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STATE OF WASHINGTON

BY

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

STATE OF WASHINGTON, RESPONDENT

v.

ANTHONY EMERY and AARON OLSON, APPELLANT

Appeal from the Superior Court of Pierce County  
The Honorable Bryan Chushcoff

No. 06-1-05952-4

**Brief of Respondent**

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

1. Whether the prosecuting attorney's improper closing argument was so flagrant and ill-intentioned as to be incurable by instruction?
2. Whether the defendants waived the issue on appeal where they failed to object to the prosecutor's closing argument?
3. Whether the prosecutor's remarks were harmless error?
4. Whether the trial court abused its discretion in denying Olson's motion to sever defendants?
5. Whether Emery waived the severance issue by failing to move for severance in the trial below?
6. Whether Emery's counsel was ineffective for failing to move for severance?
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8. Whether the trial court abused its discretion in denying Emery's motions for mistrial and new trial?

B. STATEMENT OF THE CASE.

1. Procedure

On December 18, 2006, the Pierce County Prosecuting Attorney (State) charged Anthony Emery and Aaron Olson with kidnapping in the first degree, robbery in the first degree, rape in the first degree, and attempted robbery in the first degree. CP 1-3, 4-5. On July 19, 2007, the State amended the Information to charge an alternative means to rape in the first degree, and added two more counts of rape in the first degree. CP 46-49. The court later ordered that some of the counts be severed for trial. CP 50-51. On June 5, 2008, the State filed a Second Amended Information, charging kidnapping in the first degree, robbery in the first degree, four counts of rape in the first degree, and one count of attempted robbery in the first degree. CP 72-75.

December 29, 2008, Olson moved to sever the defendants for trial. CP 110.

Trial began January 6, 2009, before Hon. Bryan Chushcoff. RP 4 ff. Before jury selection began, Olson argued his motion to sever defendants. RP 36. After hearing the argument, the court denied the motion. RP 58. Olson repeated the motion before the victim testified. RP 84. Again, the court denied the motion. *Id.* After the State rested, Olson again renewed the motion to sever. RP 622. The court denied the motion. RP 623. Olson rested his case without presenting evidence. RP 629.

Neither defendant moved to dismiss after the close of the State's case.

Emery testified in his own defense. RP 631-724. After Emery testified, he rested his case. RP 724. Olson then testified in rebuttal. RP 725-742. Before closing arguments, Olson again renewed his motion to sever. RP 777. After closing arguments, he renewed his severance motion. RP 907. The court denied the motion each time. RP 781, 908.

The jury returned verdicts of guilty on all counts for each defendant. CP 295, 298, 299; 174-177 RP 914-914. Judge Chushcoff sentenced Olson March 27, 2009. CP 337-350. Emery was sentenced April 2, 2009. CP 180-195.

Each defendant filed timely notices of appeal. CP 364-378, 203-204.

## 2. Facts

On February 27, 2006, G.C.<sup>1</sup> was working at a Walgreens at So. 56<sup>th</sup> St. and Pacific Ave. in Tacoma. RP 90.<sup>2</sup> G.C. got off work at 11 p.m. and went to the parking lot to get in her vehicle, a Lincoln Navigator. RP 91.

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<sup>1</sup> The victim, G.C., will be referred to by her initials or as "the victim" to protect her privacy.

<sup>2</sup> The VRP of the trial in this case is 10 volumes whose pages are numbered sequentially. Because most of the references to the VRP are regarding the trial, they will be designated as RP. Any VRP references other than the trial will be referred to by the date of the hearing.

Because the Navigator was new and belonged to her boyfriend, she was unfamiliar with the keys and access to the vehicle. RP 93. She called her boyfriend when she had trouble with the keys and could not get into the vehicle. RP 94. Because her boyfriend was not able to come help her, she turned to go back to the store. RP 94, 95.

As she turned to go back to the store, she was confronted by two men. RP 99. One of them pointed a gun at her stomach. RP 95. One of the men was a white male, the other she described as a Filipino. RP 100.

The white male pointed the gun at her and demanded money. RP 100. G.C. told them that she had no money. RP 103. The white male took her phone. RP 102. The white male then ordered her to open the vehicle. RP 104. The white male had her drive and he got in the passenger seat. *Id.* The Filipino male got in the back seat *Id.*

Because she thought that the two men were going to abduct her, G.C. dumped the contents of her pockets in the parking lot. RP 105. She hoped that the items would be a sign to whomever came looking for her that something had happened to her. RP 106.

