

655 36-1

65536-1

NO. 65536-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

ANJUM KHAN,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE HELEN HALPERT

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**BRIEF OF RESPONDENT**

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A. ISSUES PRESENTED

1. Whether the testimony of a nurse relating to standard practice and standard advice to patients when obtaining consent for a sexual assault examination was properly admitted and did not convey an opinion of the nurse as to Khan's guilt.

2. Whether Khan waived any objection to the nurse's testimony relating to consent practice and procedures because he failed to object in the trial court.

3. Whether police testimony that a search warrant is submitted to a judge, who then confers permission to search, was properly elicited to explain police procedure and did not constitute improper vouching.

4. Whether Khan waived any objection to the mention of search warrant approval because he failed to object in the trial court.

5. Whether a reference to booking Khan conveyed no inference that Khan was jailed, based on dictionary definitions of the word.

6. Whether any inference that Khan was jailed when he was booked did not deprive Khan of a fair trial because the jury knew that Khan was not in custody pending trial or during trial.

7. Whether Khan waived any objection to the mention of his booking because he failed to object in the trial court.

8. Whether the claim of prosecutorial misconduct is without merit because the testimony elicited that is the subject of this claim all was properly presented.

9. Whether the trial court properly exercised its discretion in denying Khan's motion for new trial because Khan did not establish ineffective assistance of counsel, where the trial court found that it would not have admitted the additional testimony that Khan alleged should have been presented.

10. Whether the absence of any error at trial renders the cumulative error doctrine irrelevant in this case.

## B. STATEMENT OF THE CASE

### 1. PROCEDURAL FACTS

The defendant, Anjum Khan, was charged with rape in the second degree and rape in the third degree, both relating to the same incident and the same victim, on December 14, 2008. CP 5-6. Khan was tried in King County Superior Court, the Honorable

Helen Halpert presiding. 1RP 1.<sup>1</sup> A jury found Khan guilty on both counts. 7RP 3.

Khan was represented at trial by attorney David Gehrke. 1RP 1. After the verdict Khan retained new counsel and filed a motion for arrest of judgment and for a new trial, alleging the evidence was insufficient to support the conviction, alleging every basis for a new trial listed in CrR 7.5(a) without specifying the applicability of any to this case, alleging every basis for relief from final judgment in CrR 7.8(b)(2) without specifying the applicability of any to this case, and alleging violation of unspecified constitutional rights. CP 60-62. Three weeks later Khan specified three bases for his motion for new trial. CP 67-71. The trial court denied the motion. CP 72-73. The defendant filed a motion to reconsider and the court denied that motion. CP 74-94, 156-59.

At sentencing, Khan requested an exceptional sentence below the standard range on the basis that the victim of the rape, KD<sup>2</sup>, had initiated the contact with Khan, even if she did not initiate

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<sup>1</sup> The verbatim report of proceedings will be referred to in this brief as it is in the appellant's brief, as follows: 1RP: March 15, 2010; 2RP: March 22, 2010; 3RP: March 23, 2010; 4RP: March 24, 2010; 5RP: March 25, 2010; 6RP: March 26, 2010; 7RP: May 10, 2010.

<sup>2</sup> The State will refer to the victim by her initials in the interest of preserving her privacy.

any sexual contact. 7RP 7-9. The trial court rejected that request for a downward departure and sentenced Khan to an indeterminate sentence for the rape in the second degree, with a minimum term of 78 months, the low end of the standard range. CP 98-101; 7RP 20.

## 2. SUBSTANTIVE FACTS

KD met Khan on the social networking website MySpace, through mutual friends. 3RP 53-55. Khan identified himself as "Angel." 3RP 53, 55. KD, who was about 21 years old at the time, exchanged telephone numbers with Khan. 3RP 49, 56.

On December 14, 2008, KD and Khan exchanged text messages and agreed to meet at Khan's apartment later that day for pizza and a movie. 3RP 60-62. The two had never met in person before this. 3RP 62. After KD arrived at the apartment the two talked and ordered pizza for dinner. 3RP 69-75. After dinner, Khan asked if KD wanted to see a movie and she agreed. 3RP 75-77. The two went into Khan's bedroom and both sat on the bed, against the headboard, to watch the movie. 3RP 77-78.

Khan kissed KD, and she kissed him back; although she did not really want to kiss him, she did not want to hurt his feelings. 3RP 79-81. Then Khan tried to put his hand inside the front of KD's

shirt and she grabbed his hand and told him "no." 3RP 82-83.

Khan resisted removing his hand, saying, "Why not? It's just your boobs?" 3RP 83. KD was annoyed and beginning to feel nervous. 3RP 84.

Khan tried to put his hand down the front of KD's pants and she again grabbed his hand and firmly told him "no." 3RP 85. Khan asked "Why not?" and said no one would find out. 3RP 85. When KD said, "Let's just watch the movie," Khan said he would just go to sleep then. 3RP 86. KD rolled onto her stomach and as she tried to come up with a way to leave politely, Khan rubbed her bottom, then put his hand inside the back of her pants. 3RP 86, 94-96.

Khan then quickly got on top of KD, pressing her flat on her stomach. 3RP 86-87, 92-93, 96. Khan was a large, muscular man, 35 years old. 3RP 67-68; 4RP 165. Khan grabbed both of KD's wrists in one hand and held them. 3RP 93, 96. Khan pulled down KD's loose-fitting pants and underpants with his free hand. 3RP 65, 96. KD told Khan to get off but Khan responded, "It'll just take a couple minutes." 3RP 94.

