

67249-5

67249-5

NO. 67249-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,
Respondent,
v.
CRAIG ROWLAND,
Appellant.

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COURT OF APPEALS DIV I
STATE OF WASHINGTON
~~FILED~~

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE DOUGLASS NORTH

BRIEF OF RESPONDENT

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A. ISSUES

1. An excited utterance is an exception to the hearsay rule and may be admitted if it is a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition. Officers and paramedics described a domestic violence victim as hysterical, crying, frightened, highly anxious, and unable to complete full sentences when she disclosed that her boyfriend choked her. Did the trial court properly exercise its discretion by admitting the victim's statements as excited utterances?

2. Alleged misconduct by the prosecutor is waived if there is no objection. Rowland did not object to the prosecutor's closing argument, failed to demonstrate any misconduct, and failed to show a substantial likelihood that the challenged questions affected the verdict. Has Rowland failed to demonstrate reversible error?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Craig Rowland, was charged with assault in the second degree (domestic violence). CP 1-4. The State alleged that he strangled his girlfriend, Chere Madill, until she passed out.

CP 1-4. When the trial began, the prosecutor indicated that he had subpoenaed Madill and had police officers searching for her, but he was "not one hundred percent confident that she will be here."

1RP 11¹. The prosecutor intended to proceed without Madill if she could not be located. 1RP 11. Rowland moved to exclude any statements made by Madill to the paramedics because she was reporting a crime rather than seeking help; hence, they were "testimonial" under Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). 1RP 22-23. The trial court preliminarily permitted Madill's statements to paramedics as statements for medical diagnosis.² 1RP 25. The defense did not indicate Madill would recant her statements or argue that her recantation should be a basis to exclude the statements.

1RP 22-23.

The trial court permitted two hearsay statements from Madill after the State laid the proper foundation. Madill told a paramedic that "my boyfriend choked me," and she told the first officer on the

¹ The verbatim report of proceedings consists of two volumes that will be referred to as follows: 1RP (March 29, 30, 2011) and 2RP (April 4, 5, and June 3, 2011).

² During the pretrial hearings, the prosecutor was not sure if he could lay the foundation to admit hearsay statements made to the first officer on the scene.

scene that Rowland had "choked her until she passed out."

1RP 62, 106-07. The defense objected to the hearsay but did not raise Madill's recantations as a basis for excluding the statements. During the trial, the prosecutor sent police officers to locate Madill. 2RP 19. They succeeded in securing Madill's presence and she did testify on the last day of trial. She recanted and denied that Rowland had strangled her. 2RP 30. After her testimony, the defense did not ask the court to revisit the admission of Madill's statements.

The jury found Rowland guilty as charged. CP 36. The court imposed a standard range sentence of 22 months of confinement. CP 37-45.

2. SUBSTANTIVE FACTS

Chere Madill and the defendant, Craig Rowland, had a dating relationship and lived together in the Greenwood neighborhood of Seattle. 1RP 90-92; 2RP 18-19. They had been together for 11 years. 2RP 18. They shared an apartment together. 1RP 90.

On August 24, 2010, Seattle Firefighter Vance Anderson was responding to an unrelated call near their apartment, when his

crew informed him there was a woman who needed assistance. 1RP 57-58. Anderson was an emergency medical technician (EMT) and went to provide aid. 1RP 45. Anderson found Chere Madill on the ground and having difficulty breathing. 1RP 59-60. Madill was rolling from side to side and could not sit in one place. 1RP 59-60. Anderson described her as highly anxious. 1RP 60. He observed red marks on both sides of her neck that were consistent with strangulation. 1RP 61, 67. Anderson noted that Madill's vital signs were elevated. 1RP 63. Madill's heart rate was 120 beats per minute, while a normal heart rate is about 60 beats per minute. 1RP 63. Madill's respiration rate was 44 breaths per minute, while a normal rate is 12-24 breaths per minute. 1RP 63.