The white male had her drive out of the parking lot, south on Pacific Ave. RP 107-108. The white male directed G.C. to the parking lot of a Market Place grocery store at So. 64<sup>th</sup> and Yakima Ave. They parked in a dark spot, not visible from the street. RP 112.

The white male told her that since she had no money, they were going to rape her. RP 112. To try to escape, G.C. told them that she was

pregnant. RP 113. The white male informed her that she would have to engage in oral sex instead. *Id.*

The white male and G.C. moved to the back of the vehicle, while the Filipino male waited outside. RP 114, 116. There, the white male put his penis in G.C.'s mouth. RP 115. When he ejaculated, G.C. wiped the semen on her pants. *Id.* She feared that the two men were going to kill her. *Id.* She intended the semen and its DNA to be used to identify the perpetrators. *Id.*

When the white male was done, he signaled the Filipino male. RP116. The Filipino male then forced G.C. to have oral sex. RP 118. When he ejaculated, she wiped his semen on her work smock. RP 131. Again, her intent was to leave evidence identifying her attackers. *Id.*

G.C. begged the two men not to kill her. RP 132. They had her drive to a Safeway store on So. 56<sup>th</sup> St.. There, the men got out. RP 133. The white male threatened that if she talked, they would kill her. *Id.*

G.C. drove to a friend's house nearby. RP 133. Her friend called police. RP 137. The police collected forensic evidence at the friend's house and later at the police station. RP 137, 142.

Police investigated the crime. Eventually they assembled photo montages of suspects. G.C. identified Emery as one of her attackers. RP 150. She was unable to identify Olson in a montage. RP 147, 149. Through additional investigation, police discovered that Olson was the white male suspect. RP 335, 350. Based upon their continued

investigation, police got DNA samples from Emery and Olson. RP 463. Laboratory examination identified the semen on the victim's clothing as Emery's and Olson's respectively. RP 562, 564.

C. ARGUMENT.

1. WHERE THE PROSECUTOR'S ARGUMENT WAS NOT FLAGRANT OR ILL-INTENTIONED AS TO BE INCURABLE BY INSTRUCTION, THE DEFENDANT WAIVES THE ISSUE ON APPEAL WHEN HE FAILED TO OBJECT AT TRIAL.
  - a. By failing to object to the prosecutor's remarks in closing argument, the defendant waived the issue on appeal.

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)). The defendant has the burden of establishing that the alleged misconduct is both improper and prejudicial. *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). Even if the defendant proves that the conduct of the prosecutor was improper, the misconduct does not constitute prejudice unless the appellate court determines there is a substantial likelihood the misconduct affected the jury's verdict. *Id.* at 718-19.

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. Gentry*, 125 Wn.2d 570, 640, 888 P.2d 570 (1995), citing *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. *State v. Binkin*, 79 Wn. App. 284, 293-294, 902 P.2d 673 (1995), *overruled on other grounds by State v. Kilgore*, 147 Wn.2d 288, 53 P.3d 974 (2002). Failure by the defendant to object to an improper remark constitutes a waiver of that error unless the remark is deemed 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.” *Stenson*, 132 Wn.2d at 719, citing *Gentry*, 125 Wn.2d at 593-594.

When reviewing an argument that has been challenged as improper, the court should review the context of the whole argument, the issues in the case, the evidence addressed in the argument and the instructions given to the jury. *State v. Russell*, 125 Wn.2d 24, 85-6, 882 P.2d 747 (1994), citing *State v. Graham*, 59 Wn. App. 418, 428, 798 P.2d 314 (1990).

Here, the trial court instructed the jury regarding burden of proof and reasonable doubt per WPIC 4.01:

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element

of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

Instruction 3. CP 258.

The trial court also properly instructed the jury that:

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.

Instruction 0, CP 254. *See*, WPIC 1.02.

Olson does not allege that the jury instructions were in error.

Neither defendant objected to the prosecutor's closing argument. That issue is waived unless the defendant can show the remark is flagrant and ill-intentioned and prejudiced to defendant. The defendants do not meet their burden.

- b. The prosecutor's argument was not flagrant or ill-intentioned and did not result in prejudice that could not have been cured by a jury instruction.

In the present case, the prosecutor made a “fill in the blank” reasonable doubt argument. RP 830. The prosecutor also argued that the jury’s verdict should “speak the truth”. RP 831. In two recent cases, this Court has found similar “fill in the blank” and “speak the truth” arguments to be misconduct. *See, State v. Venegas*, - Wn. App. -, 228 P.3d 813 (2010); *State v. Anderson*, 153 Wn. App. 417, 220 P.3d 1273 (2009).

