

Court of Appeals No. 36131-1-II

SW

**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON

Plaintiff/Respondent,

v.

JEREMY JAMES BONO,

Defendant/Appellant.

BRIEF OF APPELLANT

**Appeal from the Superior Court of Pierce County,
Cause No. 05-1-05264-5
The Honorable Brian Tollefson, Presiding Judge**

**Sheri L. Arnold
Attorney for Appellant
WSBA No. 18760**

**P. O. Box 7718
Tacoma, Washington 98406
email: slarnold2002@yahoo.com
(253)759-5940**

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I. ASSIGNMENTS OF ERROR

1. The prosecutor committed misconduct by arguing facts not in evidence during closing argument.
2. The prosecutor committed misconduct in closing argument by presenting argument which was an improper appeal to the passions and prejudices of the jury.
3. The trial court erred in overruling the objection to the prosecutor arguing facts not in evidence during closing argument.
4. Cumulative error deprived Mr. Bono of his right to a fair trial.

II. ISSUES PRESENTED

1. Is it prosecutorial misconduct for a prosecutor to argue that a victim was raped or was threatened with rape where there is no evidence in the record to support such an argument? (Assignments of Error Nos. 1 & 2)
2. Is it prosecutorial misconduct to argue in a manner that is designed to inflame the passions and prejudices of the jury? (Assignments of Error Nos. 1 & 2)
3. Does a trial court err in overruling an objection to the prosecutor arguing facts not in evidence where there were not sufficient facts in the record to support the prosecutor's argument? (Assignment of Error No. 3)
4. Has cumulative error deprived Mr. Bono of his right to a fair trial where the State made inflammatory and baseless arguments and the trial court overruled objection to the argument on untenable grounds? (Assignments of Error Nos. 1, 2, 3, & 4)

III. STATEMENT OF THE CASE

1. Procedural History

On October 25, 2005, Mr. Bono was charged with one count of assault in the first degree while armed with a deadly weapon other than a firearm. CP 1-2.

A Motion in Limine was filed regarding the admissibility of the testimony of Ms. Colleen Bono (CP 87-90) and argument was heard on the motion. Mr. Bono, however, ultimately did not testify at trial, rendering the trial court's ruling on the motion moot.

A jury found Mr. Bono guilty of assault in the first degree and found that he was armed with a deadly weapon. CP 126, 128.

On March 23, 2007, Mr. Bono received a sentence of one hundred and thirty-six (136) months with a twenty-four (24) month deadly weapon sentence enhancement. CP 131-143.

A timely Notice of Appeal was filed March 30, 2007. CP 146-159.

2. Factual Summary

On October 12, 2005, Mr. Wilson voluntarily got into Mr. Bono's truck with Mr. Bono and Mr. Metcalf. RP 319-323. Mr. Bono began to drive

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and Mr. Metcalf put Mr. Wilson into a sleeper hold. Mr. Metcalf began hitting Mr. Wilson with his fists and a plastic bottle. RP 324-329. Mr. Wilson testified that while he was in the “sleeper hold,” he defecated in his pants because he thought it would be funny. RP 338.

Mr. Bono drove the truck to an area on Mt. Rainier where the men got out of the truck. RP 332-334. Mr. Wilson took off his clothes and ran into the bushes but was hit with rocks as he ran. RP 334, 341-342. Mr. Bono never struck Mr. Wilson. RP 336-337.

After the men left, Mr. Wilson put his clothes back on and walked out of the woods. RP 344. Mr. Wilson was discovered by a passing driver and taken to a fire station. RP 347-348. Paramedics were called and Mr. Wilson was transported to St. Joseph’s hospital where it was determined that he had suffered a nasal fracture and a skull fracture at the base of the skull, multiple lacerations to his head and face, and a puncture wound to one ear. RP 287-288, 348-349.

Mr. Wilson gave a statement to police indicated that Mr. Bono and Mr. Metcalf were the ones who had assaulted him. RP 449-454.

3. Trial Testimony

- *Tracy Vasquez*

Mr. Vasquez has known Mr. Bono for several years. RP 164-165. Ms. Vasquez had known Mr. Garrett Wilson for a year to a year-and-a-half prior to October 12, 2005. RP 167.