KD struggled to get away, telling Khan "no", crying and yelling for him to stop. 3RP 96-97. KD told Khan she was "a good girl" and "[hadn't] slept with a lot of people."<sup>3</sup> 3RP 97-98.

KD could not escape and Khan raped her, penetrating KD's vagina with his penis. 3RP 99-100. As KD struggled and repeatedly told Khan to stop, Khan said that he was almost done. 3RP 99-100. KD said that she was not on birth control and pleaded that he stop. 3RP 100. Khan ejaculated on KD and then rolled off her. 3RP 100-01.

KD pulled up her pants and underwear and left immediately. 3RP 101. She was hysterical and, crying, called a coworker when she got outside, telling her friend that she had been raped. 2RP 33-34, 44; 3RP 101-02, 115. KD met several friends at the Tacoma mall location of the store where they all worked, so the others could go to the hospital with KD. 2RP 48, 57, 102, 118, 124; 3RP 117-19.

While still at the store, KD received a call from Khan. 3RP 119. Dustin Neudeck, a military police officer and the husband of one of KD's coworkers, confronted Khan about the rape. 2RP

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<sup>3</sup> When KD testified to this statement, the trial court instructed the jury that the comment was not admitted for the truth of the matter asserted. 3RP 98.

97, 120-21; 3RP 119-20; 5RP 4-5, 9-13. During that conversation, Khan first denied that he had had sex with KD. 2RP 122; 3RP 120, 122. Khan said they had only kissed. 5RP 13-14. When Neudeck said that DNA would be collected from KD at the hospital, Khan changed his story, claiming that the two had consensual sex. 2RP 123; 3RP 121-22; 5RP 14.

KD did go to the hospital and underwent a sexual assault examination by Nicole Aubery, a Sexual Assault Nurse Examiner. 2RP 141, 150, 156; 3RP 122. Aubery took swabs from KD's body. 2RP 189-91. Forensic analysis of the swabs revealed sperm on two of the swabs and male DNA. 4RP 28-29, 33. The male DNA was identified as Khan's. 4RP 37-39.

Khan testified at trial that after he and KD kissed for a long time, KD rubbed his chest and his penis. 5RP 38-39, 40-41. He claimed that KD had masturbated him behind her back and he ejaculated. 5RP 42, 82-83, 106. According to Khan, KD became angry and left because he refused to go get a towel to wipe his ejaculate from her bottom and he called her a "freaking whore." 5RP 43-44.

C. ARGUMENT

1. THE SEXUAL ASSAULT NURSE EXAMINER'S TESTIMONY ABOUT POLICIES RELATING TO SEXUAL ASSAULT EXAMINATIONS DID NOT CONSTITUTE AN IMPERMISSIBLE OPINION AS TO GUILT.

Khan claims that a Sexual Assault Nurse Examiner's general testimony about two aspects of sexual assault examinations was an impermissible opinion as to Khan's guilt. That claim should be rejected. Khan did not object to the testimony in the trial court and has waived any error. The testimony did not relate specifically to KD or to Khan; it was a description of the policies applicable to every person who has a sexual assault examination. Because the testimony applied to all examinations, it was not an opinion as to Khan's guilt. In the context of all of the evidence and the jury instructions, if it was improper opinion evidence, it was not reversible error.

a. Relevant Facts

Within hours after this rape, KD went to a hospital for a sexual assault examination. 3RP 115, 122-23. She had a medical examination in the Emergency Room and then she had a sexual assault examination by a Sexual Assault Nurse Examiner, Nicole Albery. 2RP 141, 150, 156; 3RP 23, 122. Albery testified to her

training in the specialty of Sexual Assault Nurse Examiner. 2RP 138. She stated that she had performed 113 sexual assault examinations. 2RP 139. Then Albery testified to the general nature of a sexual assault examination. 2RP 140.

The testimony that Khan argues is constitutional error occurred during this discussion of the nature of a sexual assault examination. The prosecutor asked Albery to explain “the notion of obtaining consent to perform an examination.” 2RP 147. Albery went into great detail concerning the information given to each patient before the examination. 2RP 147-48. The last sentence of this description was: “Also, from there we also talk to her about crime victim’s compensation, and she tells me what parts we can do and what parts we can’t do.” 2RP 148.

The prosecutor then asked Albery to explain “crime victim’s compensation.” 2RP 148. The exchange continued:

A: The State of Washington has a fund set aside called crime victims’ compensation, and so anyone in the state of Washington who is a victim of a crime is entitled to apply for these benefits. And what that means is that the emergency room visit is automatically covered, the screening exam – the medical screening exam here, as well as my portion of the exam, the actual evidence collection.

Q: So in other words, you are not paying out-of-pocket medical expenses –

A: No.

Q: --because you happen to be a victim of a crime?

A: That is correct.

2RP 148.

Immediately afterward, the prosecutor followed up on Albery's statement that the patient controls what portions of the examination will be performed. The testimony follows:

Q. The other thing you mentioned ...you said at any point in the examination, you inform the patient, "You can say 'Stop,' or you can say, 'No, I don't want to do this part of the exam.'" In other words, you can make up your mind or change your mind at any point.

A. Absolutely.

Q. Why is that important? And also related to that, if a patient says, "Hey, you know, I don't mind you conducting an examination of my body, but I don't want you to take any photographs"? Would you respect that?

