misconduct has the burden of proving that the conduct was both improper and prejudicial to the defendant. *State v. Emery*, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). Failure to object at trial constitutes a waiver of error unless the defendant demonstrates that the prosecutor's conduct was so flagrant and ill intentioned that a curative instruction would not have eliminated the prejudicial effect on the jury and that there is a substantial likelihood that the resulting prejudice affected the jury's verdict. *Id.* at 760-61.

We evaluate a prosecutor's conduct in the context of the entire argument, the issues in the case, the evidence addressed by the argument, and the jury instructions. *State v. Scherf*, 192 Wn.2d 350, 394, 429 P.3d 776 (2018). Even improper remarks are not grounds for reversal if they were "a pertinent reply" or response to defense counsel's acts or statements *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). Reversal is not required so long as the remarks did not go beyond what was necessary to respond to the defense and were not "so prejudicial that a curative instruction would be ineffective." *State v. Gentry*, 125 Wn.2d 570, 643-44, 888 P.2d 1105 (1995).

B. Testimony and Argument About the Sexual Assault Examination

Caldwell alleges that the prosecutor appealed to the jurors' passions and prejudices and encouraged them to convict based on emotion by discussing the details of the sexual assault exam during direct examination of the victim and Curt. Caldwell asserts that the prosecutor "deliberately and repeatedly commented on [the exam in] a way designed to incite an emotional response and bolster [the victim]." Br. of Appellant at 22. Caldwell argues these were "unfair efforts to incite the jury's passions and prejudices . . . and make [the victim] more sympathetic." *Id.* at 23. We disagree.

Prosecutors may not make deliberate appeals to the jury's passion and prejudices, nor may a prosecutor encourage the jury to decide the verdict based on sympathies instead of on properly admitted evidence. *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 711, 286 P.3d 673 (2012) (plurality opinion); *State v. Fedoruk,* 184 Wn. App. 866, 890, 339 P.3d 233 (2014). We have previously held that a prosecutor committed misconduct by asserting her opinion of the defendant's guilt immediately after a discussion of the murder victim's virtues while showing the jury inflammatory images that were not admissible evidence. *Fedoruk*, 184 Wn. App. At 890. Similarly, Division One has held that a prosecutor committed misconduct by inviting a jury to imagine what a murder victim was thinking and by telling the jury that the victim knew she was going to die. *State v. Whitaker*, 6 Wn. App. 2d 1, 19, 429 P.3d 512 (2018), *review granted*, 193 Wn.2d 1012, 443 P.3d 800 (2019).

In contrast, in *State v. Gregory*, 158 Wn.2d 759, 805-06, 809, 147 P.3d 1201 (2006), *overruled on other grounds by State v. W.R.*, 181 Wn.2d 757, 336 P.3d 1134 (2014), the prosecutor elicited extensive narrative testimony from the victim about how she felt about having to testify. The prosecutor re-read the testimony during closing and argued that the defense had to make the

victim look like a prostitute to succeed. On appeal, the defendant alleged both a chilling of his constitutional rights and an improper appeal to jury sympathy. *Id.* at 806. The Washington Supreme Court disagreed, holding that testimony about the difficulty of testifying was not an improper appeal to the jury's sympathy because the testimony was introduced to rebut the defendant's assertion that the victim was out for revenge and not credible. *Id*. at 808-10. In addition, the jury instructions "explaining that the jury should not let sympathy guide its decision would arguably have cured any sympathetic tendencies the jury may have had." *Id*. at 809.

Like *Gregory*, this case turned on relative credibility. Caldwell's theory of the case was that the victim invented the sexual assault story to keep her boyfriend from breaking up with her. The prosecutor here elicited testimony to support the State's assertion that a sexual assault exam is not a procedure that one undergoes on a whim, a direct challenge to the defense's theory that the victim had "buyer's remorse" about consensual sex and fabricated the assault to preserve her relationship. 3 VRP (Feb. 23, 2018) at 346-47. The prosecutor did not extoll the victim's virtues as in *Fedoruk* or invite the jury members to imagine themselves in her shoes as in *Whitaker*.

The State's trial strategy was built to emphasize the victim's credibility by highlighting the unpleasantness of the process that she subjected herself to, implying to the jury that she would not have undergone the sexual assault exam unless she had truly been a victim of an assault. We hold that the prosecutor did not err when he elicited this testimony.