On October 12, 2005, Mr. Wilson had been living with Mr. Vasquez for several weeks. RP 168. During the day of October 12, 2005, Mr. Vasquez saw Mr. Bono drive by Mr. Vasquez's home and then 20 minutes later Mr. Bono and Mr. Metcalf entered Mr. Vasquez's home. RP 168-169. When Mr. Bono entered Mr. Vasquez's home, he appeared to be intoxicated and Mr. Vasquez could smell the alcohol on his breath. RP 171-172. Mr. Bono asked Mr. Vasquez who Garret was, and Mr. Vasquez pointed Mr. Bono to Mr. Wilson. RP 172. Someone said that they needed to go for a ride. Mr. Wilson got up willingly and walked out the door with Mr. Bono and Mr. Metcalf. RP 172. Mr. Vasquez thinks that the person who said they needed to go for a ride was Mr. Bono, but he was not sure. RP 172-173. Mr. Vasquez knew that Mr. Wilson did not expect Mr. Bono and Mr. Metcalf to appear that day since Mr. Wilson and Mr. Vasquez had planned on going to Wal-mart to shoplift. RP 174. Mr. Vasquez saw Mr. Bono's truck driving

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away with Mr. Wilson in it and he heard yelling. RP 174. Mr. Vasquez did not know who was yelling or even if the yelling came from the truck. RP 242.

When Mr. Bono and Mr. Metcalf arrived, Mr. Wilson did not appear to be angry with anyone and got up and left with the men willingly. RP 175. Mr. Metcalf appeared to be angry and expressed hostility through his voice. RP 175-176.

Mr. Vasquez next saw Mr. Wilson a week later after Mr. Wilson had gotten out of the hospital. RP 178. Mr. Wilson had left stolen property at Mr. Vasquez's home. RP 178.

After Mr. Metcalf was arrested, he called Mr. Vasquez several times a day for several months. RP 185. Mr. Vasquez got to know Mr. Metcalf and Mr. Metcalf told Mr. Vasquez that he had not been involved in the assault on Mr. Wilson. RP 185-187. Mr. Metcalf offered to pay Mr. Vasquez money to write a statement to help Mr. Metcalf, but Mr. Vasquez and Mr. Wilson had already gotten together and written a statement saying that they had seen the man who attacked Mr. Wilson at Wal-mart. RP 187-188.

Mr. Vasquez also wrote a statement for Mr. Bono at Mr. Bono's

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request. RP 195-196. Mr. Bono did not threaten Mr. Vasquez when he asked Mr. Vasquez to write a statement for him. RP 195-196. Plaintiff's exhibit 2 is the handwritten statement Mr. Vasquez prepared for Mr. Bono and had notarized, but it contains statements that are not true. RP 196-197. Mr. Bono did not offer to pay Mr. Vasquez to write the statement. RP 240.

Mr. Vasquez did not see Mr. Bono or Mr. Metcalf harm Mr. Wilson. RP 225-226. On October 12, 2005, Mr. Vasquez was doing methamphetamine. RP 227. Due to his drug use, Mr. Vasquez has doubts that Mr. Bono was with Mr. Metcalf when Mr. Wilson left Mr. Vasquez's house. RP 250-251.

In Mr. Vasquez's opinion, Mr. Wilson was not an honest man. RP 228-229.

Mr. Vasquez did not like being in jail and had no desire to go back to jail and when testifying felt he would say whatever he had to say to avoid going back to jail. RP 231-232. Mr. Vasquez felt pressured to testify in the way the State wanted in order to avoid going back to jail. RP 236.

Based on what Mr. Vasquez knew about the people around his house, it could have been someone besides the defendants who beat Mr. Wilson. RP 235.

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- ***Daniel Brocksmith***

Mr. Brocksmith works as a physician's assistant at Tacoma General Hospital and St. Joseph's Hospital.. RP 276-278. On October 12, 2005, Mr. Brocksmith received a report that Mr. Wilson was en route to the hospital and had been beaten about the head and neck. RP 279-280. When Mr. Wilson arrived in the emergency room he had blood around his head and neck. RP 282. Plaintiff's Exhibit 1 contains three pictures showing what Mr. Wilson looked like when he arrived at the hospital. RP 283.