A. Oh, absolutely. Absolutely. This process of doing this examination is pretty invasive. Especially after being in a sexual assault, the patient is traumatized at that point already. And then to have a stranger, me, look at her body, every single inch of it, take pictures of it, document it, for her to tell me what happened, it's traumatic.

So the last thing that I want to do is retraumatize her all over again. So if there is something that she's not comfortable with, then we stop automatically.

2RP 149. The prosecutor then asked whether a support person would be allowed to be present during an examination. 2RP 150.

After a recess was taken, the prosecutor continued, "So Ms. Albery, I want to start with your contact with [KD]." 2RP 150. After an explanation of the record made of an examination, the prosecutor repeated, "I want to start with your contact with [KD]" and asked when the examination began. 2RP 152-53. Albery's testimony continued with a review of the record of the examination of KD, the details of KD's disclosures and injuries, and the collection of evidence from KD. 2RP 156-91, 3RP 4-18.

There was no objection at trial to any of the testimony challenged in this appeal. This issue was not raised in the postverdict motions for a new trial. CP 60-62, 67-71, 74-77.

b. Khan Waived His Right To Object To Testimony About The Practices Related To Obtaining Consent For A Sexual Assault Examination, Which Was Not An Opinion As To Khan's Guilt.

Khan did not object to the testimony that he now claims was admitted in violation of his right to a fair trial. RAP 2.5(a) bars consideration of this issue. A claim of error may be raised for the first time on appeal only if it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

Not every constitutional error falls within this exception; the defendant must show that the error occurred and caused actual prejudice to his rights. Id. It is the showing of actual prejudice that makes the error manifest, allowing appellate review. State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007).

Generally, testimony will not be deemed an opinion as to the defendant's guilt unless it relates directly to the defendant. State v. Sanders, 66 Wn. App. 380, 387, 832 P.2d 1326 (1992). However, testimony regarding the veracity of a victim may be improper depending on the circumstances of the case. Kirkman, 159 Wn.2d at 928. The court will consider the type of witness, the challenged testimony, the charges, the type of defense, and the other evidence. Id. (citing State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)). The jury is presumed to follow the court's instruction that it is the sole judge of the victim's credibility. Kirkman, 159 Wn.2d at 928. The Supreme Court has noted that "the assertion that the province of the jury has been invaded may often be simple rhetoric." Id.

An analysis of the five factors identified by the Supreme Court in Demery and Kirkman establishes that the testimony at issue here was not an improper opinion as to the victim's veracity.

The witness was a Sexual Assault Nurse Examiner, who described the general policies applied during every sexual assault examination. She specified that her role did not include investigation of the incident. 3RP 27-28, 30-31. The challenged testimony occurred before Albery began to discuss her examination of KD. The challenged testimony did not refer to KD or Khan.

This was a sexual assault case and the examination was referred to as a "sexual assault examination" many times. E.g., 2RP 138-40, 147, 188. Albery testified that a sexual assault examination is performed when a person comes to the emergency room reporting a sexual assault. 2RP 140-41. The prosecutor referred to the patients examined as women who "[make] a report of a sexual assault or a rape." 2RP 187.

Finally, the defense in this case was not consent, the defense was that there had not been sexual intercourse because Khan's penis did not penetrate KD's vagina. 1RP 6; 5RP 42; 6RP 24-25. Even if the implication from Albery's general testimony was that she believed the people she examined were traumatized, that is not inconsistent with Khan's defense that no vaginal penetration occurred.

Because the testimony at issue related to every sexual assault examination, any inference as to credibility would have to be that every person upon whom a sexual assault examination is performed actually was sexually assaulted. Such a belief might establish a bias of the witness, but would not be persuasive evidence that this particular woman should be believed.

The record does not support Khan's claim that the prosecutor's sole purpose in asking these questions was to convey Albery's opinion that Khan was guilty. Even if the questions and answers were irrelevant, that would not convert the answers into an opinion as to guilt. But in any event, development of each subject was relevant in this case.

Albery brought up the subject of crime victim's compensation when she was asked to explain "the notion of obtaining consent" to a sexual assault examination. 2RP 147-48. The term "crime victim's compensation" suggested that victims of crime obtain a monetary benefit, so the prosecutor's clarification that the benefit was limited to payment for the hospital examination was necessary to avoid an inference that KD had a monetary incentive for reporting a crime.

It also was important to establish that a sexual assault examination is invasive and that a person being examined has the ability to stop the examination at any point. The prosecutor relied on that evidence in closing argument, in arguing that the examination was invasive, KD described it as terrible, and KD "could back out at any time" but did not. 6RP 15.

Even if the testimony was an improper opinion as to guilt, Khan has not established that it caused actual prejudice. Admission of testimony as to a defendant's guilt, without objection, is not necessarily manifest constitutional error. Kirkman, 159 Wn.2d at 936. "[W]hen a witness does not expressly state his or her belief of the victim's account, the testimony does not constitute manifest constitutional error." State v. Warren, 134 Wn. App. 44, 55, 138 P.3d 1081 (2006), aff'd on other grounds, 165 Wn.2d 17 (2008).

The jury was instructed that it was the sole trier of fact and the sole judge of the credibility of the witnesses. CP 34-35. In considering the possible prejudicial effect of opinion testimony, the jury is presumed to follow instructions when there is no evidence that they were confused or unfairly influenced. State v.

Montgomery, 163 Wn.2d 577, 595-96, 183 P.3d 267 (2008). The defendant has cited no such evidence in this case.

