

Σ RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Dec 19, 2014, 2:39 pm
BY RONALD R. CARPENTER
CLERK

NO. 89657-7

mt
RECEIVED BY E-MAIL

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In re Personal Restraint

Petition of

ZAHID A. KHAN,

Petitioner.

SUPPLEMENTAL
BRIEF OF RESPONDENT

MARK K. ROE
Prosecuting Attorney

SETH A. FINE
Deputy Prosecuting Attorney
Attorney for Respondent

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

 ORIGINAL

TABLE OF CONTENTS

I. ISSUES 1

II. STATEMENT OF THE CASE..... 2

III. ARGUMENT 3

A. BECAUSE THE DEFENDANT’S CLAIMS ARE VARIANTS OF CLAIMS THAT WERE REJECTED ON DIRECT APPEAL, THEY CANNOT BE RAISED IN A PERSONAL RESTRAINT PETITION. .3

B. TO OBTAIN AN EVIDENTIARY HEARING ON A PERSONAL RESTRAINT PETITION, THE PETITIONER MUST PROVIDE ADMISSIBLE EVIDENCE OF THE FACTS JUSTIFYING RELIEF. 3

C. DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR DECIDING NOT TO REQUEST APPOINTMENT OF AN INTERPRETER.6

1. Counsel Could Validly Decide That The Defendant’s Testimony Would Be More Persuasive If He Testified In His Own Words. 6

2. Since The Defendant Has Not Established That He Failed To Understand Any Significant Portion Of The Proceeding, He Has Not Shown That He Was Prejudiced By Any Deficient Performance... 12

D. THE PROSECUTOR’S CROSS-EXAMINATION OF THE DEFENDANT DOES NOT PROVIDE ANY GROUNDS FOR RELIEF..... 16

1. It Is Not “Misconduct” For A Prosecutor To Cross-Examine The Defendant About Facts Surrounding The Crime..... 16

2. Defense Counsel Reasonably Chose To Clarify This Topic On Re-Direct Examination Instead Of Objecting..... 23

E. THE DEFENDANT HAS FAILED TO SHOW THAT DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBTAIN EXPERT TESTIMONY. 25

1. Since The Defendant Has Provided No Evidence About The Scope Of Counsel's Investigation, He Has Failed To Show That The Investigation Was Inadequate.....25

2. Even If Counsel's Investigation Is Considered Inadequate, The Defendant Has Failed To Show That An Investigation Would Have Produced Any Admissible Evidence.....26

IV. CONCLUSION28

TABLE OF AUTHORITIES

WASHINGTON CASES

<u>Doe v. Puget Sound Blood Center</u> , 117 Wn.2d 772, 819 P.2d 370 (1991).....	27
<u>In re Jeffries</u> , 114 Wn.2d 485, 789 P.2d 731 (1990).....	3, 23
<u>In re Rice</u> , 118 Wn.2d 876, 828 P.2d 1086 (1992) 3, 5, 6, 13, 15, 25	
<u>In re St. Pierre</u> , 118 Wn.2d 321, 823 P.2d 492 (1992)	7
<u>In re Yates</u> , 177 Wn.2d 1, 296 P.3d 872 (2013).....	4
<u>Lilly v. Lynch</u> , 88 Wn. App. 306, 945 P.2d 727 (1997).....	27
<u>State v. Baylor</u> , 17 Wn. App. 616, 565 P.2d 99 (1977).....	17
<u>State v. Canfield</u> , 154 Wn.2d 698, 116 P.3d 391 (2005)	10
<u>State v. Etheridge</u> , 74 Wn.2d 102, 443 P.2d 536 (1968).....	17
<u>State v. Fisher</u> , 165 Wn.2d 727, 202 P.3d 937 (2009)	16
<u>State v. Gore</u> , 143 Wn.2d 288, 21 P.3d 262 (2001)	27
<u>State v. Grier</u> , 171 Wn.2d 17, 246 P.3d 1260 (2011)	8
<u>State v. Kloeppe</u> r, 179 Wn. App. 343, 317 P.3d 1088, <u>review denied</u> , 180 Wn.2d 1017 (2014).....	23
<u>State v. Korum</u> , 157 Wn.2d 614, 141 P.3d 13 (2008).....	2, 7, 23
<u>State v. McCuiston</u> , 174 Wn.2d 369, 275 P.3d 1062 (2012).....	5
<u>State v. Monday</u> , 171 Wn.2d 667, 257 P.3d 551 (2011).....	17

FEDERAL CASES

<u>Baja v. Ducharme</u> , 187 F.3d 1075 (9th Cir. 1999), <u>cert. denied</u> , 528 U.S. 1079 (2000).....	6
<u>Gonzalez v. United States</u> , 722 F.3d 118 (2nd Cir. 2013).....	5
<u>Rock v. Arkansas</u> , 483 U.S. 44, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987).....	9
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	8, 9, 12, 13, 15, 24

