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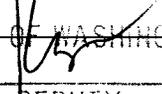
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DIVISION II

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON  
BY   
DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

DONALD VICTOR SCHNEIDER, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Sergio Armijo

No. 05-1-01781-5

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**BRIEF OF RESPONDENT**

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## Table of Contents

A.	<u>ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR</u> .....	1
1.	Were the prosecutor's remarks proper in rebuttal argument where the statements correctly defined the jury's role, and were intended to focus the jury on the facts of the case and to ignore personal prejudice? In the alternative, if the remarks were improper, were they improper at a level requiring a new trial, where defense counsel felt no need to request a curative instruction or a mistrial based on the prosecutor's remarks and any prejudice that could have resulted from the prosecutor's alleged improper remarks were mitigated by the sustained objections, and the remaining statement was clearly proper? .....	1
2.	Was the evidence presented at trial sufficient to prove first degree rape and unlawful imprisonment, where the victim identified defendant as the man who tied her up with duct tape and raped her, defendant's DNA was found at the scene, and other evidence produced at trial corroborated the victim's testimony? .....	1
B.	<u>STATEMENT OF THE CASE</u> .....	1
1.	Procedure.....	1
2.	Facts .....	3

C.	<u>ARGUMENT</u> .....	11
1.	THE PROSECUTOR’S REMARKS IN REBUTTAL ARGUMENT WERE PROPER BECAUSE THEY CORRECTLY DEFINED THE JURY’S ROLE, AND WERE INTENDED TO FOCUS THE JURY ON THE FACTS OF THE CASE AND IGNORE PERSONAL PREJUDICE. IN THE ALTERNATIVE, IF THE REMARKS WERE IMPROPER, THEY WERE NOT AT A LEVEL REQUIRING A NEW TRIAL, AS DEFENSE COUNSEL AT TRIAL FELT NO NEED TO REQUEST A CURATIVE INSTRUCTION OR A MISTRIAL BASED ON THE PROSECUTOR’S REMARKS, ANY PREJUDICE THAT COULD HAVE RESULTED FROM THE PROSECUTOR’S IMPROPER REMARKS WERE MITIGATED BY THE SUSTAINED OBJECTIONS, AND THE REMAINING STATEMENT WAS CLEARLY PROPER.....	11
2.	THE STATE PRODUCED SUFFICIENT EVIDENCE TO PROVE DEFENDANT COMMITTED THE CRIMES OF FIRST DEGREE RAPE AND UNLAWFUL IMPRISONMENT WHERE DNA LINKED DEFENDANT TO BOTH THE VICTIM AND THE CRIME SCENE, THE VICTIM IDENTIFIED DEFENDANT AS THE MAN WHO TIED HER UP AND RAPED HER, AND OTHER EVIDENCE ADDUCED AT TRIAL CORROBORATED THE VICTIM’S STORY .....	24
D.	<u>CONCLUSION</u> .....	29

## Table of Authorities

### Federal Cases

<u>United States v. Alloway</u> , 397 F.2d 105, 113 (6th Cir. 1968).....	15
<u>United States v. Bascaro</u> , 742 F.2d 1335, 1354 (11th Cir. 1984).....	15
<u>United States v. Kopituk</u> , 690 F.2d 1289, 1342-43 (11th Cir. 1982) .....	15
<u>United States v. Lester</u> , 749 F.2d 1288, 1301 (9th Cir. 1984).....	14
<u>United States v. Lewis</u> , 547 F.2d 1030, 1036-37 (8th Cir. 1976).....	15

### State Cases

<u>In re Seago</u> , 82 Wn.2d 736, 513 P.2d 831 (1973) .....	26
<u>Jones v. Hogan</u> , 56 Wn.2d 23, 27, 351 P.2d 153 (1960).....	14
<u>Nissen v. Obde</u> , 55 Wn.2d 527, 348 P.2d 421 (1960) .....	26
<u>Seattle v. Gellein</u> , 112 Wn.2d 58, 61, 768 P.2d 470 (1989).....	24
<u>State v. Anderson</u> , 72 Wn. App. 453, 458, 864 P.2d 1001, <u>review denied</u> , 124 Wn.2d 1013 (1994).....	25
<u>State v. Atkinson</u> , 19 Wn. App. 107, 111, 575 P.2d 240, <u>review denied</u> , 90 Wn.2d 1013 (1978).....	14
<u>State v. Barrington</u> , 52 Wn. App. 478, 484, 761 P.2d 632 (1987), <u>review denied</u> , 111 Wn.2d 1033 (1988) .....	25
<u>State v. Bautista-Caldera</u> , 56 Wn. App. 186, 783 P.2d 116 (1989), <u>review denied</u> , 114 Wn.2d 1011 (1990) .....	19, 20, 21
<u>State v. Binkin</u> , 79 Wn. App. 284, 902 P.2d 673 (1995), <u>review denied</u> , 128 Wn.2d 1015 (1996) .....	12
<u>State v. Camarillo</u> , 115 Wn.2d 60, 71, 794 P.2d 850 (1990).....	25