This preliminary, general testimony about payment for sexual assault examinations and the patient's ability to limit consent did not convey any opinion about KD's credibility or Khan's guilt. Because the defendant has not established manifest constitutional error, he has waived this claim.

c. Any Error Was Harmless.

A constitutional error is harmless if the reviewing court is convinced beyond a reasonable doubt that the same result would have been reached in the absence of the error. State v. Deal, 128 Wn.2d 693, 703, 911 P.2d 996 (1996). Any constitutional error in the testimony at issue was harmless beyond a reasonable doubt.

If this testimony conveyed an opinion as to KD's veracity, it did so only indirectly -- the witness was not referring to KD directly, but only as a member of the group of people who obtain sexual assault examinations. The jury was specifically instructed that it was the sole trier of fact and the sole judge of the credibility of the witnesses. CP 34-35. Neither party referred to the challenged testimony again except when, in closing argument, the prosecutor

pointed out that the examination was invasive and KD could have stopped it at any point. 6RP 15. There was no suggestion by either party that the nurse examiner had an opinion about KD's credibility. Later, when she provided the details of KD's description of the assault, the nurse testified that she could not even remember KD's demeanor while she was describing the rape. 2RP 159.

The defense in this case was that although Khan was "a jerk" and "a cad," Khan was not guilty of rape because there was insufficient evidence of penetration of KD's vagina. 6RP 24-26, 49-50. Defense counsel at trial conceded that KD made a mistake going to Khan's apartment, and that she did not deserve whatever happened. 6RP 38. The conclusion that KD had been assaulted and traumatized is not inconsistent with this defense.

Given the clear instructions to the jury as to their role in determining credibility, the complete lack of any reference to KD or Khan during the challenged testimony, and the nature of the defense, there is no doubt that the same result would have been reached in the absence of this alleged error.

2. LIEUTENANT KLEINNECHT DID NOT TESTIFY THAT A PROSECUTOR OR A JUDGE HAD DETERMINED GUILT.

Khan claims that the prosecutor engaged in improper vouching in his testimony defining "search warrant." That claim should be rejected. Khan did not object to the testimony in the trial court and has waived any error. His claim that the Lieutenant stated that a prosecutor and a judge had to determine that a crime has been committed in order to obtain a search warrant is not supported by the record. In the context of all of the evidence and the jury instructions, even if the testimony was improper vouching, it was not reversible error.

a. Relevant Facts

Bellevue Police Lieutenant Kleinnecht testified at trial about his participation in the execution of a search warrant at the apartment where this incident occurred. 4RP 74-75. After Kleinnecht made reference to a search warrant and the reading of the warrants at a police briefing, the prosecutor asked, "just as a general matter, what is a search warrant, and what authority does a search warrant give you, and from whom do you get the authority?" 4RP 75. The exchange continued as follows:

A. Sure. A search warrant is a document that is approved by - - usually by a King County prosecutor and then submitted to a judge in person, basically outlining the elements of a crime that we believe has occurred, the location that we believe either evidence will be found, which is usually the location where the crime occurred, the type of evidence that we believe will be found there, and it requests permission to go to that location to collect evidence.

Q. And this permission slip, if you will, from a judge to go to a particular location, you need that obviously before you go to the location to search it?

A. Yes. It gives us the authority to break and enter if nobody shall be home so we can go in there and do what we need to do to collect evidence.

4RP 75-76.

There was no objection at trial to the testimony challenged in this appeal. Khan did raise this issue in a supplemental filing related to the motion for new trial filed in the trial court. CP 70.

b. The Description Of The Nature Of A Search Warrant Did Not Convey A Judge's Or A Prosecutor's Opinion As To Guilt.

The record does not support Khan's claim that Kleinnecht testified "that before the search warrant was issued, both a prosecutor and a judge had to determine that a crime had been committed and that further evidence of the crime might be found at the residence." App. Br. at 22. Kleinnecht testified that a search warrant is a document outlining a crime that the police believe has

occurred and the location where the police believe evidence will be found, and requests permission from a judge to go to that location to collect evidence. 4RP 75-76. He did not testify to any legal standard or to any specific finding required before a judge will issue a search warrant.

This testimony includes no direct or implied assertion that a prosecutor believed that Khan raped KD. The testimony was a general definition of a search warrant, and the only reference to a prosecutor was that the document was "approved by -- usually by a King County Prosecutor." 4RP 75 (emphasis added). This statement does not indicate what a prosecutor's approval would signify but, more importantly, Kleinnecht did not testify that a prosecutor approved the warrant obtained in this case.

The testimony included no statement as to the finding that is made by a judge before granting permission to execute a particular search. Kleinnecht testified that the document "requests permission to go to that location to collect evidence." 4RP 75-76. He also testified that the warrant "gives us the authority" to enter the location and collect evidence. 4RP 76.

The Lieutenant did not testify that the judge has to determine that a crime has been committed before a search warrant is issued,

as Khan asserts. App. Br. at 22, 24. The Lieutenant did not even testify that the judge has to find that there is probable cause to believe that a crime has occurred to justify a warrant. The simple statement that the police describe the elements of a crime that they believe occurred and request permission to search does not convey that a judge must have concluded that there was sufficient evidence to convict Khan of rape.

Khan's citation to State v. Stith, 71 Wn. App. 14, 856 P.2d 415 (1993), as disapproving this type of testimony is unpersuasive. The comments held improper in Stith were a prosecutor's statements in closing that the case would not be in court if there was any problem with the officers' actions, because the system has "incredible safeguards" that would not allow it, and that a judge already had determined probable cause before the case came to court. Stith, 71 Wn. App. at 17, 22. The statement in the case at bar, that a judge had given permission to conduct a search early in the investigation, did not convey that guilt already had been determined.