Anderson was concerned about Madill's elevated respiration rate and called for paramedics for "advanced life support" capabilities. 1RP 63-64. When Madill initially spoke, she could not form complete sentences. 1RP 60. Anderson testified that it took approximately ten minutes to calm Madill down. 1RP 64. Anderson was able to calm Madill enough for her to tell him that "her boyfriend had taken her inhaler and that she was asthmatic and that he had choked her." 1RP 62. Anderson and the

paramedics stayed with Madill for about thirty minutes and left her at the scene with the police. 1RP 73.

Seattle Police Officer Simmons responded to the scene. 1RP 103. When he arrived, Madill was being treated by the fire department personnel. 1RP 104. Simmons described Madill as hysterical. 1RP 104. He said she was screaming, hyperventilating and having difficulty speaking in complete sentences. 1RP 105. Madill told Simmons that Rowland had choked her. 1RP 105. She said that she had been choked until she passed out. 1RP 105. Officer Simmons also saw red marks on her neck that were consistent with strangulation. 1RP 110-11.

Simmons said that, after the paramedics had treated Madill, she fluctuated between being hysterical and calming down. 1RP 126. He described her as highly emotional, sobbing, crying, and appearing frightened. 1RP 126-27, 129. Simmons became concerned that her hyperventilating would trigger an asthma attack, and he considered calling the paramedics to return to the scene. 1RP 128. Simmons said that "when the medics were done with her and she started talking to us, she fluctuated from being hysterical and calm. It took several minutes to calm her down completely where I could take a statement from her." 1RP 126. Later, Officer

Simmons took a written statement from Madill, but only after she had "calmed down and was rational and could tell me what happened." 1RP 121. Madill also showed Simmons a cellular phone that Rowland had broken. 1RP 111.

Officer Kevin Stewart also responded to the scene. 1RP 135. While he let the paramedics and Officer Simmons interact with Madill, he noted that she was excited and hyperventilating. 1RP 136. Officer Stewart searched the area for Rowland but was not able to locate him. 1RP 136. After Officer Simmons had taken a statement from Madill, the police escorted her to her car and followed her back to her apartment so they could be sure Rowland was not there. 1RP 138-39. Madill arrived at the apartment before the officers. When Officer Stewart arrived, he saw a man matching Rowland's description approach Madill, see the officers, then turn and run.³ 1RP 140-43. Officer Stewart pursued him but was unable to catch the suspect. 1RP 143. Officer Stewart went to Madill's apartment but did not see any sign of a struggle and did not testify about anyone else being at the apartment. 1RP 145.

³ Officer Stewart was not able to identify Rowland in court but indicated that he matched the description of the suspect. 1RP 142.

Initially, the State did not believe that Madill would testify, and planned to proceed without her. 1RP 11-12. On the last day of trial, Madill did testify because the prosecutor sent police to her home to secure her presence in court. 2RP 19. Madill recanted her prior statements. She testified that she learned that Rowland was cheating on her and they argued on August 24, 2010. 2RP 21. She said they argued for several hours and Rowland left. 2RP 21. Madill claimed she followed him outside and saw the fire trucks and police cars. 2RP 22. She was having an asthma attack and a panic attack and went to the fire trucks to get an inhaler. 2RP 22. She testified that she never told the EMT that her boyfriend had choked her. 2RP 27. Madill claimed that she wanted to get Rowland in trouble and told police that he had choked her. 2RP 22, 30. She also claimed that she told the officers later that night that she was simply trying to get Rowland in trouble. 2RP 23. Madill said her two other roommates were present and had also tried to call authorities to say there was no assault. 2RP 29, 45.

Madill acknowledged that she told police that Rowland had broken her phone. 2RP 30. She claimed that was not true and said that she had the phone in court. 2RP 31. When the prosecutor pointed out that the phone she brought to court

appeared to be a different color than the phone shown in photos that night, Madill claimed that was a different phone that was already broken. 2RP 31-32. Madill also tried to explain the red marks on her neck. She testified that she had been in a fight several days earlier with the woman she believed Rowland was having an affair with. 2RP 32-33. Later, she testified she caused the injuries herself during her asthma attack. 2RP 42-43. Madill acknowledged that she still loved Rowland. 2RP 44.

The jury found Rowland guilty of assault in the second degree.