Mr. Wilson was fully clothed when he arrived at the hospital. RP 286. When Mr. Brocksmith assisted in cutting Mr. Wilson's clothes off, Mr. Brocksmith noted that Mr. Wilson had lost bowel function and had stool from his waist to his ankles in his pants. RP 286-287. The treating team in the hospital did a CAT scan of Mr. Wilson's head which showed that his brain was uninjured but that Mr. Wilson had suffered a nasal fracture and a skull fracture at the base of the skull. RP 287-288. Mr. Wilson also had multiple lacerations to his head and face and a puncture wound to one ear. RP 288. Mr. Wilson had lacerations under his eye which extended to his forehead and ear which required stitches. RP 291.

When Mr. Wilson arrived in the emergency room, he told the doctors

that he had been assaulted with bottles and fists. RP 293. Mr. Wilson may have some scarring on his face but will otherwise make a full recovery. RP 292-301.

- ***Garret Wilson***

On October 12, 2005, Mr. Wilson was living with Mr. Tracy Vasquez. RP 315. Prior to October 12, 2005, Mr. Wilson had known Mr. Bono for approximately a year. RP 317. Mr. Bono was the brother of Mr. Wilson's "ex." RP 317-318. Prior to October 12, 2005, Mr. Wilson did not have any issues with Mr. Bono and Mr. Bono had not threatened Mr. Wilson. RP 318. At a friend's house, Mr. Bono had said that if Mr. Wilson ever slept with his sister, Mr. Bono would kill Mr. Wilson, but Mr. Wilson considered this statement to be "idle chitchat" and did not see it as a threat. RP 318-319.

On October 12, 2005, Mr. Bono came to the residence where Mr. Wilson was staying. RP 319. Mr. Bono came in the house and asked Mr. Wilson to go with him, so Mr. Wilson did. RP 320. Mr. Bono and the man who was with him seemed to be upset, but Mr. Wilson did not know why. RP 321. Mr. Wilson got into Mr. Bono's Dodge truck in between Mr. Bono and the other man. RP 322-323.

Nobody said anything in the truck until the truck got close to the end

of the trailer park, but then the man who came with Mr. Bono put Mr. Wilson in a “sleeper hold” and “put [Mr. Wilson] to sleep.” RP 324-325. The man put his left arm around Mr. Wilson’s shoulders and tried to cut off the oxygen to Mr. Wilson’s brain to knock him out. RP 325-326. The man then let go of Mr. Wilson and began hitting him. RP 327.

While Mr. Wilson was in the “sleeper hold,” he defecated in his pants because he thought it would be funny. RP 338.

While being hit by the other man, Mr. Wilson asked Mr. Bono why he was being beat up. RP 327. Mr. Bono said something about his sister being arrested. RP 327-328. Mr. Wilson was aware that two months prior Mr. Bono’s sister had been arrested for shoplifting, but Mr. Wilson was not with Mr. Bono’s sister at the time of her arrest or at the time she was shoplifting. RP 327-328.

Mr. Wilson was punched in the head and beat with a plastic bottle. RP 328-329. The man who was beating Mr. Wilson said abusive and obscene cuss words, possibly of a sexual nature. RP 331.

The truck passed a summer camp on Mount Rainier and stopped on a gated logging road. RP 332. The men got out of the truck and walked past the gate. RP 333. At that time, the fighting had stopped and Mr. Wilson was

fine. RP 334. The man who was with Mr. Bono said a few more “vulgars” and then told Mr. Wilson to get naked. RP 334, 337. Mr. Wilson took his clothes off and the men told him to run. RP 334. Mr. Wilson ran but got hit with two rocks. RP 334.

Mr. Wilson did not take his clothes off because the man asked him to. RP 340. Mr. Wilson took his clothes off because his pants were full of feces and he needed to “wipe [his] ass.” RP 339. Mr. Wilson ran off into some bushes in order to wipe. RP 339. Mr. Wilson hid in the bushes after being hit with two rocks. RP 341. The rocks hit Mr. Wilson in the back of the head and in his ribs. RP 342.

Mr. Bono never struck Mr. Wilson. RP 336-337. Mr. Bono never said anything to Mr. Wilson. RP 337.

