

NO. 42575-1-II

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

STATE OF WASHINGTON, RESPONDENT

v.

JESS JAMES VARNELL, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Katherine M. Stolz

No. 11-1-00638-9

Brief of Respondent

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

1. Whether the defendant's conviction should be affirmed where the trial court's excusal for cause of two venire members after an in-chambers conversation did not implicate the defendant's rights to a public trial because that decision was the resolution of a purely legal issue that did not require the resolution of disputed facts.
2. Whether the defendant failed to meet his burden of showing prosecutorial misconduct.
3. Whether the trial court could have abused its discretion in responding to a motion to substitute counsel or precede pro se where the defendant never made such a motion.

B. STATEMENT OF THE CASE.

1. Procedure

On February 8, 2011, Jess James Varnell, hereinafter referred to as the "defendant," was charged by information with one count of first degree escape alleged to have been committed by escaping from custody or, in the alternative, escaping from a detention facility, CP 1-2, after being sentenced in Pierce County Cause Number 10-1-04516-5 "to 207 days of confinement to be served at the Alternative Confinement Program (BTC)." CP 3.

The case was called for trial on July 25, 2011, and the court heard preliminary motions that day. RP 3-10.

The parties conducted voir dire and selected a jury on July 25, 2011. RP 10-13. Both sides gave an opening statement. RP 19.

The State then called Joan Spencer, RP 20-47, 07/26/2011 RP 4-59.

The court conducted a hearing pursuant to Criminal Rule (CrR) 3.5, and found that statements made by the defendant to Pierce County Sheriff's Deputy Wellington Hom were admissible. 07/26/2011 RP 60-76.

Afterwards, the State called Deputy Hom, 07/26/2011 RP 79-130.

The court took exceptions to its instructions to the jury. 07/26/2011 RP 131-34. *See* CP 46-61. The defendant did not have any exceptions to those instructions. 07/26/2011 RP 133.

On July 27, 2011, the State rested. RP 49-50, 56.

The defendant then moved to dismiss for insufficient evidence, and that motion was denied. RP 49-55.

The defendant rested, and the court read its instructions to the jury. RP 56.

The parties then gave their closing arguments. RP 56-69 (State's closing argument); 69-86 (Defendant's closing argument); 86-94 (State's rebuttal argument).

On July 28, 2011, the jury returned a verdict of guilty as charged. CP 45; RP 97-98.

On September 9, 2011, the court sentenced the defendant to the low end of the standard range, or 33 months in total confinement, and imposed legal financial obligations totaling \$2,300.00. 07/26/2011 RP 114; CP 86-96.

The defendant filed a timely notice of appeal the same day. CP 82; RP 122.

2. Facts

On November 18, 2010, the defendant pleaded guilty to attempt to unlawfully possess a controlled substance, methamphetamine, and was sentenced to Alternative to Confinement (ATC), a program that used to be referred to as Breaking the Cycle, or BTC. RP 26, 30-31. *See* CP 3.

Once a defendant is sentenced to ATC, a sheriff's deputy picks that person up from the jail, and drives him or her to the Pierce County Alliance office, at which the ATC program is based. RP 31. Once there, the person undergoes orientation and leaves a sample for urinalysis. RP 31.

Joan Spencer, a case manager at Alternative to Confinement, testified that ATC is a program open to defendants who have pleaded guilty to nonviolent offenses. RP 20-21. Participants in the program are considered to be in the custody of the Pierce County Jail, and their home addresses are considered to be their cell. RP 22. They are required to

“constantly check in with the case manager” by either calling in or coming and signing in. RP 22-23.

Spencer explained that the conditions of ATC include that the program participant must “maintain a verifiable address in Pierce County,” submit to urinalysis testing, and come to the office and sign in every day before noon, Monday through Friday, excluding holidays. RP 35-37.

Spencer testified that one provision of the orientation papers given to clients noted that should a client fail to meet any of the program conditions, he or she would be returned to jail and could be charged with escape. RP 37-39. Moreover, if a participant is ordered to do drug and/or alcohol treatment, ATC will conduct the assessment and make sure that participant gets the opportunity to complete any recommended treatment. 07/26/2011 RP 50.

Spencer testified that these rules and conditions are contained in a document that she read to the defendant during his orientation on November 24, 2010. RP 33-40, 45; 07/26/2011 RP 88.