C. ARGUMENT

**1. THE TRIAL COURT PROPERLY ADMITTED
MADILL'S EXCITED UTTERANCES AND
STATEMENTS FOR MEDICAL DIAGNOSIS.**

Rowland argues that the trial court erred by admitting excited utterances and statements for medical diagnosis from Madill at trial. Rowland is incorrect. At the time the evidence was admitted, the State had laid the proper foundation, and Madill's subsequent recantation did not make the statements inadmissible. Moreover, after Madill had recanted, the defense never asked the court to restrict the admissibility of her statements on this basis.

Hearsay is “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” ER 801(c). Hearsay is not admissible unless an exception applies. ER 802. An excited utterance is such an exception. ER 803(a)(2). It is defined as “[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” Id.; State v. Chapin, 118 Wn.2d 681, 686, 826 P.2d 194 (1992). In determining whether a statement is an excited utterance, the court does not solely look to the event itself, but to the event's effect on the declarant. Chapin, 118 Wn.2d at 687. This determination is a fact-specific inquiry. State v. Brown, 127 Wn.2d 749, 757-59, 903 P.2d 459 (1995).

A statement “made for purposes of medical diagnosis or treatment” may be admitted pursuant to ER 803(a)(4). This exception applies to statements reasonably pertinent to diagnosis or treatment. In re Dependency of Penelope B., 104 Wn.2d 643, 656, 709 P.2d 1185 (1985).

The trial court's admission of evidence is reviewed for abuse of discretion. State v. Pirtle, 127 Wn.2d 628, 648, 904 P.2d 245 (1995). A decision is an abuse of discretion if it is outside the range

of acceptable choices given the facts and the applicable legal standard. In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).

a. The Evidence Showed That Madill's Statements Were Excited Utterances And Statements For Medical Diagnosis.

- i. Madill's statements to EMT Anderson were properly admitted as statements for medical diagnosis.

The trial court did not abuse its discretion by admitting Madill's statements for medical diagnosis. Anderson, a trained EMT, obtained information from Madill to assess and treat her injuries. When Anderson initially found Madill she was highly anxious, rolling on the ground, and having difficulty breathing. 1RP 59-60. He assessed her vital signs, found her heart and respiration rates were very high, and determined that she required immediate attention. 1RP 63. She had signs of recent injury from the red marks on her neck. 1RP 61, 70. The marks on Madill's neck were consistent with strangulation and Anderson was concerned about her extremely anxious state triggering an asthma attack. The trial court did not abuse its discretion in admitting

Madill's statements to Anderson as statements for medical diagnosis. 1RP 25.

- li. Madill's statements to Officer Simmons were properly admitted as excited utterances.

Furthermore, the trial court did not abuse its discretion by admitting Madill's statement to Officer Simmons as excited utterances.⁴ Every witness who interacted with Madill noted her highly distraught emotional state. EMT Anderson noted that Madill was "highly anxious" and that initially she was unable to speak in complete sentences because of her condition. 1RP 60. Although Madill made some of her statements in response to questions from a paramedic, they still qualify as excited utterances. See State v. Ryan, 103 Wn.2d 165, 176, 691 P.2d 197 (1984). The key is spontaneity. State v. Palomo, 113 Wn.2d 789, 791, 783 P.2d 575 (1989); State v. Woods, 143 Wn.2d 561, 599, 23 P.3d 1046 (2001). Here, the record reflects that the statements to Anderson were made in a spontaneous manner, on the heels of a clearly startling

⁴ The trial court correctly admitted Anderson's statements as under the medical diagnosis exception, but clearly the foundation for their admission as an excited utterance had been established as well. 1RP 25, 59-64.

event and while Madill was still under the influence of that event. Officer Simmons described Madill as hysterical, screaming, and hyperventilating. 1RP 105. Madill was sobbing, crying and appeared frightened to Simmons. 1RP 126-27, 129. Officer Stewart also noted that Madill was excited and hyperventilating. 1RP 136. The trial court had ample information to conclude that Madill was under the stress of excitement caused by the assault. The trial court did not abuse its discretion by admitting the initial statements to Anderson and Simmons as excited utterances.