After the men left, Mr. Wilson put his clothes back on and walked out of the woods. RP 344. Mr. Wilson discovered that his shoes, his hat, his wallet, and his lighter were not with his clothes. RP 344-345. The man who beat Mr. Wilson told Mr. Wilson to remove those items from his pockets and give them to Mr. Bono while the men were in the truck. RP 345.

Mr. Wilson began walking and was picked up by a guy in a truck. RP 347-348. The man took Mr. Wilson to a fire station and called 911. RP 348.

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The paramedics arrived and took Mr. Wilson to St. Joseph's Hospital. RP 349.

After being treated at the hospital, Mr. Wilson was contacted by a police officer. RP 350. Mr. Wilson did not want to talk to the police officer and told the officer to get lost. RP 350. Mr. Wilson did not tell the officer anything and the officer left after five minutes. RP 351-352.

About two weeks after Mr. Wilson got out of the hospital, he was contacted by Detective Heishman. RP 352. Mr. Wilson told Detective Heishman what happened, but he was high on Percocet and marijuana when he spoke with her. RP 352-353, 372-373. Detective Heishman told Mr. Wilson who she thought had assaulted him and Mr. Wilson agreed with what she said. RP 353. Mr. Wilson did not know how Detective Heishman knew who had assaulted him. RP 353. Detective Heishman showed Mr. Wilson pictures of Mr. Bono and the other man Mr. Wilson was allegedly with. RP 353.

Mr. Wilson believes that the prosecutor should not have prosecuted this case. RP 358. Mr. Wilson considers the scars on his face to be character builders and is not bothered by them. RP 361. To the best of his knowledge, Mr. Wilson did not tell any police officers that Mr. Bono and Mr. Metcalf

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were the ones who assaulted him. RP 376.

Mr. Wilson gets dizzy spells now that he did not get before the incident. RP 360. Mr. Wilson described the choke hold and beating. RP 360-366. Mr. Wilson described the sequence of events on October 12, 2005. RP 369-370. Mr. Wilson described his medical treatment. RP 370-372. Mr. Wilson discussed his criminal history. RP 378-379.

Mr. Wilson gave a signed statement to Mr. Metcalf's previous attorney and did not mention anything about a rock. RP 379-381. Mr. Wilson was shown the statement, made some changes, initialed the changes, and then signed the document. RP 403.

The declaration that Mr. Wilson signed is true. RP 383. Mr. Wilson's statement to Detective Heishman was "a lot of lies." RP 390-391.

● ***Jason Conner***

Jason Conner is a police officer stationed in the City-County Building. RP 414. On June 6, 2006, Garrett Wilson filed a complaint with Officer Conner. RP 415. Mr. Wilson reported that he had been receiving phone calls from Jared Metcalf, one of the suspects that had assaulted him. RP 423. Mr. Wilson said that Mr. Metcalf had called him and wanted Mr. Wilson to change his story and that Mr. Metcalf said he would pay Mr.

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Wilson and give Mr. Wilson property equal to \$10,000. RP 423.

- ***Curtis Filleau***

Curtis Filleau is a Pierce County Deputy Sheriff. RP 426. On October 12, 2005, Deputy Filleau was on duty around 4:00 in the afternoon. RP 428. At approximately 3:40 in the afternoon, Deputy Filleau was dispatched to a report of an assault. RP 430. The fire department was treating the victim and eventually transported the victim to St. Joseph's Hospital. RP 430. Deputy Filleau had the name of the victim and used his computer to obtain the victim's address. RP 431.

Deputy Filleau communicated with Deputy Saavedra and requested that Deputy Saavedra go to the victim's address to find out what happened prior to the victim arriving at the hospital. RP 431. Deputy Filleau continued to the hospital where he found Mr. Wilson in an emergency room bed. RP 449. Mr. Wilson had massive facial trauma. RP 450.

Deputy Filleau attempted to talk to Mr. Wilson but Mr. Wilson was uncooperative and told Deputy Filleau that he did not want to talk to him. RP 451-452. Eventually, after Deputy Filleau pressured him, Mr. Wilson told Deputy Filleau that "Jared had assaulted him while Jeremy stood by and watched." RP 453-454. Mr. Wilson did not volunteer the names of Jeremy

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Bono and Jared Metcalf, and only said Jeremy and Jared did it after Deputy Filleau introduced those names into the conversation. RP 463. Deputy Filleau got the names of Jeremy and Jared from another officer. RP 468.

