IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	DIVISION ONE
	)	
Respondent,	)	No. 63073-3-I
	)	
v.	)	
	)	UNPUBLISHED OPINION
LAURA ROBERTA CUTLER,	)	
	)	
Appellant.	)	FILED: April 26, 2010
	)	

Dwyer, C.J. — Laura Cutler appeals from the judgment entered on a jury's verdict finding her guilty of assault in the second degree, contending that prosecutorial misconduct during closing argument denied her a fair trial. Because the prosecutor's arguments were not so flagrant and ill-intentioned that any resulting prejudice could not have been cured with an appropriate instruction, we affirm.

I

Cutler was charged with assault in the first degree, a violation of RCW 9A.36.011(1)(c), and assault in the second degree, a violation of RCW 9A.36.021(1)(a), after biting off a large portion of Tom Brummel's lower lip.

Cutler and Brummel initially met while in treatment for substance abuse. More than a year later, Brummel and Cutler rented rooms in the same house.

Testimony elicited at trial revealed that, after a single sexual encounter shortly after their treatment ended, Cutler became interested in Brummel merely as a friend and, hence, had consistently rejected his attempts to initiate an intimate relationship.

On November 5, 2007, Cutler relapsed, drinking significant amounts of brandy. Witnesses testified that she was intoxicated to the extent that she began crying, screaming, and throwing things. When Brummel came home that night he found Cutler in the kitchen wearing only a sweatshirt and masturbating. Eventually, Brummel and Cutler went into Cutler's room, where Brummel could "console" her. In Cutler's room, Brummel rubbed Cutler's back while they lay in her bed hugging and kissing. Then, without warning, Cutler leaned in to Brummel and bit off a significant portion of his lower lip.

At trial, Brummel, two of Cutler's and Brummel's former roommates, and the responding and investigating officers testified. Cutler did not testify. Cutler asserted two defenses at trial. First, she claimed that her voluntary intoxication prevented her from forming the requisite intent to assault Brummel. Second, she claimed that she had acted in self-defense against Brummel's allegedly unwanted sexual advances.

During the State's closing argument, the prosecutor remarked about the likely tactic that defense counsel would take in her closing argument:

> Furthermore, what the defense gets up here and says is not evidence. The defense is going to get up and muddy the waters and try to distract you from what the real issue at hand is. They're

> going to put Mr. Brummel on trial. Mr. Brummel is the victim here, and that is not what you've been summoned here to do. The defendant is the person who is on trial in this case. The defense is going to attack Mr. Brummel's character, is going to call him names, to make it so that you don't like him or won't want to like him. And even in their attack of Mr. Brummel, the best that they can do is paint him to be some monster because he actually was interested in the defendant, because he tried to do nice things for her, tried to take her out to eat once in a while, he told her she was pretty, and he was trying to be a nice guy toward the defendant.
>
> I challenge the defense to actually argue the evidence in this case without putting Mr. Brummel on trial, because that is not what you were summoned here to do.

Defense counsel then argued Cutler's theory that Brummel had acted inappropriately and that Cutler had reasonably defended herself against his unwanted sexual advances. Defense counsel began her closing statement by discussing a phrase that the prosecutor had used in her opening statement: "smoke and mirrors."

> They told you to watch out for the smoke and mirrors that the defense was going to put before your eyes. Smoke and mirrors? We know what that means, that famous Pulitzer prize winning author Jimmy Breslin, How the Good Guys Finally Won, he used smoking mirrors and coined that phrase in 1975. It means don't look over here, look over here.
>
> We do not need smoke and mirrors in this case for any reason, whatsoever. Tom Brummel, he came into this courtroom and he told you exactly what he was thinking. He told you exactly where to look, at himself, at his needs, his desire, how he was scorned for trying to score.

In the State's rebuttal argument, the prosecutor returned to her theme of putting the victim on trial:

> Smoke and mirrors, that's what that was. Look here, don't look there, hate the victim, pity the defendant. Look at the victim and how unlikable he is, not at the defendant. Mr. Brummel is not on

> trial, the defendant is. The defendant's actions are the ones that are in question, not Mr. Brummel's.
> . . . .
> And any argument that I say, any argument that the defendant makes that is not supported by the evidence you must disregard. That's what I meant by the smoke and mirrors, because they're trying to throw everything at you, muddy the waters, cloud everything up, so that you'll just throw your hands up and say there's no way we can make a decision on this, we have to find her not guilty.
>
> But [give] yourselves more credit than that. [Give] yourselves more credit that you can see past smoke and mirrors, that you can view all of the defendant's actions, all of the things that she did that point to her guilt in this case, to return with the proper verdict, guilty of assault in the first degree and guilty of assault in the second degree. Thank you.

