

NO. 36131-1

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

STATE OF WASHINGTON, RESPONDENT

v.

JEREMY BONO, APPELLANT
JARED METCALF, APPELLANT

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DIVISION II
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STATE OF WASHINGTON
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Appeal from the Superior Court of Pierce County
The Honorable Brian Tollefson

No. 05-1-05264-5

No. 05-1-05263-7

BRIEF OF RESPONDENT

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

1. Should this court reject defendants' claims of prosecutorial misconduct when the challenged arguments were not improper because they were based upon the evidence adduced at trial or the inferences that could be drawn from such evidence and when there has been no showing of bad faith?
2. Have defendants failed to show that the trial court erred in overruling the two objections made in closing arguments when the arguments were not improper and when there can be no prejudice because the jury was instructed to disregard any argument unsupported by evidence and any emotional appeal?
3. Have defendants failed to show that they are entitled to relief under the doctrine of cumulative error when they have failed to show any error much less an accumulation of prejudicial error?
4. Did defendant Metcalf waive any right to challenge the classification of his criminal history or the calculation of his offender score on direct appeal when he stipulated to facts regarding the existence of six prior convictions –two juvenile and four adult- and that his offender score was “5” based on this history?

B. STATEMENT OF THE CASE.

1. Procedure

On October 26, 2005, the Pierce County Prosecutor's office filed an information charging appellant JEREMY BONO (defendant Bono), with one count of assault in the first degree in Pierce County Cause No. 05-1-05264-5. BCP 1-2.¹ The State also alleged a deadly weapon enhancement. *Id.*

On October 26, 2005, the Pierce County Prosecutor's office filed an information charging appellant JARED METCALF (defendant Metcalf), with one count of assault in the first degree in Pierce County Cause No. 05-1-05263-7. MCP 1-2. The State also alleged a deadly weapon enhancement. *Id.*

The defendants' cases were consolidated for trial before the Honorable Brian Tollefson. After hearing the evidence, the jury found the defendants guilty as charged and found the deadly weapon enhancement against each defendant. BCP 126,128; MCP 118, 120.

The court sentenced defendant Bono on March 23, 2007. BCP 131-143. Defendant Bono stipulated that he had a prior conviction and an offender score of "1," which resulted in a standard range of 102 to 136

¹ Clerk's papers for defendant Bono will be referred to as "BCP" and clerk's papers for defendant Metcalf will be referred to as MCP. The defendant's were tried jointly and the verbatim report of proceedings will be referred to as "RP."

months plus an additional 24 months for the enhancement. BCP 129-130. The court imposed a high end standard range sentence of 136 months plus 24 months for the enhancement for a total confinement period of 160 months. BCP 131-143. Additionally the court imposed a community custody range of 24 to 48 months and \$2,300 in legal financial obligations. *Id.*

The court sentenced defendant Metcalf on March 23, 2007. MCP 123-135. Defendant Metcalf stipulated that he had six prior convictions (two juvenile) and an offender score of "5," which resulted in a standard range of 138 to 184 months plus an additional 24 months for the enhancement. MCP 121-122. The court imposed a mid-range standard range sentence of 176 months, plus an additional 24 months for the enhancement for a total confinement period of 200 months. MCP 123-135. Additionally the court imposed a community custody range of 24 to 48 months and \$2,300 in legal financial obligations. *Id.*

Defendants filed a timely notice of appeal from entry of these judgments. BCP 146-159; MCP 136-149.

2. Facts

Tracy Vasquez testified that he had known Garret Wilson about a year and a half as of October 2005, and would usually see him a couple of times a month. RP 167-168. In October, 2005, Wilson was staying at Vasquez's mobile home in Bonney Lake. RP 163-164, 168. Mr. Vasquez

also had known defendant Bono for a couple of years, but it was not a close friendship. RP 165-166. Mr. Vasquez had not met defendant Metcalf prior to October 12, 2005, but had “seen him around.” RP 166-167.

Mr. Vasquez testified that he saw Defendant Bono drive by his house on October 12, 2005, and then about twenty minutes later, both defendants came into his house. RP 169-170. Vasquez testified that Metcalf came into his house through an open door and asked which of them was “Garrett.” RP 171-172. Vasquez thought that Metcalf said this with some hostility in his voice. RP 175-176. Vasquez testified that he pointed at Wilson, who was sitting next to him; Metcalf stated that they needed to go for a ride. Wilson left the house with both defendants, Vasquez saw them get into the cab of a Bono’s pick-up truck. RP 174, 224. Vasquez testified that Bono was driving, Wilson was in the middle, and Metcalf was on the passenger side. RP 176-177. Vasquez testified that he heard some yelling as the truck drove away; it might have been defendant Metcalf yelling, but he could not be sure. RP 174. Vasquez learned a couple of hours later from law enforcement that Wilson had been hurt and hospitalized. RP 179-181. The next time he saw Wilson was a week later after Wilson got out of the hospital. RP 178.

Vasquez testified that after Metcalf was arrested, he would call, collect, from the jail almost every day and frequently, multiple times in a day. RP 185-186. Vasquez testified that his phone bill for two –four

months was \$1,400, largely due to these collect calls. RP 186-187.