OTHER CASES

<u>Commonwealth v. Tedford</u> , 598 Pa. 639, 960 A.2d 1 (2008).....	16
<u>State v. Casipe</u> , 5 Haw. App. 210, 686 P.2d 28 (1984).....	9
<u>State v. Fauci</u> , 282 Conn. 23, 917 A.2d 978 (2007)	16
<u>State v. Leutschaft</u> , 759 N.W.2d 414 (Minn. App.), <u>review denied</u> , 2009 Minn. LEXIS 196 (Minn. 2009)	16
<u>Stubblefield v. Commonwealth</u> , 10 Va. App. 343, 392 S.E.2d 197, 200 (1990).....	9

U.S. CONSTITUTIONAL PROVISIONS

Sixth Amendment.....	8
----------------------	---

WASHINGTON STATUTES

RCW 10.52.040 17

COURT RULES

ER 611(a) 22
RAP 13.5A(c) 1
RAP 13.7(a) 1
RAP 13.7(b) 1
RAP 13.7(b)(4) 1
RAP 13.5(c) 1
RAP 16.7 4

OTHER AUTHORITIES

28 U.S.C. § 2255 5
American Bar Association Resolution 100B (Adopted Aug. 9-10, 2010), <http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/100b.authcheckdam.pdf> (last visited Aug. 29, 2014) 16
National District Attorneys Association (NDAA) 16
National District Attorneys Association, Resolution Urging Courts to Use "Error" Instead of "Prosecutorial Misconduct" (Approved April 10 2010), http://www.ndaa.org/pdf/prosecutorial_misconduct_final.pdf (last visited Aug. 29, 2014) 16

I. ISSUES

In an amended order, this court granted review “as to all issues contained in the motion for discretionary review.” Unfortunately, those issues are not clear.

The form for a motion for discretionary review is specified by RAP 13.7(b) (which is incorporated by RAP 13.5A(c) and 13.5(c)). Instead of using this form, petitioner’s counsel used the general form for appellate motions specified in RAP 13.7(a). As a result, the motion fails to set out “[a] concise statement of the issues presented for review,” which is required by RAP 13.7(b)(4).

In argumentative headings, the motion specifies the following bases for review:

A. This court should remand for an evidentiary hearing followed by consideration by a three judge panel.

...

B. This court should accept review to determine whether an attorney can make a reasonable tactical choice to deny a defendant, whose native language is not English, the right to an interpreter especially where the result is that the defendant does not understand portions of trial, is unable to assist, and whose ability to understand and answer questions on the stand is impaired.

This court should accept review to determine whether the cross-examination of Khan by the prosecutor who exploited Khan’s lack of familiarity with the English

language was flagrant and improper and whether trial counsel was ineffective for failing to move for a curative instruction and a mistrial.

...

C. Mr. Khan was denied his right to effective assistance of counsel where counsel failed to retain and consult with an expert who could have testified that the complaining witness'[s] lack of injury was inconsistent with her accusations against Kahn and where such an expert could have rebutted the testimony of the State's expert that no injury was consistent with repeated rapes.

MDR at 1, 6, 17. These headings will be treated as the petitioner's statement of issues.

Although the motion for discretionary review refers to other matters, they were not designated as issues warranting review. This court will not consider matters that were argued in a petition for review but not designated as issues. State v. Korum, 157 Wn.2d 614, 624-25 ¶¶ 10-11, 141 P.3d 13 (2008).

II. STATEMENT OF THE CASE

The facts are set out in detail in the State's Response to Personal Restraint Petition, at 3-13. Due to the page limitations on supplemental briefs, those facts will not be repeated.

III. ARGUMENT

A. BECAUSE THE DEFENDANT'S CLAIMS ARE VARIANTS OF CLAIMS THAT WERE REJECTED ON DIRECT APPEAL, THEY CANNOT BE RAISED IN A PERSONAL RESTRAINT PETITION.

On direct appeal, the defendant¹ raised claims of both ineffective assistance of counsel and prosecutorial misconduct. The Response to Personal Restraint Petition at 15-18 explains why these claims are barred under In re Jeffries, 114 Wn.2d 485, 488, 789 P.2d 731 (1990). Because of page limitations, those arguments will not be repeated.

B. TO OBTAIN AN EVIDENTIARY HEARING ON A PERSONAL RESTRAINT PETITION, THE PETITIONER MUST PROVIDE ADMISSIBLE EVIDENCE OF THE FACTS JUSTIFYING RELIEF.