<u>State v. Casbeer</u> , 48 Wn. App. 539, 542, 740 P.2d 335, <u>review denied</u> , 109 Wn.2d 1008 (1987).....	25
<u>State v. Cord</u> , 103 Wn.2d 361, 367, 693 P.2d 81 (1985).....	26
<u>State v. Crane</u> , 116 Wn.2d 315, 332-33, 804 P.2d 10 (1991).....	13
<u>State v. Delmarter</u> , 94 Wn.3d 634, 638, 618 P.2d 99 (1980) .....	25
<u>State v. Finch</u> , 137 Wn.2d 792, 840, 975 P.2d 967 (1999) .....	14
<u>State v. Fondren</u> , 41 Wn. App. 17, 25, 701 P.2d 810, <u>review denied</u> , 104 Wn.2d 1015 (1985).....	19
<u>State v. Green</u> , 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980) .....	25
<u>State v. Holbrook</u> , 66 Wn.2d 278, 401 P.2d 971 (1965) .....	25
<u>State v. Hopson</u> , 113 Wn.2d 273, 284, 778 P.2d 1014 (1989) .....	13
<u>State v. Joy</u> , 121 Wn.2d 333, 338, 851 P.2d 654 (1993).....	25
<u>State v. Kroll</u> , 87 Wn.2d 829, 835, 558 P.2d 173 (1976).....	18
<u>State v. Mabry</u> , 51 Wn. App. 24, 25, 751 P.2d 882 (1988).....	25
<u>State v. Mak</u> , 105 Wn.2d 692, 726, 718 P.2d 407, <u>cert. denied</u> , 479 U.S. 995, 107 S. Ct. 599, 93 L.Ed.2d 599 (1986).....	12, 13
<u>State v. Manthie</u> , 39 Wn. App. 815, 820, 696 P.2d 33 (1985) .....	12, 19, 24
<u>State v. McCullum</u> , 98 Wn.2d 484, 488, 656 P.2d 1064 (1983) .....	24
<u>State v. Negrete</u> , 72 Wn. App. 62, 66, 863 P.2d 137 (1993)...	16, 17, 18, 19
<u>State v. Papadopoulos</u> , 34 Wn. App. 397, 399-400, 662 P.2d 59 (1983) .....	17, 18, 19
<u>State v. Perez-Mejia</u> , 134 Wn. App. 907, 143 P.3d 838 (2006) ....	21, 22, 23
<u>State v. Russell</u> , 125 Wn.2d 24, 85, 882 P.2d 747 (1994).....	12, 19, 24
<u>State v. Swan</u> , 114 Wn.2d 613, 661, 790 P.2d 610 (1990).....	14, 18

State v. Weber, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983).....12

State v. Weekly, 41 Wn.2d 727, 252 P.2d 246 (1952).....12

**Statutes**

RCW 9A.40.040 .....26

RCW 9A.44.040(1)(a) .....26

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Were the prosecutor's remarks proper in rebuttal argument where the statements correctly defined the jury's role, and were intended to focus the jury on the facts of the case and to ignore personal prejudice? In the alternative, if the remarks were improper, were they improper at a level requiring a new trial, where defense counsel felt no need to request a curative instruction or a mistrial based on the prosecutor's remarks and any prejudice that could have resulted from the prosecutor's alleged improper remarks were mitigated by the sustained objections, and the remaining statement was clearly proper?

2. Was the evidence presented at trial sufficient to prove first degree rape and unlawful imprisonment, where the victim identified defendant as the man who tied her up with duct tape and raped her, defendant's DNA was found at the scene, and other evidence produced at trial corroborated the victim's testimony?

B. STATEMENT OF THE CASE.

1. Procedure

On April 13, 2005, the Pierce County Prosecutor's Office filed an information in Cause No. 05-1-01781-5, charging DONALD VICTOR

SCHNEIDER , hereinafter “defendant,” with five counts of first degree rape and one count of first degree kidnapping. CP 1-6. The State filed an amended information on October 20, 2005, adding one count of second degree assault. CP 8-11. The State filed a second amended information on December 4, 2006, dismissing three of the first degree rape charges. CP 155-57. The matter proceeded to trial before the Honorable Sergio Armijo on November 27, 2006. 3RP 1<sup>1</sup>. After hearing the evidence, the jury found defendant guilty as charged on both counts of first degree rape, and on the lesser included charge of unlawful imprisonment. 3RP 1249-50; CP 247-49.

The court proceeded to sentence defendant to life without the possibility of early release on each of the first degree rape charges, and 29 months on the unlawful imprisonment charge, to run concurrently and to be served in the Department of Corrections. CP 297-309. The court also ordered defendant to pay monetary penalties. 3RP 1257, CP 297-309. From entry of this judgment, defendant filed a timely notice of appeal. CP 342.

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<sup>1</sup> There are three volumes of Verbatim Reports of Proceedings: 1RP, 2/24/06; 2RP, 4/12/06; 3RP, 11/27/06-1/19/07.

## 2. Facts

Matilda Laythe was working as a prostitute during April of 2004. 3RP 393. Laythe's ex-husband introduced her to cocaine between 1999 and 2000, and she began prostituting herself in 2000 to support her cocaine habit. 3RP 392. She had tried to kick her cocaine habit twice, but was unsuccessful. 3RP 391-92.

Laythe was working as a prostitute on April 29, 2005, when she encountered defendant. Defendant was Laythe's last customer of the evening, and they met at midnight. 3RP 404. Laythe had another customer that same evening prior to defendant, and had used to money she received from the customer to buy crack cocaine, which she had smoked. The effects, though, had largely worn off by midnight. 3RP 406.