Khan relies on two federal cases that found improper vouching had occurred when there was extensive, detailed testimony about the process of obtaining a wiretap in the case:

United States v. Cunningham, 462 F.3d 708, 709-12 (7<sup>th</sup> Cir.<sup>4</sup> 2006), and United States v. Brooks, 508 F.3d 1205, 1210-11 (9<sup>th</sup> Cir. 2007), which relied on Cunningham.<sup>5</sup> The Seventh Circuit court later explained that its concern in Cunningham related to inferences regarding uncharged crimes: "that the testimony permitted the jury to infer that the defendant was engaged in illegal activity before the wiretap because law enforcement, government attorneys, and a district judge each approved it." United States v. Recendiz, 557 F.3d 511, 529 (7<sup>th</sup> Cir. 2009) (emphasis in original, citations omitted).

The Seventh Circuit has rejected the claim that testimony that a judge approved a search warrant is improper vouching. In a case prior to Cunningham, that court characterized that claim as "totally without merit." United States v. Buchanan, 529 F.2d 1148, 1151 (7<sup>th</sup> Cir. 1975). The Cunningham case distinguished Buchanan, but did not disapprove it. Cunningham, 462 F.3d at 714. In United States v. Hendrix, the court described such

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<sup>4</sup> Although Khan's citation refers to the Ninth Circuit, this case is a decision of the Seventh Circuit.

<sup>5</sup> Khan relies upon United States v. Roberts, 618 F.2d 530 (9<sup>th</sup> Cir. 1980), for the same proposition, but in that case the court found improper vouching in the prosecutor's statement in closing argument that a detective who had been in court during trial was monitoring the truthfulness of testimony of a witness who testified as a condition of a plea agreement. 618 F.2d at 533-34.

testimony as "a far cry from the facts in Cunningham." 509 F.3d 362, 372-73 (7<sup>th</sup> Cir. 2007).

Although Khan asserts that testimony about how a search warrant was obtained can be reversible error, he has cited no case in which a court found that testimony that a judge approved a search warrant was improper. Khan misplaces his reliance on an Arizona appellate court case for this proposition. Khan cites State v. Woodward, 21 Ariz. App. 133, 516 P.2d 589 (1973), for the proposition that "[t]elling the jury that the judge had found probable cause to issue a warrant not only conveys to the jury that guilt already has been proven, it may imply to the jurors that they have not heard all of the evidence available when a search warrant was obtained." App. Br. at 24. However, the facts in Woodward involved the prosecutor's statements in closing argument: discussing the merits of a search warrant, he said, "If you think the jury hears all the evidence on this search warrant is[sic] a criminal case, you're crazy"; he also argued, "If this was a mere presence case ... [t]he court would have thrown this case out last week, but he hasn't." Woodward, 516 P.2d at 590. The court held that the prosecutor improperly had referred to matters not in evidence and indicated that the judge would have dismissed the case if he did not

believe the defendants guilty. Id. The prosecutor had explicitly done so.

In the case at bar, the general testimony that a search warrant was obtained and a search warrant is approved by a judge did not convey any opinion about KD's credibility or Khan's guilt. The search warrant was obtained nine days after the rape was reported, before the police had any contact with Khan. 4RP 74-75, 141-42, 164. KD had identified her attacker only by the nickname "Angel" with an address and phone number. 2RP 88-89; 4RP 143-45. It cannot be reasonably inferred that because a search warrant for that address was approved in December 2008, a judge had concluded that Khan was guilty of rape based on the evidence available at the time of trial in March 2010.

c. Khan Waived His Right To Object To This Testimony.

Khan did not object to the testimony that he now claims was admitted in violation of his right to a fair trial. RAP 2.5(a) bars consideration of this issue. A claim of error may be raised for the first time on appeal only if it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); McFarland, 127 Wn.2d at 333.

The defendant must show that the error occurred and caused actual prejudice to his rights. Id.

Improper vouching is considered prosecutorial misconduct.. State v. Ish, \_\_\_ Wn.2d \_\_\_, 241 P.3d 389, 395 (2010). When there was no objection to the evidence at trial, it is reversible only if the evidence was material to the trial's outcome and the vouching so flagrant and ill-intentioned that a curative instruction could not have obviated any resulting prejudice. State v. Hughes, 118 Wn. App. 713, 726, 77 P.3d 681 (2003).<sup>6</sup>

Khan has not established that the testimony that a judge approved the search warrant was flagrant and ill-intentioned vouching. It was a passing comment that, without reference to a legal standard necessary to obtain the warrant, conveyed no information about the judge's opinion of the evidence.

Khan has not established that the testimony that a judge approved the search warrant caused actual prejudice that could not have been cured by striking the testimony and instructing the jury to disregard it, or instructing the jury that the legal standard applied by

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<sup>6</sup> Khan misplaces his reliance on State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985), in asserting that reversal is required unless any error was harmless beyond a reasonable doubt. App. Br. at 25. Guloy addressed the harmless error standard applicable to a violation of the confrontation clause, not improper vouching. Guloy, 104 Wn.2d at 425-26.

the judge upon an application for a search warrant is a lesser standard than proof beyond a reasonable doubt.