The basic standards governing personal restraint petitions were explained in In re Rice, 118 Wn.2d 876, 828 P.2d 1086 (1992):

As a threshold matter, the petitioner must state in his petition the facts underlying the claim of unlawful restraint and the evidence available to support the factual allegations. This does not mean that every set of allegations which is not meritless on its face entitles a petitioner to a reference hearing. Bald assertions and conclusory allegations will not support the holding of a hearing. Rather, with regard to the required factual statement, the petitioner must state with

¹ Although Khan is petitioner in this personal restraint proceeding, he was defendant at trial. For clarity, this brief will refer to him as "defendant."

particularity facts which, if proven, would entitle him to relief.

As for the evidentiary prerequisite, we view it as enabling courts to avoid the time and expense of a reference hearing when the petition, though facially adequate, has no apparent basis in provable fact. In other words, the purpose of a reference hearing is to resolve genuine factual disputes, not to determine whether the petitioner actually has evidence to support his allegations. Thus, a mere statement of evidence that the petitioner believes will prove his factual allegations is not sufficient. If the petitioner's allegations are based on matters outside the existing record, the petitioner must demonstrate that he has competent, admissible evidence to establish the facts that entitle him to relief. If the petitioner's evidence is based on knowledge in the possession of others, he may not simply state what he thinks those others would say, but must present their affidavits or other corroborative evidence. The affidavits, in turn, must contain matters to which the affiants may competently testify. In short, the petitioner must present evidence showing that his factual allegations are based on more than speculation, conjecture, or inadmissible hearsay.

Id. at 885-86 (citations omitted). The court re-affirmed these standards in In re Yates, 177 Wn.2d 1, 18 ¶ 16, 296 P.3d 872 (2013). The court has considered but rejected a proposed rule that would have allowed petitions to be based on inadmissible evidence. Proposed Amendment to RAP 16.7, http://www.courts.wa.gov/court_Rules/proposed/2013Dec/RAP16.7_alt.pdf (last visited December 19, 2014).

Federal courts use similar standards to resolve collateral attacks on those court's judgments under 28 U.S.C. § 2255. To obtain a hearing on such a motion, "the motion must set forth specific facts supported by competent evidence, raising detailed and controverted issues of fact that, if proved at a hearing, would entitle him to relief." Gonzalez v. United States, 722 F.3d 118, 131 (2nd Cir. 2013).

The defendant claims that he is entitled to an evidentiary hearing whenever he makes allegations that are "not patently frivolous or false on a consideration of the whole record." MDR at 2. If this were true, than almost any person who has been convicted of a crime could obtain an evidentiary hearing, simply by alleging facts that are outside the record. The rule established by this court in Rice was designed to prevent this kind of abuse.

The defendant claims that the requirements of Rice violate Federal constitutional requirements. Contrary to this claim, there is no Due Process right to obtain an evidentiary hearing on the basis of mere allegations. Rather, a person can be required to show that there is evidence to support his claims. See State v. McCuiston, 174 Wn.2d 369, 385 ¶¶23-24, 275 P.3d 1062 (2012). In habeas corpus proceedings, Federal courts have accepted the

requirements of Rice. If a petitioner fails to present necessary evidence to a Washington State court, he will also be barred from Federal relief. Baja v. Ducharme, 187 F.3d 1075, 1079 (9th Cir. 1999), cert. denied, 528 U.S. 1079 (2000).

In short, under Rice it is not sufficient for a petitioner to merely allege a constitutional violation. Rather, he must "state with particularity facts which, if proven, would entitle him to relief." He must then "demonstrate that he has competent, admissible evidence" to prove those facts. Rice, 118 Wn.2d at 886. If the defendant here has satisfied these requirements, he is entitled to an evidentiary hearing to determine the accuracy of his claims. If he has not, the petition should be dismissed.

C. DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR DECIDING NOT TO REQUEST APPOINTMENT OF AN INTERPRETER.

1. Counsel Could Validly Decide That The Defendant's Testimony Would Be More Persuasive If He Testified In His Own Words.

In his first substantive claim, the defendant argues that his trial attorney was ineffective for failing to seek appointment of an interpreter. The defendant's arguments in this regard are specifically based on ineffective assistance of counsel. P.R.P at 14 ("Khan frames this claim as one of ineffectiveness by his counsel.")

In his initial supplemental brief, the defendant asked the court to create a requirement that he personally waive an interpreter. This is not, however, the claim that he raised in his personal restraint petition. Nor is it the issue raised in the motion for discretionary review. As quoted above, the issue raised in the motion is “whether an attorney can make a reasonable tactical choice to deny a defendant ... the right to an interpreter.” MDR at 6. This court will not consider a claim that was argued but not designated as an issue. Korum, 157 Wn.2d at 624-25 ¶¶ 10-11.