Mr. Wilson never mentioned rocks being thrown at him to Deputy Filleau. RP 466. Mr. Wilson told Deputy Filleau that Jeremy and Jared had arrived at Tracy's house and told him to get into the truck. RP 454. Mr. Wilson agreed to get in the truck because he believed that, had he refused, Jeremy and Jared would have assaulted him at Tracy's house. RP 454. Mr. Wilson told Deputy Filleau that Jared and Jeremy drove him to an area east of Wilkeson and Jared began punching Mr. Wilson and hitting him with an alcohol bottle. RP 454. Mr. Wilson told Deputy Filleau that he was eventually able to get away and ran down to the road where he was picked up by a passerby. RP 454. Mr. Wilson told Deputy Filleau that he was assaulted because of an argument he had with Jeremy's father. RP 455.

Mr. Wilson's case was assigned to Detective Heishman to be investigated. RP 456. At some point, Deputy Filleau attempted to get Tracy Vasquez to try and identify a suspect using a photomontage. RP 456-457. Deputy Filleau went to Mr. Vasquez's residence and had him sign a photo line-up admonishment form. RP 458-460. Mr. Vasquez signed the back of

the photomontage indicating he had selected that picture as a picture of the suspect. RP 460-461.

On October 27, 2005, Deputy Filleau assisted in arresting Mr. Bono outside of his residence as he worked on a vehicle. RP 461-462.

- ***Deborah Heishman***

Deborah Heishman is a detective with the Pierce County Sheriff's Department. RP 471.

On October 14, 2005, Detective Heishman was assigned to incident number 052850819. RP 472. Deputy Filleau had written the initial report in the case. RP 473. The person identified as the potential victim was Garrett Wilson. RP 473-474.

On October 27, 2005, Detective Heishman located Mr. Wilson at an undisclosed residence. RP 474. Detective Heishman spoke with Mr. Wilson about what had happened. Mr. Wilson was cooperative and was "absolutely not" vague about what happened and who had assaulted him. RP 475. Prior to speaking to Mr. Wilson, Detective Heishman was aware of the names Jeremy Bono and Jared Metcalf. RP 478-479.

Mr. Wilson told Detective Heishman that the beating did not start until the men were past Wilkeson. Mr. Wilson did not mention anything Bono, Jeremy J. - Opening Brief COA No. 36131-1-II

about a sleeper hold, that the bottle was plastic, or say anything about being hit with a rock. RP 482. Mr. Wilson did say he was kicked in the head repeatedly. RP 482. Mr. Wilson told Detective Heishman the he may have been assaulted because of his relationship with Mr. Bono's sister. RP 484.

As Detective Heishman was leaving Mr. Wilson's address after interviewing him, she was notified by telephone that arrest warrants had been issued for the arrest of Mr. Bono and Mr. Metcalf for assaulting Mr. Wilson. RP 476-477.

- ***Douglas Kitts***

Officer Kitts is a K-9 handler for the Puyallup Police Department. RP 498. Officer Kitts' K-9 partner, Daro, is trained to track people by scent. RP 499-500.

On January 14, 2006, Officer Kitts and Daro were requested to assist in tracking Jared Metcalf. RP 502. Daro tracked Mr. Metcalf who was taken into custody. RP 502-509.

V. ARGUMENT

- 1. The prosecutor committed misconduct and violated Mr. Bono's right to a fair trial by presenting argument not supported by evidence and which was an improper appeal to the passions and prejudices of the jury.**

“Only a fair trial is a constitutional trial.” *State v. Coles*, 28 Wn.App. 563, 573, 625 P.2d 713, *review denied*, 95 Wn.2d 1024 (1981). Prosecutorial misconduct may violate a defendant’s due process right to a fair trial. *State v. Charlton*, 90 Wn.2d 657, 664, 585 P.2d 142 (1978). In order for a defendant to obtain reversal of his conviction on the basis of prosecutorial misconduct, he must show the prosecutor’s conduct was improper and that the conduct had a prejudicial effect. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S.Ct. 931, 133 L.Ed.2d 858 (1996). A defendant must show that the conduct of the prosecutor had a substantial likelihood of affecting the verdict. *Brett*, 126 Wn.2d at 175, 892 P.2d 29.

