Court of Appeals No. 84947-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JAMES PATRICK HILTBRUNER,

Appellant

PETITION FOR REVIEW

James W. Herr, WSBA No. 49811
David S. Marshall, WSBA No. 11716
THE MARSHALL DEFENSE FIRM
901 Fifth Avenue, Suite 280
Seattle, WA 98164
(206) 826-1400

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION

I. IDENTITY OF PETITIONER

The Petitioner is James Hiltbruner.

II. COURT OF APPEALS DECISION

On May 20, 2024, the Court of Appeals, Division One affirmed James Hiltbruner's jury trial conviction for indecent liberties in an unpublished opinion, No. 84947-6-I (herein after referred to as "the opinion below"). The opinion below is included in Appendix 1.

Appellant submits this timely petition for review to the honorable Supreme Court of the State of Washington.

III. ISSUES PRESENTED FOR REVIEW

A. By rejecting Hiltbruner's prosecutorial misconduct claim because his attorney did not object, does the Court of Appeals' decision conflict with long-established case law providing for relief from prosecutorial misconduct despite a lack of objection from the attorney?

B. Can a reviewing court decline to find prejudice on claims of ineffective assistance of counsel based on the jury's verdict, when counsel's deficient performance directly impacted the jury's credibility determinations?

IV. STATEMENT OF THE CASE

Prior to his conviction in 2022, Mr. Hiltbruner had been working as a pizza delivery driver for a local Pizza Hut. RP

772, 775. He had been living with his long-term girlfriend, Katie Grantham, since 2000. RP 1148-50. At forty-nine years old, he had no criminal record.

Around 2015, Clark Garrison (Hiltbruner's friend for over 30 years and coworker at Pizza Hut) moved in with Hiltbruner and Grantham. RP 1027. In August of 2019, Garrison began dating F.F., a Pizza Hut coworker of theirs. RP 774. F.F. and her six-year-old son would visit Garrison at the home he shared with Hiltbruner and Grantham, and she and her son became better acquainted with all of them. RP 777-78.

In October 2019, Garrison, F.F., and Hiltbruner went to a nearby bar after work around 11 p.m. RP 794, 907. F.F. had two or three glasses of beer and two shots of Jameson in the approximately 90 minutes that they were at the bar. RP 795, 800-04, 809. At the bar, Garrison became jealous of his girlfriend's (F.F.'s) interactions with Hiltbruner and left, leaving F.F. and Hiltbruner at the bar. RP 801-02, 987. Hiltbruner drove F.F. back to the Pizza Hut. RP 812.

While at the Pizza Hut, F.F. needed to urinate, and did so in the alley. She asked Hiltbruner to help her stand up, and

thanked him with a hug after he did. RP 813-14, 817-18. Garrison appeared and "flipped out"; F.F. then became furious at Garrison for being jealous. RP 818, 821-22. Garrison left to stay with a friend, and Hiltbruner and F.F. drove separately to Hiltbruner's home, with F.F. intending to pick up some items then head to her son's babysitter. RP 824.

At Hiltbruner's home, Grantham greeted F.F. at the door "around 1:00 or 2:00 in the morning," and F.F. gathered up her belongings while venting her frustrations about Garrison to Grantham. RP 828-29, 1171, 1173. Grantham realized that F.F. was too drunk to drive, so Grantham her to her son's babysitter and picked up F.F.'s child at approximately 2 a.m. The three of them then returned to the Grantham/Hiltbruner home. RP 1173-75. F.F. decided not to sleep in Garrison's empty room, and instead took a shower before laying down with her son in the living room on a large bean bag mattress. RP 1176.

From there, descriptions of the evening diverge. Grantham testified that she and Hiltbruner had sex in their bedroom and they both fell asleep around 3:30 to 4 a.m. RP 1180, 1233. Grantham testified that she and Hiltbruner woke up

around 5:30 a.m. to find that F.F. had left, and that Hiltbruner had not left the bedroom. RP 1185. She further testified that their bedroom door is always open to allow their cats in and the doorway was covered by a blanket, with the bedroom about fifteen feet from the living room. RP 1162-63.