Rowland relies on State v. Brown, 127 Wn.2d 749, 759, 903 P.2d 459 (1995), to argue that Madill's statements should not have been admitted because of her subsequent recantation. In Brown, an alleged rape victim reported to police that she was abducted and raped. At a pretrial hearing, the trial court ruled the 911 tape of her telephone call was admissible under the excited utterance exception to the hearsay rule. At trial, the victim maintained that she was raped, but acknowledged that she had lied to the police about being abducted because she thought they would not take the case seriously if they knew that she was a prostitute and had agreed to meet with the defendant to commit fellatio for

money. Id. at 751-53. She admitted that she took some time before calling 911 to fabricate aspects of her story.

The Supreme Court reversed Brown's conviction, concluding that the trial court had abused its discretion in ruling the alleged victim's 911 telephone call was an excited utterance. The Court held that her testimony evidenced not only the opportunity to fabricate, but represented an actual fabrication of part of her story prior to making the 911 call. Id. at 757-59.

However, a later recantation by the declarant does not necessarily disqualify the statement as an excited utterance. State v. Briscoeray, 95 Wn. App. 167, 173-74, 974 P.2d 912 (1999). In Briscoeray, a security guard received a phone call from an anonymous tenant describing a domestic violence incident occurring in the apartment of Briscoeray and his girlfriend. Id. at 168. Around 30 to 40 seconds later, the victim ran up to the security guard, crying and screaming that the defendant had tried to kill her. Id. at 168-69. The victim continued to tell the security guard and the responding officer that her boyfriend had threatened her with a gun and assaulted her. Id. at 169. The police noted fresh injuries on the victim. Id. According to the police, she

seemed calm and controlled at first, but at times became upset and teary when she told him what had happened. Id.

At trial, the victim recanted and testified that she had decided to make up the story about the gun incident before she reached the security guard. Id. at 170. This Court held that she had insufficient opportunity to fabricate a lie before making her statements to the security guard, the 911 operator, and the officer. Id. at 174. A short amount of time passed between the startling event and the excited utterances, indicating spontaneity. Id. at 174. The victim was upset and, at times, crying when she made the statements. Id. at 174. In addition, the Court noted that her relationship with her boyfriend gave her a motive to recant and that the trial court had determined that the recantation was not credible. Id. at 174-75.

The present case is very similar to Briscoeray. First, the assault was a startling event, as evidenced by the visible injuries on Madill, her elevated vital signs, and her extreme anxiety. Second, the statements relate to the assault. Third, Madill was clearly under stress caused by the assault when she made the statements because the officers described her as upset and crying when they talked to her, and her injuries appeared recent. Like in Briscoeray,

Madill also had a motive to recant later because Rowland was her boyfriend and she testified that she still loved him. 2RP 44. As in Briscoeray, the trial court had ample independent evidence that Madill was still under the stress of the assault. The trial court did not abuse its discretion in admitting the statements at the scene as excited utterances.

Rowland argues that, as in Brown, Madill had time between the alleged strangulation and her statements to fabricate her claim. Brief of Appellant at 11. However, he cites only to her recantation at trial as the basis for this conclusion. As the Court concluded in Briscoeray, the recantation alone is not dispositive. Briscoeray, 95 Wn. App. at 173-74. Rowland further argues that this case is distinguishable from Briscoeray because in that case only 30 to 40 seconds elapsed between the encounter and the statements, and it is not clear how much time elapsed in this case. But the courts have recognized that a victim can still be under the stress of an event for quite some time; the key is that the declarant still be under the stress of the startling event. See, e.g., Woods, 143 Wn.2d at 598-601 (approximately 45 minutes between the event and the statement); State v. Flett, 40 Wn. App. 277, 287, 699 P.2d 774 (1985) (statement made seven hours after rape deemed properly

relative to periods when she was so upset that she was unable to speak.

Officer Simmons described that, "when the medics were done with her and she started talking to us, she fluctuated from being hysterical and calm. It took several minutes to calm her down completely where I could take a statement from her." 1RP 126. However, only Madill's initial brief statements were admitted; her written statement was not admitted as an excited utterance. As this Court noted, intervals of relative calm do not mean the statements are no longer excited utterances. Briscoeray, 95 Wn. App at 169. In Briscoeray, the victim appeared calm and controlled when officers first responded, but at times became upset and teary when she told him what happened. Id. This Court still found that the victim was acting under the stress of that recent assault. For the same reason, Madill's moments of relative calm do not undermine the conclusion that her brief statement was an excited utterance.