Here, as in *Venegas* and *Anderson*, the prosecutor attempted to make a reasonable argument based on the law as given to the jury in the court’s instructions<sup>3</sup>. The prosecutor was clear in his argument that the burden of proof in a criminal case is on the State and that burden is proof beyond a reasonable doubt. RP 791-792, 827-829. In rebuttal closing, the State reminded the jury again that the State bears the burden of proof. RP 877-878. The prosecutor quoted the law directly from the jury instructions. RP 829-830. Nothing in the record indicates that he was acting in bad faith or trying to mislead the jurors. The prosecutor’s

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<sup>3</sup> It should be noted that the trial in this case was held in January, 2009, before either the *Anderson* or *Venegas* opinions were published.

statements were an attempt to expound on the concept of reasonable doubt. The language “a reasonable doubt is one for which a reason exists” is taken directly out of the instruction. CP 258, Instruction 3.

The State’s argument mirrored the jury instruction and also explained the State’s burden. “A ‘reasonable doubt’, at a minimum, is one based upon ‘reason.’” “A fanciful doubt is not a reasonable doubt.” *Victor v. Nebraska*, 511 U.S. 1, 17, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994)(citing *Jackson v. Virginia*, 443 U.S. 307, 317, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). A juror who has a reasonable doubt should be able to articulate a reason for that doubt and it can be as simple as “there was not enough evidence.”

The explanation of the concept of “reasonable doubt” has challenged courts and attorneys for many years. In 1997, in considering a non-standard reasonable doubt instruction, Division I observed that: “Scholars will continue endlessly to debate the best definition of reasonable doubt.” *State v. Castle*, 86 Wn. App. 48, 62, 935 P.2d 656, review denied 133 Wn. 2d 1014 (1997). That same year, Division I considered yet another nonstandard reasonable doubt instruction in *State v. Cervantes*, 87 Wn. App. 440, 942 P.2d 382 (1997). For a period of time, the *Castle* instruction was approved for general use. See, 11 Washington Practice, Pattern Jury Instructions (2d edition, 1994), 4.01A (1998 pocket

part). Eventually, in *State v. Bennett*, 161 Wn. 2d 303, 165 P.3d 1241 (2007), the Supreme Court requested that trial courts cease using the *Castle* instruction, in favor of the standard WPIC 4.01.

The appellate courts have found a number of different acts to be prosecutorial misconduct. *State v. Reed*, 102 Wn. 2d 140, 684 P.2d 699 (1984) is a notorious case where, despite defense objections, the prosecutor committed numerous acts of misconduct including insulting defense counsel and defense experts, pandering to the prejudices of the jury, and calling the defendant a liar. In *State v. Stenson*, 132 Wn. 2d at 719-724, and *State v. Henderson*, 100 Wn. App. 794, 998 P.2d 907 (2000), the prosecutor elicited improper comments from witnesses regarding improper opinion (*Stenson*) and comment on the defendant's right to remain silent (*Henderson*).

In *State v. Barrow*, 60 Wn. App. 869, 874-875, 809 P.2d 209 (1991), and *State v. Fleming*, 83 Wn. App. 209, 213-214, 921 P.2d 1076 (1996), the prosecutor argued that in order to acquit, the jury had to find that the State's witnesses were lying. In *Fleming*, the prosecutor also commented in closing on the defendant's failure to present evidence. *Id.*, at 214. The Court of Appeals found that the prosecutor's errors "pervaded" the closing. *Id.*, at 21.

In the present case, the prosecutor did not engage in any of these flagrant acts. He attempted to argue reasonable doubt to the jury in the words of the instruction. This Court has subsequently found that argument

improper. The jury was correctly instructed on the law. They were told what standards to apply and also to disregard any remarks that were not supported by the law or the court's instructions. The State's remark was not flagrant or ill-intentioned. Even if this Court finds it was in error, the jury was still properly instructed and presumed to follow the court's instructions on the law.

- c. The prosecutor did not express a personal opinion in closing argument.

A prosecutor may not express a personal opinion regarding witness credibility or the defendant's guilt in closing argument. *See, State v. Anderson*, 153 Wn. App. at 428. In judging the propriety of the remarks, they are viewed in context. *Id.* As pointed out by this Court in *Anderson*, the central point is:

Prejudicial error does not occur until such time as it is clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion.