The defendant initialed and signed the bottom of that document indicating that it had been read to him and that he had been offered a copy of the document itself. RP 39-41, 07/26/2011 RP 5. Spencer testified that she believed the defendant understood the contents of that document and the rules and conditions of the program. RP 41-42.

Pierce County Sheriff’s Deputy Wellington Hom was also present for the orientations of new participants and was present for the defendant’s

orientation. 07/26/2011 RP 5-8. Spencer testified that Hom also went through the program rules and conditions during his orientation of new clients. 07/26/2011 RP 7, 48.

Spencer testified that the last time the defendant checked into the ATC program was on January 5, 2011. 07/26/2011 RP 8-9. He was supposed to sign in the next day, as well, but did not check in with Spencer again. 07/26/2011 RP 9-10. Spencer testified that she therefore felt that the defendant was not in compliance with the Alternative to Confinement program. 07/26/2011 RP 10.

She called the last telephone number she had for the defendant, but could only speak to the defendant's roommate. 07/26/2011 RP 11. Spencer explained to the roommate that the defendant needed to come in and that an arrest warrant for escape could issue if he did not. 07/26/2011 RP 11. She testified that the defendant never told her that he had changed his address or telephone number. 07/26/2011 RP 12.

Pierce County Sheriff's Deputy Wellington Hom testified that he worked for the Sheriff Department's court security unit, and had been involved in the breaking the cycle, or ATC, program. 07/26/2011 RP 80-81. Hom testified that his duties with respect to ATC included transportation of defendants participating in the program from the jail to the Pierce County Alliance office where the ATC program was administered, and the subsequent supervision of these individuals to assure compliance with program rules and conditions. 07/26/2011 RP 81-82.

Deputy Hom testified that among the program rules is that the participants “must be at a verifiable address within Pierce County.” 07/26/2011 RP 83. After Hom transports a program participant to the Pierce County Alliance office, he goes through the rules and conditions of the program with those participants using a series of forms. 07/26/2011 RP 85- Among those forms is the rules and conditions form, which Hom explained extensively to the program participants. 07/26/2011 RP 87-88.

Deputy Hom testified that he was at the defendant’s orientation on November 24, 2010. 07/26/2011 RP 88-89. One of the rules that Deputy Hom explained to the defendant was that the defendant needed to maintain a verifiable address within Pierce County, that the defendant needed to be at that address every night, and that he could be charged with escape for failure to do so. 07/26/2011 RP 89-91, 112, 105-06. Hom testified that he tries to verify the address with the participants at the orientation 07/26/2011 RP 93.

Deputy Hom testified that the defendant maintained very good communication with him early in the program, but that he had some difficulties, and Hom worked with him to keep him in compliance, and in the program. 07/26/2011 RP 94.

However, on January 10, 2011, Deputy Hom was given information from Spencer, which led him to attempt to contact the defendant. 07/26/2011 RP 97. Deputy Hom first tried calling the telephone number which the defendant provided on his address verification form, but

Hom could not contact the defendant. 07/26/2011 RP 97-98. Instead, he left a voice message for the defendant, asking the defendant to contact him. 07/26/2011 RP 98.

On January 12, 2012, Deputy Hom received a telephone message from the defendant, in which the defendant acknowledged that the deputy was trying to contact him, that the defendant knew he was supposed to come in, and that the defendant felt “he had failed the program.” 07/26/2011 RP 98, 113. The defendant went on to say “that he wanted some time to get his things together before going back to jail, and [that] he did not want an escape charge.” 07/26/2011 RP 99. The defendant seemed to be “indicating that he want[e]d to come in to avoid that escape charge.” 07/26/2011 RP 99.

Deputy Hom tried to call the defendant back, and “called every number that was known to [him] for [the defendant],” but could not contact him. 07/26/2011 RP 99.

So, on the morning of January 13, 2011, he went to the address that the defendant had listed as his residence, but could not find the defendant there. 07/26/2011 RP 99-102, 116.

Deputy Hom had no further communication with the defendant after the defendant’s January 12, 2012 voice message. 07/26/2011 RP 102.

C. ARGUMENT.

1. THE DEFENDANT’S CONVICTION SHOULD BE AFFIRMED BECAUSE THE TRIAL COURT’S EXCUSAL FOR CAUSE OF TWO VENIRE MEMBERS AFTER AN IN-CHAMBERS CONSULTATION DID NOT IMPLICATE THE DEFENDANT’S RIGHTS TO A PUBLIC TRIAL WHERE THAT DECISION WAS THE RESOLUTION OF A PURELY LEGAL ISSUE THAT DID NOT REQUIRE THE RESOLUTION OF DISPUTED FACTS.