Finally, Rowland argues that the trial court erred by not explicitly finding that Madill was still under the stress of the assault when she made the statement at issue. Rowland is incorrect. First, the statements to Anderson were admitted as statements for

medical diagnosis. 1RP 25. Second, for the excited utterances to Officer Simmons, the trial court understood the requirement that Madill needed to be under the stress from the assault. During pretrial hearings, the court noted that "[i]t depends upon whether there's evidence that the declarant is still under the stress of the event, and so obviously it's going to depend on how the evidence comes in. Certainly [a] longer period of time is going to require more evidence that they're under the stress of the event in order to be convincing that it is an excited utterance." 1RP 45. While the court did not stop the testimony and explicitly find that Madill was still under the stress of the strangulation, the court clearly listened to the testimony and was satisfied that Madill was still under the stress of the assault.

Rowland cites to State v. Ramires, 109 Wn. App. 749, 757-58, 37 P.3d 343 (2002), and State v. Williamson, 100 Wn. App. 248, 257, 996 P.2d 1097 (2000), to argue that the failure to make an explicit finding that the witness remained upset requires reversal. Neither case holds that the failure to explicitly make such a finding requires reversal. Here, the trial court clearly understood the legal requirements to admit excited utterances, listened to the

testimony laying the proper foundation, and overruled Rowland's objection.

b. By Not Raising An Objection To Madill's Statement Based On Her Recantation Rowland Waived Any Error.

While Rowland objected to the admission of Madill's statements at trial, he never argued Madill's recantation as a basis to exclude the statements. An appellate court will not generally review issues raised for the first time on appeal. RAP 2.5(a); State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). While there is an exception for manifest error affecting a constitutional right (see State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)), evidentiary rulings are not of constitutional magnitude. State v. Jackson, 120 Wn.2d 689, 695 P.2d 76 (1984).

A party cannot object on one basis at trial, and then claim a different error on appeal. For example, in State v. Fredrick, 45 Wn. App. 916, 922, 729 P.2d 56 (1986), the defendant objected to the admission of money seized in a drug case. The defendant stated that the State was trying to prejudice the jury, but at no time did he object to admission of the money under ER 404(b) or any other specific rule of evidence. The court held the defendant did

not preserve an ER 404(b) objection at trial because a party may only assign error on the specific evidentiary objection made at trial. Id. at 922 (citing State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985), cert. denied., 475 U.S. 1020 (1986); State v. Boast, 87 Wn.2d 447, 451-52, 553 P.2d 1322 (1976)).

In Guloy, the defendant claimed the trial court erred by not weighing the probative value of the gambling conspiracy evidence against its prejudicial impact as required by ER 403. 104 Wn.2d at 412. The defendant in Guloy never made an objection on that basis at trial. The court affirmed the conviction, “steadfastly adher[ing] to the rule that a litigant cannot remain silent as to claimed error during trial and later, for the first time, urge objections thereto on appeal.” Id. at 421 (citing Bellevue Sch. Dist. 405 v. Lee, 70 Wn.2d 947, 950, 425 P.2d 902 (1967)).

During the pretrial hearing, Rowland argued that admission of Madill's statements violated the Confrontation Clause because they were testimonial; at the time Madill was not expected to be available for cross-examination. 1RP 22-23. During the testimony of Anderson and Simmons, the defense objected to Madill's statements, presumably as to the foundation. After Madill testified, the defense did not re-raise the issues with the court. In fact, when

Madill testified she was impeached with many of her prior inconsistent statements to the police detailing the assault. The defense requested that the jury be instructed not to consider the inconsistent statements as substantive evidence. 2RP 8-10. When asked by the court, the defense conceded that Madill's initial statements to EMT Anderson and Officer Simmons were admissible for the truth of the matters asserted. 2RP 9. In sum, the defense never asked the court to exclude Madill's statements based on her recantation.