During these calls, Metcalf stated that he was not involved and offered Vasquez money if he would write out a statement that would “help him out.” RP 187-188. Vasquez knew that Wilson had also spoken with Metcalf while he was in the jail, because he talked to him using Vasquez’s home phone. RP 190. At one point, he and Wilson went to the law office of Metcalf’s attorney², and wrote out a statement, under the penalty of perjury, that falsely stated that they had seen the person who “did it at a Wal-Mart. RP 193- 195, 255-256. Vasquez testified that he wrote out another statement, also under penalty of perjury at Defendant Bono’s request which falsely stated that he had not seen Wilson leave his house on the day in question. RP 196-198, 217, 255-256. At several points during his testimony, Vasquez interjected information about Wilson which placed him in an unflattering light. RP 174, 178-179, 228, 255. Mr. Vasquez testified that he put money on defendant Metcalf’s book at the jail. RP 262-263. Do to a lack of cooperation with the prosecutor’s office, Vasquez was arrested as a material witness and held in jail. RP 189, 257-259. Mr. Vasquez testified that once before he had been beaten for supposedly being a snitch and did not want that to happen again.

² There had been a change in representation prior to trial, this was not the office of Mr. Metcalf’s trial attorney. RP 193.

Garrett Wilson testified that he was acquainted with Jeremy Bono for a year prior to October 12, 2005, because he was the brother of Wilson's former girlfriend. RP 317. They had not had any problems or conflicts with one another prior to that date, although Bono had made a comment on one occasion that he would kill Wilson if he slept with his sister. RP 318. In early October, Mr. Wilson was staying at Vasquez's mobile home, sleeping on the couch. RP 315. On October 12, 2005, Bono showed up at Vasquez's residence with another white male, of similar height and build as Bono; Wilson was not expecting them. RP 319-320. The two men asked Wilson to go with them for a ride; Wilson perceived that the two men had raised tempers and did not want anything to happen in his friend's house, so he left with them. RP 320-322. He left the residence and went out to Bono's pickup truck and got in. RP 322. Bono was driving, Wilson was in the middle and the other man was in the passenger seat. RP 322-323.

Wilson testified that about two blocks away from Vasquez's home, the man in the passenger seat put him in a sleeper hold which made it very hard to breathe. RP 324-326, 362-363. Then the man started hitting Wilson; Wilson asked why he was getting beat up and Bono said something about his sister being arrested. RP 327-328. Wilson testified that Bono's sister had been arrested about two months earlier for shoplifting; she had been shopping while he was at a nearby appointment. RP 328. The man punched Wilson in the head with his fist and an empty

plastic liquor bottle. RP 328-330. The man punching him said a “bunch of obscenities” some of which were cuss words and possibly some were of a sexual nature and of what might happen to Wilson. RP 331, 366-367. At some point during this ride, the man inflicting the blows told Wilson to remove his wallet and whatever else he had from his pockets; he complied. RP 345. The blows went on for approximately twenty minutes until Bono stopped on an isolated logging road off the road to Carbonado. RP 330, 332-334, 347.

All three men got out of the truck, Wilson was bleeding from the blows. RP 333-334. Wilson testified that he was told to “get naked” and that he complied. RP 334, 340-341. The man who had hit Wilson in the truck tried to grab him again and they both went to the ground. RP 335. Wilson got up and ran off into the bushes; as he ran he was hit with two rocks. RP 334, 339-341. One hit him in the back of the head and the other hit him in the ribs. RP 342. After spending a few minutes hiding in the bushes, Wilson realized that Bono and the other man had left. RP 344. He went back to where he left his clothes and discovered that his shoes had been taken. RP 344-346. Wilson walked out to the road and began walking toward Carbonado. RP 346-347. A man driving a truck picked him up and drove him to the fire station; Wilson called 911 from there. RP 348 . The 911 call was made at 3:40 in the afternoon. RP 430.

Wilson acknowledged that during this series of events that he defecated in his pants. RP 338. He testified that he did this, while in the

truck, because he thought it would be funny. RP 338. He acknowledged that he - possibly - had given a different explanation for this event to others. RP 338. He acknowledged that the defendants made comments of a sexual nature regarding things that were going to be done to him, but testified that these comments came after he had defecated in his pants. RP 338. He was not certain if he had said, during an interview with the prosecutor and defense counsel, that he had defecated to avoid having sexual acts done to him, but did not think that he had. RP 338-339.

Wilson testified that he waited approximately 20 minutes for the paramedics to arrive. RP 349. The paramedics transported him to St. Joseph's Hospital where he was treated for his injuries. RP 349-350. When a law enforcement officer arrived, Wilson told the officer to "get lost" because he didn't want to speak to him; Wilson testified that this incident was of a personal nature that the "law doesn't have any involvement in." RP 350-351. A detective came to speak with him two days later, and he told her what had happened in vague terms. RP 352. The detective showed him some photo montages. RP 353. Wilson denied ever giving the names of his assailants as "Jeremy" and "Jared" to any law enforcement officer. RP 376. The State later introduced impeaching testimony that he had given these names to the deputy who spoke to him in the emergency room. RP 453-454. He also acknowledged that, since the incident, he had spoken on the phone with someone who had identified himself as Jared Metcalf. RP 354, 357. Wilson testified that he was

offered money -\$6000 in cash and \$4000 in property- to make this go away. RP 356. Wilson indicated that the money was offered because of regret over the incident and not in an effort to get him not to cooperate or to change his story. RP 399. In June of 2006, Wilson reported to law enforcement that Metcalf made multiple calls to him. RP 357, 399-401. The State offered impeaching testimony that when Wilson made this report to law enforcement he indicated that Metcalf had called six times in a five month period and offered to pay him \$10,000 in cash and property if he would change his story. RP 423-424. Wilson testified that he was arrested three times as a material witness with regards to this case and that he thought he case shouldn't be prosecuted. RP 357-358. One of the times he was arrested, he was put on the same "chain" as defendant Metcalf. RP 374.