“A criminal defendant’s right to a public trial is found in article I, section 22 of our state constitution and the Sixth Amendment to the United States Constitution which both provide a criminal defendant with a ‘public trial by an impartial jury.’” *State v. Lormor*, 172 Wn.2d 85, 90-91, 257 P.3d 624 (2011); *State v. Slert*, ___ P.3d ___ (2012)(WL 3205356).

The public also has “an interest in open, accessible proceedings,” under the First Amendment to the United States Constitution and article I, section 10 of the Washington constitution, which “provides that ‘[j]ustice in all cases shall be administered openly.’” *Lormor*, 172 Wn.2d at 91 (citing *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716 (1982) and *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 104 S. Ct. 819, 78 L.Ed.2d 629 (1984)); *Slert*, ___ P.3d ___ (2012)(WL 3205356).

However, a defendant’s constitutional right to a public trial only applies to the evidentiary phases of the trial and to other “adversary

proceedings.” *State v. Sadler*, 147 Wn. App. 97, 114, 193 P.3d 1108 (2008)(quoting *State v. Rivera*, 108 Wn.2d 645, 652, 32 P.3d 292 (2001)). Because the right to a public trial is linked to the defendant’s constitutional right to be present during all critical phases, the defendant has the right to an open court whenever evidence is taken and during suppression hearings, voir dire, and the jury selection process. *Rivera*, 108 Wn. App. at 653.

“The guaranty of open criminal proceedings extends to ‘the process of juror selection,’” *In Re Personal Restraint Petition of Orange*, 152 Wn. 2d 795, 804, 100 P.3d 291 (2005). However, “[a] defendant does not... have a right to a public hearing on purely ministerial or legal issues that do not require the resolution of disputed facts.” *Sadler*, 147 Wn. App. at 114; *State v. Sublett*, 156 Wn. App. 160, 181, 231 P.3d 231 (2010). See *Rivera*, 108 Wn. App. at 653.

Moreover, “[t]he public trial right is not absolute but may be overcome to serve an overriding interest based on findings that closure is essential and narrowly tailored to preserve higher values.” *Lormor*, 172 Wn.2d at 91.

To determine if closure is appropriate, the trial court is to consider the following factors and enter specific findings on the record to justify any ensuing closure: (1) The proponent of closure must show a compelling interest and, if based on anything other than defendant’s right to a fair trial, must show serious and imminent threat to that right; (2) anyone present when the motion is made must be given an opportunity to object; (3) the least restrictive means must be

used; (4) the court must weigh the competing interests; and (5) the order must be no broader in application or duration than necessary.

Lormor, 172 Wn.2d at 91n1 (citing *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995) (citing *Allied Daily Newspapers v. Eikenberry*, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993))). See *Waller v. Georgia*, 467 U.S. 39, 47, 104 S. Ct. 2210, 81 L.Ed.2d 31 (1984).

[A] ‘closure’ of a courtroom occurs when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave. This does not apply to every proceeding that transpires within a courtroom but certainly applies during trial, and extends to those proceedings that cannot be easily distinguished from the trial itself. This includes pre- and posttrial matters such as voir dire, evidentiary hearings, and sentencing proceedings.

Lormor, 172 Wn.2d at 93.

While the Washington State Supreme Court has not adopted the federal rule that a courtroom closure can be “trivial’ when it does not implicate the values served by the Sixth Amendment,” it has “occasionally suggested that a closure might be trivial or de minimis.” *Id.* at 95-96. Moreover, “[t]he Washington Supreme Court has held that not all violations of the public trial right result in structural error requiring a new trial.” *Skert*, ___ P.2d ___ (2012)(WL 3205356)(citing *State v. Momah*, 167 Wn.2d 140, 149-50, 217 P.3d 321 (2009)).

“Whether the right to a public trial has been violated is a question of law reviewed de novo.” *State v. Lormor*, 172 Wn.2d 85, 90, 257 P.3d 624 (2011)(citing *State v. Momah*, 167 Wn.2d 140, 147, 217 P.3d 321 (2009)(citing *Bone-Club*, 128 Wn.2d at 256, 906 P.2d 325)); *State v. Brightman*, 155 Wn.2d at 514, 122 P.3d 150 (2005).

In the present case, although the defendant argues that the trial court violated his “right to a public trial by conducting a portion of jury selection in chambers,” Appellant’s Opening Brief, p. 11-14, the record indicates otherwise.