Laythe was sitting on the grass at the La Quinta Hotel on Portland Avenue when defendant drove up in a white car. 3RP 408. The car reminded Laythe of a Valiant, due to its look and size. 3RP 410. Defendant rolled down his window and asked Laythe if she was working that evening. 3RP 409. Defendant then asked Laythe if she wanted a date. 3RP 411. Laythe said, "Well, okay, I'll go," and got into the car on the passenger side, in the front. *Id.* The two discussed money, and defendant agreed to pay Laythe \$50 for two hours. 3RP 412. Defendant ripped a \$50 bill in half and gave one half to Laythe, with the other half to come later. 3RP 413. Laythe was wearing pants and a top over a bra and shorts at the time. 3RP 419, 428.

Defendant drove to Upper Park without discussing the destination with Laythe. 3RP 412. Defendant parked and took a backpack out of the car. 3RP 413. The two walked five minutes down a path into the park, with Laythe still not sure what defendant was planning to do. 3RP 413-15, 419. It was Laythe's first time in a park with a customer. 3RP 414. However, defendant was very nice to Laythe, including talking to her "real kind" and holding her hand while they walked into the park, and was able to put her at ease about the unfamiliar situation. 3RP 414-15. By the time they reached their destination, the two were within earshot of I-5, although Laythe could not see the freeway. 3RP 415-16.

Laythe's and defendant's destination was a dirt clearing surrounded by a lot of leaves, but no trees. 3RP 420. Defendant placed a cloth on the dirt in the clearing. 3RP 420-21. Defendant then pulled out a knife and demanded that Laythe do what he said, or he would stab her in the heart and bury her. 3RP 420. Laythe believed defendant's threat. 3RP 429. Defendant told Laythe to get on her knees. 3RP 430. He then wrapped Laythe's feet and mouth with duct tape, and wrapped her wrists behind her back with duct tape. Id. Defendant then made Laythe lay on her left side. 3RP 430-31. Defendant then began putting bottles and other objects inside of Laythe's rectum, doing this multiple times and telling her that the bottles were filled with stuff for rinsing her out. 3RP 432-34. Laythe testified that one of her conditions when she worked was that she would not engage in anal sex. 3RP 393. Laythe could not see the objects

when they were being placed inside of her, and relied on what defendant was telling her to identify what the objects were. 3RP 432. Defendant also had vaginal intercourse with Laythe as well as oral sex. 3RP 433. In order to allow Laythe to perform oral sex on him, defendant ripped the duct tape off of Laythe's mouth. 3RP 433-34. Defendant then took a number of Seroquel pills, which he told Laythe he got from Greater Lakes Mental Health, put them in her mouth and told her to chew them up. 3RP 435-36. Defendant gave Laythe a bottle of Scope mouthwash to wash down the pills. 3RP 436. Laythe was able to avoid swallowing the pills by spitting them out and covering them with dirt while defendant rummaged through his backpack. 3RP 436-37. Defendant then had Laythe get back on her knees and resumed placing objects in her rectum. 3RP 437. He then rinsed out Laythe's rectum, then placed one more item inside her. 3RP 437-38. Eventually, defendant unwrapped the duct tape from Laythe's wrists and feet, and let her go. 3RP 439-40. Laythe was unable to find her bra or shorts. 3RP 442. Laythe, however, did find defendant's knife on the ground, and put it in her pocket. 3RP 443, 446.

A sworn statement describing the DNA evidence recovered from the crime scene was read at trial to the jury at the conclusion of witness testimony, and stipulated to by both parties. 3RP 1088-92. According to the statement, defendant's DNA was found on vaginal swabs taken from

Laythe and a floral print fabric found at the crime scene. 3RP 1089-90.

Laythe's DNA was found on the fabric and from hair stuck to duct tape found at the crime scene. 3RP 1089-91.

The afternoon following the attack, after telling a couple of women who lived in the same building what had happened, Laythe went to the Puyallup Tribal Police station, which then notified the Tacoma Police Department. 3RP 240, 455-58. When Laythe made contact with the Tacoma Police, her hair was disheveled with leaves, sticks, and twigs in it, and she had dirt tape lines on both sides of her face and wrists. 3RP 242-43. Laythe told the Tacoma Police Officers Beverly and Bornander what defendant had done, and where the incident occurred. 3RP 460. Sergeant Larson and Officers Beverly and Bornander then took Laythe to where they believed the attack had occurred based on Laythe's description. 3RP 248, 309-10. At the scene, Officer Bornander located a pair of black and red shorts that had been torn or cut up, and half a white bra. 3RP 313. Officer Bornander later located the other half of the bra hanging in brush. Id. Officer Bornander also found a purple and blue print cloth lying on the ground, a large amount of duct tape that appeared to have been used scattered throughout the cleared area, and in the nearby pile of foliage, a bottle of Oxy Clean, and a shoe lace. 3RP 313-14. Officer Bornander located a large, full roll of duct tape, a Vaseline jar, and an empty bottle of Scope mouthwash. 3RP 314-15. Additionally, the surrounding foliage, which included grass, sticks, limbs, and leaves had been trampled down.

3RP 316. At trial, the prosecutor produced several photographs depicting the scene, and Officer Bornander identified the photographs as accurate depictions of what he observed at the scene. 3RP 317-20, 326-31.