In Brown, there appears to be a similar sequence of events, but the defense in Brown did raise their objection again after the victim testified. Brown, 127 Wn.2d at 752-53. In Brown, the trial court held a pretrial hearing and ruled that a 911 tape was admissible as an excited utterance. Id. at 752. The victim subsequently testified, and admitted that she had fabricated part of her initial report. Id. at 752. After the victim's testimony, the defense objected to the 911 tape based on the victim's admission that she had fabricated part of her claims. In the present case, the defense never objected to Madill's statements based on her recantation. This Court should not consider arguments that Rowland failed to raise in the trial court.

The trial court had ample evidence to find that Madill's statements were admissible as excited utterances and statement from medical diagnosis. Madill's subsequent recantation did not require the exclusion of the statements. The trial court properly exercised its discretion to admit the evidence. This Court should affirm.

2. ROWLAND HAS FAILED TO SHOW ANY PROSECUTORIAL MISCONDUCT THAT AFFECTED THE VERDICT.

Rowland argues that the prosecutor committed misconduct in three comments made by the prosecutor during closing argument. The record does not support Rowland's allegations of misconduct. Furthermore, he did not object to any of the remarks at trial, nor can he show prejudice. Rowland has failed to demonstrate any prosecutorial misconduct.

a. The Prosecutor Did Not Commit Misconduct.

A defendant claiming prosecutorial misconduct bears the burden of establishing that the challenged conduct was both

improper and prejudicial. State v. Cheatam, 150 Wn.2d 626, 652, 81 P.3d 830 (2003). The prosecutor's comments are viewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Unless a defendant objected to the allegedly improper comments at trial, requested a curative instruction, or moved for a mistrial, reversal is not required unless the prosecutorial misconduct was so flagrant and ill-intentioned that a curative instruction could not have obviated the resulting prejudice. State v. Smith, 67 Wn. App. 838, 847, 841 P.2d 76, 81 (1992). Prejudice occurs only if "there is a substantial likelihood the instances of misconduct affected the jury's verdict." State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995).

- i. The prosecutor did tell the jury that they should not "wish for more evidence."

Rowland alleges that the prosecutor committed misconduct by urging the jury to "not wish for more evidence." The record does not support Rowland's contention. A lack of evidence can raise a reasonable doubt. WPIC 4.01. In State v. Evans, 163 Wn. App.

635, 260 P.3d 934 (2011)⁵, Division Two concluded that the prosecutor undermined the burden of proof by arguing that "the court's instruction doesn't tell you to say, 'Well, I wish I had more.'" Evans, 163 Wn. App. at 645. In Evans, the prosecutor admonished the jury not to ask for more evidence. Id.

In the present case, the prosecutor explained why there is limited evidence in cases of domestic violence. The State did not suggest to the jury that a lack of evidence was not a reasonable doubt, nor did the State tell the jury not to ask for more evidence. The prosecutor told the jury:

The evidence is important. Domestic violence cases, it's not like a burglary. You're not going to get a video tape, you're not going to get a million different witnesses all pointing to the same individual, all pointing to the same kind of crime. It's happened, by definition, in an intimate surrounding, an intimate area.

2RP 85-86. The prosecutor immediately noted that the State was required to prove the elements of the offense. 2RP 86. The prosecutor correctly noted that he need not prove the motive for the attack, whether those involved were using drugs, and "there is

⁵ Division Two's decision in Evans deemed several arguments misconduct that this Court has not decided yet. While the State does not agree with the Evans decision, the arguments made by the prosecutor in Evans are readily distinguishable from those made in the present case.

nothing about calling every witness who again would say a dam thing." 2RP 86. The prosecutor's argument properly explained why the available evidence may be limited without undermining the burden of proof, or suggesting that the jury "not wish for more evidence" as in Evans. The prosecutor's remarks were not misconduct.

- ii. The prosecutor did not tell the jury to "find the truth."

Rowland argues that the prosecutor told the jury to "find the truth." Again, Rowland's assertion is not supported by the record. The prosecutor made no such arguments. The prosecutor told the jury:

Look at all of that evidence, do not leave your common sense at the door, please use it, and you will find that the only true verdict in this case. Find the defendant guilty of assault in the second degree.