Here, just prior to jury selection, the parties inquired of the court’s procedure for dealing with challenges for cause:

[DEPUTY PROSECUTOR (DPA)]: And if we have cause – or if we believe there’s cause, would you like us to take that up in a sidebar?

THE COURT: You can go sidebar if you chose. I mean, you know, if it’s something that’s fairly blatant –

[DPA]: Yes.

THE COURT: -- you know, I assume we can probably dispense with it right then and there.

[DEFENSE ATTORNEY]: Okay.

THE COURT: I mean, do you think that as the defendant is sitting there, is he guilty or innocent? And if someone says guilty, you know, obviously, that’s rather blatant cause.

[DPA]: Thank you, Your Honor.

RP 12.

During voir dire, the court, after consulting the parties, chose to excuse two members of the venire because “employment and other issues” did not allow them to sit on a jury in any case:

[DPA]: Your honor, it did occur to me, though, yesterday we had a little counsel in chambers during jury selection where *we discussed that number 6 and number 26?*

[DEFENSE COUNSEL]: 28

[DPA]: *28 should be excused for cause. And I don't think we ever put that on the record.*

THE COURT: I don't think we did either.

[DPA]: Thank you.

THE COURT: *So we were excusing 6 and 28 for cause. That was because both of them had employment and other issues that would not allow them to sit on the jury.*

07/26/2011 RP 77 (emphasis added).

“[S]tatutory and common law authorize[s] the court to excuse veniremen on its own motion.” *State v. Langford*, 67 Wn. App. 572, 583, 837 P.2d 1037 (1992)(quoting *State v. Killen*, 39 Wn. App. 416, 693 P.2d 731 (1985)). RCW 2.36.100(1) specifically provides that the trial court may excuse jurors “upon a showing of undue hardship, extreme inconvenience, public necessity, or any reason deemed sufficient by the court for a period of time the court deems necessary.”

Here, the court's excusal for hardship of venire members 6 and 26 did not turn on any case-specific reason for excusal, but on the general qualifications of these members to serve on any jury. *See* 07/26/2011 RP 77. Its decision to excuse these members does not appear to be the product of an adversary proceeding and did not concern the excused jurors' qualifications to serve impartially. *See* 07/26/2011 RP 77. The discussions appeared to pertain solely to hardship matters governed by the court's

discretion and did not involve resolution of disputed facts. 07/26/2011 RP 77. Indeed, the discussions were most akin to the court's discussion of legal matters in chambers or during a sidebar, to which the defendant and members of the public have traditionally not been privy. *Cf. In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 483–84, 965 P.2d 593 (1998) (defendant's presence not required for in-chambers discussion of jury sequestration, wording of jury instructions, and ministerial matters); *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 306, 868 P.2d 835 (1994) (defendant's presence not required for in-chambers or bench conferences between court and counsel on legal matters); *State v. Sublett*, 156 Wn. App. 160, 181–82, 231 P.3d 231 (public trial right inapplicable to court's conference with counsel regarding jury's purely legal question submitted during deliberations), *review granted*, 170 Wn.2d 1016 (2010); *State v. Bremer*, 98 Wn. App. 832, 834–35, 991 P.2d 118 (2000) (defendant had no right to be present during in-chambers conference for legal inquiry about jury instruction).

Thus, the court's decision to "excus[e venire members] 6 and 28 for cause" because they "had employment and other issues that would not allow them to sit on the jury," 07/26/2011 RP 77, was the resolution of a purely legal issue that did not require the resolution of any disputed facts.

Although this Court recently held that an "in-chambers conference and the dismissal of [four prospective] jurors were part of the jury selection process to which the public trial right applied," it so held only

“[b]ecause the record indicate[d] that this in-chambers conference involved the dismissal of [these] four jurors for case-specific reasons based at least in part on the jury questionnaires” rather than for reasons related to their “general qualifications” to sit on any jury. *Slert*, ___ P.3d ___ (2012) (WL 3205356).

In the present case, the in-chambers conference did not involve the dismissal of prospective jurors for case-specific reasons, but for reasons related to their general qualifications to sit on any jury: specifically, employment and other issues would not allow them to sit on a jury. 07/26/2011 RP 77. Hence, the in-chambers conference and dismissal at issue here involved the resolution of purely legal issues that did not require the resolution of disputed facts.