Tacoma police also provided Laythe with a photograph montage of six different men, telling her that her attacker may have a beard in the photograph. 3RP 461-62. Laythe picked out a different man from the montage, based on the person's hair and the green color of his shirt. 3RP 463-64. The police then drove her to the Multi-Care Health System and Madigan Army Medical Center, where she received care in the emergency room and the forensic nurse Lynne Berthiaume performed an examination on her and took pictures of her. 3RP 463-64, 711, 714. Berthiaume testified that the initial medical examination revealed that Laythe had rectal bleeding. 3RP 719. Berthiaume testified that her own examination revealed that Laythe's neck was very dirty, her lower back had tape residue and a leaf on it, her left shoulder had an abrasion with swelling and redness, her left forearm was scratched, her right upper arm was bruised, her left breast and knees had several superficial abrasions. 3RP 731-32, 779-81, 783-84. Berthiaume further testified that Laythe's anal region had had bleeding and several contusions, as well as swelling of the rugae with smoothing indicating sexual intercourse had occurred, surrounded by botanical debris. 3RP 732, 762-63. Berthiaume testified that one of the injuries was not caused by a penis, but by an object, and

that her findings were consistent with what Laythe told her, that objects had been inserted into her rectum. 3RP 770, 811.

At trial, the prosecutor produced photographs that were taken of Laythe during her examination at the hospital. 3RP 464, 474-76. The photographs were of injuries to Laythe's back, arm, knees, shoulder, and other injuries. 3RP 474-76, 621. Laythe testified that the injuries to her anus, knees and shoulder, as well as injuries depicted in other photographs, occurred the night of the attack, and she was unsure if the injuries in the other photographs had occurred that same night. Id. Laythe identified defendant as her attacker. RP 622.

At trial, defendant's ex-wife, Angel Miranda, testified that defendant frequently carried one or multiple pocket knives. 3RP 999-1000. Miranda testified that defendant carried duct tape with him, either in the car or in the house. 3RP 1000. Miranda also testified that defendant took Seroquel. 3RP 1001-02. She testified that defendant had received mental health counseling from Greater Lakes. 3RP 1005.

Mr. Horibe made the closing argument for the state, while Ms. Ko made the rebuttal argument. 3RP 1130, 1226. Mr. Horibe argued the facts of the case, and his argument is not challenged on appeal. Ms. Ko, in her rebuttal, stated that, as the jury, "Your job is to take the evidence that we do have, that you do have, and you have to see whether or not the evidence proves beyond a reasonable doubt the elements of the crime of rape, of kidnap, of assault. That's what you have to do." 3RP 1236. Ms.

Ko also made the following statements during her rebuttal, which defendant challenges [challenged portions in italics]:

MS. KO: Each and every one of you, each and every one of you come from a different background, different life experience. And each one of you have different beliefs, opinions. But *the 12 of you have been chosen to represent the people of Washington.*

MS. COREY: Your Honor, I'm going to object to that. They have been chosen to decide this case. They don't represent anyone.

THE COURT: Sustained.

MS. COREY: Move to strike.

THE COURT: Let's move on.

MS. KO: *Ladies and Gentlemen, you have to decide what he did to Matilda Laythe. Was that a violation of Matilda Laythe? You have to decide whether someone, as sad and as pathetic as Matilda Laythe, is entitled to the protection of our laws.*

MS. COREY: Objection. That's not what they are to decide. They are to decide whether the State proved it beyond a reasonable doubt.

MS. KO: This is closing argument, Your Honor.

THE COURT: I'm going to sustain.

MS. COREY: Move to strike.

MS. KO: You have to decide whether this defendant is guilty of this crime and before you do that, you have to understand one thing: The title of this case is not Matilda Laythe versus Donald Schneider. The title of this case is the State of Washington versus Donald Schneider. It's the State that has brought these charges and it is the State that has prosecuted him. And *when he violated Matilda Laythe, he violated the laws of this State that says every person, regardless of wealth, education, status, color, gender, every person has a right to be free from*

*harm. When he violated Matilda Laythe, he violated the peace and dignity of this state. And when he violated Matilda Laythe, he violated the people of the state of Washington.*

MS. COREY: Objections, Your Honor, this is emotion, passion, prejudice. It's prohibited.

THE COURT: I'm going to deny the objection. Ms. Ko, continue.

MS. KO: Violated the people of this state, to which she is a member of. Your verdict, your verdict will not change her life. Your verdict will not make her whole. Your verdict will not alter what happened to Matilda Laythe on April 29<sup>th</sup>. *Your verdict will, however, define what he did. Your verdict will define what justice means and what the law represents.*

MS. COREY: Objection, Your Honor, the verdict is limited to proof beyond a reasonable doubt.

THE COURT: I'll sustain.

MS. COREY: Move to strike.

THE COURT: Continue, Ms. Ko.

MS. KO: Your verdict will represent the truth of what he did and I'm asking you to return a verdict that represents the truth. He is guilty... I ask you to return a verdict that respects the truth.

3RP 1242-45.

The jury received, amongst others, the following instruction from the court:

...

"The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, one stipulation, and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it

in reaching your verdict...

“The lawyer’s remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers’ statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.”

...

Jury instructions 1, CP 250-91.

