

NO. 61851-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2009 JUN -2 PM 4:24

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STATE OF WASHINGTON,

Respondent,

v.

JOHNNY SHEARS,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE RICHARD EADIE

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**BRIEF OF RESPONDENT**

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**A. ISSUES**

1. In this case, the trial court refused to allow the defendant to elicit testimony that an assault victim told her doctor that a former boyfriend, not the defendant, had assaulted her. A statement to a medical provider identifying the perpetrator of an assault is admissible only if the proponent can show that (1) the victim has an ongoing, intimate relationship with the perpetrator, and (2) the medical provider relied on the identification in his treatment or diagnosis. The record, however, does not show that the victim had a continuing relationship with her former boyfriend or that the doctor relied on this statement for treatment. Did trial court properly exclude the assault victim's statement under ER 803(a)(4)?

2. A prosecutor may not offer personal opinions about the testimony, but may make reasonable inferences from the evidence. Here, the prosecutor said that the witnesses' testimony was "credible." These statements were supported by, and tied to, the evidence. Did the prosecutor properly argue reasonable inferences from the evidence?

3. A defendant who fails to object to a prosecutor's comments during closing arguments cannot challenge those statements on appeal unless the remarks are so flagrant and ill-intentioned that they could not be cured by an instruction. Here, even if the prosecutor made improper

comments, they were errors on close issues of law and were so minor that they could have been ameliorated by an instruction had the defendant objected. Did the defendant waive his right to challenge those issues here?

**B. FACTS**

**1. PROCEDURAL FACTS**

Defendant Johnny Shears was charged in King County Superior Court with two counts of Assault in the Second Degree. CP 1. The jury found Shears guilty on both counts. CP 57-58. At sentencing, Shears was sentenced to 13 months confinement. CP 119. Shears appealed. CP 124.

**2. SUBSTANTIVE FACTS**

On the evening of April 12, 2008, friends Madeline Holden, Kerry McCarthy, Nicole Santos, and Alexandra Freeman arrived at the Alpha Sigma Phi fraternity camouflage theme party. 2RP 51, 134.<sup>1</sup> When they

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<sup>1</sup> The verbatim report of proceedings is cited as follows:

- 1RP (Mar. 12, 2008)
- 2RP (Mar. 13, 2008)
- 3RP (Mar. 17, June 5, and June 10, 2008)
- 4RP (Mar. 18, 2008).

arrived, they noticed the long line in front and entered the party through the back door. 2RP 51.

There were roughly 50 to 75 individuals there when they arrived. 2RP 53. In the basement, there was a DJ, a bartender, and music playing. 2RP 134. The lights were dimmed. 2RP 53, 134-35.

Soon after arriving, Johnny Shears, who was intoxicated, walked up and put his hand on Freeman's groin area. 2RP 135-36. He was wearing a camouflage shirt and Timberland-style khaki boots. 2RP 138-39; 4RP 32. Shears then said something to Madeline Holden, who turned away from him. 2RP 54-55. When Holden turned away, Shears poured his drink on her head. 2RP 55. Holden responded by pouring her drink on Shears's head. 2RP 55. Shears then punched Holden in the face, knocking her to the ground. 2RP 56-57. While she was on the ground, he kicked and hit her several times in the face and body. 2RP 138-39.

Seeing her friend being assaulted, McCarthy jumped in and attempted to pull Shears away. 2RP 138-39; 3RP 211-12. Shears responded by punching McCarthy in the face as well. 3RP 212, 257. Others at the party apprehended Shears until the police arrived, a few minutes later. 2RP 95-97.

After the assault, both Holden and McCarthy were taken upstairs to a bedroom in the fraternity house, then they went to the hospital.

2RP 57, 63. Holden suffered a broken nose and a laceration on her lip.

4RP 72-73. McCarthy suffered a broken nose. 2RP 126-27.