To establish prosecutorial misconduct, a party must show that the prosecutor’s improper conduct caused prejudice in the context of the entire record and circumstances at trial. A prosecutor improperly comments when he or she encourages a jury to render a verdict on facts not in evidence. A party establishes prejudice if there is a substantial likelihood that the misconduct affected the verdict.

State v. O’Neal, 126 Wn.App. 395, 421, 109 P.3d 429 (2005) (internal citations omitted), *affirmed*, 159 Wash.2d 500, 150 P.3d 1121 (2007). Comments that encourage a jury to render a verdict on facts not in evidence are improper. *State v. Stover*, 67 Wn.App. 228, 230-31, 834 P.2d 671 (1992),

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review denied, 120 Wash.2d 1025, 847 P.2d 480 (1993). Remarks by counsel will require reversal when they influence the jury, and cause the jury to consider inappropriate matters in rendering a verdict. *State v. Buttry*, 199 Wash. 228, 251, 90 P.2d 1026 (1939).

During closing arguments, the prosecutor argued,

MR. GREER:¹ And despite Mr. Wilson's desire that they not be prosecuted, either because, as I said, he accepts the apology or the financial gain that he could get from this², or he doesn't want to come before you and talk about the fact that he potentially was raped and had to poop all over himself to prevent –

MR. UNDERWOOD:³ Objection, there's no evidence of that.

THE COURT: Jury gets to decide the facts. That's my ruling.

MR. GREER: He doesn't want to take the stand and talk about the brutal humiliating, degrading acts that were done on him at the hands of these two individuals.

RP 591.

¹ The prosecutor was Mr. Gregory Greer.

² At trial, the State alleged that Mr. Bono's codefendant, Jared Metcalf, had called Mr. Wilson and offered to pay him cash and give him property equivalent to \$10,000 in value if Mr. Wilson would not testify. RP 415, 423.

³ Mr. Bono was represented by Mr. Kent Underwood at trial.

A. There was insufficient evidence in the record to establish that Mr. Wilson was “potentially raped.”

According to the testimony of Mr. Brocksmith, the physician’s assistant who treated Mr. Wilson at St. Joseph’s Hospital, all of Mr. Wilson’s injuries were on his head and there was no evidence that he had been sexually assaulted. RP 279-293. Mr. Wilson, the victim, never indicated that he had been sexually assaulted. The only facts in the record which might support the inference that Mr. Wilson had been raped by the defendants was Mr. Wilson’s testimony that the man who was beating Mr. Wilson said abusive and obscene cuss words, **possibly** of a sexual nature (RP 331) and that after Mr. Wilson got out of the truck the man who was with Mr. Bono said a few more “vulgars” and then told Mr. Wilson to get naked. RP 334, 337. Mr. Wilson, however, later denied that he took his clothes off at the request of the man with Mr. Bono. RP 340. He testified that he took his clothes off because his pants were full of feces and he needed to “wipe [his] ass.” RP 339. Mr. Wilson ran off into some bushes in order to wipe. RP 339.

No evidence was introduced at trial to support the argument made by the State that Mr. Wilson was “potentially” raped.

B. There was insufficient evidence in the record to establish that Mr. Wilson’s act of defecating in his

pants was done for any reason other than he thought it would be funny.

At trial, the only evidence introduced as to why Mr. Wilson defecated in his pants was Mr. Wilson's testimony that he had done so voluntarily because he thought it would be funny. RP 338. The only other testimony regarding the feces in Mr. Wilson's pants was Mr. Brocksmith's testimony that Mr. Wilson was "incontinent" and covered in feces from his waist to his ankles on both legs. RP 286-287. There was no evidence whatsoever in the record that Mr. Wilson had relieved himself in an attempt to avoid being raped, as was suggested by the prosecutor in closing argument.

C. The prosecutor's argument caused the jury to consider inappropriate matters in rendering its verdict and there is a substantial likelihood that the prosecutor's improper argument affected the verdict.