*Id.*, at 428, quoting *State v. McKenzie*, 157 Wn.2d 44, 54, 134 P.3d 221 (2006).

In the present case, the record reflects that the prosecutor was arguing a conclusion from the evidence. He did not express a personal opinion regarding witness credibility or the defendants' guilt.

d. The prosecutor's remarks were harmless error.

The improper argument was harmless error. The central purpose of a criminal trial is to determine guilt or innocence. *Rose v. Clark*, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986). “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*, 527 U.S. 1, 17, 119 S. Ct. 1827, 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.”).

Here, even if part of the prosecutor’s argument was improper, the defendants cannot show that the improper argument affected the verdict. The evidence against the defendants was considerable. The victim picked

Emery out of a photo montage. RP 150, 346. She identified him in court. RP 154. Forensic tests found his fingerprints inside the victim's car. RP 403. Lab tests showed that his semen and DNA was on the victim's clothes. RP 548, 564.

Emery testified at trial, admitting most of what the victim had testified to, including that both he and Olson were present and had oral sex with the victim on the night in question. RP 639-640. Emery's testimony about Olson was confirmed by lab testing. Olson's semen and DNA was on a different part of the victim's clothing than Emery's. RP 547, 562.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING OLSON'S MOTION TO SEVER TRIALS.

Separate trials have never been favored in Washington. *State v. Grisby*, 97 Wn.2d 493, 647 P.2d 6 (1982). The granting or denial of a motion for severance of jointly charged defendants is entrusted to the sound discretion of the trial court and will not be disturbed on appeal absent a manifest abuse of discretion. *State v. Alsup*, 75 Wn. App. 128 876 P.2d 935 (1994); *State v. Barry*, 25 Wn. App. 751, 611 P.2d 1262 (1980). To support a finding that the trial court abused its discretion, the burden is on the defendant to come forward with facts sufficient to warrant the exercise of discretion in his favor. *Alsup*, 75 Wn. App. at 131. Severance is only proper when the defendant carries the difficult burden of demonstrating undue prejudice from a joint trial. *Grisby*, 97 Wn.2d at 507.

Defendants seeking a separate trial must demonstrate manifest prejudice in a joint trial which outweighs the concern for judicial economy. *State v. Hoffman*, 116 Wn.2d 51, 804 P.2d 577 (1991).

The administration of justice would be greatly burdened if required to accommodate separate trials in all cases where multiple parties have participated in a criminal offense and where one or more have confessed to its commission.

*State v. Ferguson*, 3 Wn. App. 898, 906, 479 P.2d 114 (1970), *review denied*, 78 Wn.2d 996 (1971), cited in *State v. Samsel*, 39 Wn. App. 564, 694 P.2d 670 (1985).

A defendant can demonstrate specific prejudice by showing:

(1) antagonistic defenses conflicting to the point of being irreconcilable and mutually exclusive; (2) a massive and complex quantity of evidence making it almost impossible for the jury to separate evidence as it related to each defendant when determining each defendant's innocence or guilt; (3) a co-defendant's statement inculcating the moving defendant; (4) or gross disparity in the weight of the evidence against the defendants.

*State v. Canedo-Astorga*, 79 Wn. App. 518, 528, 903 P.2d 500 (1995).

Existence of mutually antagonistic defenses is not alone sufficient to compel separate trials. *State v. Hoffman, supra; State v. Davis*, 73 Wn.2d 271, 438 P.2d 185 (1968). The defense must demonstrate that the conflict is so prejudicial that defenses are irreconcilable, and the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty.

All of the participants in a crime will invariably be in conflict when all are tried for that crime. If such conflicts are regarded as

requiring separate trials, then joint trials will be the exception and not the rule. *Grisby, supra*. Defenses that are inconsistent are not necessarily irreconcilable. To be irreconcilable, and thus mutually antagonistic, they must be “mutually exclusive to the extent that one must be believed if the other is disbelieved.” *State v. McKinzy*, 72 Wn. App. 85, 90, 863 P.2d 594 (1993).

Recently, the Court of Appeals considered similar issues in *State v. Johnson*, 147 Wn. App. 276, 194 P. 3d 1009 (2008). There, three defendants were each charged with first degree murder, two counts of first degree assault, and one count of first degree burglary. Two defendants had a strategy to blame the others. The third claimed alibi. *Id.*, at 287. Despite the fact that one of the defendants took the stand and implicated the other two, this did not make the defenses irreconcilable. *Id.*, at 287-288.