At trial, Madeline Holden, Kerry McCarthy, Nicole Santos, and Peter Lutovsky testified that they knew Shears and observed him assault both Holden and McCarthy at the party. 2RP 51, 52, 56 (Holden); 3RP 211-12, 215 (McCarthy); 3RP 257-61 (Lutovsky); 4RP 27-29, 33-34 (Santos). Alexandra Freeman — who did not know Shears — saw Shears commit the assaults and, in court, identified Shears as the assailant. 2RP 147. Two of the officers further testified that Shears's boots had blood on them. 2RP 98-99, 172. The boots, however, were never sent to the crime lab for testing. 2RP 105. The defense did not present any evidence, and Shears did not testify in his behalf.

The State will provide additional facts as they relate to each argument.

**C. ARGUMENT**

**1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION BY EXCLUDING HOLDEN'S STATEMENT TO HER TREATING PHYSICIAN.**

Shears asks this Court to reverse the conviction because the trial court refused to allow the defense to elicit testimony from Holden's treating doctor that Holden told the doctor that her former boyfriend

assaulted her. For two reasons, this argument is wrong. First, Shears fails to show how the trial court abused its discretion by excluding this statement as substantive evidence. Second, any abuse of discretion is harmless under the facts of this case.

**a. Relevant Facts**

After the incident, Holden received treatment from Dr. Richard Cummins at the University of Washington. 4RP 70. The doctor's notes apparently indicated that Holden told the doctor that she was assaulted by a male and that the male was her former boyfriend. 4RP 68.<sup>2</sup>

During trial, however, Holden testified that Shears assaulted her. 2RP 56. The defense attorney then impeached her with her statements made to the doctor:

Q: And did you tell [the medical providers] that Anthony Shears hit you?

A: I don't remember if I used his name or not.

Q: In fact, didn't you tell the doctor that it was a boyfriend that had assaulted you at the party?

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<sup>2</sup> The doctor's notes were never admitted into evidence, so we do not know exactly what those notes said. The record, however, shows that the State moved to exclude a large print-out of the doctor's notes, which appears to have noted that Holden told the doctor that a former boyfriend assaulted her. 4RP 68. Further, during cross-examination, Holden was asked why the doctor would write in his notes that Holden said it was her former boyfriend who assaulted her. 2RP 83.

A: No. They might have gotten my words mixed up. I told them that I had dated someone, and it was his brother.

Q: You told them that you had dated someone and it was his brother?

A: Yes.

Q: And you think the doctor would make a mistake and say it was your boyfriend?

A: It's possible.

2RP 83.

Prior to Dr. Cummins's testimony, the defense had an enlarged print-out of his report, which apparently included the statement that Holden told him that she was assaulted by a former boyfriend. 4RP 68. The State moved to exclude reference to this statement because it was hearsay. 4RP 65-66. The defense objected, arguing that this information was admissible under ER 803(a)(4). 4RP 66-68

The court granted the motion to exclude. 4RP 67-68. The defense never argued or proffered that it wanted to admit the statement to *impeach* Holden's previous comment about what she told the doctor. Further, Shears never provided a proffer of whether Dr. Cummins relied on Holden's statement identifying the assailant in his treatment or diagnosis of her injuries or whether the doctor felt this information was relevant to his diagnosis or treatment.

**b. The Trial Court Properly Exercised Its Discretion In Excluding The Statements To The Doctor As Substantive Evidence.**

ER 803(a)(4) exempts the following out-of-court declarations from the hearsay prohibition:

Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof as reasonably pertinent to diagnosis or treatment.

As a general rule, statements attributing fault or identifying the assailant are not relevant to diagnoses or treatment and, thus, inadmissible. State v. Sims, 77 Wn. App. 236, 239, 890 P.2d 521 (1995). This is because the declarant's statements "relating to identity of the person allegedly responsible for her injuries . . . are not normally thought to promote effective treatment." United States v. Joe, 8 F.3d 1488, 1494 (10th Cir. 1993).