Because “[a] defendant does not... have a right to a public hearing on purely ministerial or legal issues that do not require the resolution of disputed facts,” *Sadler*, 147 Wn. App. at 114, the defendant did not have the right to a public hearing for the resolution of this issue.

Thus, the court’s excusal for cause of the two venire members in question did not implicate the defendant’s right to a public trial. As a result, it could not have violated that right and the defendant’s conviction should be affirmed.

2. THE DEFENDANT FAILED TO MEET HIS BURDEN OF SHOWING PROSECUTORIAL MISCONDUCT.

“Without a proper timely objection at trial, a defendant cannot raise the issue of prosecutorial misconduct on appeal unless the misconduct was so flagrant and ill-intentioned that no curative jury instruction could have corrected the possible prejudice.” *State v. Curtiss*, 161 Wn. App. 673, 250 P.3d 496 (2011); *State v. Larios-Lopez*, 156 Wn. App. 257, 260, 233 P.3d 899 (2010) (citing *State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006) (quoting *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008, 118 S. Ct. 1193, 140 L. Ed. 2d 323 (1998))). This is because the absence of an objection “strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.” *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990) (emphasis in original).

Even where there was a proper objection, an appellant claiming prosecutorial misconduct “bears the burden of establishing the impropriety of the prosecuting attorney’s comments and their prejudicial effect.” *State v. Anderson*, 153 Wn. App. 417, 427, 220 P.3d 1273 (2009); *State v. Fisher*, 165 Wn.2d 727, 746-47, 202 P.3d 937 (2009); *State v. McKenzie*, 157 Wn.2d 44, 134 P.3d 221 (2006) (quoting *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997); *Beck v. Washington*, 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962)).

Hence, a reviewing court must first evaluate whether the prosecutor's comments were improper. *Anderson*, 153 Wn. App. at 427. "The State is generally afforded wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence." *Anderson*, 153 Wn. App. at 427-28, 220 P.3d 1273. It is not misconduct for a prosecutor to argue that the evidence does not support a defense theory, *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994) (citing *State v. Graham*, 59 Wn. App. 418, 429, 798 P.2d 314 (1990), *State v. Contreras*, 57 Wn. App. 471, 476, 788 P.2d 1114, review denied, 115 Wn.2d 1014, 797 P.2d 514 (1990)), and "the prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel." *Russell*, 125 Wn.2d at 87. Moreover, "[r]emarks of the prosecutor, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective." *Id.* at 86.

"A prosecutor's improper comments are prejudicial 'only where 'there is a substantial likelihood the misconduct affected the jury's verdict.'" *State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359 (2007) (quoting *Brown*, 132 Wn.2d at 561, 940 P.2d 546; *Fisher*, 165 Wn.2d at 747. "A reviewing court does not assess '[t]he prejudicial effect of a prosecutor's improper comments... by looking at the comments in isolation but by placing the remarks '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.’” *Id.* (quoting *Brown*, 132 Wn.2d at 561; *State v. Johnson*, 158 Wn. App. 677, 683, 243 P.3d 936 (2010). “[R]emarks must be read in context.” *State v. Pastrana*, 94 Wn. App. 463, 479, 972 P.2d 557 (1999); *Larios-Lopez*, 156 Wn. App. at 261.

Prosecutorial misconduct may be neutralized by a curative jury instruction, *Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), and juries are presumed to follow the court’s instructions. *State v. Weber*, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983).

In the present case, the defendant argues that the deputy prosecutor committed misconduct by “repeatedly denigrating defense counsel in general and counsel for [the defendant] in particular.” Appellant’s Opening Brief, p. 14-18.

In this case, the Deputy Prosecutor began her closing argument by telling the jury that the State bore the burden of proving each of the four elements of first degree escape. RP 57. She then discussed the evidence admitted at trial and argued that the State had proven each of these elements. RP 57-68. The Deputy Prosecutor concluded her argument by directing the jury to the definition of proof beyond a reasonable doubt in the court’s instruction number three, and then reading verbatim from that instruction. RP 68; CP 46-61. She said no more. RP 57-69.