C. Argument That Having to Testify Upset the Victim

Caldwell alleges that the prosecutor "bolstered [the victim] by suggesting that jurors should draw a negative inference from facts relating to Caldwell's exercise of his constitutional rights" to a jury trial by evoking the jury's sympathy for "what she had to go through as a normal part of a jury trial." Br. of Appellant at 17, 21. This argument fails.

Prosecutors cannot invite juries to draw negative inferences from defendants' exercise of their constitutional rights. *See, e.g.*, *State v. Martin*, 171 Wn.2d 521, 535-36, 252 P.3d 872 (2011) (prosecutor arguments "'tied only to the defendant's presence in the courtroom and not to his actual testimony'" violated the Washington Constitution whereas questioning defendant's credibility during cross-examination was permissible) (quoting *Portuondo v. Agard*, 529 U.S. 61, 77, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000) (Ginsburg, J., dissenting)); *State v. Jones*, 71 Wn. App. 798, 811-12, 863 P.2d 85 (1993) (improper, but not prejudicial, for prosecutor to invite jury to draw negative inferences from defendant exercising right to cross-examine witness by highlighting that defendant made direct eye contact with child victim and that victim cried and refused to return to court). To determine whether there has been an improper comment, we examine whether the prosecutor intended their remarks to comment on the defendant's exercise of his rights. *Scherf*, 192 Wn.2d at 391.

For example, in *Gregory*, the prosecutor used the victim's testimony to argue in closing that the victim "did not relish having to testify and be cross-examined." 158 Wn.2d at 807. This supported the State's argument that it was unlikely that the victim "would have put herself through a trial to avenge a broken condom." *Id.* Because the prosecutor "did not specifically criticize the defense's cross-examination of [the victim] or imply that Gregory should have spared her the unpleasantness of going through trial," the prosecutor's questioning and argument were not improper. *Id.* at 807. "[T]he argument merely focused on the credibility of the witness." *Scherf,* 192 Wn.2d. at 391 (describing the *Gregory* court's reasoning).

Here, the prosecutor's closing arguments retold the story of the sexual assault exam and "multiple interviews" that the victim gave, noting that she "came in here, told her story to a group of 14 strangers, talked about this experience, which is obviously upsetting to her" and emphasized

that "[t]his has been a process for her[,] . . . [s]he lost her relationship with her boyfriend, she has had to talk about this with multiple people. She has had to go through this process since 2015." 3 VRP (Feb. 23, 2018) at 327-28.

The testimony in this case more closely resembles the testimony and arguments from *Gregory* than from cases holding that prosecutorial misconduct occurred. The prosecutor's response to Caldwell's theory of the case—that the victim alleged a sexual assault to avoid a breakup with her boyfriend—legitimately required discussing why bringing sexual assault allegations to trial had not been easy for her. Like in *Gregory,* the prosecutor's closing remarks did not imply that Caldwell should have spared the victim from going to trial. The argument instead focused on the credibility of the witnesses. The remarks therefore served a purpose other than commenting on Caldwell's exercise of his right to a jury trial. We hold that the prosecutor did not invite the jury to draw negative inferences from Caldwell's exercise of his constitutional right to a jury trial.

D. "Guidebook for Sexual Assault Victims" Metaphor

Caldwell argues that the prosecutor "invoked community concerns about believing women claiming sexual misconduct" by suggesting that the defense wanted the victim to follow a "'guidebook'" on how to behave like a sexual assault victim. Br. of Appellant at 25. The State agrees that the comment evoked community concerns, but asserts that the comment was not prejudicial. We disagree with both parties and conclude that the prosecutor's comment was not improper.

The remark was a pertinent reply to defense counsel's closing argument. Prosecutors may not argue for convictions "to protect the community, deter future law-breaking, or [for] other reasons unrelated to the charged crime." *State v. Ramos*, 164 Wn. App. 327, 338, 263 P.3d 1268

(2011). However, remarks that are "a pertinent reply" are not grounds for reversal, so long as they are not so prejudicial that a curative instruction would not correct the resulting prejudice. *Russell*, 125 Wn.2d at 86.