An exception, however, is *sometimes* made in cases of sexual or domestic assault where the victim identifies the alleged perpetrator. This is because identity of the perpetrator, in these cases, can often assist the doctor in diagnosis and treatment. As this Court aptly stated, however, when analyzing whether statements to doctors attributing fault are admissible, "[m]uch, of course, depends on the context in which such

statements are made.” In the Matter of the Dependency of Penelope B., 104 Wn.2d 643, 656, 709 P.2d 1185 (1985).

To admit statements of fault under ER 803(a)(4), the proponent generally has to show two things, neither of which exists here. *First*, the proponent needs to show that the victim had an *ongoing intimate relationship* with the person she identified as the assailant. Sims, 77 Wn. App. at 239-40 (quoting Joe, 8 F.3d at 1494-95) (“In short, the domestic sexual abuser’s identity is admissible under Rule 803(a)(4) where the abuser has such an intimate relationship with the victim that the abuser’s identity becomes ‘reasonably pertinent’ to the victim’s proper treatment.”). This is because if an assault victim has an ongoing relationship with the perpetrator, this information helps the doctor “prevent recurrence and future injury.” State v. Williams, 137 Wn. App. 736, 746, 154 P.3d 322 (2007). In these situations, the “treating physician may recommend special therapy or counseling and instruct the victim to remove himself or herself from the dangerous environment by leaving the home and seeking shelter elsewhere.” State v. Price, 126 Wn. App. 617, 640, 109 P.3d 27 (2005).

However, if there is not an ongoing intimate relationship between the victim and the perpetrator, the identity of the perpetrator is generally considered not relevant to treatment. See, e.g., State v. Huynh, 107

Wn. App. 68, 75-76, 26 P.3d 290 (2001) (affirming trial court's decision to exclude statements under ER 803(a)(4) that attributed fault to a police officer because the patient was "no longer" in the officer's custody at the time of the statements and, thus, the statements attributing fault to the officer were "not relevant to the prevention of recurrence of injury").

This Court's decision in Sims, 77 Wn. App. at 239-40, illustrates the importance of the *ongoing* relationship when deciding whether a victim's statement identifying a perpetrator is admissible. In that case, the victim told her medical providers that she was assaulted "by the man she once lived with." Id. at 239. In affirming the trial court's admission of these statements, the appellate court noted that the victim "viewed her relationship with Sims as a *continuing* one" and that, as part of the treatment, the medical providers "encouraged" the victim "to change her relationship pattern and discussed with her how to avoid threatening situations." Id. at 240 (emphasis added).

In this case, however, Holden's statement apparently attributed fault to a *former* boyfriend, and, unlike the situation in Sims, there is no evidence that Holden had a *continuing* relationship with the former boyfriend, that she ever talked to him, or that he even lived in this State. For this reason, based on the record, there is no evidence that the identity of the perpetrator as a *former* boyfriend was relevant to prevent future

injury or reasonably pertinent to diagnosis or treatment. Accordingly, the trial court properly ruled that the statement was inadmissible.

*Second*, to admit Holden's statement, Shears must show that the doctor, when treating Holden, *actually relied* on the statements attributing fault to a former boyfriend. Williams, 137 Wn. App. at 746 (holding that for a statement to be admissible under ER 803(a)(4), the evidence must show that the "medical professional reasonably relied on the statement for purposes of treatment"); State v. Moses, 129 Wn. App. 718, 728-29, 119 P.3d 906 (2005) ("For statements to be admissible under ER 803(a)(4) . . . the medical provider must reasonably rely on the information for diagnosis or treatment."). This is simply because if the doctor did not rely on the victim's statements to treat her, then those statements were not pertinent to her treatment or diagnosis and do not fall within the purview of ER 803(a)(4).

Indeed, the cases illustrate that when statements of fault are admissible, there has been *testimony* from the doctor that this information was relevant to his treatment. See, e.g., Sims, 77 Wn. App. at 240 ("The testimony demonstrated that [the victim's] physicians and the social worker considered the information attributing fault to be reasonably pertinent to her treatment."); Williams, 137 Wn. App. at 746-47

(testimony showed doctor found identity of assailant pertinent to treatment).