The jury was instructed that it was the sole trier of fact and the sole judge of the credibility of the witnesses. CP 34-35. The jury is presumed to follow instructions. Montgomery, 163 Wn.2d at 595-96. The approval of the warrant was mentioned briefly in passing and the warrant was not mentioned at all during the closing argument of either party. 6RP 4-56. Any vouching that could be inferred by Kleinnecht's reference to warrant approval could have been eliminated by an objection and curative instruction and, therefore, does not constitute reversible error.

3. TESTIMONY THAT KHAN WAS BOOKED DID NOT DEPRIVE HIM OF THE PRESUMPTION OF INNOCENCE WHEN THE JURY WAS INFORMED THAT KHAN WAS NOT IN CUSTODY.

Khan claims that he was deprived of the presumption of innocence by testimony that he was booked into jail. This argument must be rejected. There was no testimony that Khan was booked into jail. Even if there had been such testimony, any inference would be in his favor: the jury was aware that Khan was out of custody during trial, and if any inference would be drawn, it would be that a judge did not consider him to be dangerous. Khan

did not object to the testimony in the trial court and has waived any error.

a. Relevant Facts

In its trial brief, the State addressed issues relating to statements made by Khan. CP 13-15. It stated:

The defendant was also booked and released on the case by Detective Johnson. The State only seeks to admit statements made by the defendant related to routine booking questions: Name, address and date of birth.

CP 13.

During pretrial hearings, defense counsel stated that there was no need for a hearing to address the admissibility of Khan's statements, because Khan was not in custody at the time. 1RP 4.

At trial, during the testimony of investigating detective Johnson, the prosecutor elicited booking information. 4RP 165.

Khan challenges the final question and answer in this exchange:

Q. At some point, detective, did you have contact with Mr. Khan other than this?

A. It was on the same day.

Q. And did you obtain for purposes of documenting in booking, if you will, of the defendant, did you obtain his name -- full name and date of birth?

A. Yes.

4RP 165.

There was no objection at trial to this question or answer.

Khan was not in custody during trial. 1RP 2. If that was not clear from jurors' observation of his freedom of action during trial, there was specific testimony that Khan was not in custody. The jury was informed that Khan had not been in custody during the time between his booking and the trial, when his friend Diana Dreve testified that Khan had moved out of the apartment in Bellevue and moved in with a new roommate, and that she regularly went to restaurants and movies with Khan during this time period. 4RP 62. Dreve also established that Khan remained out of custody during the trial, as Khan had driven her home the night before Dreve testified. 4RP 71.

No objection to use of the term "booking" was raised in the postverdict motions for a new trial. CP 60-62, 67-71, 74-77.

- b. The Reference To Booking Did Not Imply That Khan Was Incarcerated And Did Not Deprive Khan Of The Presumption Of Innocence.

The record does not support Khan's claim that there was testimony that Khan was booked into jail. Neither the prosecutor

nor the detective referred to Khan being taken into custody. 4RP  
165.

"Booking" refers to documenting a charge, not to incarceration. The common meaning of the verb "to book" includes the following pertinent definitions:

[2] to enter, write, or register (as a name, an act, or an intention) in a record, book, or list;

[3] to enter the name of and tentative charges against (a person) usu. in a police register.

Webster's Third New International Dictionary of the English

Language 252 (1993). The legal meaning of the word is the same:

1. To record in a book (as a sale or accounting item).
2. To record the name of (a person arrested) in a sequential list of police arrests, with details of the person's identity (usu. including a photograph and a fingerprint), particulars about the alleged offense, and the name of the arresting officer.

Black's Law Dictionary 194 (8<sup>th</sup> ed. 2004) (sample sentences omitted).

This meaning of the term as documenting an arrest and charge is apparent from the manner in which it was used in this case: Khan was not incarcerated when he was booked but the term "booked" was used to refer to the documentation of his arrest.

Because there was no evidence presented that the defendant ever was in custody, this argument is entirely without merit.

Even if the reference to "booking" included an implication that Khan was jailed briefly at that time, the jury knew that Khan was out of custody during trial and had been out of custody pending trial, so any presumed inferences would be based on his release by a judge and would be beneficial to Khan, not prejudicial. The cases on which Khan relies are premised on the belief that jurors may infer that a person who is in custody at trial is dangerous or is more likely to be guilty. E.g., Estelle v. Williams, 425 U.S. 501, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976). The jury in this case was aware that Khan was out of custody during trial, and if the jury believed that he had been jailed when he was arrested, they would understand that a judge had permitted his release, and if any inference would be drawn, it would be that a judge did not consider him to be dangerous.

c. Khan Waived His Right To Object To This Testimony.

Khan did not object to this testimony and RAP 2.5(a) bars consideration of this issue. A claim of error may be raised for the

first time on appeal only if it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); McFarland, 127 Wn.2d at 333. The defendant must show that the error occurred and caused actual prejudice to his rights. Id.

Because there was no testimony that Khan ever was jailed and because the jury knew that he was out of custody during trial, Khan has not established that use of the term "booking the defendant" caused him actual prejudice.

4. NO PROSECUTORIAL MISCONDUCT OCCURRED IN THIS CASE.

Khan's claim of prosecutorial misconduct is premised entirely on the conclusion that the previous three arguments have merit. Because none of that testimony was improper, eliciting the testimony was not prosecutorial misconduct.

A defendant who claims prosecutorial misconduct has the burden of establishing that conduct of the prosecuting attorney was both improper and that prejudice to the defendant resulted. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). When there has been no objection at trial, the claim of prosecutorial misconduct has been waived unless that misconduct is so flagrant and ill-

intentioned that it causes an enduring prejudice that it cannot be cured by an instruction to the jury. Id.