C. ARGUMENT.

1. THE PROSECUTOR’S REMARKS IN REBUTTAL ARGUMENT WERE PROPER BECAUSE THEY CORRECTLY DEFINED THE JURY’S ROLE, AND WERE INTENDED TO FOCUS THE JURY ON THE FACTS OF THE CASE AND IGNORE PERSONAL PREJUDICE. IN THE ALTERNATIVE, IF THE REMARKS WERE IMPROPER, THEY WERE NOT AT A LEVEL REQUIRING A NEW TRIAL, AS DEFENSE COUNSEL AT TRIAL FELT NO NEED TO REQUEST A CURATIVE INSTRUCTION OR A MISTRIAL BASED ON THE PROSECUTOR’S REMARKS, ANY PREJUDICE THAT COULD HAVE RESULTED FROM THE PROSECUTOR’S IMPROPER REMARKS WERE MITIGATED BY THE SUSTAINED OBJECTIONS, AND THE REMAINING STATEMENT WAS CLEARLY PROPER.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks or conduct was improper and that it prejudiced the defense. State v. Mak, 105 Wn.2d 692, 726, 718 P.2d 407,

cert. denied, 479 U.S. 995, 107 S. Ct. 599, 93 L.Ed.2d 599 (1986); State v. Binkin, 79 Wn. App. 284, 902 P.2d 673 (1995), review denied, 128 Wn.2d 1015 (1996). If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. Binkin at 293-294. Where the defendant did not object or request a curative instruction, the error is considered waived unless the court finds that the remark was “so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” Id.

To prove that a prosecutor's actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. State v. Manthie, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing State v. Weekly, 41 Wn.2d 727, 252 P.2d 246 (1952)).

In determining whether prosecutorial misconduct warrants the grant of a mistrial, the court must ask whether the remarks, when viewed against the background of all the evidence, so tainted the trial that there is a substantial likelihood the defendant did not receive a fair trial. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994); State v. Weber, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983). In deciding whether a trial irregularity warrants a new trial, the court considers: (1) the seriousness of the irregularity; (2) whether the statement was cumulative of evidence properly admitted; and (3) whether the irregularity could have been cured

by an instruction. State v. Crane, 116 Wn.2d 315, 332-33, 804 P.2d 10 (1991). The trial court is in the best position to assess the impact of irregularities. See Mak, 105 Wn.2d at 701. The court will disturb the trial court's exercise of discretion only when no reasonable judge would have reached the same conclusion. State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989).

In the instant case, defense counsel objected to the challenged remarks at trial, but did not request a curative instruction, nor did she move for a mistrial. On this topic, the Washington Supreme Court has stated:

We have consistently held that unless prosecutorial conduct is flagrant and ill-intentioned, and the prejudice resulting there from so marked and enduring that corrective instructions or admonitions could not neutralize its effect, any objection to such conduct is waived by failure to make an adequate timely objection and request a curative instruction. Thus, in order for an appellate court to consider an alleged error in the State's closing argument, the defendant must ordinarily move for a mistrial or request a curative instruction. The absence of a motion for mistrial at the time of the argument strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial. Moreover, “[c]ounsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal”

State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990)(citing Jones v. Hogan, 56 Wn.2d 23, 27, 351 P.2d 153 (1960); State v. Atkinson, 19 Wn. App. 107, 111, 575 P.2d 240, review denied, 90 Wn.2d 1013 (1978)) [footnotes omitted] [emphasis added].

In the present case, the prosecutor's remarks in rebuttal argument were proper because they correctly defined the role of the jury, and were intended to focus the jury on the facts of the case and ignore personal prejudice. Appellant first challenges the prosecutor's statement that the jury had "been chosen to represent the people of Washington." 3RP 1243. This comment is very similar to the one made in State v. Finch, where the prosecutor stated in rebuttal argument, "We can't call everybody in Snohomish County down to the courthouse to have a trial... So we bring in a representative sampling of the community to make the decision and you are the representative sampling of that community." State v. Finch, 137 Wn.2d 792, 840, 975 P.2d 967 (1999). The prosecutor went on to say that the jury was "the conscience of the community," as well as "the voice of the law in the community." Id. The Supreme Court held that these statements did not constitute prosecutorial misconduct, citing federal court cases that held, "appeals for the jury to act as a conscience of the community are not impermissible, unless specifically designed to inflame the jury." Id. at 841-42 (quoting United States v. Lester, 749 F.2d 1288, 1301 (9th Cir. 1984); accord United States v. Bascaro, 742 F.2d 1335,

1354 (11th Cir. 1984); United States v. Kopituk, 690 F.2d 1289, 1342-43 (11th Cir. 1982); United States v. Lewis, 547 F.2d 1030, 1036-37 (8th Cir. 1976); United States v. Alloway, 397 F.2d 105, 113 (6th Cir. 1968).

There is nothing in the prosecutor's statement that the jury "has been chosen to represent the people of Washington" that is designed to inflame the jury, and is therefore permissible.

The other challenged statements all were designed as a response to defense counsel's repeated attacks on Laythe's character, imploring the jury to focus on the facts of the case and away from any personal prejudice they may feel towards Laythe. The prosecutor gave her rebuttal after defense counsel argued that Laythe had withheld that she was a crack addict, a prostitute, and "had arranged a business deal, a contract, sex for money, with [defendant]." 3RP 1162-63. Defense counsel also told the jury that, in making its decision, "Because the State's case rests on Matilda Laythe, you need to consider who she is... Well, she's a prostitute... In addition to that, she's a crack addict... She's using a lot of drugs, she's having a lot of sex... She has no regard for the law." 3RP 1166-68.

Faced with this characterization of the victim, the prosecutor was asking the jury to look beyond any prejudice they may feel towards Laythe, her personal habits, and how she made money, and instead focus on the facts as they related to the rape. The prosecutor therefore employed several tactics in order to mitigate defense counsel's attacks on Laythe's

character, all proper arguments. The prosecutor asked the jury to apply the law equally, even though Laythe was a particularly downtrodden individual. The prosecutor argued rightfully that a violation of the law is not just a crime against an individual, but a crime against society, as well. Finally, the prosecutor bolstered her previous argument by stating that the jury's verdict "will define what justice means and what the law represents," reiterating her stance that justice should be applied equally to all crime victims. 3RP 1244. All of these arguments asked the jury to reach their verdict based on their determination of whether defendant raped Laythe, not on their personal feelings towards Laythe and her lifestyle, and was therefore entirely proper.