In this case, however, there is nothing in the record — nor is there an offer of proof — that establishes that the identity of the perpetrator was relevant to Dr. Cummins’s treatment or diagnosis of Holden’s injuries. Dr. Cummins surely did not say this, and this Court should not speculate as to how the doctor could have, or would have, used this information. Further, there is no evidence that the doctor referred Holden to a social worker, advised her about counseling services, or discussed options about avoiding her assailant again. Since Shears failed to lay a proper foundation — or provide an offer of proof — that Dr. Cummins relied on her statement attributing fault, Shears has failed to show that the trial court abused its discretion in excluding this testimony.<sup>3</sup>

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<sup>3</sup> In this case, Shears incorrectly attempted to get the statement in as *substantive* evidence rather than as *impeachment* evidence against Holden. To the extent that Holden denied telling Dr. Cummins that it was her former boyfriend that had assaulted her, Shears could have elicited testimony from the doctor that this is what Holden told him. This testimony would likely have been admissible as impeachment evidence, but Shears never once attempted to admit the evidence under this theory. Instead, without proper foundation, Shears attempted to admit this statement as substantive evidence under ER 803(a)(4), and it was an appropriate abuse of discretion for the trial court not to allow these statements under that hearsay exception.

**c. Any Error By The Trial Court Was Harmless Error.**

Further, any abuse of discretion was harmless. This alleged error does not implicate Shears's constitutional rights and, thus, this Court should apply the non-constitutional harmless error standard. Under that standard, an erroneous ruling will result in reversal only if the outcome of the trial would have been materially affected had the error not occurred. State v. Calegar, 133 Wn.2d 718, 727, 947 P.2d 235 (1997).

For several reasons, under this standard, any error was harmless. First, the jury heard that Holden had said that a former boyfriend had assaulted her — the evidence that Shears wanted to introduce through Holden's statement to the doctor. During Holden's cross-examination, the defense counsel asked Holden why the doctor would say that she told him that a former boyfriend assaulted her. Holden responded that she did not recall saying that, but if she did, it was possible that the doctor made a mistake. 2RP 83.

Further, Holden explained to the jury the possible confusion. 2RP 83. She testified that Shears was the *brother* of her former boyfriend, and that she either misspoke or the doctor wrote it down wrong, but that she meant to tell the doctor that the brother of her former boyfriend, Shears, assaulted her. 2RP 83.

This explanation, along with the substantial evidence against Shears, shows that the statement allegedly made to the doctor would not have mattered even if admitted. During the trial, four witnesses testified that they knew Shears and saw Shears assault both Holden and McCarthy that evening. Another witness who did not previously know Shears said that she saw Shears assault Holden and McCarthy and identified him in court. These witnesses were not intoxicated and witnessed Shears assault these individuals from feet away. In addition, Shears had blood on his boots, and Shears was at the party wearing the exact type of boots the witnesses described the assailant as wearing.

Under the facts of this case, any abuse of discretion by the trial court was harmless error.

**2. SHEARS'S PROSECUTORIAL MISCONDUCT CLAIM FAILS BECAUSE HE HAS FAILED (1) TO DEMONSTRATE THAT THE CHALLENGED COMMENTS WERE IMPROPER, (2) FAILED TO PRESERVE THE ISSUE FOR REVIEW, AND (3) FAILED TO DEMONSTRATE THE CHALLENGED COMMENTS AFFECTED THE VERDICT.**

A defendant who alleges prosecutorial misconduct must show both: (1) improper conduct, and (2) its prejudicial effect. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). Prejudice is

established if there is substantial likelihood that the misconduct affected the jury's verdict. Id. A prosecutor's allegedly improper remarks must be reviewed in "the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). The failure to object to a prosecuting attorney's improper remark constitutes a waiver of such error unless the remark is deemed to be 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. State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991).