Here, despite no evidence to support the argument, the prosecutor argued to the jury that Mr. Wilson was "potentially raped" and defecated in his pants to avoid being raped. The prosecutor then argued to the jury that Mr. Wilson's failure to testify in a manner which supported the prosecutor's version of events was due to Mr. Wilson being embarrassed by the "humiliating" and "degrading" acts done to Mr. Wilson by the defendants.

In effect, the prosecutor made an argument with no basis in the record and then supported the argument with the allegation that the lack of evidence was due the defendant's actions in attempting to rape Mr. Wilson. This evidence prejudiced the jury against the defendants in that the prosecutor accused Mr. Bono of participating in a crime which the prosecutor had no evidence occurred.

“A person being tried on a criminal charge can be convicted only by evidence, not by innuendo.” *State v. Yoakum*, 37 Wn.2d 137, 144, 222 P.2d 181 (1950); *State v. Miles*, 162 P.3d 1169 (2007). Here, the State's improper closing argument was a blatant attempt to prejudice the jury against Mr. Bono based not on evidence but on the innuendo that Mr. Bono and Mr. Metcalf had threatened to rape Mr. Wilson. The act of intentionally defecating in one's own pants is an act that nearly all jurors would find so offensive that the jurors would not believe that the act was done simply because Mr. Wilson thought it would be funny, even though he testified that that was his motivation. The jury would naturally seek to find a more logical explanation such as Mr. Wilson soiled himself to protect himself from a threatened rape. However, there was absolutely no evidence in the record to suggest that any threat was made to rape Mr. Wilson.

The prosecutor sought to exploit the jury's natural repulsion from the thought that Mr. Wilson defecated on himself for fun and turn the jury's disgust towards such an act into prejudice against Mr. Bono by turning Mr. Wilson's decision to soil himself from one of poor taste to one of self defense against a crime for which there was no evidence. This argument was an improper argument design to have the jury convict Mr. Bono on innuendo and suggestion rather than on the evidence the State was able to put before the jury. The argument prejudiced the jury against Mr. Bono leading to the guilty verdict.

D. The prosecutor's argument was an improper appeal to the passions and prejudice of the jury.

Prosecutors have a duty to seek verdicts free from appeals to passion or prejudice. *State v. Perez-Mejia*, 134 Wn.App. 907, 915-16, 143 P.3d 838 (2006). While a prosecuting attorney has wide latitude to draw and express reasonable inferences from the evidence in closing argument (*State v. Hoffman*, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991)), a prosecutor commits misconduct if his or her argument appeals to the jurors' passion and prejudice and invites them to decide the case on a basis other than the evidence. *State v. Echevarria*, 71 Wn.App. 595, 860 P.2d 420 (1993); *State v. Russell*, 125 Wn.2d 24, 89, 882 P.2d 747 (1994).

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“Arguments that courts characterize as improper appeals to passion or prejudice include arguments intended to ‘incite feelings of fear, anger, and a desire for revenge’ and arguments that are ‘irrelevant, irrational, and inflammatory ... that prevent calm and dispassionate appraisal of the evidence.’” *State v. Elledge*, 144 Wash.2d 62, 85, 26 P.3d 271 (2001) (citations omitted).

As discussed above, there was no factual basis to support the prosecutor’s argument that Mr. Bono or Mr. Metcalf threatened to rape Mr. Wilson and that Mr. Wilson soiled himself to avoid being raped. However, this argument would appeal to the juror’s natural disgust of the idea that a person would defecate on themselves for fun. This argument was simply an inflammatory argument made to incite feeling of anger and a desire for revenge in the jurors and which prevented a calm and dispassionate appraisal of the evidence.

2. The trial court abused its discretion in overruling Mr. Bono’s objection to the improper closing argument of the prosecutor.

A trial court’s rulings regarding prosecutorial misconduct are reviewed for abuse of discretion. *Brett*, 126 Wn.2d at 174, 892 P.2d 29. A defendant bears the burden of establishing, first, prosecutorial misconduct,

and second, its prejudicial effect. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

A trial court abuses its discretion when its decision is “manifestly unreasonable or based on untenable grounds.” *Grandmaster Sheng-Yen Lu v. King County*, 110 Wn.App. 92, 99, 38 P.3d 1040 (2002). A court’s decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. *Grandmaster Cheng-Yen Lu*, 110 Wn.App. at 99, 38 P.3d 1040.