Even if this court created such a rule, it could not be applied to this case. A requirement of affirmative waiver would be a “new rule.” Such a rule will not be applied retroactively to a case that has already become final. See In re St. Pierre, 118 Wn.2d 321, 823 P.2d 492 (1992). If this court wishes to adopt such a requirement, it should do so by court rule, which would place everyone on notice concerning the necessary procedures. For the present case, this court should resolve the issue that the defendant has raised – ineffective assistance – based on existing law.

To establish ineffective assistance, a defendant must make two showings:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

State v. Grier, 171 Wn.2d 17, 32-33 ¶¶ 41, 246 P.3d 1260 (2011), quoting Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

To establish deficient performance, the defendant must "overcome a strong presumption that counsel's performance was reasonable." Grier, 171 Wn.2d at 33 ¶¶ 41. "When counsel's conduct can be characterized as legitimate trial strategy, performance is not deficient." Id. ¶ 42. The U.S. Supreme Court has warned of the dangers of second-guessing counsel's decisions:

Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.

Strickland, 466 U.S. at 690.

The defendant claims that his attorney did not adequately investigate the need for an interpreter. His declaration does not, however, set out any facts to substantiate this claim. He

acknowledges that he told his attorney "that Urdu was my native language and that I did not speak English very well." P.R.P., app. B ¶ 8. According to the affidavit, "I told my attorney several times that I spoke limited English. In response, he told me that using an interpreter would make me look bad." Id. ¶ 18. It is thus clear that counsel was aware of his client's asserted language difficulties, considered the need for an interpreter, and made a strategic decision not to request one. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable..." Strickland, 466 U.S. at 690.

There is a clear basis for counsel's decision. By insisting that his client testify through an interpreter, counsel would have impeded one aspect of the defendant's constitutional right to testify: his "right to present his own version of events in his own words." Rock v. Arkansas, 483 U.S. 44, 52, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987). Interpretation is necessarily inexact. "Words in one language may not have an exact equivalent in another so that, in some instances, it is impossible for an interpreter to translate a witness'[s] answer word for word." Stubblefield v. Commonwealth, 10 Va. App. 343, 350, 392 S.E.2d 197, 200 (1990); accord, State v. Casipe, 5 Haw. App. 210, 214, 686 P.2d 28, 33 (1984). If the

defendant had testified through an interpreter, the jury would not have heard his words, but rather those of the interpreter. As this court has recognized in a different context, another person may not be able to speak for the defendant as persuasively “as the defendant might, with halting eloquence, speak for himself.” State v. Canfield, 154 Wn.2d 698, 703 ¶ 5, 116 P.3d 391 (2005) (discussing common law right of allocution). Counsel could properly decide that the defendant’s idiosyncratic English would be more persuasive to a jury than the polished words of a translator.

It might have been possible for a translator to function in a way that avoided this problem – for example, by having the questions translated, with the defendant answering in his own words. Such a procedure could, however, have created a separate problem. It could have appeared to the jury that the defendant was hiding behind a translator that he did not really need.

Counsel could have viewed this case as fraught with possibilities of jury bias. The defense theory of the case was that the defendant was “the victim of a calculating, manipulative girl” whose “goal was to get Zahid out of the house.” Counsel argued that this desire resulted in part from the defendant’s attempt to enforce his cultural standards. RP 462-63 (defense closing

argument); see RP 347-48 (defendant testified that he barred victim from using computer and deleted her I-tunes music). Jurors might view those standards as alien and oppressive. Counsel could be concerned that jurors might sympathize with a girl's desire to free herself from this kind of domination. This resentment could increase if they viewed the defendant as unwilling to even attempt to speak English. As the attorney told his client, "using an interpreter would make [the defendant] look bad." P.R.P. app. B ¶ 18.

On the other hand, if the jurors were able to observe the defendant's language difficulties, this could engender sympathy in his favor. As the Acting Chief Judge pointed out, "[a]llowing the jury to hear Khan's story in somewhat broken English in contrast to [the victim's] fluent testimony was in line with [his] theory [of the case]." Order of Dismissing P.R.P. at 5. This could be particularly true if the prosecutor attempted to take advantage of those difficulties. The jurors could then see for themselves that the defendant had been trapped by a hostile system that had no respect for his cultural, religious, and linguistic heritage.

The defendant has presented a declaration from an experienced defense attorney. This attorney claims that "[u]nless [his] client is fully fluent in English," he would "always err towards

having an interpreter.” Reply in Support of P.R.P., app C ¶ 11. This attorney’s tactical standards cannot properly be turned into a rigid requirement: “Even the best criminal defense attorneys would not defend a particular client in the same way.” Any set of “detailed rules for counsel’s conduct” would “interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.” Strickland, 466 U.S. at 688-89.

In short, counsel made a tactical decision, after consulting with his client, that the defendant would “look bad” to the jury if he testified via an interpreter. This decision had potential disadvantages, but it also had advantages. Balancing those considerations was the task of counsel. His decision cannot properly be second-guessed by this court.