Shears claims that the State committed two separate acts of misconduct during closing arguments: (1) the prosecutor improperly inflamed the passions of the jury, and (2) the prosecutor expressed a personal opinion about the credibility of the State's witnesses. These arguments fail. First, the State did not commit any misconduct. Second, even if misconduct occurred, Shears has failed to show — as he must — that any misconduct could not have been cured by an instruction or that the misconduct affected the jury's verdict.

**a. Shears Has Failed To Show The Challenged Conduct Was Improper.**

**i. Shears has failed to show that the State inflamed the passions of the jury.**

The officers removed the boots worn by Shears and placed them into evidence. 2RP 102-04. At trial, two of the officers then testified that several specks on the front of the boots appeared to be blood. 2RP 98-99, 172. The boots, however, were never tested to see if these drops were blood or whether they were victims' blood. 2RP 110; 3RP 176-77; 4RP 47-48. Accordingly, both during trial, and in closing arguments, defense counsel made the point that the boots should have been tested for DNA and the lack of the DNA testing shows a reasonable doubt in Shears's guilt. 2RP 176-77; 4RP 108-09.

In response, during closing the prosecutor made the following comment:

Now, the detective did not have those boots tested for DNA. Was that a mistake, yes. Should she have, yes. She testified to that for you. That doesn't negate what the defendant did that night. The victims who endured what they endured should not be punished because the detective didn't send the boots in. That's not their fault.

4RP 97.

In rebuttal, the prosecutor further stated:

Should the cops have done something different?  
Potentially, maybe. In the boots, yes. Ladies and

gentlemen, again, do not make the victims suffer. That is not reasonable doubt by any means. What that is is something that should have been done, yes, but that is not the victims' fault.

4RP 121.

In rebuttal, the prosecutor finally stated:

Again, should the cops have tested the boots, yes, and they admitted that, but, ladies and gentleman, this isn't reasonable doubt.

4RP 119.

During the trial, the defense attorney did not object to any of these statements. Now, however, Shears contends that these statements constituted prosecutorial misconduct because they inflamed the passions and prejudices of the jury. This is wrong.

A prosecutor may not make a remark "calculated to appeal to the jury's passion and prejudice and encourage it to render a verdict on facts not in evidence." State v. Stover, 67 Wash. App. 228, 230-31, 834 P.2d 671 (1992). The courts generally will not reverse a verdict based on an improper appeal to the passions and prejudices of the jury unless the conduct is particularly egregious in nature. See, e.g., State v. Barajas, 143 Wn. App. 24, 33, 177 P.3d 106 (2007) (comparing defendant to mangie "mongrel mutt"); State v. Perez-Mejia, 134 Wn. App. 907, 917, 143 P.3d 838 (2006) (exhorting jury to "send a message . . . to other

members of [the defendant's] gang . . . that we as citizens of the State of Washington and the United States of America, we have the right to life, liberty, and the pursuit of happiness and we will no longer allow those who choose to dwell in the underworld of gangs to stifle our rights. And that message begins now.”); State v. Rivers, 96 Wn. App. 672, 673-74, 981 P.2d 16 (1999) (prosecutor comparing defendant to a hyena and a jackal and asking jury to imagine what would happen to the defense witnesses — inmates at the King County Jail — in the shower at the jail if they testified adversely to the defendant); State v. Powell, 62 Wn. App. 914, 918, 816 P.2d 86 (1991) (prosecutor in closing suggesting that a not guilty verdict would send a message that children who reported child abuse would not be believed, thereby “declaring open season on children”).

In this case, although possibly inartfully expressed, the message by the prosecutor here was clear and straightforward: although the officers made a mistake by not conducting DNA testing on the boots, this does not mean that there exists reasonable doubt against the defendant. Indeed, if any confusion existed, the prosecutor clearly stated this message by noting “should the cops have tested the boots, yes, and they admitted that, but ladies and gentleman, *this isn't reasonable doubt.*” 4RP 119 (emphasis added). This was the prosecutor's message, and this was not improper.