Division One has held that a prosecutor committed misconduct by appealing to the jury to convict so that "'people can go out there and buy some groceries . . . or go to a movie . . . and not have to wade past the coke dealers in the parking lot. That's why . . . you're here . . . to stop [the defendant] from continuing that line of activities.'" *Ramos*, 164 Wn. App. at 338 (quoting closing argument). Division Three has held that implying that an acquittal would "'declar[e] open season on children'" was misconduct. *State v. Powell*, 62 Wn. App. 914, 918-19, 816 P.2d 86 (1991). *See also State v. Belgarde*, 110 Wn.2d 504, 508, 512, 755 P.2d 174 (1988) (misconduct to tell jury defendant was "'strong in'" group that prosecutor described as "'a deadly group of madmen,'" "'butchers that kill indiscriminately'"); *State v. Reed*, 102 Wn.2d 140, 143, 145, 684 P.2d 699 (1984) (misconduct for prosecutor to call witness and defendant liars in closing argument, to state that it "'must be very difficult to represent somebody like [the defendant] when you don't have'" a case, and to ask the jury, "'[a]re you going to let a bunch of city lawyers come down here and make your decision? A bunch of city doctors who drive down here in their Mercedes Benz?'" (emphasis omitted)).

Here, the defense introduced testimony from Caldwell's friend that the victim did not act like women he knew who had experienced sexual assault. During closing arguments, defense counsel said that "[i]f you are sexually assaulted, you want to call the police, especially if you are going to go and get a sexual assault kit done. . . . It just makes sense. Any other alternative doesn't make sense." 3 VRP (Feb.23, 2018) at 347. In rebuttal, the prosecutor wondered if there was a "How Do I Behave After I've Been Sexual Assaulted" guidebook that the victim was expected to

follow, asking, "Is that how it works? That if you don't act a certain way that someone else says you should, then you are not a victim of sexual assault? Is that how it works around here? No." *Id*. at 350-51.

The prosecutor made these remarks in direct response to testimony and to defense counsel's closing arguments about whether the victim's behavior made sense for a sexual assault victim. We hold that the prosecutor's remarks were a pertinent reply to the defense's arguments.

In addition, the argument was not so prejudicial that a curative jury instruction would have been ineffective. For example, the defendant could have requested an instruction directing the jury to focus only on the particular facts of this case. Or he could have asked for an instruction reminding the jury that its job was to focus on the evidence, and it was not permitted to consider sending a message about community values. An instruction could have cured any prejudicial effect. *See Russell*, 125 Wn.2d at 86.

The prosecutor's remarks about a guidebook were a pertinent reply to defense counsel's arguments and therefore they do not warrant reversal. Moreover, a curative instruction could have been effective, but defense counsel failed to object.

Caldwell also argues that the prosecutor denigrated his counsel and impugned him by using the guidebook metaphor to subvert challenges to the victim credibility. It is improper for the prosecutor to disparage defense counsel's role or integrity. *State v. Thorgerson*, 172 Wn.2d 438, 451, 258 P.3d 43 (2011); *see also State v. Lindsay*, 180 Wn.2d 423, 434, 326 P.3d 125 (2014) (prosecutor impugned defense counsel by calling defense's closing arguments "'a crock'"); *State v. Negrete*, 72 Wn. App. 62, 66-67, 863 P.2d 137 (1993) (prosecutor's comment that defense counsel was "'being paid to twist the words of the witnesses'" was improper, but not irreparably prejudicial).

Here, the prosecution never launched a direct or indirect attack on defense counsel or Caldwell beyond assertions that there were holes in Caldwell's story that did not make sense. The guidebook metaphor was not accompanied by language impugning the defense, and it was made in direct response to an argument that Caldwell raised. We hold that the prosecutor's comment was not improper as an attack on defense counsel.

E. Description of the State's Burden in Closing

Caldwell argues that the prosecutor misstated the State's burden of proof during closing by emphasizing the two narratives presented in the case and stating that the jurors had "'to look at both versions of events and decide which one makes more sense.'" Br. of Appellant at 30-33 (emphasis omitted) (quoting 3 VRP (Feb. 23, 2018) at 360). Considering the entire argument in context, the prosecutor did not misstate the burden of proof.