Cutler did not object to any of the prosecutor's remarks. The jury acquitted her of assault in the first degree but found her guilty of assault in the second degree.

Cutler appeals.

II

Cutler contends that the prosecutor's statements that the defense was putting the victim on trial and was going to "muddy the waters" and use "smoke and mirrors" to disguise the real issue constituted flagrant, ill-intentioned, and prejudicial arguments that require reversal. We disagree.

Prosecutorial misconduct is grounds for reversal only when the conduct "was both improper and prejudicial in the context of the entire record and circumstances at trial." State v. Hughes, 118 Wn. App. 713, 727, 77 P.3d 681 (2003). Prejudice is established only if there is a substantial likelihood that the

misconduct affected the jury's verdict. State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995). The defendant bears the burden of showing both that the conduct was improper and that it caused prejudice. Hughes, 118 Wn. App. at 727.

When the defendant fails to object to a comment made by the prosecutor in closing argument, the alleged misconduct will not be reviewed unless the comment is so flagrant and ill-intentioned as to cause an enduring and resulting prejudice that no instruction could have cured. State v. Stenson, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997). In analyzing prejudice, we look at the comments in the context of the total argument, the issues, the evidence, and the instructions. State v. Warren, 165 Wn.2d 17, 28, 195 P.3d 940 (2008), cert. denied, 129 S. Ct. 2007 (2009).

Appeals to the passion, prejudice, or sympathy of jurors are improper. Viereck v. United States, 318 U.S. 236, 247–48, 63 S. Ct. 561, 87 L. Ed. 734 (1943). A prosecutor has a duty to ensure that a verdict is free from prejudice and based on reason, not passion. State v. Reed, 102 Wn.2d 140, 143, 145–48, 684 P.2d 699 (1984) (improper and prejudicial for prosecutor to urge jury not to be swayed by defendant's "city lawyers"); State v. Echevarria, 71 Wn. App. 595, 598–99, 860 P.2d 420 (1993) (improper and prejudicial for prosecutor to remark "about the war on drugs and other wars this country has waged").

Even were we inclined to find that the prosecutor's statements about

putting the victim on trial and her challenge to defense counsel to argue the evidence without putting Brummel on trial were improper, these remarks were not so flagrant and ill-intentioned that any resulting prejudice could not have been neutralized by an admonition to the jury. See Stenson, 132 Wn.2d at 719. These statements were not nearly as inflammatory as the prosecutor's statements in Reed and Echevarria. The prosecutor did not argue that acquitting Cutler would be tantamount to convicting Brummel of sexual assault or would be re-victimizing the victim. Under these circumstances, the prosecutor did not engage in any misconduct that could not have been cured by an appropriate instruction.

It is true that a prosecutor may not disparage or misstate the role of defense counsel. Warren, 165 Wn.2d at 29–30 (improper but not prejudicial for prosecutor to argue that all defense attorneys mischaracterize evidence and twist the facts); State v. Gonzales, 111 Wn. App. 276, 283-84, 45 P.3d 205 (2002) (improper and prejudicial for prosecutor to remark that, unlike defense lawyers, prosecutors take an oath "to see that justice is served"); State v. Negrete, 72 Wn. App. 62, 66-67, 863 P.2d 137 (1993) (improper but not prejudicial for prosecutor to argue that defense counsel is being paid to twist the words of a witness). Here, while the prosecutor argued that defense counsel was going to "muddy the waters" and was using "smoke and mirrors," these phrases did not impugn defense counsel's integrity or the integrity of all defense

attorneys, as did the prosecutors' comments in the cases of Warren, Gonzales, and Negrete. Disparaging an opposing attorney is significantly different from disparaging the opposing attorney's argument. Trial counsel is accorded significant latitude in closing arguments. Warren, 165 Wn.2d at 30. The efficacy of rhetorical flourishes is debatable. However, an argument that disparages the other party's argument is not a prohibited attack on counsel.

Moreover, the prosecutor only used the phrase "smoke and mirrors" in her rebuttal argument, in response to defense counsel's closing arguments. "[E]ven improper remarks by the prosecutor are not grounds for reversal 'if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective.'" State v. Weber, 159 Wn.2d 252, 276-77, 149 P.3d 646 (2006) (quoting State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994)).

In the context of the issues of the case, defense counsel's closing argument, and the prosecutor's entire argument, Cutler has not shown that the prosecutor's comments were so flagrant and ill-intentioned that a prompt instruction to the jury could not have cured any prejudice the comments may have caused. Accordingly, appellate relief is not warranted.

Affirmed.

Dwyer, C. J.

We concur:

Edlington, J.

Grosse, J.