In the alternative, if this Court determines that the prosecutor's remarks were improper, they were not at a level requiring a reversal of defendant's conviction and remand for a new trial. Washington Courts have held remarks in closing arguments by prosecutors that go well beyond what the prosecutor said in the present case, even if improper, did not prejudice a defendant to the point that a new trial is necessary. In State v. Negrete, Negrete argued that the prosecutor had committed misconduct in closing argument, and therefore he had been prejudiced and deserved a new trial. State v. Negrete, 72 Wn. App. 62, 66, 863 P.2d 137 (1993). In rebuttal argument, the prosecutor stated that defense counsel "is being paid to twist the words of the witnesses by Mr. Negrete." Id. The comment was in response to defense counsel's argument that Officer

Valdez, one of the prosecution witnesses, paid an informant to “frame people.” Id. Negrete was convicted of delivery of a controlled substance. Id. at 63. Division Three held that, while the prosecutor’s remark was improper, “It was not irreparably prejudicial.” Id. at 67. The court based its ruling primarily on defense counsel’s decision at trial to not request a curative instruction nor ask for a mistrial, which the court held was a strong indication that the remark did not seem prejudicial at the time. Id. The court also cited the trial court’s jury instructions as minimizing any potential prejudice resulting from the remark. Id. The court therefore concluded that, “Considering the strength of the State’s case against him, and the isolated nature of the prosecutor’s remark, Mr. Negrete has not established a substantial likelihood that the remark affected the jury’s verdict.”

In State v. Papadopoulos, defendant Kantas appealed her conviction for first degree armed robbery, arguing that the prosecutor made improper remarks regarding the credibility of her co-defendants, Patricia and Theofanis Papadopoulos. State v. Papadopoulos, 34 Wn. App. 397, 399-400, 662 P.2d 59 (1983). Defense counsel for Kantas had vigorously attacked the Papadopouloses’ credibility. Id. at 399. The prosecutor responded in closing argument, stating that Mr. Papadopoulos voluntarily turned himself in despite a weak case against him, and, “Patty can’t testify against her husband, Theo in a trial.” Id. at 400. Defense counsel objected, and the court reminded the jury that the prosecutor’s

comments in closing argument are not equivalent to evidence. Id. Division One held that, although the prosecutor's comment was improper and "arguments concerning questions of law must be confined to the instructions given by the court," the comment was not so prejudicial as to warrant a new trial. Id. at 400-01. The court relied on the isolated nature of the prosecutor's comment, that the judge instructed the jury "to follow the law as given them by the court," and that a curative instruction would have taken care of any remaining prejudice. Id. at 401.

The potential for prejudice resulting from the arguments made by the prosecutors in Negrete and Papadopoulos was clearly much greater than from the arguments made by the prosecutor in the present case, and the appellate courts held that the comments did not require a new trial. The prosecutor in Negrete directly attacked the defense counsel's professionalism. The misstatement of the law in Papadopoulos went to a direct issue in the case. Neither is true in the present case. All of the statements were made in the larger context of a clearly proper argument focusing on the facts and the law as given by the court. Furthermore, the jury instructions in the present case, like the instructions in Negrete and Papadopolous, direct the jury to follow the law as given by the judge and not to consider the attorneys' arguments as evidence, and "the jury is presumed to follow the court's instructions." Swan, 114 Wn.2d at 662, citing State v. Kroll, 87 Wn.2d 829, 835, 558 P.2d 173 (1976); State v. Fondren, 41 Wn. App. 17, 25, 701 P.2d 810, review denied 104 Wn.2d

1015 (1985). Finally, defense counsel's decision not to request a curative instruction or a mistrial is evidence that, in context, the prosecutor's comments did not seem highly prejudicial. Defendant therefore fails to meet his burden of showing that the prosecutor acted in bad faith, that her remarks so tainted the trial that there is a substantial likelihood defendant did not receive a fair trial, and that a curative instruction could not have mitigated any prejudice from the prosecutor's remarks. Manthie, 39 Wn. App. at 820; Russell, 125 Wn.2d at 85.

Defendant relies on State v. Bautista-Caldera to support his argument that the prosecutor's statements were improper and prejudiced defendant. Br. of Appellant at 12; State v. Bautista-Caldera, 56 Wn. App. 186, 783 P.2d 116 (1989), review denied, 114 Wn.2d 1011 (1990). Defendant's reliance on Bautista-Caldera is misplaced. In Bautista-Caldera, similar to Negrete and Papadopoulos, the court found the prosecutor's statements were improper, but that they did not rise to the level of egregiousness where a reversal of the defendant's conviction was warranted. Bautista-Caldera at 195. Bautista-Caldera was convicted of two counts of first degree statutory rape, and one count of indecent liberties. Id. at 190. Bautista-Caldera appealed all three convictions, arguing in part that he was denied a fair trial because of prosecutorial misconduct in the closing argument. Amongst those statements were the following pleas from the prosecutor:

“Think of [R], think of all the children who do not talk that well who unfortunately don’t remember everything in precise order in which it happens but whose only hope is people like yourself who are willing to take this case seriously, understand why it is that this happened...

“... Do not tell that child that this type of touching is okay, that this is just something that she will have to learn to live with. Let her and children know that you’re ready to believe them and enforce the law on their behalf.”