Here, the trial court considered Olson’s arguments and specifically found that the separate trials would make no difference to the defendants. The court pointed out that Olson might maintain his alibi and assert that the “white male” was someone else. RP 56. Indeed, the evidence in this case supported such a strategy. When shown the montages, the victim came closest to identifying a Mr. McMullen as the white male. RP 330. The Court observed that Olson’s attorney would cross-examine Emery and argue credibility to the jury. It was the jury’s job to determine whose

version to believe. RP 48. Olson did not show that the defenses were irreconcilable. The court did not abuse its discretion in denying the motion to sever.

b. Emery waived his objection to severance.

A motion to sever defendants must be made before trial:

A defendant's motion for severance of offenses or defendants must be made before trial, except that a motion for severance may be made before or at the close of all the evidence if the interests of justice require. Severance is waived if the motion is not made at the appropriate time.

CrR 4.4(a)(1).

Here, Emery did not move to sever his trial from Olson's before or during trial. Therefore, he waived this issue and cannot raise it for the first time on appeal.

c. Emery's counsel was not ineffective where he failed to renew the severance motion at the end of the State's case.

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); *see also, State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. Prejudice exists if "there is a reasonable probability that, except for counsel's unprofessional errors,

the result of the proceeding would have been different.” *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *see also*, *Strickland*, 466 U.S. at 695 (“When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.”). There is a strong presumption that a defendant received effective representation. *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S. Ct. 931, 133 L.Ed.2d 858 (1996); *Thomas*, 109 Wn.2d at 226. A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. *McFarland*, 127 Wn.2d at 336.

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988).

Judicial scrutiny of a defense attorney’s performance must be “highly deferential in order to eliminate the distorting effects of hindsight.” *Strickland*, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel’s actions “on the facts of the particular case, viewed as of the time of counsel’s conduct.” *Id.* at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

In the present case, Emery's strategy was essentially consent: to admit the sex act and to deny any criminal intent and that any weapon was involved. RP 45. The evidence limited Emery's options. The victim identified him in the montage and in court. RP150, 154. The DNA evidence confirmed his identity and that he had ejaculated. RP548, 564. During Olson's argument for severance, the court recognized that severance would make no difference to either defendant's trial, especially Emery. RP 48.

Emery may well have benefited from a joint trial. He may have hoped for mercy or sympathy from the jury. Olson could be portrayed as the leader and the one with the gun. Emery's partial admission would have looked better to the jury in comparison to Olson's incredible complete denial in the face of the DNA evidence. Emery's decision not to move to sever was trial strategy. It was not ineffective assistance of counsel.

3. THE STATE ADDUCED SUFFICIENT EVIDENCE FOR THE JURY TO FIND ALL ELEMENTS PROVEN BEYOND A REASONABLE DOUBT.

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). 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). 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.2d 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)). Therefore, when the State has produced evidence of all elements of a crime, the decision of the trier of fact should be upheld.

In the present case, Olson only challenges the sufficiency of the evidence of the element that the defendant “used or threatened to use a

deadly weapon or what appeared to be a deadly weapon”. Olson Br. at 14. Olson concedes that the State proved that the defendants threatened G.C. with what appeared to be a deadly weapon. Olson Br. at 18.

In a robbery trial, the gun does not have to be produced in order to prove the deadly weapon element. Circumstantial evidence, such as the description by witnesses is sufficient. *See, State v. Bowman*, 36 Wn. App. 798, 803, 678 P.2d 1273 (1984); *State v. Mathe*, 35 Wn. App. 572, 581-582, 668 P. 2d 599 (1983). Under the “displays what appears to be” subsection, the defendant need not truly display anything. It is enough if the combination of his words and actions imply that he has a weapon. *See, e.g. State v. Henderson*, 34 Wn. App. 865, 869, 664 P.2d 1291 (1983).

The same is true in a rape case. The threat of a weapon is enough to satisfy the element. *See, Bowman, supra; State v. Coe*, 109 Wn. 2d 844-845, 750 P.2d 208 (1988)(plurality opinion); *see also, State v. Bright*, 129 Wn. 2d 257, 267, 916 P.2d 922 (1996)(although no explicit threat made, mere presence of police officer’s weapon was sufficient).

The robbery statute, RCW 9A.56.200(1)(a), does list alternative means for committing the crime:

A person is guilty of robbery in the first degree if:

- (a) In the commission of a robbery or of immediate flight therefrom, he or she:
  - (i) Is armed with a deadly weapon; or
  - (ii) Displays what appears to be a firearm or other deadly weapon; or
  - (iii) Inflicts bodily injury...