2. Since The Defendant Has Not Established That He Failed To Understand Any Significant Portion Of The Proceeding, He Has Not Shown That He Was Prejudiced By Any Deficient Performance.

Even if counsel’s performance is considered deficient, the defendant must still establish prejudice. Prejudice will be presumed only in cases where counsel has suffered from a conflict of interest, or where the defendant has been denied assistance of counsel

altogether. Strickland, 466 U.S. at 692. This case does not present such a situation.

When prejudice is not presumed, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Strickland, 466 U.S. at 694. “The assessment of prejudice should proceed on the assumption that the decision maker is reasonably, conscientiously, and impartially applying the standards that govern the decision.” Id. at 695.

In his declaration, the defendant complains generally that he “did not understand [some] parts of trial” and was “confused several times” when he testified. P.R.P. ex. B ¶¶ 14, 16. He fails, however, to specify *any* particular statement or question that he failed to understand. To obtain a hearing on a personal restraint petition, the petitioner must “state with particularity facts which, if proven, would entitle him to relief.” Rice, 118 Wn.2d at 886. Absent any specification of *what* the defendant failed to understand, the defendant cannot establish that this lack of understanding resulted in prejudice.

Nor does the defendant have any excuse for this failure. By the time the personal restraint petition was filed, the defendant had access to the trial transcript. (The petition contains numerous references to that transcript.) He also had access to an interpreter. (A certificate from an interpreter is attached to his declaration. P.R.P., app. B.) Based on a translation of the transcript, the defendant could have pointed out any specific incident that he failed to understand.

Instead of providing particularized allegations, the defendant's attorney has provided *argument* concerning things that the defendant purportedly did not understand. Some of these arguments are clearly unfounded. This includes the most significant claim of prejudice – that the defendant failed to understand cross-examination about his "erection." MDR at 9-10. On re-direct examination, the defendant made it clear that he understood this word:

Q. You mentioned to the prosecutor – or she asked you, Do you ever have erections; and you said no.

A. No.

Q. Now, do you mean ever, ever, or just –

A. In front of my wife. I live with my wife. I have erection because when I sleep with her, without erection I cannot do my – make my kids.

Q. But what did you mean, that you don't have an erection?

A. I mean not in front of kids. I just stay inside my home, inside the room, whenever I do, inside my room.

RP 394. The defendant thus knows exactly what an "erection" is – something that a man uses to make children with his wife.

The defendant's brief points to other times when he was purportedly confused. Confusion, of course, can arise even when a witness has no language problems at all. In each of these incidents, the questions were re-phrased, and the defendant provided the relevant information. RP 342-43, 349, 382-83, 391, 401-02. The defendant has not shown that any of these incidents affected the outcome of the trial.

Under Strickland and Rice, it is the defendant's burden to show that (1) he failed to understand specific events at the trial, (2) that this lack of understanding would have been alleviated by the presence of a translator, and (3) that if this had occurred, there is a reasonable probability that the outcome of the proceeding would have been different. He has failed to make any such showing. He has therefore not demonstrated ineffective assistance of counsel.

D. THE PROSECUTOR'S CROSS-EXAMINATION OF THE DEFENDANT DOES NOT PROVIDE ANY GROUNDS FOR RELIEF.

1. It Is Not "Misconduct" For A Prosecutor To Cross-Examine The Defendant About Facts Surrounding The Crime.

The defendant next contends that the prosecutor committed "misconduct" in cross-examining him.²

Prosecutorial misconduct is grounds for reversal if the prosecuting attorney's conduct was both improper and prejudicial. Instead of examining improper conduct in isolation, we determine the effect of a prosecutor's improper conduct by examining that conduct in the full trial context, including the evidence presented, the context of the total argument, the issues in the case,

² "'Prosecutorial misconduct' is a term of art but is really a misnomer when applied to mistakes made by the prosecutor during trial." State v. Fisher, 165 Wn.2d 727, 740 n. 1, 202 P.3d 937 (2009). Recognizing that words pregnant with meaning can undermine the public's confidence in the criminal justice system, both the National District Attorneys Association (NDAA) and the American Bar Association's Criminal Justice Section (ABA) urge courts to limit the use of the phrase "prosecutorial misconduct" to intentional acts, rather than mere trial error. See American Bar Association Resolution 100B (Adopted Aug. 9-10, 2010), <http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/100b.authcheckdam.pdf> (last visited Dec. 18, 2014); National District Attorneys Association, Resolution Urging Courts to Use "Error" Instead of "Prosecutorial Misconduct" (Approved April 10 2010), http://www.ndaa.org/pdf/prosecutorial_misconduct_final.pdf (last visited Dec. 18, 2014). A number of appellate courts agree that the term "prosecutorial misconduct" is an unfair phrase that should be retired. See, e.g., State v. Fauci, 282 Conn. 23, 917 A.2d 978, 982 n. 2 (2007); State v. Leutschaff, 759 N.W.2d 414, 418 (Minn. App.), review denied, 2009 Minn. LEXIS 196 (Minn. 2009); Commonwealth v. Tedford, 598 Pa. 639, 960 A.2d 1, 28-29 (2008).

the evidence addressed in the argument, and the instructions given to the jury. Generally the prosecutor's improper comments are prejudicial only where there is a substantial likelihood the misconduct affected the jury's verdict.