Id. at 194-95.

Division One reversed one of his convictions for statutory rape and his conviction for indecent liberties on other grounds, but upheld the other statutory rape conviction.

The court concluded that the prosecutor, through the above pleas, was asking the jury to “send a message to society about the general problem of child sexual abuse.” Id. at 195. The prosecutor, the court held, was exhorting the jury not to make its decision based on the facts of the case, but on emotion, and “such an emotional appeal is improper.” Id. However, the court also held that the prosecutor’s statements, while in error, were “not nearly so extensive or egregious” that Bautista-Caldera’s conviction should be reversed. Id. The court also held that the prosecutor had properly urged the jury in closing argument to base its decision on the evidence presented, concluding, “We do not find any prejudice to be such as could not have been neutralized with a curative instruction.” Id.

In the present case, unlike Bautista-Caldera, the prosecutor did not argue that the jury should send such a message to rape victims or rapists.

The prosecutor did not ask the jury to state or send a message to either a specific group or society at large. The prosecutor also never asked the jury to use its position to advance an agenda beyond rendering a verdict based on the evidence presented at trial. Additionally, defense counsel's objections to three of the four statements were sustained. Even if this Court were to determine that the prosecutor's statements rose to the level of asking the jury to make a statement to society with their verdict, these statements were "not nearly so extensive or egregious" to warrant a reversal. Id. This is true in part because, just as in Bautista-Caldera, both prosecutors made their arguments based on the facts of the case, and Ms. Ko specifically asked the jury to base their decision on the evidence and return a verdict that "represents the truth." 3RP 1236, 1245.

Defendant also argues that the prosecutor's rebuttal argument "purposefully attempted to inflame the patriotic passions of the jury," and are therefore analogous to the statements the prosecutor made in State v. Perez-Mejia. Br. of Appellant at 10-12, 13; State v. Perez-Mejia, 134 Wn. App. 907, 143 P.3d 838 (2006). Defendant's argument is misguided. Perez-Mejia is easily distinguishable from the present case because the statements made by the prosecutor were egregious, and the defendant's objections during closing argument were denied. In Perez-Mejia, the jury found the defendant, Soto-Rodriguez, guilty of first-degree murder for his role in the shooting of a peacemaker who tried to intervene between two opposing groups who were in a heated argument. Perez-Mejia, 134 Wn.

App. at 909. Division One reversed Soto-Rodriguez's conviction on the grounds that the prosecutor committed misconduct in his closing argument, and that the misconduct so prejudiced the trial that "there exists a substantial likelihood that the prosecutor's remarks affected the jury's verdict." Id. at 915, 920. The court went through a litany of instances during the closing argument where the prosecutor committed misconduct, including urging the jury to send a message to gangs and use the verdict as an opportunity to help end violence, appealing to the jury's sense of patriotism, and, of great concern to the court, race-baiting.

Defendant ignores that Division One was particularly troubled that the prosecutor invoked love of country as code to stoke ethnic and national prejudice. Elaborating on its holding that "these appeals to prejudice and patriotism were unquestionably improper," the court stated that the prosecutor "needlessly injected the sensitive issues of nationality and ethnicity into a case where the defendant and his associates were alleged members of a Central American gang, many of whom, including Soto-Rodriguez, required Spanish language interpreters during the trial." Id. at 918. The court pointed to another instance in the prosecutor's closing argument where he talked about the defendants walking into Soto-Rodriguez's house "proudly showing their *machismo*" [emphasis in original] as further evidence that the prosecutor was attempting to distinguish Soto-Rodriguez by his ethnicity. Id.

Despite holding that the prosecutor's statements were improper, the court's analysis clearly shows that the improper statements alone were not enough to reverse Soto-Rodriguez's conviction. The court instead stated, "There is a clear danger that the prejudicial impact of the prosecutor's objectionable statements, considered in their totality, affected the jury's verdict. Id. at 918-20. Additionally, the court held that, by overruling Soto-Rodriguez's objections and failing to give a curative instruction, "The trial court, at best, failed to cure the prejudicial impact of the improper argument. At worst, the trial court augmented the argument's prejudicial impact by lending its imprimatur to the remarks." Id. at 920.

In the present case, the alleged misconduct on the part of the prosecutor does not rise to the level discussed in Perez-Mejia. The prosecutor's entire closing argument was proper and focused on the facts of the case, and is not challenged on appeal; only portions of the rebuttal argument are challenged. Defense counsel objected to all of the alleged improper statements, and all but one of those objections were sustained. In those instances, any potential prejudice was cured by the trial court sustaining defense counsel's timely objections. The only defense counsel objection that was denied regarded the prosecutor's statement that "when [defendant] violated Matilda Laythe, he violated the people of the State of Washington," which is a proper explanation to the jury that when someone commits a crime, that crime not only affects the victim, but affects society

as a whole. Defense counsel never asked for a curative instruction, nor did she move for a mistrial due to the alleged improper remarks, strongly implying that defense counsel felt the prosecutor's statements were not so egregious as to warrant such action. Therefore, none of the prosecutor's statements in her rebuttal argument unfairly prejudiced defendant, and do not warrant a reversal of defendant's conviction.

Defendant does not meet his burden of showing that the prosecutor acted in bad faith, that her remarks so tainted the trial that there is a substantial likelihood defendant did not receive a fair trial, and that a curative instruction could not have mitigated any prejudice from the prosecutor's remarks. Manthie, 39 Wn. App. at 820; Russell, 125 Wn.2d at 85. Therefore, defendant's conviction should be affirmed.