Daniel Brocksmith is a physician's assistant trained for trauma surgery who was working in the emergency room when Garrett Wilson was brought in on October 12, 2005, around 4:00 p.m. RP 276-280. When he arrived, Mr. Wilson had blood about his head and neck; he was agitated and emergency personnel had placed a C-Collar around his neck. RP 282-284. Emergency room staff cut off his clothing; Mr. Wilson had defecated and there was fecal matter from his waist to his ankles. RP 286-287. The staff took x-rays and a CAT scan of Mr. Wilson to assess internal injuries. RP 285-288. These tests revealed that Mr. Wilson had a nasal fracture and skull fracture at the base of his skull. RP 287-288. This

skull fracture was in the same location where the rock had hit Wilson on the back of the head. RP 343. The CAT scans showed no inter-cranial hemorrhaging. RP 291. Mr. Wilson had numerous lacerations to the head and face and a puncture, or through and through, wound to his ear. RP 288. Many of his lacerations were sutured closed. RP 289, 291. Mr. Wilson was kept in the hospital for two days for observation before he was released. RP 292. Mr. Brocksmith testified that Mr. Wilson told him that he had been assaulted with bottles and fists. RP 293. He also testified that there were law enforcement officers in the emergency room who attempted to ascertain from Mr. Wilson what had happened to him. RP 295. Mr. Brocksmith testified that Mr. Wilson would not give the officers any information about the incident. RP 295.

Pierce County sheriff's Deputy Filleau testified that he was dispatched to respond to Mr. Wilson's 911 call on October 12, 2005. RP 428-429. Prior to arriving at the fire station, Deputy Filleau learned that the assault victim was being transported to St. Joseph's hospital, so he changed direction and headed to the hospital. RP 430. While en route, he used the victim's name to obtain his address via his computer; Filleau requested another deputy go to the address to see if he could find out any information about the victim while he proceeded onto the hospital. RP 431. Filleau found Wilson being treated in the emergency room; Wilson had massive trauma to his face; he appeared to be in pain. RP 449-450, 465. After waiting five to ten minutes for clearance from the medical staff

to speak to the victim, Filleau approached Wilson and asked him about how and why he was assaulted. RP 451-452. Filleau testified that Wilson indicated that he did not want to talk to him because he felt that he would be assaulted again. RP 452. Deputy Filleau continued to press for some information; eventually, Wilson indicated that "Jared" had assaulted him while "Jeremy" had stood by and watched. RP 453-454. Wilson relayed that Jeremy and Jared had come to Tracy's house and told him to get in their truck; he complied because he felt that he would be assaulted if he did not. RP 454. He continued to relate that they drove him east of Wilkerson to a wooded area; he stated that Jared was punching him and hitting him with a bottle. RP 454. Wilson told the officer that he was able to get away and ran down to SR 165 where he was picked up by a passerby. RP 454. Deputy Filleau took some photographs of Wilson's injuries. RP 455. About two weeks later, Filleau later showed a photomontage to Tracy Vasquez to see if he could identify any of the photos as being one of the men who had left with Wilson on October 12, 2005. RP 456- 461. Vasquez identified a picture of Jared Metcalf. RP 460-462.

Arrest warrants went out for both defendants. RP 476-477. On January 14, 2006, Douglas Kitts, a canine officer with the Puyallup Police Department, received a dispatch that he was needed to assist the Bonney Lake Police Department as one of its officers had made a traffic stop and a suspect with warrants had run from the vehicle. RP 497- 504. Officer

Kitts took his dog to the location of the vehicle and started him on the track from where the suspect had run into the woods. RP 504. The dog tracked about a hundred yards into the woods and located defendant Metcalf hiding in a tree. RP 507-509. Deputy Filleau arrested defendant Bono on October 27, 2005. RP 462.

Neither defendant presented any evidence. RP 510.

C. ARGUMENT.

1. DEFENDANTS' CLAIMS OF PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT SHOULD BE REJECTED BECAUSE THE ARGUMENTS WERE BASED UPON EVIDENCE ADDUCED AT TRIAL OR INFERENCES THAT COULD BE DRAWN FROM THE EVIDENCE AND BECAUSE THERE HAS BEEN NO SHOWING OF BAD FAITH.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks were improper and that they prejudiced the defense. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997); *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)). Before an appellate court should review a claim based on prosecutorial misconduct, it should require “that [the] burden of showing essential unfairness be sustained by him who claims such injustice.” *Beck v. Washington*, 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962). Allegedly improper comments are reviewed in the context of the entire argument, the issues in the case, the evidence addressed in the argument and the instructions given. *State v. Bryant*, 89 Wn. App. 857, 950 P.2d 1004 (1998). It is not misconduct to argue based on the evidence and the reasonable inferences. *State v. Ranicke*, 3 Wn. App. 892, 897, 479 P.2d 135 (1970)(in closing argument, prosecuting attorney permitted reasonable latitude in drawing inferences from the evidence). A prosecutor is allowed to argue that the evidence doesn’t support a defense theory. *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994). The prosecutor is entitled to make a fair response to the arguments of defense counsel. *Russell*, 125 Wn.2d at 87.