2RP 86. It is improper for a prosecutor to ask that the jury "declare the truth." State v. Anderson, 153 Wn. App. 417, 220 P.3d 1273 (2009). In Anderson, the prosecutor stated in closing argument that "by your verdict in this case, you will declare the truth about what happened." Id. at 424. In Evans, the prosecutor used a theme of "finding the truth" that focused more on the "truth" than the State's

burden of proof. The Court disapproved of the State's argument that the jury's role was to "find the truth," or "to decide what really happened," or suggest the jury's role was to "solve" the case. Evans, 163 Wn. App. at 644-45. Evans does not hold that simply uttering the word "true" is misconduct.

No Washington case has found a single reference to the truth to be misconduct. See State v. Walker, 164 Wn. App. 724, 265 P.3d 191, 196 (2011) (telling the jury the verdict means to "declare the truth," that the jury will "decide the truth of what happened," declaring "[s]o it's time for the truth.... So I talked to you at the very beginning about this—about declaring the truth as part of your role in returning a verdict."); State v. Curtis, 161 Wn. App. 673, 701, 250 P.3d 496 (2011) (telling the jury that a trial is a search for the "truth and a search for justice," and to return a verdict that "you know speaks the truth").⁶ In those cases that found the prosecutor's arguments about the truth to be misconduct, the court focused on the prosecutor urging the jury to find the truth rather than holding the State to its burden, or placing the burden on

⁶ In Curtis, Division Two found the remarks were inartful but not misconduct. Id. However, Division Two questioned that holding in State v. Walker, *supra*.

the jury to "solve the case," rather than the prosecution carrying its burden to prove the case.

In the present case, the prosecutor's reference to a "true" verdict was not an effort to mislead the jury about its role to hold the State to its burden of proof, or plea to the jury to "declare the truth." The prosecutor correctly advocated for the jury to return the correct verdict. Such an argument is within the bounds of proper advocacy. This was not misconduct.

- iii. The prosecutor did not tell the jury that Rowland was obligated to call witnesses.

Rowland argues that the prosecutor improperly shifted the burden of proof to the defendant by implying that Rowland had an obligation to call witnesses. Rowland's allegation is not supported by the record. The prosecutor's reference to potential witnesses who did not testify did not suggest that Rowland had an obligation to present evidence.

During Madill's testimony, she claimed that her two roommates were present at the scene. 2RP 29, 45. However, there was no mention of anyone else being present during the assault until Madill testified. EMT Anderson testified that there was

no one else with Madill when she sought aid. The police officers checked her apartment and did not mention anyone else being present. 1RP 145.

Based on this, the prosecutor argued:

There's a couple other folks present at the scene, according to Ms. Madill. We've never seen them. We never heard their statements. Officers and firemen never saw anybody else.

2RP 70-71. The prosecutor did not argue that Rowland had any obligation to call these other persons as witnesses. The only implication was that the jury should be skeptical of Madill's claim that there were other witnesses because it was inconsistent with the police and firefighter's observations, and that Madill's recantation was not credible.

Rowland, however, argued that the State had an obligation to call additional witnesses:

She testified that someone else was there. There may have been two people there. That was a little uncertain that there was yelling involved, yet, the state never produced any other witness . . .

2RP 79. The defense continued: "there was a man present that they never questioned." 2RP 79.

In rebuttal, the State responded by noting that the law does not require "calling every witness who again would say a darn

thing." 2RP 86. This response did not suggest that Rowland was obligated to call witnesses. It is not misconduct for the State to note that there may have been witnesses who did not testify, and that does not imply that the defense should have called them. The prosecutor properly pointed out that the police officers and firefighters at the scene did not support Madill's contention that there were other witnesses. Pointing out that Madill's assertion was unsupported by the evidence did not imply that Rowland was obligated to call witnesses.