F.F. testified that Hiltbruner emerged from his bedroom and, while her son was sleeping next to her, offered her water, boasted about the size of his appendage, then took out his penis, tried to pull her pants down, and groped her breast. RP 853-59. F.F. claimed that she resisted, but that Hiltbruner did not stop until she grabbed his jaw. RP 859-60, 864. F.F. testified that after Hiltbruner left, she gathered her things and her child, left $100 in Grantham's purse, and left around 4:15 a.m., arriving home around 5 a.m. RP 868-70, 1184. F.F. did not immediately report the incident to the police; only after her Pizza Hut manager refused to approve a shift change or store transfer without a police report did F.F. report to the police. RP at 706, 887-90.

As part of the investigation, Detective Ostrom called Mr. Hiltbruner in February of 2020 (about four months later) and

asked him about the night in question. RP 618-19, 630. Hiltbruner recalled that after the encounter with F.F. and Garrison at the Pizza Hut, he went home and went to bed. RP 630-32. Hiltbruner told Ostrom that he'd been in bed with his girlfriend (Grantham) for a couple of hours when there was someone knocking on their door; his girlfriend went to check the door and, finding an intoxicated F.F., drove F.F. to pick her up her son from the babysitter. RP 632.

Grantham did not want F.F. to drive to pick up her son given her intoxication, and so she drove F.F. to her son's babysitter and brought the two of them back. RP 632-33. Hiltbruner recounted that he had stayed in bed and did not get up until the early morning. RP 633.

Hiltbruner was convicted after a jury trial of indecent liberties and appealed his conviction. On appeal, the Court agreed with Hiltbruner that two errors occurred in his trial. The first was that the State was permitted to question Garrison (F.F.'s then-boyfriend) and Grantham (Hiltbruner's longtime girlfriend) about their knowledge of Mr. Hiltbruner's prior unfaithfulness to Ms. Grantham. RP 1057-60. The prosecutor

argued the evidence should be admitted because it did not fall under ER 404(b); specifically, the prosecutor asserted that it was not evidence of a prior non-consensual assault against a third party, and that the door had been opened by defense counsel's prior questioning. *Id.* Hiltbruner's attorney objected on the basis of relevance and prejudice to Mr. Hiltbruner, and argued that the door had not been opened—his attorney did not, however, object under ER 404(b). RP 1060.

The court permitted the State to enquire about Mr. Hiltbruner's alleged infidelity because it found that the door had been opened. RP 1063-65. However, on appeal, the Court of Appeals concluded (and the State conceded) that the evidence was "erroneously admitted…under the open-door doctrine" because it was the State, not Hiltbruner, that opened the door regarding Garrison's jealousy. Opinion below, at 10 n. 2.

The second error the Court of Appeals found occurred was the prosecutor's misconduct in closing argument, when the State repeatedly commented on Mr. Hiltbruner's right not to testify. The Court of Appeals found clear misconduct occurred:

On this record, the prosecutor's statements and rhetorical questions improperly commented on Hiltbruner's right not to testify at the trial. The prosecutor asked the jurors over a dozen rhetorical questions about Hiltbruner's motivations for his behavior that only Hiltbruner could have answered. The prosecutor bookended these questions by stressing that "I could never prove to you" and "you can never know" the answers to these questions, which heavily implied that the jury could only have learned these answers had Hiltbruner testified. Most problematic, after emphasizing that "the only two people that could possible know what happened" are F.F. and Hiltbruner, the prosecutor immediately reminded the jury that F.F. "told you exactly what happened," which highlighted the absence of testimony from the other eyewitness: Hiltbruner.

Opinion Below, Ex. A, at 7. The Court of Appeals found that the prosecutor "manifestly intended his statements to commend on Hiltbruner's right against self-incrimination," and that as a result, "the jury would have naturally and necessarily interpreted these remarks as a comment on Hiltbruner's decision not to testify." *Id.*

Despite finding these errors, the Court of Appeals affirmed Hiltbruner's conviction, holding that although the prosecutor engaged in misconduct, because his counsel did not object, Hiltbruner had "not met the heightened showing required for us to reverse based on prosecutorial misconduct in the absence of an objection." *Id.* at 8. The Court of Appeals noted that if Hiltbruner had objected, the judge "could have sustained the objection," told the prosecutor to stop commenting on Hiltbruner's lack of testimony, "and reminded the jury that it must not use Hiltbruner's silence as substantive evidence of guilt or to prejudice him in any way," because "[w]e presume the jury would have followed such an instruction." *Id.*