Further, the references to the victims were isolated, and in response to the argument that the boots should have been tested. The prosecutor never specifically explained to the jury what would happen to the victims if a not guilty verdict occurred, how a not guilty verdict would affect their lives, and how they would cope with a not guilty verdict. In the context of the entire argument, the prosecutor told the jury to convict based on the evidence, and because the evidence showed his guilt beyond a reasonable doubt.

The comments here come nowhere close to the statements that the Washington courts have previously identified as improperly inflaming the passions of the jury. The prosecutor did not tell the jury to send a message, did not compare Shears to an animal or a despot, and did not say that a not guilty verdict would result in further assaults. To the contrary, the prosecutor merely encouraged the jury not to not guilty simply because the officers made a mistake. The basic essence of the prosecutor's comments was proper, and these comments did not constitute misconduct.

**ii. Shears has failed to show that the prosecutor improperly vouched for the State witnesses.**

The issue in the case was identity. During closing argument, the prosecutor provided reasons why the State's main witnesses — Peter

Lutovsky, Madeline Holden, Kerry McCarthy, Alexandra Freeman, and Nicole Santos — were credible when they all said that it was Shears who assaulted Holden and McCarthy.

For Lutovsky, the prosecutor argued that he was credible because he admitted that his fraternity sponsored an event with underage drinking, he was not intoxicated, he had sufficient light to see the assault, and because he knew Shears since Shears was a pledge in Lutovsky's fraternity. 3RP 100, 120. For Holden, the prosecutor mentioned that Holden knew Shears because she used to date his brother, that she did not have a bias against him, as she supported his aspiring rap career, and her demeanor on the stand showed that she was credible. 2RP 97-98, 101. For McCarthy, the prosecutor mentioned her demeanor on the witness stand and her confidence in stating who assaulted her to show that she was credible. 3RP 98-99. For Nicole Santos, the prosecutor argued that her testimony was credible because she described how she saw Shears that night, what he was wearing, how he was walking, and that although she had issues with him in the past, she testified that, prior to the incident, she did not have a grudge against him. 4RP 97-98.

Further, for all the witnesses, the prosecutor argued that they were credible because they admitted to underage drinking (a crime), that they were absolutely sure that it was Shears who committed the assaults, they

were not intoxicated, and their testimony was consistent on the major points. 4RP 97, 99, 99, 116.

Based on these arguments, the prosecutor made the following statements in rebuttal of closing arguments:

[Lutovsky's] testimony was credible. Madeline Holden's testimony was credible. Kerry McCarthy's testimony is credible. Alexandra Freeman's testimony is credible. So is Nicole Santos.

4RP 120.

Defense counsel did not object to any of these statements. Now, however, Shears contends that each sentence constituted prosecutorial misconduct because the State improperly "vouched" for its witnesses and stated personal opinions about their testimony. This argument fails.

A prosecutor may comment on a witness's veracity or invite the jury to make reasonable inferences from the evidence, as long as a personal opinion is not expressed and the comments are not intended to incite the passion of the jury. State v. Rivers, 96 Wn. App. 672, 674-75, 981 P.2d 16 (1999); State v. Smith, 71 Wn. App. 14, 21, 856 P.2d 415 (1993). Moreover, a prosecutor can tell the jury to believe one witness over another; emphasizing the reliability of one witness over another does not constitute witness vouching. State v. Sandoval, 137 Wn. App. 532, 541, 154 P.3d 271 (2007). Thus, there is a distinction between the

individual opinion of the prosecuting attorney as an independent fact and an opinion based on or deduced from the testimony and evidence in the case. State v. McKenzie, 157 Wn.2d 44, 53, 134 P.3d 221 (2006).

“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 54 (italics in original) (quoting State v. Papadopoulos, 34 Wn. App. 397, 400, 662 P.2d 59 (1983)).