The defense attorney argued that it was Ms. Spencer that accused the defendant of escape, but that she did not even know what the definition

of escape was. RP 69-70. He then discussed the standard of proof beyond a reasonable doubt, RP 70-72, before arguing that Deputy Hom's failure to preserve the defendant's voice mail could generate a reasonable doubt, RP 72-73. The defense attorney went on to argue that Spencer had never read the judgment and sentence, RP 76-78, and that Deputy Hom was not familiar with the defendant's judgment and sentence. RP 78-79. Finally, the defense attorney pointed the jury to instruction number nine, which discussed the elements of the charged crime, and stated that the only contested issue was whether the defendant escaped from custody RP 79-80. He pointed the jury to the instruction defining "custody" as restraint pursuant to an order of the Court, noted that Spencer was not a judge, and argued that the exhibit setting for the rules and conditions of the ATC program merely set "out the whims of Joan Spencer," and that they were "irrelevant" and "confuse the issue." RP 81-82.

The deputy prosecutor then began her rebuttal argument as follows:

Ladies and gentlemen, there's a saying in the criminal law community, and that saying is: If the facts are against you, if you have bad facts, what you need to do is argue the law. There's a technical reason that the –that the defendant is not guilty; or –

[DEFENSE ATTORNEY]: Your Honor, I object. I think that makes me a personal issue in the case, and I don't believe that that would be appropriate.

THE COURT: Why don't you try rephrasing it, Counsel.

[DEPUTY PROSECUTOR]: Okay. All right. Ladies and gentlemen, there – there's a trend in the – in the community; and that is, if the laws are against you, then you look at the facts.

[DEFENSE ATTORNEY]: Again, I object, Your Honor. I think it personalizes –

THE COURT: It's closing argument, Counsel. She's not making any personal aspersions on you.

[DEPUTY PROSECUTOR]: And –and if the law is against you, you look at the facts and say, well, these facts are bad. These facts don't really fit into the law; or on the other hand, if the law is against you, you can look at the facts and say, well, these facts don't meet with the law; and if they are both against you, then you have to find some other scapegoat. In this case, that seems to be Ms. Spencer, doesn't it? Ms. Spencer didn't do this right. Ms. Spencer didn't do that right. Ms. Spencer seems to think that she's a judge. Ms. Spencer just makes up these things as a whim. Well, let's look at the facts.

RP 86-87.

Hence, in her rebuttal argument, the deputy prosecutor responded to the defense attorney's allegations that Ms. Spencer had failed to perform her job by failing to know the definition of escape, RP 69-70, and failing to read the judgment and sentence. RP 76-78. She rebutted the defense attorney's argument that the exhibit setting forth the rules and conditions of the ATC program merely set "out the whims of Joan Spencer," and that they were "irrelevant" and "confuse the issue." RP 81-82. In fact, the deputy prosecutor spent the remainder of her rebuttal responding to such claims. *See* RP 88-94.

Because it is not misconduct for a prosecutor to argue that the evidence does not support a defense theory, and because "the prosecutor, as an advocate, is entitled to make a fair response to the arguments of

defense counsel.” *Russell*, 125 Wn.2d at 87, the prosecutor’s rebuttal argument was proper.

While the defendant seeks to portray this argument as one in which the prosecutor “repeatedly denigrat[ed defense] counsel,” Appellant’s Opening Brief, p. 14-18, at no point during her closing or rebuttal arguments did the deputy prosecutor so much as mention the defense attorney, either by name or role. *See* RP 56-69; 86-94. While she did indicate that there was a trend “in the criminal law community” to argue the law if the facts are against you, to argue the facts if the law is against you, or to find a scapegoat if both are against you, she did not attribute this trend to the defense attorney directly. RP 86-87. Rather, by the terms of the deputy prosecutor’s statement, it was a trend or belief that was shared by all members of the criminal bar, which would mean that the deputy prosecutor was ascribing the same proclivity to herself.

Moreover, it is not entirely clear that the trend of which she spoke was one that is unethical or disparaging. Indeed, most jurors would, like most lawyers, probably expect a criminal defense attorney to be an effective advocate for his or her client. *See, e.g.*, RPC 3.1. Emphasizing the strong points of one’s case, whether they be factual or legal, and de-emphasizing the weak ones, is not unethical; it is competent representation. The deputy prosecutor never accused the defense attorney

of being less than truthful or otherwise being “unscrupulous, dishonest, or somehow less honorable than the prosecutor herself.” Appellant’s Opening Brief, p. 16. *Compare* RP 56-69; 86-94.

Although the defendant argues that this case is analogous to *State v. Gonzales*, 111 Wn. App. 276, 45 P.3d 205 (2002), Appellant’s Opening Brief, p. 16, 18, the present case differs factually, and must therefore, be distinguished.