Both defendants assert that the prosecutor engaged in improper argument. On appeal, defendant Bono challenges one argument made by

the prosecutor, which he also challenged in the trial court. *See* Opening Brief of Appellant Bono at p. 18; RP 591. Defendant Metcalf challenges several arguments made by the prosecutor, including the one challenged by Bono. *See* Opening Brief of Appellant Metcalf at pp. 11-13. Metcalf objected to only one of his challenged arguments in the trial court. RP 547. Each challenged argument will be addressed below.

Metcalf challenges the following emphasized portion of the argument as being improper:

Prosecutor: These two individuals, acting as thugs, decided to take this person up to the woods and on route during the process just beat him mercilessly, humiliate him in the truck, *telling him that they were going to perform – or somebody was going to perform sexual acts on him, another male, and then once out of the truck basically an attempt to follow through with those threats.*

And Mr. Wilson can get up on the stand and minimize and say he didn't feel threatened at all... But through the trial process, despite what a witness may say on the stand now, by virtue of past statements, by virtue of overall understanding, using common sense, you get a clear picture of what happened.

RP 536-537. There was no objection to this argument in the trial court; Metcalf must show that it was so flagrant and ill-intentioned that no instruction could have eliminated the prejudice.

To begin with this argument was supported by evidence adduced at trial or by reasonable inferences flowing from the evidence. On direct examination Wilson acknowledged that his assailants made comments of a

sexual nature of things that were going to be done to him. RP 338. Once Wilson was out of the truck, he was instructed to strip naked. RP 334, 340-341. In light of the threats made in the truck, it is reasonable to infer that his assailants wanted him to be naked in order to engage the victim in sexual acts. Thus the argument was based upon the evidence in the case.

Nor does the argument appear to be one made in bad faith. The prosecutor was bringing up these facts in order to address why the victim might have minimized the fear he felt during this crime and testified in the manner he did. The jury heard evidence that the victim did not want to talk to the responding officer because was fearful of his assailants and that he had been offered financial rewards by defendant Metcalf with regards to the case. There was evidence that the victim defecated in his pants. Defecating in one's pants would generally be considered to be an embarrassing event. The argument simply asks the jury to assess the victim's testimony in light of all of these circumstances and to consider whether things such as embarrassment, fear, or potential financial gain might have influenced his testimony. The minimizing nature of the victim's testimony was a legitimate issue in the case and this argument was not ill-intentioned.

Metcalf next challenged argument presents similar issues. Metcalf challenges the following emphasized portion of the argument as being improper:

Prosecutor: if you have a gun and you point the gun at someone and you intend on killing them [sic] or maiming them [sic] and you shoot it and you miss, you've committed an assault in the first degree because it's what was your intent when you shot, not what the result is, and that's what we're dealing with in this case. *Mr. Metcalf's intent was to cause great bodily harm to Mr. Wilson, and probably other crimes, other acts such as rape. But as Mr. Wilson at one point said, he pooped on himself – he didn't use that word but I'm going to use it – in order to dissuade these two individuals from further humiliating him.*

Metcalf's Counsel: Objection, assuming facts not in evidence.

Court: This is closing argumentsObjection's overruled

Prosecutor: The State believes that based on what Mr. Wilson's testimony and past statements have been[,] that when it's told to him during this brutal situation that sexual acts are going to be done on him and he says he therefore defecates in order to prevent that, coupled with the fact that he's out of the truck, he's ordered to take his clothes off, all of his clothes, socks, shoes, all of his clothes, a reasonable person could conclude that [,] but for the fact that he did that to himself[,] he may have been in that situation

And that's important because not only do you have an individual who apparently has a drug problem, who apparently is not the most solid citizen around, but he's got to come here before 12 strangers, the people who did this to him, the judge, and this environment, he's had to be arrested four times to get him here in order to tell you that this happened to him. Humiliation, degradation. How do victims of that kind of trauma deal with it?

RP 546-548. Looking at this argument in context and based upon the evidence presented at trial, the challenged argument falls within acceptable boundaries.

In his testimony, Wilson acknowledged that he defecated in his pants, but indicated that he did so just because he thought “it would be funny.” RP 338. He acknowledged that the defendants made comments of a sexual nature regarding things that were going to be done to him, but indicated that, as the comments occurred after the defecation, they could not be a motivation for the defecation. RP 338. When asked whether he had ever given any other explanation for his defecation, Wilson acknowledged that it was possible that he had given a different explanation for his defecation. RP 338. While he did not think that he had, he allowed that it was possible that he had said he defecated to avoid having sexual acts done to him during an interview with the prosecutor and defense counsel. RP 338-339.

Once again, the prosecutor’s argument stemmed from evidence that was before the jury. The record shows that victim did not testify that he “pooped” himself to dissuade the defendants from engaging in further humiliations as the prosecutor initially argues. However, after the objection, the prosecutor clarified that his argument was that this is what the jury should conclude from the evidence that was before them. It is not improper to ask a jury to draw inferences and conclusions from the evidence; it is up to the jury to decide if the inference is supported by the evidence and if it is reasonable.