The alternative means are apparent from the structure, as well as the wording of the statute. *See, State v. Arndt*, 87 Wn. 2d 374, 553 P. 2d 1328 (1976).

However, under the same analysis, the rape statute shows alternative means of committing the crime, but only one involving a weapon:

- (1) A person is guilty of rape in the first degree when such person engages in sexual intercourse with another person by forcible compulsion where the perpetrator or an accessory:
  - (a) Uses or threatens to use a deadly weapon or what appears to be a deadly weapon; or
  - (b) Kidnaps the victim; or
  - (c) Inflicts serious physical injury, including but not limited to physical injury which renders the victim unconscious; or
  - (d) Feloniously enters into the building or vehicle where the victim is situated.

RCW 9A.44.020(1). Here, by listing and differentiating the alternatives (a)-(d), it is clear that the Legislature's intent was to create only one alternative regarding a weapon. *See, Arndt*, 87 Wn. 2d at 378-379.

Subsections (a) and (b) create two alternatives, not three or four as Olson's reasoning would require. *See, e.g., State v. Whitney*, 108 Wn. 2d 506, 739 P.2d 1150 (1987).

In the present case, G.C. testified that the white male pointed a gun at her stomach. RP 95. She testified that the white male had a gun when he

demanded money. RP 100. She described the gun in detail as a black, semi-automatic. RP 101, 156. The gun looked real. RP 102. The white male pointed the gun at her. RP 157. She gave up her phone because the white male had a gun. RP 102. The white male threatened to kill her. RP 114. She had sex with the white male because he had a gun. RP 115.

In challenging the sufficiency of the evidence, Olson accepts all this testimony as true. He also accepts all the reasonable inferences from this testimony. This evidence is sufficient for the jury to find both weapon alternatives of robbery and to prove the weapon element of rape.

4. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING EMERY'S MOTION FOR MISTRIAL AND MOTION FOR NEW TRIAL.

An appellate court reviews the trial court's denial of a mistrial for an abuse of discretion. *State v. Greiff*, 141 Wn.2d 910, 921, 10 P.3d 390 (2000). A “court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly.” *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). The defendant bears the burden of showing that the conduct complained of was both improper and prejudicial. *State v. Borg*, 145 Wn.2d 329, 335, 36 P.3d 546 (2001). In determining the effect of an irregular occurrence during trial, the appellate court examines “(1) its seriousness; (2) whether it involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard it. *State v. Johnson*,

124 Wn. 2d 57, 76, 873 P.2d 514 (1994), quoting *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989).

Here, while Emery testified, Olson accused him of lying. RP 693. The court excused the jury. *Id.* The court warned Olson. RP 695, 697. When the jury returned, the court instructed them to disregard the outburst. RP 702. Emery's testimony resumed. Olson again accused Emery of lying. RP 708.

Olson took the stand in rebuttal. RP 725 ff. In redirect, Olson tried to make statements to the jury. RP 734. Again, the court instructed the jury to disregard it. *Id.* Later, the court again instructed the jury to disregard Olson's outbursts. RP 742.

There is no basis for concluding that the jury held Olson's outbursts against Emery. There is no basis for concluding that the jury believed Emery was more likely to be guilty of the crimes charged simply because it observed co-defendant Olson accuse him of lying. The court repeatedly instructed the jury to disregard the outbursts.

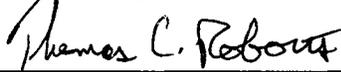
The trial court properly instructed the jury to disregard the outburst. RP 734, 742. A jury is presumed to follow the court's instructions. *State v. Johnson*, 124 Wn.2d 57, 77, 873 P.2d 514 (1994). The trial court did not abuse its discretion in denying Emery's motion for mistrial.

D. CONCLUSION.

Part of the prosecutor's closing argument has subsequently been found to be improper by this Court. Neither defendant objected at trial to the remarks. The defendants had a fair trial where the State presented sufficient evidence to convict them of all charges. For the reasons argued above, the State respectfully requests that the defendants' convictions be affirmed.

DATED: May 25, 2010.

MARK LINDQUIST  
Pierce County  
Prosecuting Attorney

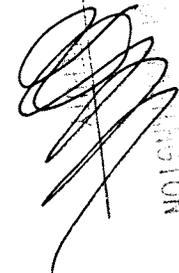
  
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Thomas C. Roberts  
Deputy Prosecuting Attorney  
WSB # 17442

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

*Donnan and  
Marushige*

  
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