In *Gonzales*, the deputy prosecutor argued that s/he “had a very different job than the defense attorney” in that s/he had “an obligation to see that justice is served,” while the defense attorney only “ha[d] an obligation to a client.” *Gonzales*, 111 Wn. App. at 283. Division One held that the prosecutor thereby committed misconduct because s/he “disparaged the role of defense counsel and sought to ‘draw a cloak of righteousness’ around the state’s position.” *Id.* at 282 (*apparently quoting U.S. v. Frascone*, 747 F.2d 953, 957-58 (1984)).

In the present case, however, the deputy prosecutor did not so much as mention defense counsel directly, much less disparage counsel or his role. *See* RP 86-94. Even were the deputy prosecutor’s comments to be considered disparaging, they did not apply to defense counsel only, but to the prosecutor, as well. Therefore, they were not designed to “‘draw a cloak of righteousness’ around the state’s position,” as in *Gonzales*, 111

Wn. App. at 282-83, but to properly “respon[d] to the arguments of defense counsel,” as in *Russell*, 125 Wn.2d at 87.

Indeed, the comments here are distinguishable from those at issue in *Gonzales* for the same reasons stated by the Washington State Supreme Court in *Yates*:

Unlike the prosecutor in *Gonzales*, the prosecutor in the present case did not refer to defense counsel’s role and drew no direct contrast between the roles of prosecutors and defense attorneys. Here, the trial court reasonably determined that the remark was not improper. Even if we were to declare the comment improper, the criticism of defense counsel was far too attenuated to have been prejudicial; little likelihood –certainly not a “substantial likelihood” –exists that the comment “affected the jury’s verdict.

State v. Yates, 161 Wn.2d 714, 778, 168 P.3d 359 (2007).

The defendant also seeks to analogize the present comments to those in *State v. Warren*, 165 Wn.2d 17, 195 P.3d 940 (2008). Again, the present case should be distinguished.

The Court in *Warren* held that it was improper for a deputy prosecutor “to tell the jury there were a ‘number of mischaracterizations’ in defense counsel’s argument as ‘an example of what people go through in a criminal justice system when they deal with defense attorneys,’” or to describe “defense counsel’s argument as a ‘classic example of taking these facts and completely twisting them to their own benefit, and hoping that

you are not smart enough to figure out what in fact they are doing.’”

Warran, 165 Wn.2d at 29-30.

In contrast, the prosecutor here never indicated that the defense attorney mischaracterized anything or twisted facts in anyway. While she may have implied that defense counsel emphasized the strong points of his client’s case, this is not the same as accusing the defense attorney of being in anyway dishonest.

Finally, the defendant relies on *State v. Thorgerson*, 172 Wn.2d 438, 258 P.3d 43 (2011) to argue that the comments at issue here were improper. Such reliance is misplaced.

The Court in *Thorgerson* held that comments that “the defense [was] engaging in ‘sl[e]ight of hand’ tactics” and the use of “disparaging terms like ‘bogus’ and ‘desperation’ to describe the defense” were improper because they “impugned defense counsel’s integrity.”

Thorgerson, 172 Wn.2d at 451-52. The Court noted that the use of the term sleight of hand, in particular, implied “wrongful deception or even dishonesty in the context of a court proceeding.” *Id.* at 452.

By contrast, the prosecutor here made no such allegations. She simply never stated or implied that defense counsel was being dishonest. *See* RP 86-94.

Rather, the deputy prosecutor's comments during rebuttal argument were a response to the defense attorney's allegations that Ms. Spencer had failed to perform her job, RP 69-70, RP 76-78, and the defense attorney's argument that the exhibit setting forth the rules and conditions of the ATC program merely set "out the whims of Joan Spencer," and that they were "irrelevant" and "confuse the issue." RP 81-82. Because it is not misconduct for a prosecutor to argue that the evidence does not support a defense theory, and because "the prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel." *Russell*, 125 Wn.2d at 87, the prosecutor's rebuttal argument was proper.

Therefore, the defendant failed to meet his burden of showing prosecutorial misconduct, and his conviction should be affirmed.

3. THE TRIAL COURT COULD NOT HAVE ABUSED ITS DISCRETION IN RESPONDING TO A MOTION TO SUBSTITUTE COUNSEL OR PRECEDE PRO SE WHERE THE DEFENDANT NEVER MADE SUCH A MOTION.