The Court of Appeals also rejected Hiltbruner's argument that he was prejudiced by his ineffective assistance of counsel when his attorney failed to object to the questioning regarding his prior infidelity under ER 404(b) and the prosecutorial misconduct in closing. Opinion below, Ex. A, at 13. The Court of Appeals agreed with Hiltbruner (and the State conceded) that "the trial court erroneously admitted evidence of Hiltbruner's

infidelity under the open-door doctrine." *Id.* at 10, n. 2. But the court held that Hiltbruner's "ineffective assistance of counsel arguments fail on the prejudice prong" because "[n]otwithstanding the prosecutor's improper conduct and evidence of infidelity, the jury's verdict shows that it found F.F.'s testimony to be credible." *Id.* at 13. The Court of Appeals outlined some reasons why a jury may have found F.F. more credible, but did not find the evidence to be overwhelming—the only evidence was F.F.'s testimony versus Hiltbruner's statements to Detective Ostrom. *Id.* at 13-14. The Court of Appeals did not address how these two instances of ineffective assistance of counsel would impact credibility determinations of F.F. and Hiltbruner. *Id.*

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Hiltbruner's jury trial for indecent liberties was marred by the State's misconduct in two key ways. First, the prosecutor was allowed to introduce inadmissible ER 404(b) character evidence that Hiltbruner was unfaithful to his partner, portraying him as someone with low sexual morals and who was dishonest with his partner. Second, the prosecutor

repeatedly commented on the fact that Hiltbruner did not testify, and used that fact to argue his guilt.

The Court of Appeals affirmed both errors—the prosecutor's misconduct and the inappropriately admitted evidence. The Court of Appeals nonetheless affirmed, first stating (without analysis or explanation) that any prosecutorial misconduct would have been cured by a timely objection and jury instruction; such a blanket holding would negate all unobjected-to claims of prosecutorial misconduct in closing by effectively finding they are waived by trial counsel's failure to object.

The Court of Appeals also concluded that Hiltbruner was not prejudiced by his counsel's failure to object to the inadmissible evidence or prosecutorial misconduct because the jury's guilty verdict shows it found F.F. to be credible. That circular reasoning misses the mark: the prejudice from the State's improper commentary on Hiltbruner's failure to testify and the erroneously admitted infidelity evidence was that they damaged Hiltbruner's credibility (from the statements he made to Detective Ostrom, which were admitted at trial) and

bolstered F.F.'s credibility. To analyze the prejudice Hiltbruner experienced by the improper bolstering of F.F.'s credibility, the court cannot simply rely upon the fact that the jury found F.F. credible as evidence of a lack of prejudice, because that credibility determination was impacted by the improper bolstering.

The impact of this ineffective assistance of counsel on Hiltbruner's trial was to discredit his statements to Detective Ostrom and bolster the testimony of the complaining witness. And because F.F.'s statements of what happened were the only evidence against Hiltbruner, this improper bolstering of those statements had a large impact on the outcome of the trial, turning a heavily-intoxicated witness who detailed an encounter that did not wake the other two people in the home (including someone next to her), and whose testimony conflicted with other testimony, into a credible one. This bolstered testimony from F.F. contrasted with Hiltbruner, the sexually-amoral cheater who would not even testify at his own trial.

The State was allowed to introduce evidence of Hiltbruner's prior infidelity for nothing more than propensity—

showing that Hiltbruner was dishonest in his relationship with Grantham and that he is the type of person to do what he wants, sexually, regardless of who may be hurt. The State followed this up in closing by repeatedly and intentionally calling attention to Hiltbruner's lack of testimony at trial, and contrasting that with F.F. This left the jury with one impression only: that Hiltbruner is untrustworthy and has dubious sexual morals, who would not even get on the witness stand to defend himself against these accusations after F.F. was willing to tell her side of the story under oath.

A. The Court should grant the petition for review to clarify that a failure to object to improper commenting on the right to silence does not preclude relief from prosecutorial misconduct.