Nor does the record support a conclusion that the prosecutor was intentionally engaging in improper argument. Essentially, the prosecutor

was asking the jury to reject the victim's testimony as to why he defecated –because he thought it would be funny- and to come to a different conclusion. The prosecutor offered some reasons as to why the victim might testify in the manner he did. It is not improper for a prosecutor to address the credibility of witnesses or to proffer reasons why a jury might believe some aspects of a witness's testimony and discount others.

Both defendants challenge the following emphasized portion of the rebuttal argument as being improper:

Prosecutor: And the State believes that it doesn't matter if you, as defense counsel both point out, live on the fringes of Pierce County, use methamphetamine, steal, engage in fights, basically what they call him as [-] a lowlife. The State's position is that if you get beat and there's no defense to it, the law protects everybody equally. And so they're going to be held accountable if the State proves that they did it. And the State has proved it.

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 this, 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 –*

Bono's Counsel: Objection, there's no evidence of that.

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

Prosecutor: He doesn't want to take the stand and talk about the brutal humiliating, degrading acts that were done to him at the hands of these two individuals. And maybe perhaps he doesn't want them to get the satisfaction of listening to him describe what ...happened to him.

RP 590-591. There was no objection to this argument by Metcalf in the trial court; Metcalf must show that it was so flagrant and ill-intentioned that no instruction could have eliminated the prejudice.

The State has already argued previously that the evidence of the sexual threats made to Mr. Wilson combined with the evidence that he was order to strip naked provided a basis from which to infer that the defendants might be intending to commit sexual acts upon the victim. The State has also addressed that any argument about the reason for the victim's defecation was based upon the evidence presented and the inferences that might be drawn from the evidence. The prosecutor's description of the acts that defendants committed against the victim as being "brutal, humiliating, and degrading" was not improper considering the evidence showed that they beat him, transported him to an isolated area, ordered him to remove his clothes, left him stranded there, without shoes, and faced with the option of seeking help in the nude or dressed in clothes that were smeared with feces. The argument was within reasonable bounds.

Again the purpose of this argument, looked at in context, was aimed at addressing legitimate issues in the case. The victim was not an upstanding citizen and showed little interest or cooperation in having his assailants prosecuted. A jury might be disinclined to convict under the circumstances even if it believed the State had met its burden of proof. The prosecutor asked the jury to assess the victim's testimony in light of

all of these circumstances and to consider whether things such as embarrassment, fear, or potential financial gain might have influenced his testimony. As stated earlier, the minimizing nature of the victim's testimony was a legitimate issue in the case. The prosecutor did not act in bad faith by trying to address this issue with the jury.

Metcalf makes an additional challenge that the following emphasized portion of the rebuttal argument was improper:

Prosecutor: Finally I just want to talk one last factual aspect of this, and that is that, you know, they [defense counsel] said, oh they [defendants] just left him in a relatively close area, close to the highway, those kinds of things. The last thing factually I think it is important in understanding and the State's position in this case that it was just a brutal senseless degradation and humiliation *and it could have been worse but for frankly this defecation issue*, is not only after they ordered him to take his clothes off and he ran did they take his shoes, but they took his identification. They rifled through his poopy pants to get his identification. Not a lot of money, no value to them. Why would they want his wallet? He knows who he is. He's not dead. They took his wallet because if he's found there ...it's more difficult.

RP 598. There was no objection to this argument in the trial court; Metcalf must show that it was so flagrant and ill-intentioned that no instruction could have eliminated the prejudice.

In closing Bono's defense counsel argued that the prosecutor was appealing to the jury's emotions by using language that designed to provoke an emotional response, rather than focusing on the evidence. RP 572 -574. It is not improper for a prosecutor to respond to an argument of

opposing counsel. The prosecutor began his response to this argument in the excerpt above and concluded it by arguing that he was not asking the jury to decide the case on emotion, but on facts and by using common sense. RP 599-600. The primary point of this argument was to argue that the defendants engaged in behavior which seemed aimed at increasing the victim's embarrassment or inconvenience, but which did not result in any increased benefit to them. This is consistent with the prosecutor's overall theme that this crime was one aimed at causing the victim humiliation rather than providing any pecuniary gain or tangible benefit to the defendants. Such argument is not improper. To the extent that Metcalf is arguing that the reference to defecation was an improper appeal to the jury's passions, that characterization is not supported by looking at the argument as a whole. The prosecutor concludes by asking the jury to decide the case on the facts and not emotions. RP 600.

Misconduct requires the defendants to show that the prosecutor was acting in bad faith. They have failed to meet their burden of showing that the prosecutor was acting in bad faith or that the challenged arguments were improper. The claim of prosecutorial misconduct should be rejected.

2. AS DEFENDANTS HAVE FAILED TO DEMONSTRATE THAT THE PROSECUTOR WAS ENGAGING IN IMPROPER ARGUMENT, THEY HAVE ALSO FAILED TO DEMONSTRATE THE TRIAL COURT ERRED IN OVERRULING THEIR OBJECTIONS.

As stated above, a defendant alleging prosecutorial misconduct must establish both improper conduct and prejudice. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). The challenged remarks are reviewed in “the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.” *Brown*, 132 Wn.2d at 561. To show prejudice, there must be a substantial likelihood that the misconduct affected the jury’s verdict. *Brown*, 132 Wn.2d at 561.