State v. Monday, 171 Wn.2d 667, 675 ¶ 14, 257 P.3d 551 (2011) (citations omitted). Here, the defendant has not shown either improper conduct or prejudice.

The defendant's claims relate to questions asked on cross-examination. "A defendant may be cross-examined in the same manner as any other witness if he voluntarily asserts his right to testify." State v. Etheridge, 74 Wn.2d 102, 113, 443 P.2d 536 (1968); see RCW 10.52.040 ("when accused shall so testify, he or she shall be subject to all the rules of law relating to cross-examination of other witnesses"). Within its discretion, the trial court can grant considerable latitude in cross-examination. State v. Baylor, 17 Wn. App. 616, 619, 565 P.2d 99 (1977).

The cross-examination at issue here concerned the last occasion when the defendant attempted to molest the victim. She testified that the defendant was about to touch her breast, so she screamed for her mother. RP 77. Both her mother and the defendant's aunt responded to her cry. They both testified that when they came into the room, they saw that the defendant's penis

was erect. RP 165, 305-06. The defendant testified that he had gone into the room to cover one of his children with a blanket. He denied having an erection. RP 344-45.

This conflict in testimony was highly significant. If the defendant was erect on this occasion, as two witnesses claimed, he was probably engaged in some sexual activity. Moreover, his denial of that fact was harmful to his credibility. On this subject, the prosecutor could properly be given "considerable latitude" in her cross-examination.

The cross-examination on this subject went as follows:

Q: So what about all this caused you to get the erection?

A. What do you mean, erection?

Q I mean, what caused your penis to get aroused?

A. When I heard this thing, I'm thinking, how they is using this word? I can not say anything in front of my sister or anything, this kind of word. How they using openly, in front of everybody, and they don't feel one think, this is how shameful word. I not imagine.

Q. So they should be too ashamed to say that?

A. No, ashamed to say that I can do this thing, this kind of thing, this kind of feeling, like I have something like that.

Q. You don't get erections?

A. No. No.

Q Okay.

A. I wish I had had camera with me to make my own video.

RP 358.

This line of questioning was proper. The defendant had, of course, denied that he had an erection. Defense counsel might nonetheless argue that even if he was erect, his arousal resulted from something other than attempted molestation of the victim. It was thus important for the prosecutor to clarify that, according to the defendant, nothing arousing had occurred. When cross-examined on this topic, the defendant evaded the question, instead complaining about the language used by other witnesses in their testimony. The defendant then denied that he got erections and volunteered that he wished he had a camera.

The prosecutor later followed up on that statement:

Q. I believe you testified early that you – we were talking about the erection, and you said you wished you had a camera to show what had happened, is that right?

A. No, no. no. I said, you know, like video camera, I can make my own – all you guys saying erection, right?

Q. Uh-huh.

A. I say, I wish I can also make, I can made video my own, what kind of I have my – like, now what I'm

wearing, what I had kind of I have pant, what kind of I have shirt. I mean that.

Q. So you want to show what, now, that you didn't have an erection?

A. I don't have erection.

Q. Ever?

A. Never. Ever. Look at this, this is my family. Okay, front of my kids, what I'm showing this kind of thing? I am respectable person.

Q. But you did take a picture that night; right?

A. Yes.

RP 372.

Again, this was a proper topic of cross-examination. Further cross-examination brought out more facts about the photograph. It purported to show why he had covered one of the girls with a blanket. The defendant claimed, however, that no one had accused him of any wrongdoing. RP 381-83. His action in taking the photograph contradicted that claim.

During this cross-examination, the defendant volunteered, "I don't have erection." The prosecutor then sought to clarify that statement – did he mean never, or only on that occasion? The defendant chose to make the absurd claim that he *never* had erections.

When the prosecutor began the questioning on this subject, she had no reason to believe that the defendant misunderstood the word "erection." On direct examination, he had answered a question that used that word. RP 345. The defendant nonetheless asked for clarification of the question, which the prosecutor provided. At no point following that did the defendant indicate any problems in understanding the questions. There is a good reason for this -- as already pointed out, he admitted on re-direct examination that he *did* know what an "erection" was. RP 394.