2. THE STATE PRODUCED SUFFICIENT EVIDENCE TO PROVE DEFENDANT COMMITTED THE CRIMES OF FIRST DEGREE RAPE AND UNLAWFUL IMPRISONMENT WHERE DNA LINKED DEFENDANT TO BOTH THE VICTIM AND THE CRIME SCENE, THE VICTIM IDENTIFIED DEFENDANT AS THE MAN WHO TIED HER UP AND RAPED HER, AND OTHER EVIDENCE ADDUCED AT TRIAL CORROBORATED THE VICTIM'S STORY.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); see also Seattle v. Gellein, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); State v. Mabry, 51

Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993); State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. State v. Barrington, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), review denied, 111 Wn.2d 1033 (1988) (citing State v. Holbrook, 66 Wn.2d 278, 401 P.2d 971 (1965)). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Anderson, 72 Wn. App. 453, 458, 864 P.2d 1001, review denied, 124 Wn.2d 1013 (1994).

Circumstantial and direct evidence are considered equally reliable. State v. Delmarter, 94 Wn.3d 634, 638, 618 P.2d 99 (1980). In considering this evidence, "[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal." State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing State v. Casbeer, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)). This is because the written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations. The trier of fact, who is best able to observe the witnesses and evaluate

their testimony, should make these determinations. On this issue, the Supreme Court of Washington said:

great deference . . . is to be given the trial courts factual findings. In re Sego, 82 Wn.2d 736, 513 P.2d 831 (1973); Nissen v. Obde, 55 Wn.2d 527, 348 P.2d 421 (1960). It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985).

Therefore, when the State has produced evidence of all elements of a crime, the decision of the trier of fact should be upheld.

A person commits the crime of first degree rape when he engages in sexual intercourse with another person by forcible compulsion and where he uses or threatens to use a deadly weapon or what appears to be a deadly weapon. RCW 9A.44.040(1)(a). A person commits unlawful imprisonment if he knowingly restrains another person. RCW 9A.40.040.

In the present case, there was more than sufficient evidence at trial for a reasonably jury to convict defendant of first degree rape and unlawful imprisonment. The crux of defendant's argument for insufficient evidence of first degree rape is that Laythe was unable to identify defendant as her rapist. Defendant relies on Laythe's poor memory and her identification of another man in a six-person photo montage as proof the State did not prove its case. Br. of Appellant at 14, 16-17. Defendant concedes he had a sexual encounter with Laythe, and only argues that he did not rape her. Br. of Appellant at 14-16.

The role of determining Laythe's credibility is left to the jury, and Laythe identified defendant as her rapist at trial. Additionally, the facts presented at trial, when viewed in the light most favorable to the State, prove the State's case. There was ample evidence that Laythe had been raped in Upper Park, and Laythe identified defendant at trial as her attacker. Laythe testified that her attacker raped her in a park by inserting his penis into her vagina and by inserting objects into her rectum against her will. An examination of Laythe revealed wounds consistent with a foreign object other than a penis having been inserted inside her rectum, and that she had botanical debris around the wounds. Laythe testified that defendant bound her mouth, wrists, and feet with duct tape. DNA evidence confirmed that Laythe's hair was found in duct tape at the scene, and duct tape was found throughout the scene. Laythe also had duct tape lines on her face, wrists, and feet when police officers and medical professionals encountered her.

There was also ample evidence connecting defendant to the rape and the crime scene. Laythe testified that defendant was her attacker. Defendant's DNA was found inside of Laythe's vagina and at the crime scene. Defendant argues that Laythe could have brought the floral fabric at the crime scene containing defendant's DNA, but viewed in the light most favorable to the State this evidence directly connects defendant to the crime scene. Br. of Appellant at 14. Laythe also testified that defendant threatened her with a knife if she did not do as he said, and the knife was

produced at trial. There was also testimony from defendant's ex-wife that defendant often carried duct tape and a pocket knife. Laythe testified that defendant told her of a specific prescription he was taking, Seroquel, and that he received the prescription from Greater Lakes Mental Health, before he shoved a handful of Seroquel pills into her mouth. Defendant's ex-wife testified that defendant had taken Seroquel and that he had been to Greater Lakes Mental Health. Viewed in the light most favorable to the State, this evidence clearly proves Laythe was raped and defendant committed the rape.

Defendant also argues insufficient evidence of unlawful imprisonment. Br. of Appellant at 15-16. Defendant does not argue any additional facts, only stating, "The State did not present sufficient evidence to show that Mr. Schneider was the person who restrained and raped [Laythe]. Br. of Appellant at 16. The success of defendant's argument, therefore, is wholly dependant on its success regarding the first degree rape conviction.

There was also ample evidence to convict defendant of unlawful imprisonment. Laythe testified that defendant threatened her. Duct tape was strewn throughout the crime scene, with some pieces containing Laythe's hair, and Laythe also showed duct tape lines on her mouth, wrists, and feet. Laythe also testified defendant threatened her with a knife, and the knife was produced at trial. Laythe identified defendant in court as the man who restrained her with duct tape and then raped her.

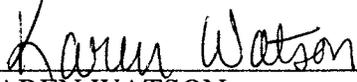
Viewed in the light most favorable to the State, the evidence proves that Laythe was restrained against her will, and that defendant restrained her.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests that this Court affirm defendant's convictions and sentence.

DATED: March 5, 2008.

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Certificate of Service:  
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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Date Signature

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