This is distinguishable from cases cited by Rowland. In each case, the State explicitly argued that the defense should have provided favorable evidence, and argued that there were negative implications for the failure to do so. See State v. Montgomery, 163 Wn.2d 577, 597, 183 P.3d 267 (2008) (prosecutor repeatedly referred to the defense's failure to call witnesses to corroborate the defendant's explanations); State v. Traweek, 43 Wn. App. 99, 106, 715 P.2d 1148 (1986) (prosecutor argued that the defense could put on witnesses to provide explanations and concluded, "Why hasn't it be [*sic*] presented if there are explanations, which there aren't? ..."); State v. Fleming, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996) (prosecutor argued that there was no reasonable doubt

because there was no evidence that the witness was lying or confused, and if there had been any such evidence, the defendants would have presented it); State v. Cleveland, 58 Wn. App. 634, 647, 794 P.2d 546 (1990) (the State argued that "he [the defendant] has a good defense attorney, and you can bet your bottom dollar that Mr. Jones would not have overlooked any opportunity to present admissible, helpful evidence to you).

In the present case, the State did not suggest that Rowland should have called the alleged roommates as witnesses. The State drew no inferences about what they would have said. Indeed, the point appears to have been that the jury should not speculate as to what these alleged witnesses would say.

Rowland alternatively argues that the same remarks were a comment on his constitutional right to remain silent. The prosecutor never remotely touched upon Rowland's right to silence. There were no comments in the trial that related to Rowland's choice not to testify or speak to police. Rowland's claim of misconduct does not implicate the Fifth Amendment; rather, it implicates the State's burden of proof.

Rowland cites only two cases that address both the Fifth Amendment and the prosecution argument that the defendant had

an obligation to call witnesses. In Fleming, the defendant was charged with a rape, and the State argued that the defense did not present any evidence that the victim was lying or confused. 83 Wn. App. at 214. The defendant's right to remain silent was implicated because, other than the victim, the defendant was the only other person who could testify to such. In Traweek, in addition to the burden shifting argument, the prosecutor made additional remarks that drew attention to the defendant's silence. 43 Wn. App. at 106. In the present case, the prosecutor's brief remark that witnesses other than the defendant did not testify was not a comment on Rowland's right to silence.

b. Rowland Did Not Object And Any Error Was Harmless.

Lastly, even if the prosecutor's remarks were improper, Rowland failed to object and any error was harmless. Rowland did not make any objections during closing arguments. Unless a defendant objected to the allegedly improper comments at trial, reversal is not required unless the prosecutorial misconduct was so

flagrant and ill-intentioned that a curative instruction could not have obviated the resulting prejudice. Smith, 67 Wn. App. at 847. As argued above, the prosecutor's remarks were not improper. To the extent that Rowland argues that the State's remarks could be interpreted as improper, had he objected the trial court could have instructed the jury to disregard them and cured any error.

Rowland relies on State v. Evans to argue that reversal is required. In Evans, the Court of Appeals reversed despite no objections from the defendant. However, in Evans there were numerous acts of misconduct, including telling jurors that the presumption of innocence ended as soon as they started to deliberate, and using a "fill in the blank" reasonable doubt argument that has been found to be misconduct in prior published opinions of the court. 163 Wn. App. at 644-46. The extensive and flagrant misconduct in Evans is distinguishable from the three isolated remarks that Rowland argues are misconduct in the present case.

Finally, Rowland cannot show any prejudice from the prosecutor's remarks. Prejudice occurs only if "there is a substantial likelihood the instances of misconduct affected the jury's

verdict.” Pirtle, 127 Wn.2d at 672. Ultimately, this case turned on whether the jury believed Madill's initial report or her recantation during the trial. There was corroboration for Madill's initial report that Rowland strangled her. She had red marks on her neck that were consistent with strangulation, and she was extremely distraught. 1RP 60-61, 67. Her phone was broken, and Rowland had fled the scene. 1RP 111, 142.

In contrast, Madill's recantation was not credible. She gave contradictory explanations for her injuries, first claiming that she had gotten into a fight several days before, then claiming she inflicted the injuries on herself. 2RP 32-33, 42-43. She flatly denied that she told Anderson that Rowland choked her, and claimed to have recanted to the officers at the scene. 2RP 23, 27. Her recantation was not supported by the evidence. There is no substantial likelihood the prosecutor's limited remarks that Rowland complains of affected the verdict.

Rowland has failed to demonstrate any prosecutorial misconduct that affected the verdict. This Court should affirm.

D. **CONCLUSION**

For the foregoing reasons, the State asks this Court to affirm Rowland's conviction for assault in the second degree.

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Respectfully submitted,

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