At the trial below, Metcalf objected to one argument made by the prosecutor, RP 547, and Bono objected to a different one. RP 591. The court overruled both objections indicating that it was closing argument and that the “jury gets to decide the facts.” *Id.* Each of the challenged arguments have been addressed above as to why the arguments were not improper. If the arguments were not improper, then it was not error to overrule the defense objections.

Additionally, it was not improper to overrule the objections because the court had properly instructed the jury as to how to consider the arguments of the attorneys in the case. The court’s instructions stated:

The lawyers' 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

BCP 97-125; MCP 89-117 (Instruction No 1). The jury was also instructed that evidence could be direct or circumstantial, which was defined as "facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience." *Id.*, (Instruction No. 2). A jury is presumed to follow the court's instruction. *State v. Lord*, 117 Wn.2d 829, 861, 822 P.2d 177 (1991); *State v. Swan*, 114 Wn.2d 613, 662, 790 P.2d 610 (1990).

In this case the jury was instructed that it was to disregard any argument that was not supported by the evidence. As argued above, both of the prosecutor's challenged arguments had a basis in the evidence adduced in court or was based on an inference that could be drawn from the evidence. The arguments were not wholly without evidentiary foundation although the jury might not have agreed with the prosecutor's assessment of the evidence or on whether the inferences he was asking them to make were reasonable inferences. But that was for the jury to decide, not the court. For the court to sustain the objection, it would have to draw conclusions about the weight to be given the evidence and the inferences that could be drawn from the evidence. The trial court properly

overruled the objection and let the jury do its job, knowing that it had been properly instructed. Defendants have failed to show any prejudicial error in light of the court's instructions.

The court's instructions are also relevant to the claim that the prosecutor's arguments were designed to inflame the passions of the jury. The court instructed the jury that emotions should not affect its thought process:

As jurors, you are officers of the court. You must not let your emotions overcome your rational thought process. You must reach your decision based upon the facts proved to you and on the law given to you, not on sympathy, prejudice or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

BCP 97-125; MCP 89-117 (Instruction No 1). So even if the prosecutor's remarks could be characterized as using an impassioned tone or as being aimed at appealing to emotions, the instructions told the jury to disregard the emotional appeal and to decide the case based upon the evidence presented and rational thought.

Defendants have failed to show that the trial court erred in overruling their objections to the prosecutor's argument by failing to show that the arguments were improper. Defendants have also failed to demonstrate that the arguments would have any prejudicial impact in light of the instructions given to the jury. The trial court did not err.

3. DEFENDANTS HAVE FAILED TO ESTABLISH THAT THERE WAS AN ACCUMULATION OF PREJUDICIAL ERROR.

The doctrine of cumulative error is the counter balance to the doctrine of harmless error. Harmless error is based on the premise that “an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.” *Rose v. Clark*, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986). The central purpose of a criminal trial is to determine guilt or innocence. *Id.* “Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.” *Neder v. United States*, 119 S. Ct. 1827, 1838, 144 L. Ed. 2d 35 (1999)(internal quotation omitted). “[A] defendant is entitled to a fair trial but not a perfect one, for there are no perfect trials.” *Brown v. United States*, 411 U.S. 223, 232, 93 S. Ct. 1565, 36 L. Ed. 2d 208 (1973)(internal quotation omitted). Allowing for harmless error promotes public respect for the law and the criminal process by ensuring a defendant gets a fair trial, but not requiring or highlighting the fact that all trials inevitably contain errors. *Rose*, 478 U.S. at 577. Thus, the harmless error doctrine allows the court to affirm a conviction when the court can determine that the error did not contribute to the verdict that was obtained. *Id.* at 578; *see also State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988)(“The harmless error

rule preserves an accused's right to a fair trial without sacrificing judicial economy in the inevitable presence of immaterial error.”).

The doctrine of cumulative error, however, recognizes the reality that sometimes numerous errors, each of which standing alone might have been harmless error, can combine to deny a defendant not only a perfect trial, but also a fair trial. *In re Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994); *State v. Coe*, 101 Wn.2d 772, 789, 681 P.2d 1281 (1984); *see also State v. Johnson*, 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998) (“although none of the errors discussed above alone mandate reversal....”). The analysis is intertwined with the harmless error doctrine in that the type of error will affect the court's weighing those errors. *State v. Russell*, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), *cert. denied*, 574 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995). There are two dichotomies of harmless error that are relevant to the cumulative error doctrine. First, there are constitutional and nonconstitutional errors. Constitutional errors have a more stringent harmless error test, and therefore they will weigh more on the scale when accumulated. *See, Id.* Conversely, nonconstitutional errors have a lower harmless error test and weigh less on the scale. *Id.* Second, there are errors that are harmless because of the strength of the untainted evidence, and there are errors that are harmless because they were not prejudicial. Errors that are harmless because of the weight of the untainted evidence can add up to cumulative error. *See, e.g., Johnson*, 90 Wn. App. at 74. Conversely, errors that individually are not

prejudicial can never add up to cumulative error that mandates reversal, because when the individual error is not prejudicial, there can be no accumulation of prejudice. *See, e.g., State v. Stevens*, 58 Wn. App. 478, 498, 795 P.2d 38, *review denied*, 115 Wn.2d 1025, 802 P.2d 38 (1990) (“Stevens argues that cumulative error deprived him of a fair trial. We disagree, since we find that no prejudicial error occurred.”).