Here, the prosecutor did not express a personal opinion, but merely made reasonable inferences from the evidence. The statement that witnesses were “credible” was based on specific inferences based on the testimony and evidence, including the witnesses’ relationship with Shears, their ability to observe that evening, their lack of bias, their willingness to admit uncomfortable facts, and their demeanor on the witness stand. Accordingly, referring to the State witness as “credible” was a reasonable inference based on the evidence, not a statement of personal opinion.

**b. Shears Cannot Raise The Issue Of Misconduct For The First Time On Appeal.**

A claim of prosecutorial misconduct may not be raised for the first time on appeal unless a proper objection, request for a curative instruction,

or a motion for a mistrial was made at trial, or the misconduct was so flagrant and ill-intentioned that no curative instruction could have obviated the prejudice. State v. Neidigh, 78 Wn. App. 71, 77, 895 P.2d 423 (1995).

In this case, none of the challenged comments from the State's closing argument, even if impermissible, were "flagrant and ill-intentioned." The statements to encourage the jury not to "punish the victims" were isolated comments, not to inflame the jury, but to show them that no reasonable doubt existed despite the failure to test the boots. These statements also pale in comparison to what the courts have previously held constitute improper appealing to the passions and prejudices of the jury. Further, the statements that the witnesses were "credible." See, e.g., Sandoval, 137 Wn. App. at 541. When viewed in context, it becomes clear that, even if inappropriate, none of these comments constitute clear, flagrant, and ill-intentioned misconduct.

Further, Shears *never* objected to the comments from the prosecutor and has failed to show that the alleged misconduct had such an enduring and resulting prejudice that an objection and curative instruction would not have been sufficient to correct any irregularity. State v. Lough, 125 Wn.2d 847, 864, 889 P.2d 487 (1995) (jurors are presumed to follow instruction). For example, Shears claims that the prosecutor improperly

inflamed the passions of the jury, once in closing argument and once in rebuttal. If true, then the court could have stopped the prosecutor from repeating this line of argument if Shears had decided to raise an objection. Similarly, the phrases that Shears claims constitute an impermissible vouching take several sentences. If Shears merely had made an objection, he could have prevented the prosecutor from continuing this argument as well. Finally, none of these comments were so egregious to believe that a curative instruction by the court would not have remedied any possible prejudice.

**c. The Defendant Cannot Show That The Verdict Was Based On Anything But An Evaluation Of The Evidence.**

A conviction will be reversed upon a claim of misconduct only if there is a substantial likelihood that the alleged misconduct affected the verdict. State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). Whatever minor prejudice Shears can ascribe to the alleged misconduct, the evidence against Shears was overwhelming. In short, five witnesses said that Shears committed the assaults, and blood was found on his boots. The prosecutor did nothing so egregious that would suggest that the jury's verdict was based upon anything other than the facts and the jury's independent determination of the credibility of the witnesses. See e.g.,

State v. Wilson, 16 Wn. App. 348, 356-57, 555 P.2d 1375 (1976)

(prosecutor improperly expressed his personal opinion and made inflammatory remarks but the court did not find there was a substantial likelihood the remarks affected the verdict).

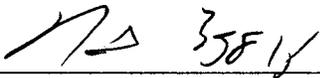
**D. CONCLUSION**

For the foregoing reasons, the State respectfully asks this Court to affirm Shears's convictions for two counts of Assault in the Second Degree.

DATED this 2nd day of June, 2009.

Respectfully submitted,

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By:   
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Sarah Hrobsky, the attorney for the appellant, at Washington Appellate Project, 1511 Third Ave., Suite 701, Seattle, WA 98101, containing a copy of the BRIEF OF RESPONDENT, in State v. Johnny Shears, Cause No. 61851-2-I, in the Court of Appeals, Division I. of the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

*C. Brame*

Name

Done in Seattle, Washington

6/2/09

Date

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