The defendant's arguments reflect an inherent self-contradiction. As discussed above, he has the burden of proving both improper conduct and resulting prejudice. His argument necessarily assumes that the prosecutor was aware that the defendant's answers reflected confusion resulting from language difficulties -- otherwise, there was no misconduct. At the same time, the argument assumes that the jurors were *not* aware of that confusion -- otherwise, the answers would not reflect adversely on the defendant's credibility. The defendant has not, however, pointed out anything that the prosecutor knew which was not also known to the jurors. So either there was no misconduct (because the prosecutor was unaware of any confusion) or there was no

prejudice (because the jurors were able to see through the prosecutor's efforts to confuse the defendant).

When a defendant chooses to testify, he is subject to thorough cross-examination, the same as any other witness. It is not at all unusual for witnesses to become confused on cross-examination, whether through lack of understanding, stress, or other reasons. The usual solution is to clarify the confusion on re-direct. If necessary, the court can exercise its discretion to "exercise reasonable control over the mode and order of interrogating witnesses." ER 611(a). Ultimately, however, the solution lies in the collective wisdom of the jurors. If jurors cannot usually distinguish between honest confusion and dishonest evasion, then the system of trial by jury is a failure. A prosecutor can ask the defendant probing questions about the events surrounding the alleged crime. Doing so is not "misconduct."

In connection with his claim of "misconduct," the defendant points out that the prosecutor responded to the defendant's question, "How do you know that I'm doing sexual things?" MDR at 10, citing RP 361. This incident is outside the scope of the issue raised in the motion for discretionary review: "whether the cross-examination of Khan by the prosecutor who exploited Khan's lack

of familiarity with the English language was flagrant and improper.” MDR at 6. Consequently, any claim of misconduct based on this incident should not be considered. Korum, 157 at 624-25 ¶¶ 10-11. Additionally, a claim of misconduct based on this incident was considered and rejected on direct appeal. State v. Korum, 2009 WL 1058626 *2 (Wn. App. 2009) (Resp. to P.R.P., ex 2). This issue can therefore not be raised in a personal restraint petition. Jeffries, 114 Wn.2d at 488.

2. Defense Counsel Reasonably Chose To Clarify This Topic On Re-Direct Examination Instead Of Objecting.

In connection with this same incident, the defendant also argues that defense counsel was ineffective for failing to object to the prosecutor’s questioning. “The decision to object, or to refrain from objecting even if testimony is not admissible, is a tactical decision not to highlight the evidence to the jury. It is not a basis for finding counsel ineffective.” State v. Kloepper, 179 Wn. App. 343, 355 ¶ 31, 317 P.3d 1088, review denied, 180 Wn.2d 1017 (2014). As already pointed out, defense counsel could reasonably believe that the prosecutor would harm her own credibility by seeking to confuse the defendant. This belief could have been reinforced by observations of the jurors’ demeanor. Counsel could have been

applying a maxim attributed to Napoleon Bonaparte: "Never interrupt your enemy when he is making a mistake."

Counsel could also have been concerned that the court would not sustain such an objection. For the reasons discussed above, the court may have viewed the cross-examination as proper. If defense counsel had objected, the jurors might have believed that he was trying to shield his client from legitimate questioning. Instead of letting the prosecutor harm her credibility, he would have harmed his own.

Rather than run these risks, counsel chose the standard response to confusing cross-examination. He let the questioning proceed, and then clarified the issue on re-direct. RP 394. By doing so, he allowed the prosecutor to enhance his theory of the case, avoided any risk of an adverse ruling from the court, and eliminated any confusion. This tactical choice was proper one.

Even if counsel's actions could somehow be considered deficient, there was no resulting prejudice. Again as discussed above, this court must assume that the jury impartially applied to governing law. Strickland, 466 U.S. at 695. Any confusion by the defendant was apparent to the jury. If the jury decided the case impartially, his honest confusion would not have adversely affected

his credibility adversely. The defendant has therefore failed to show either deficient performance or prejudice.

E. THE DEFENDANT HAS FAILED TO SHOW THAT DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBTAIN EXPERT TESTIMONY.

1. Since The Defendant Has Provided No Evidence About The Scope Of Counsel's Investigation, He Has Failed To Show That The Investigation Was Inadequate.

Finally, the defendant claims that trial counsel was ineffective for failing to "retain and consult with an expert" to refute the testimony of the State's expert concerning the lack of physical injury to the victim. Again, he has failed to show either deficient performance or prejudice.

With regard to deficient performance, the defendant has simply failed to show what investigation trial counsel conducted. The only evidence he submitted on this point was a declaration from an attorney, Amy Muth. She claimed that she had reviewed "a summary of the defense investigation." P.R.P., app. D ¶ 7. There is nothing explaining where this "summary" came from. Under Rice, affidavits in support of a personal restraint petition must "contain matters to which the affiants may competently testify." Rice, 118 Wn.2d at 886. Ms. Muth did not claim to have any personal knowledge about the scope of trial counsel's investigation. Her

declaration contains no explanation of the source of the "summary" on which she relied. Consequently, the defendant has presented no admissible evidence that trial counsel's investigation was deficient.