As discussed above, the prosecutor’s argument regarding the reason why Mr. Wilson soiled himself was both misconduct and prejudicial. When counsel for Mr. Bono objected to the State’s argument on grounds that it was not supported by evidence in the record, the trial court overruled the objection holding that, the “[j]ury gets to decide facts.” RP 591.

It is the jury's function to weigh evidence, determine witness credibility, and decide disputed questions of fact; however, the jury's findings must be supported by substantial evidence in the record. *State v. Snider*, 70

Wn.2d 326, 327, 422 P.2d 816 (1967).

Substantial evidence is evidence that “would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed.” *State v. Hutton*, 7 Wn.App. 726, 728, 502 P.2d 1037 (1972). The existence of a fact cannot rest upon guess, speculation or conjecture. *State v. Carter*, 5 Wn.App. 802, 807, 490 P.2d 1346 (1971), *review denied*, 80 Wn.2d 1004 (1972), *cited in Hutton*, 7 Wn.App. at 728, 502 P.2d 1037.

The trial court was correct that it is the province of the jury to decide issues of fact, but the trial court failed to acknowledge that there was no basis in the record for the jury to find that the prosecutor’s inflammatory description of the facts was correct. Any conclusion by the jury that Mr. Bono or Mr. Metcalf threatened to rape Mr. Wilson would have been “guess, speculation, or conjecture.”

Because there was no basis in the record to support the State’s argument, and because a jury’s findings must be supported by substantial evidence in the record, the trial court based its denial of Mr. Bono’s objection on untenable grounds. There was not substantial evidence in the record for the jury to find that Mr. Bono and Mr. Metcalf had threatened to rape Mr. Wilson or that Mr. Wilson defecated in his pants to prevent the rape. The

trial court abused its discretion in overruling the objection to the State's improper closing argument.

3. Cumulative error deprived Mr. Bono of his right to a fair trial where the State made inflammatory and baseless arguments and the trial court overruled objection to the argument on untenable grounds.

Where multiple errors occurred at the trial level, a defendant may be entitled to a new trial if cumulative errors resulted in a trial that was fundamentally unfair. Courts apply the cumulative error doctrine when several errors occurred at the trial court level, but none alone warrants reversal. Rather, the combined errors effectively denied the defendant a fair trial.

State v. Rooth, 129 Wn.App. 761, 775, 121 P.3d 755 (2005).

Where the defendant cannot show prejudicial error occurred, cumulative error cannot be said to have deprived the defendant of a fair trial.

State v. Stevens, 58 Wn.App. 478, 498, 794 P.2d 38, *review denied*, 115 Wn.2d 1025, 802 P.2d 128 (1990).

Here, as discussed above, the prosecutor made improper inflammatory arguments based on facts not contained in the record before the court and the trial court abused its discretion in overruling Mr. Bono's objection to the argument. Should this court find that the errors discussed above do not individually warrant reversal of Mr. Bono's conviction, this court should find

that the cumulative prejudicial effect of the errors warrants reversal and remand.

VI. CONCLUSION

Mr. Bono was deprived of his right to a fair trial by the prosecutor's improper and inflammatory closing argument. The trial court compounded the problem by overruling Mr. Bono's objection to the argument and failing to give a limiting instruction. These errors both separately and combined deprived Mr. Bono of his right to a fair trial. This court should vacate Mr. Bono's conviction and remand for a new trial.

DATED this 15th day of October, 2007.

Respectfully submitted,

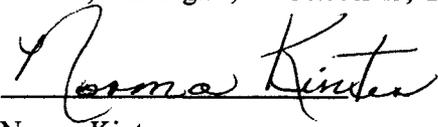


Sheri Arnold, WSBA No. 18760
Attorney for Appellant

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CERTIFICATE OF SERVICE

The undersigned certifies that on October 15, 2007, she delivered in person to the Pierce County Prosecutor's Office, County-City Building, 930 Tacoma Ave. South, Tacoma, Washington 98402, and by U. S. Mail to appellant, Jeremy James Bono, DOC # 842528, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, Washington 98526, true and correct copies of this Opening Brief. 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 October 15, 2007.


Norma Kinter