The Washington Supreme Court recognizes the reality that the absence of an objection by defense counsel “strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of trial.” State v. McKenzie, 157 Wn.2d 44, 53 n.2, 134 P.3d 221 (2006) (emphasis in original) (quoting State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990)). That Court has stated, “Counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the misconduct as a life preserver ... on appeal.” State v. Russell, 125 Wn.2d 24, 93, 882 P.2d 747 (1994) (citing Jones v. Hogan, 56 Wn.2d 23, 27, 351 P.2d 153 (1960)).

The issue of alleged prosecutorial misconduct relating to the approval of the search warrant in this case has been discussed in section C.2, supra, and will not be repeated here.

With respect to the claim of prosecutorial misconduct in the testimony of Sexual Assault Nurse Examiner Albery, in section C.1, supra, the State explained the legitimate reasons for developing the nurse's testimony about the advice given to individuals who undergo sexual assault examinations. The testimony was proper

and there was no improper motivation in eliciting that testimony. Because this testimony was elicited in the context of background questions concerning sexual assault examinations and before the nurse began testifying about the examination of KD, Khan cannot establish prejudice that could not have been obviated by a curative instruction to the effect that the statements were general statements about sexual assault examinations and did not convey any opinion about whether KD was the victim of a sexual assault.

With respect to the claim of prosecutorial misconduct in the reference to Khan being booked, the State had informed the court and counsel pretrial that she intended to elicit the testimony. CP13. No objection was made during pretrial hearings or at the time the question was asked. 1RP 4, 4RP 165. There was no suggestion by the prosecutor or the detective that Khan was jailed. 4RP 165. Khan has not established impropriety, ill intention, or prejudice.

5. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING KHAN'S MOTION FOR A NEW TRIAL.

Khan argues that the trial court improperly denied his motion for a new trial. It appears that Khan's sole claim on appeal is that his motion was improperly denied because he received ineffective

assistance of counsel at trial. Specifically, he asserts that counsel misunderstood the rape shield law and, as a result, was deficient in agreeing not to introduce evidence concerning KD's relationship with another man and in agreeing not to introduce evidence that weeks after the rape, KD allegedly went to a club where Khan often worked as a promoter. This claim is without merit. The trial court did not manifestly abuse its discretion in denying the motion for new trial. The circumstances under which KD may have previously had sexual intercourse with another man (Granger) is a subject matter within the protection of the rape shield law. KD's visit to a club weeks after the rape was irrelevant to the rape allegation and thus inadmissible for reasons unrelated to the rape shield law. Defense counsel at trial articulated his tactical reasons not to pursue this evidence. Finally, because the trial court indicated that it would not have ruled the evidence admissible, Khan did not show actual prejudice resulting from any deficiency of counsel.

The trial court denied Khan's initial motions for new trial and for arrest of judgment in a summary order filed May 3, 2010. CP 72-73. The court concluded simply that, having considered the briefing, it found "no basis for either arresting judgment or granting a new trial." CP 72.

After Khan filed a motion for reconsideration of that denial, the trial court entered more specific findings and denied reconsideration. CP 156-59. The trial court concluded that evidence relating to KD's relationship with Granger was completely irrelevant and was barred pursuant to the rape shield statute, RCW 9A.44.020. CP 156-57. The court found that even if the purported printout of a page from a MySpace web site could be authenticated, that evidence was not newly discovered, and impeachment using that printout would be collateral to the issues at trial and irrelevant. CP 157. The court concluded that even if the failure to offer the MySpace information was deficient, Khan had not established that there was a reasonable probability that it influenced the result of the trial. CP 157.

A trial court's decision on a motion for new trial is within its sound discretion and denial of a new trial will not be reversed on appeal unless the defendant makes a clear showing that the trial court abused its discretion. State v. Pete, 152 Wn.2d 546, 552, 98 P.3d 803 (2004); State v. Lemieux, 75 Wn.2d 89, 91, 448 P.2d 943 (1968). An abuse of discretion will be found only if no reasonable judge would have reached the same conclusion. Pete, 152 Wn.2d at 552.

a. Khan Has Not Established That The Failure To Offer This Evidence As To Collateral Matters Was Ineffective Assistance Of Counsel.

To establish ineffective assistance of counsel, Khan must show both that defense counsel's representation was deficient, *i.e.*, that it "fell below an objective standard of reasonableness based on consideration of all the circumstances," and that defense counsel's deficient representation prejudiced the defendant. In re Pers. Restraint of Hutchinson, 147 Wn.2d 197, 206, 53 P.3d 17 (2002) (applying the test of Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). The benchmark for judging a claim of ineffective assistance of counsel is whether counsel's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686.

Judicial scrutiny of counsel's performance must be highly deferential. Strickland, 466 U.S. at 689. Every effort should be made to "eliminate the distorting effects of hindsight," and judge counsel's performance from counsel's perspective at the time. Id. at 689.

In judging the performance of trial counsel, courts must begin with a strong presumption that the representation was effective. Strickland, 466 U.S. at 689; Hutchinson, 147 Wn.2d at 206. This

presumption of competence includes a presumption that challenged actions were the result of reasonable trial strategy. Strickland, 466 U.S. at 689-90. Legitimate trial strategy or tactics cannot be the basis of a claim of ineffective assistance of counsel. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994).