As these two dichotomies imply, cumulative error does not turn on whether a certain number of errors occurred. Compare, *State v. Whalon*, 1 Wn. App. 785, 804, 464 P.2d 730 (1970)(holding that three errors amounted to cumulative error and required reversal), with *State v. Wall*, 52 Wn. App. 665, 679, 763 P.2d 462 (1988)(holding that three errors did not amount to cumulative error), and *State v. Kinard*, 21 Wn. App. 587, 592-93, 585 P.2d 836 (1979)(holding that three errors did not amount to cumulative error). Rather, reversals for cumulative error are reserved for truly egregious circumstances when defendant is truly denied a fair trial, either because of the enormity of the errors, *see, e.g., State v. Badda*, 63 Wn.2d 176, 385 P.2d 859 (1963)(holding that failure to instruct the jury (1) not to use codefendant’s confession against Badda, (2) to disregard the prosecutor’s statement that the State was forced to file charges against defendant because it believed defendant had committed a felony, (3) to weigh testimony of accomplice who was State’s sole, uncorroborated witness with caution, and (4) to be unanimous in their verdicts was to cumulative error), or because the errors centered around a key issue, *see,*

e.g., ***State v. Coe***, 101 Wn.2d 772, 684 P.2d 668 (1984)(holding that four errors relating to defendant’s credibility combined with two errors relating to credibility of State witnesses amounted to cumulative error because credibility was central to the State’s and defendant’s case); ***State v. Alexander***, 64 Wn. App. 147, 822 P.2d 1250 (1992)(holding that repeated improper bolstering of child-rape victim’s testimony was cumulative error because child’s credibility was a crucial issue), or because the same conduct was repeated so many times that a curative instruction lost all effect, *see, e.g.*, ***State v. Torres***, 16 Wn. App. 254, 554 P.2d 1069 (1976)(holding that seven separate incidents of prosecutorial misconduct was cumulative error and could not have been cured by curative instructions). Finally, as noted, the accumulation of just any error will not amount to cumulative error—the errors must be prejudicial errors. *See Stevens*, 58 Wn. App. at 498.

In the instant case, for the reasons set forth above, defendants have failed to establish that their trial was so flawed with prejudicial error as to warrant relief. Defendants have failed to show that there were any errors in the trial. The only claim of error is regarding improper argument. As discussed above, they have failed to show that there was any prejudicial error much less an accumulation of it. Defendants are not entitled to relief under the cumulative error doctrine.

4. THE TRIAL COURT DID NOT ERR IN SENTENCING DEFENDANT METCALF BASED UPON HIS STIPULATION TO HIS CRIMINAL HISTORY AND OFFENDER SCORE.

In *In re Personal Restraint of Goodwin*, the Supreme Court held that a defendant cannot agree to a punishment that exceeds a sentencing court's statutory authority and, thus, cannot waive a challenge to such a sentence. 146 Wn.2d 861, 872, 50 P.3d 618 (2002). The court further held, however, that a claimed error involving a stipulation to incorrect facts or a discretionary offender score calculation is not subject to direct appeal. *Goodwin*, 146 Wn.2d at 874. This is because a stipulation supplied the necessary "facts in the record" to support the trial court's offender score calculation and sentencing. *State v. Ford*, 137 Wn.2d 472, 482, 973 P.2d 452 (1999), *review denied*, 142 Wn.2d 1003, 11 P.3d 824 (2000). The *Goodwin* court pointed out that there a "distinction between a stipulation based on erroneous facts and one involving a stipulation or agreement to a sentence that legally exceeds statutory authority of the sentencing court." *Goodwin*, at 875. If the sentence is authorized and constitutional assuming the stipulated fact, then review of the claimed error has been waived on direct review. *Id.*

In this case, defendant Metcalf signed a stipulation as to his prior record and his offender score that listed six prior convictions that resulted in an offender score of "5." MCP 121-122 (*see* Appendix A). The stipulation indicates that Metcalf had two juvenile convictions – each of

which scored half a point- for theft in the first degree and attempting to elude which were sentenced in 1999. *Id.* The stipulation indicates that he had four adult convictions, each of which scored one point: two for burglary in the second degree, one for unlawful possession of a controlled substance and one for attempted unlawful possession of a controlled substance. The court imposed a sentence consistent with this stipulated criminal history and offender score. MCP 123-135.

Metcalf now contends that the trial court incorrectly sentenced him arguing that one of his burglary convictions is a juvenile conviction rather than an adult conviction. But to succeed in this argument, Metcalf has to disavow a fact to which he stipulated to in the trial court. Under *Ford*, the trial court was entitled to sentence him based upon his acknowledgement of his criminal history and offender score. Under *Goodwin*, defendant has waived review on this issue on direct appeal.³ Metcalf fails to address the impact of his stipulation on his ability to raise this issue on direct review. This court should affirm the sentence which was based upon defendant's

³ The State does not dispute that something appears awry with the juvenile/adult classifications of defendant's criminal history, but it is not certain as to the nature of the error. Due to the stipulation, the State did not admit copies of defendant's criminal history in the trial court. It is impossible to tell from the record on review whether or not the challenged burglary conviction was a juvenile conviction or whether the offense/sentencing dates were improperly listed in the stipulation or whether some other error occurred. Defendant will not be precluded from seeking relief by personal restraint petition if he can prove the conviction has been improperly scored. The State may seek to transport defendant while this appeal is pending for a clarification/correction hearing pursuant to CrR 7.8.

stipulation to: 1) the nature of his criminal history; and, 2) the calculation of his offender score.