2. Even If Counsel's Investigation Is Considered Inadequate, The Defendant Has Failed To Show That An Investigation Would Have Produced Any Admissible Evidence.

Even if it is assumed that trial counsel made an inadequate attempt to refute the testimony of the State's expert, there has been no showing that any such refutation existed. On this point, the defendant relies primarily on the affidavit of Dr. William Rollins. P.R.P., app. E. Dr. Rollins works at the Medical Section of Stafford Creek Corrections Center. There is no indication that he has any experience in pediatrics. Nor did he show any familiarity with relevant medical studies. He provided no explanation of the basis for his opinion.

In opposition to the personal restraint petition, the State submitted a sworn declaration from Dr. Naomi Sugar, the Medical Director of Harborview Center for Sexual Assault and Traumatic Stress. Dr. Sugar has over 30 years of experience in pediatrics. Resp. to P.R.P., ex. 14. Her declaration explains the medical literature concerning physical injuries resulting from vaginal or anal

penetration of adolescent girls. She concluded that Dr. Rollins's opinion is "without scientific basis." Ex. 13 at 6.

Not every opinion from an "expert" is admissible as evidence. If the opinion is based on a scientific theory, that theory must be generally accepted in the relevant scientific community. State v. Gore, 143 Wn.2d 288, 302, 21 P.3d 262 (2001). Dr. Rollins's opinion is evidently not based on clinical experience, since he did not describe any relevant experience. Nor is there any valid scientific theory that supports his conclusion. His opinion is therefore inadmissible.

In civil cases, the opinion of an expert which is only a conclusion is not sufficient to create an issue of material fact, so as to avoid summary judgment. Doe v. Puget Sound Blood Center, 117 Wn.2d 772, 787, 819 P.2d 370 (1991). An expert's affidavit must be factually based and affirmatively show that the expert is competent to testify concerning the relevant issues. Lilly v. Lynch, 88 Wn. App. 306, 320, 945 P.2d 727 (1997). The same standards should be applied here. The unsupported conclusion of the defendant's "expert" does not entitle him to an evidentiary hearing.

The defendant was not prejudiced by his attorney's failure to challenge the conclusions of the State's expert, if no basis existed

for such a challenge. The defendant has not produced any admissible evidence to support his claim that those conclusions were open to any valid challenge. Consequently, he has not provided any basis for an evidentiary hearing.

IV. CONCLUSION

Although the defendant has made numerous allegations, none of them are adequately supported by any admissible evidence. The defendant has failed to show that trial counsel's decisions lacked a valid tactical basis. He has failed to show that any deficient decisions resulted in prejudice. He has likewise failed to show that the prosecutor committed any "misconduct" in cross-examining him about the facts of the crime. The personal restraint petition should therefore be dismissed.

Respectfully submitted on December 19, 2014.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: *Seth A Fine*
SETH A. FINE, #10937
Deputy Prosecuting Attorney
Attorney for Respondent

Sent via email
On this day I mailed a properly stamped envelope addressed to the attorney for the defendant that contained a copy of this document.

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office

on this day of Dec 20 14 28

[Signature]

OFFICE RECEPTIONIST, CLERK

To: Kremenich, Diane; jeffreyerwinellis@gmail.com
Subject: RE: In Re PRP of Zahid Khan

Received 12-19-2014

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Kremenich, Diane [mailto:Diane.Kremenich@co.snohomish.wa.us]
Sent: Friday, December 19, 2014 2:14 PM
To: OFFICE RECEPTIONIST, CLERK; jeffreyerwinellis@gmail.com
Subject: In Re PRP of Zahid Khan

Good Afternoon...

RE: In Re PRP of Zahid Khan
Supreme Court No. 89657-7

Please accept for filing the attached pleading: State's Supplemental Brief of Respondent

Thanks.

Diane.

Diane K. Kremenich
 Snohomish County Prosecuting Attorney - Criminal Division
Legal Assistant/Appellate Unit
Admin East, 7th Floor
(425) 388-3501
Diane.Kremenich@snoco.org

CONFIDENTIALITY STATEMENT

This message may contain information that is protected by the attorney-client privilege and/or work product privilege. If this message was sent to you in error, any use, disclosure or distribution of its contents is prohibited. If you receive this message in error, please contact me at the telephone number or e-mail address listed above and delete this message without printing, copying, or forwarding it. Thank you.

 please consider the environment before printing this email

From: SPA_APP Copier@snoco.org [mailto:SPA_APP Copier@snoco.org]
Sent: Friday, December 19, 2014 6:37 AM

To: Kremenich, Diane

Subject: Message from KMBT_601