The Court of Appeals concluded that, had Hiltbruner's counsel objected to the prosecutorial misconduct, the trial court could have cured the misconduct with a jury instruction and stopped the prosecutor from further commenting. The court did not analyze the impact that the unobjected-to statements had on Hiltbruner's trial, or *whether* a curative instruction could have cured the prejudice, as this Court's case law requires. The mere

assertion that the defendant *could* have objected to the prosecutorial misconduct and that a jury instruction *would* cure any error *because* jurors follow jury instructions would apply in every case raising misconduct. In other words, under the Court of Appeals' reasoning no defendant could raise the issue on appeal if their attorney did not object, essentially waiving it.

That approach was rejected by this Court over thirty years ago. In *State v. Belgrade*, "the Court of Appeals held that because defense counsel had failed to object to the prosecutor's remarks, the issue was not appropriately raised on appeal." 110 Wn.2d 504, 507, 755 P.2d 174 (1988). This Court rejected that conclusion, holding that "Appellate review is *not* precluded if the prosecutorial misconduct is so flagrant and ill-intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct." *Id.* (emphasis in original).

This Court has held it was "prejudicial and reversible error" when the prosecutor's comments in closing violated the defendant's right not to give evidence against himself. *State v. Charlton*, 90 Wn.2d 657, 662-64, 585 P.2d 142 (1978). Despite a lack of objection and curative instruction from the defense

attorney, this Court found that the prosecutor's comments on the defendant's failure to call his wife to testify, in violation of that defendant's marital privilege, warranted reversal. *Id.* at 660-64. This Court analogized the marital privilege "to the constitutional privilege against self-incrimination" and find that the prosecutor "violated the spirit of the [Washington] Constitution, Article 1, section 9, that no person shall be compelled in a criminal case to give evidence against himself." *Id.* at 662-63.

Under this Court's precedent, a defendant's failure to object and request a curative instruction, in and of itself, does not bar relief. Rather, reviewing courts must analyze whether the prejudice from the prosecutor's misconduct was egregious enough that no curative instruction could have cured it.

If the Court of Appeals had analyzed whether a curative instruction could have cured the prejudice from the prosecutor's misconduct, it would have found that no curative instruction could have corrected the problem. Like in *Charlton*, the repeated comments on Hiltbruner's right not to testify at trial (which came at two different points in the prosecutor's closing

argument) were enough to impact the jury's verdict and deny Hiltbruner a fair trial. The trial came down to who the jury believed—F.F. or Hiltbruner. "But when the prosecutor inferred by means of improper comment that the only available witness who might corroborate petitioner's version events was not called to testify, any inclination to believe petition may well have vanished." *Charlton*, 90 Wn.2d at 664.

> Over forty years ago, this Court noted that:
>
> > In spite of our frequent warnings that prejudicial prosecutorial tactics will not be permitted, we find that some prosecutors continue to use improper, sometimes prejudicial means in an effort to obtain convictions. In most of these instances, competent evidence fully sustains a conviction. Thus, we are hard pressed to imagine what, if anything, such prosecutors hope to gain by the introduction of unfair and improper tactics.
> >
> > It has been thoughtfully observed that:
> >
> > > (i)f prosecutors are permitted to convict guilty defendants by improper, unfair means, then we are but a moment away from the time when prosecutors will convict innocent defendants by unfair means.

Charlton, 90 Wn.2d at 665 (quoting *State v. Torres*, 16 Wn. App. 254, 263, 554 P.2d 1069 (1976)). Despite this Court's precedent, such comments from prosecutors continue. Rulings like the one on review here—finding prosecutorial misconduct

but effectively deeming the claim waived if it was not objected to—will only encourage prosecutors to continue their tactics, because they know they will not face reversal.

The continued application of this shortcut analysis by lower courts conflicts with current Washington Supreme Court precedent which allows unobjected-to prosecutorial misconduct claims. *See*, *e.g.*, *State v. Belgrade*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). RAP 13.4(b)(1). It significantly diminishes the value inherent in the right to remain silent and not to testify under the Fifth Amendment of the U.S. Constitution and Art. 1, sec. 9 of the Washington Constitution. RAP 13(b)(3). And its continued application will impact future defendants raising similar claims, acting to bar future defendants from raising claims of prosecutorial misconduct if their trial lawyer failed to object. RAP 13.4(b)(4).

B. The Court should grant the petition for review because Hiltbruner was prejudiced by the attacks on his credibility, which necessarily impacted the jury's credibility assessment.