Arguments that "shift or misstate the State's burden to prove the defendant's guilt beyond a reasonable doubt constitute misconduct." *Lindsay*, 180 Wn.2d at 434. A jury does not exist to "'solve'" a case or "'declare what happened on the day in question,'" their purpose is to determine if the State has carried its burden of proving the allegations against the defendant beyond a reasonable doubt. *State v. Anderson*, 153 Wn. App. 417, 429, 220 P.3d 1273 (2009).

During closing, the prosecutor acknowledged that "we know what this all comes down to ultimately. It's going to be what [the victim] told you and what [Caldwell] said."

> Mr. Caldwell's attorney is going to get to talk to you, tell you their version of events, give you a closing. And then . . . I'm going to come back and get to talk to you one more time. And we are going to go through sort of what evidence do we know is undisputed, what's [the victim's] story, and what's Mr. Caldwell's story, and where are the holes in Mr. Caldwell's story and why does it not make sense. So that's what we're going to do, and I submit to you at the end of this whole process *you will be convinced beyond a reasonable doubt that the defendant committed the crime of indecent liberties.*

3 VRP (Feb. 23, 2018) at 332-33 (emphasis added). Defense counsel also explained that "this case boils down to credibility, because you are going to have to weigh what you believe." *Id.* at 336. The prosecutor's rebuttal reminded the jury of the two versions of events, arguing that Caldwell's story did not make sense. The prosecutor finished by asking the jury to "weigh the evidence, use [their] common sense, think about all the flaws in the defendant's version of events and story, the facts that he omitted earlier, and . . . to return a verdict of guilty, *because the State has proven each and every element of indecent liberties beyond a reasonable doubt*." *Id.* at 362 (emphasis added).

Considering the whole argument in context, we hold that the prosecutor did not misstate the State's burden of proof. Instead, he repeatedly told the jury that the State must prove Caldwell's guilt beyond a reasonable doubt.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee criminal defendants effective assistance of counsel. *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). "[W]e review the entire record in determining whether a defendant received effective representation." *State v. Carson*, 184 Wn.2d 207, 215-16, 357 P.3d 1064 (2015).

The defendant must demonstrate that his counsel's performance at trial was deficient, and that deficiency had a prejudicial effect. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). There is a strong presumption that counsel exercised reasonable professional judgment to render adequate assistance. *Carson*, 184 Wn.2d at 216. To demonstrate deficient performance, the defendant must show "'in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct.'" *Emery*, 174 Wn.2d at 755 (quoting *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995)). Prejudice ensues if there is a

"'reasonable probability'" that the result of the proceeding would have been different had defense counsel not performed deficiently. *State v. Estes*, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017) (quoting *Strickland*, 446 U.S. at 694). Because the defendant must show both prongs, a failure to demonstrate either prong will end the inquiry. *State v. Classen*, 4 Wn. App. 2d 520, 535, 422 P.3d 489 (2018).

Caldwell argues that his counsel's failure to object to the prosecutor's alleged misconduct throughout the trial constitutes ineffective assistance of counsel. But because no prosecutorial misconduct occurred, defense counsel's failure to object cannot constitute deficient performance. *State v. Beasley*, 126 Wn. App. 670, 687-89, 109 P.3d 849 (2005). We hold that Caldwell's ineffective assistance claim fails.

III. CUMULATIVE ERROR

Caldwell finally argues that cumulative error warrants reversal. The cumulative error doctrine applies to trials with multiple errors that combine to deprive the defendant of a fair trial, even though each single error was harmless. *In re Pers. Restraint of Cross*, 180 Wn.2d 664, 690, 327 P.3d 660 (2014), *abrogated on other grounds by State v. Gregory*, 192 Wn.2d 1, 17, 427 P.3d 621 (2018). Because we find no error, this argument also fails.

CONCLUSION

We hold that the prosecutor did not commit misconduct in his examination of witnesses or in closing argument, and defense counsel was not deficient. We affirm Caldwell's conviction.

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.

Glasgow, J.

We concur:

Maxa, C.J.

Melnick, J.

CERTIFICATE OF SERVICE BY MAIL/EFILING

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Petition for Review to opposing counsel via this Court's upload service and to Mr. Caldwell at the following address: 1921 Minor Rd., Apt. 2, Kelso, WA. 98626.

DATED this 11th day of May, 2020.

/s/ Kathryn Russell Selk
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