The defendant "must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel." Hutchinson, 147 Wn.2d at 206 (quoting McFarland, 127 Wn.2d at 335). Courts should recognize that, in any given case, effective assistance of counsel could be provided in countless ways, with many different tactics and strategic choices. Strickland, 466 U.S. at 689.

In addition to overcoming the strong presumption of competence of counsel and showing deficient performance, Khan must affirmatively show prejudice. Strickland, 466 U.S. at 693. Prejudice is not established by a showing that an error by counsel had some conceivable effect on the outcome of the proceeding. Id. at 693. Khan must establish a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Id. at 694.

Khan has not shown deficient performance. His argument that defense counsel should have offered the printout of a set of MySpace communication and pictures of KD at the Vertigo Club weeks after the rape relies on the inaccurate predicate that the evidence was relevant. Defense counsel at trial believed that the evidence was not relevant, noting that an inquiry into other sexual behavior of the victim "ends up in a mud-slinging contest that obscures the issues in the case and the issues before us." 1RP 6. As to evidence of any allegation of a reputation for sexual promiscuity, defense counsel at trial repeated his position: "That's the same thing, and even more, so you get into just ugly mud slinging." 1RP 7.

Experienced trial counsel in this case chose a trial strategy, to avoid "mud-slinging" that would distract from the issue upon which his defense rested: that there was no sexual intercourse. 6RP 24-25. KD testified at trial that she told Khan during the attack that she had not had sex with very many people. 3RP 97-98. No additional evidence was necessary to establish that KD was sexually experienced. Defense counsel may reasonably have concluded that attacking the victim based on prior sexual activity, flirtation during web communications, or visiting a club weeks after

the rape, could generate sympathy for the victim or hostility to the defense.

Even if counsel was deficient in not offering this testimony, Khan has not affirmatively shown prejudice – a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. Strickland, 466 U.S. at 694. To the contrary, it is clear that the court would have excluded that evidence, because the trial court specifically stated that it would have excluded the evidence as a violation of the rape shield law and as irrelevant, in its denial of the motion for new trial. CP 156-57.

**b. Khan Has Not Established That The Trial Court Manifestly Abused Its Discretion In Denying His Motion For A New Trial.**

The trial court concluded that it would have excluded the evidence that Khan claims should have been offered by his trial counsel. CP 156-57. Therefore, it concluded, the failure to offer the evidence could not have affected the result of the trial and did not constitute ineffective assistance. Khan has not shown an abuse of discretion in the predicate evidentiary rulings the trial judge endorsed or in the denial of the motion for new trial. The proffered evidence

was collateral to the issue of what happened during the charged incident, at most constituting impeachment on minor matters, even assuming that the jury would consider that statements made during a social MySpace communication with a casual acquaintance would be effective impeachment of statements made at trial, under penalty of perjury.

State v. Jones, 168 Wn.2d 713, 230 P.3d 576 (2010), does not support Khan's argument that KD's statements about a prior relationship were admissible. In Jones, the defendant proffered testimony that the sexual intercourse that was alleged had occurred during a sex party at which, over the course of a nine-hour period, the victim and another woman danced for money and engaged in consensual intercourse with three males. Id. at 717. The trial court excluded any reference to the sex party, citing the rape shield statute. Id. at 717-18. The Washington Supreme Court concluded that exclusion of that evidence was error because it deprived Jones of his ability to testify to his version of the incident, and it was very highly probative evidence. Id. at 721.

The additional evidence proffered in the case at bar did not relate to events during the course of the incident at Khan's apartment. Khan testified to his communication with KD prior to the incident and

was not limited in his testimony about the events at his apartment or his contact with KD afterward. 5RP 32-47. The Court in Jones affirmed that a defendant does not have a constitutional right to present irrelevant evidence, or evidence of minor probative value. Id. at 720. The additional evidence in this case was properly determined to be irrelevant by the trial judge.

Khan has not established that no reasonable judge would have denied the motion for new trial.

6. THERE WAS NOT CUMULATIVE ERROR THAT DEPRIVED KHAN OF A FAIR TRIAL.

Cumulative trial errors may deprive a defendant of a fair trial. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). The cases in which courts have found that cumulative error justifies reversal include multiple significant errors. E.g., Coe, 101 Wn. 2d 772 (discovery violations, three types of bad acts evidence improperly admitted, impermissible use of hypnotized witnesses, improper cross-examination of the defendant); State v. Alexander, 64 Wn. App. 147, 822 P.2d 1250 (1992) (improper hearsay as to details of child sex abuse and identity of abuser, court challenged

defense attorney's integrity in front of jury, counselor vouched for credibility of victim, prosecutor misconduct).

No trial error has been shown, so the cumulative error doctrine is inapplicable in this case.

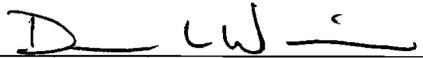
D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Khan's conviction and sentence.

DATED this 15<sup>TH</sup> day of December, 2010.

Respectfully submitted,

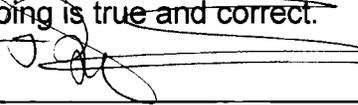
DANIEL T. SATTERBERG  
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By:   
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to John Henry Browne, the attorney for the appellant, at The Law Offices Of John Henry Browne, 821 Second Avenue, Suite 2100, Seattle, WA 98104, containing a copy of the Respondent's Brief, in STATE V. ANJUM NAWAZ KHAN, Cause No. 65536-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

  
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Name  
Done in Seattle, Washington

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