"Effective assistance of counsel is guaranteed by both the United States Constitution amendment VI and Washington Constitution article I, section 22 (amendment X)." *State v. Yarbrough*, 151 Wn. App. 66, 89,

210 P.3d 1029, 1040-41 (2009); *State v. Johnston*, 143 Wn. App. 1, 177 P.3d 1127 (2007).

Within the attorney-client relationship, “[g]enerally, the client decides the goals of litigation and whether to exercise some specific constitutional rights, and the attorney determines the means.” *State v. Cross*, 156 Wn.2d 580, 606, 132 P.3d 80 (2006). Thus, “a conflict over strategy is not the same thing as a conflict of interest.” *Cross*, 156 Wn.2d at 607.

“When the ‘relationship between lawyer and client completely collapses, the refusal to substitute new counsel violates the defendant's Sixth Amendment right to effective assistance of counsel’ even if no actual prejudice is shown.” *State v. Cross*, 156 Wn.2d 580, 606, 132 P.3d 80 (2006)(citing *In Re Pers. Restraint of Stenson*, 142 Wn.2d 710, 722, 16 P.3d 1 (2001)).

However, “[u]ntil and unless the disagreement about strategy actually compromises the attorney's ability to provide adequate representation, strategy differences do not violate any constitutional rights held by defendants.” *Cross*, 156 Wn.2d at 611.

Moreover, “[a] defendant may not discharge appointed counsel unless the motion is timely and upon proper grounds.” *Cross*, 156 Wn.2d

at 606. Likewise, “[r]equests to proceed pro se must be timely and stated unequivocally.” *Id.* at 607, 610-11.

When such a motion is made, “[a]n adequate inquiry must include a full airing of the concerns (which may be done in camera) and a meaningful inquiry by the trial court.” *Id.* at 610 (*citing Stenson*, 142 Wn.2d at 731).

“When reviewing a trial court’s refusal to appoint new counsel, [appellate courts] consider ‘(1) the extent of the conflict, (2) the adequacy of the [trial court’s] inquiry, and (3) the timeliness of the motion.’” *Id.* (*quoting Stenson*, 142 Wn.2d at 724). “[T]rial court decisions relating to attorney/client differences” are generally reviewed “for abuse of discretion.” *Id.*

In the present case, although the defendant argues that the trial court abused its discretion by failing to inquire into his motion for substitution of counsel, Appellant’s Opening Brief, p. 18-26, the record demonstrates that no such motion was ever made, and therefore, that the court could not have abused its discretion in responding or failing to respond to such a motion.

The defendant, despite being able to file three separate letters, never moved the trial court to discharge his appointed attorney, substitute new counsel, or to precede pro se. *See* RP 1-122; 07/26/2011 RP 1-134;

CP 62-67, 70-74, 175. Indeed, he did not say or file anything until after his trial was concluded, and the guilty verdict returned. *See* RP 111-21; CP 62-67, 70-74, 175. *Compare* RP 1-111; 07/26/2011 RP 1-134; CP 1-61, 68-69, 75-174.

Even if the defendant's statements at sentencing are construed as a motion to substitute counsel or precede pro se, they were made during his allocution and after his sentencing, and therefore, could not be considered timely.

Because "[a] defendant may not discharge appointed counsel unless the motion is timely and upon proper grounds," and "[r]equests to proceed pro se must be timely and stated unequivocally," *Cross*, 156 Wn.2d at 606-07, and the defendant never made either motion or request, the trial court cannot have abused its discretion in responding or failing to respond to such a motion or request. There simply was no motion, and therefore, there was no decision through which the court could have abused its discretion.

Because the defendant is not otherwise asserting ineffective assistance of counsel, *see* Appellant's Opening Brief, p. 1-26, his conviction should be affirmed.

D. CONCLUSION.

The trial court's excusal for cause of two venire members after an in-chambers conversation did not implicate the defendant's rights to a public trial because that decision was the resolution of a purely legal issue that did not require the resolution of disputed facts. Hence, neither that decision nor the process by which it was apparently made could have violated the defendant's rights to a public trial, and his conviction should be affirmed.

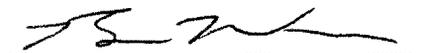
The defendant failed to meet his burden of showing prosecutorial misconduct.

Finally, the trial court not have abused its discretion in responding or failing to respond to a motion to substitute counsel or precede pro se because the defendant never made such a motion.

Therefore, the defendant's conviction should be affirmed.

DATED: August 15, 2012.

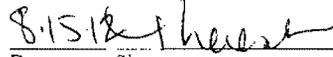
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Certificate of Service:

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

8.15.12 
Date Signature

PIERCE COUNTY PROSECUTOR

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