D. CONCLUSION.

For the foregoing reasons the State asks this court to affirm the judgments and sentences entered below.

DATED: June 6, 2008.

GERALD A. HORNE
Pierce County
Prosecuting Attorney



KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

Certificate of Service:

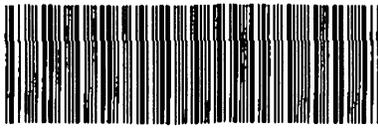
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under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

6/6/08 J. Johnson
Date Signature

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DIVISION II
08 JUN -6 PM 1:58
STATE OF WASHINGTON
BY _____
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APPENDIX “A”

*Stipulation on Prior Record and Offender Score,
Defendant Metcalf*



05-1-05263-7 27188003 STPPR 03-28-07



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 05-1-05263-7

MAR 26 2007

vs.

JARED NATHANIEL METCALF,

STIPULATION ON PRIOR RECORD AND
OFFENDER SCORE
(Plea of Guilty)

Defendant.

Upon the entry of a plea of guilty in the above cause number, charge ASSAULT IN THE FIRST DEGREE, the defendant JARED NATHANIEL METCALF, hereby stipulates that the following prior convictions are HIS complete criminal history, are correct and that HE is the person named in the convictions:

WASHINGTON STATE CONVICTIONS

Crime	Date of Sentence	Jurisdiction	Date of Crime	Adult/Juvenile	Crime Type	Class	Score	Felony or Misdemeanor
THEFT 1 ST	03/01/99	PIERCE CO.	02/01/99	J	NV	B	.5	FELONY
ATTEMPT TO ELUDE	03/01/99	PIERCE CO.	02/01/99	J	NV	C	.5	FELONY
BURQ 2 ND	04/24/96	PIERCE CO.	12/05/95	A	NV	B	1	FELONY
BURQ 2 ND	02/15/00	PIERCE CO.	12/22/99	A	NV	B	1	FELONY
UPCS	07/09/02	PIERCE CO.	06/19/02	A	NV	C	1	FELONY
ATT UPCS	08/21/03	PIERCE CO.	07/21/03	A	NV	C	1	FELONY

Concurrent conviction scoring:

CONVICTIONS FROM OTHER JURISDICTIONS

The defendant also stipulates that the following convictions are equivalent to Washington State felony convictions of the class indicated, per RCW 9.94A.360(3)/9.94A.525 (Classifications of felony/misdemeanor, Class, and Type made under Washington Law):

Crime	Date of Sentence	Jurisdiction	Date of Crime	Adult/Juvenile	Crime Type	Class	Score	Felony or Misdemeanor
NONE KNOWN OR CLAIMED								

Concurrent conviction scoring:

The defendant stipulates that the above criminal history and scoring are correct, producing an offender score as follows, including current offenses, and stipulates that the offender score is correct:

COUNT NO.	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE (not including enhancements)	PLUS ENHANCEMENTS	TOTAL STANDARD RANGE (including enhancements)	MAXIMUM TERM
I	5	XII	138 - 184 MOS.	24 MOS.	162 - 208 MOS.	LIFE

*(F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Hom, See RCW 46.61.520, (JP) Juvenile present.

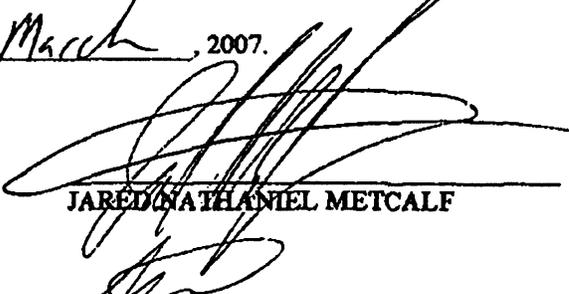
The defendant further stipulates:

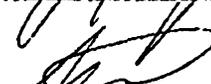
- 1) Pursuant to *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), defendant may have a right to have factors that affect the determination of criminal history and offender score be determined by a jury beyond a reasonable doubt. Defendant waives any such right to a jury determination of these factors and asks this court to sentence according to the stipulated offender score set forth above.
- 2) That if any additional criminal history is discovered, the State of Washington may resentence the defendant using the corrected offender score without affecting the validity of the plea of guilty.
- 3) That if the defendant pled guilty to an information which was amended as a result of plea negotiation, and if the plea of guilty is set aside due to the motion of the defendant, the State of Washington is permitted to refile and prosecute any charge(s) dismissed, reduced or withheld from filing by that negotiation, and speedy trial rules shall not be a bar to such later prosecution;
- 4) That none of the above criminal history convictions have "washed out" under RCW 9.94A.360(3)/9.94A.525 unless specifically so indicated.

If sentenced within the standard range, the defendant further waives any right to appeal or seek redress via any collateral attack based upon the above stated criminal history and/or offender score calculation.

Stipulated to this on the 23rd day of March, 2007.


 GREGORY L. GREER
 Deputy Prosecuting Attorney
 WSB # 22936


 JARED NATHANIEL METCALF


 SHANE M SILVERTHORN
 WSB # 28223

mms