The Court of Appeals erred when it declined to find prejudice because "the jury's verdict shows that it found F.F.'s testimony to be credible. Opinion Below, at 13. This reasoning

disregards the harm to Hiltbruner articulated in his ineffective assistance of counsel claims: that this ineffective assistance of counsel resulted in significant impacts to Hiltbruner's credibility and bolstered F.F.'s contrasting testimony. Most every jury guilty verdict will be based on a jury's credibility determination, otherwise there would not be a conviction. Where the claims focus on the impact to credibility of the defendant and complaining witness, there must be an analysis of the prejudice flowing from those impacts and how it impacted the jury's credibility determination, not deference to it.

The opinion below highlights counsel's deficient performance. As noted above, The Court of Appeals found that a timely objection and curative instruction would have cured the prosecutorial misconduct. Based on that holding, trial counsel was deficient in failing to timely object, where case law is clear that commenting on a defendant's right to remain silent prejudices defendants and where counsel's timely objection would have cured the issue. As a result, the prejudice analysis must focus on the prejudice of the prosecutor's repeated

comments on the defendant's lack of testimony at trial, which would have been avoided by effective counsel (in the Court of Appeals' calculation).

Similarly, prejudice from counsel's failure to correctly object to evidence of Hiltbruner's unfaithfulness impacted the credibility of his statements and bolstered the credibility of F.F. The statements were an attempt to paint Hiltbruner as someone who was dishonest in his relationship with his partner and loose with his sexual morals—the kind of person who would try and fulfill his urges regardless of whom he hurt. This portrayal of Hiltbruner, coupled with the prosecutor's repeated and intentional commentary on Hiltbruner's lack of testimony at trial, made F.F. seem credible for testifying in a way that was consistent with the portrayal of Hiltbruner, contrasting with Hiltbruner, who did not testify at all.

This Court's precedent regarding ineffective assistance of counsel claims for an attorney's failure to object requires more than what the Court of Appeals conducted. The defendant must "show that the objection would have likely succeeded … [o]nly in egregious circumstances, on testimony central to the State's

case, will the failure to object constitute incompetence of counsel justifying reversal." *State v. Vazquez*, 198 Wn.2d 239, 248, 494 P.3d 424 (2021) (quoting *State v. Crow*, 8 Wn. App. 2d 480, 508, 101 P.3d 1 (2004). "However, if defense counsel fails to object to *inadmissible* evidence, then they have performed deficiently, and reversal is required if the defendant can show the result would likely have been different without the inadmissible evidence." *Id.* at 248-49 (emphasis in original).

In *Vazquez*, this Court examined multiple instances of an attorney's failure to object to determine if the defendant received ineffective assistance of counsel. *Id.* at 247-270. As with Hiltbruner's case, the Court reviewed ER 404(b) evidence that was admitted at trial and concluded that "the testimony was intended only to show *Vazquez* had the propensity to sell drugs." *Id.* at 258.

When analyzing the prejudice to *Vazquez* from the deficient performance of counsel, this Court did not simply note that the jury's verdict showed it found the State's witnesses credible (as the Court of Appeals did here); rather, the Court evaluated the prejudice to *Vazquez*, holding, "Whether each

instance of deficient performance considered separately would independently meet the prejudice prong of *Strickland*, we conclude that the cumulative effect of counsel's subpar performance likely affected the outcome of the case." *Id.* at 268-69. The Court noted that the State's improperly admitted evidence "completed a picture of a dangerous drug dealer," similar to the portrayal of Hiltbruner as a sexually amoral individual who is unconcerned about who he hurts in pursuit of sexual gratification. *Id.* at 269.

The analysis outlined by this Court in *Vazquez* was lacking in the opinion below. The Court of Appeals did not evaluate whether "the cumulative effect of counsel's subpar performance likely affected the outcome of the case." *Id.* at 268-69. Rather, the Court of Appeals merely noted that the jury's verdict showed it found F.F., the State's only witness to present substantive evidence of the alleged crime, to be credible, citing to *State v. Mireles*, 16 Wn. App. 641, 662, 482 P.3d 942 (2021). Opinion below, at 13. Notably, *Mireles* evaluated the prejudice from defense counsel's failure to object to the prosecutor's argument in closing which "encourag[ed]

the jury to draw an impermissible inference from the evidence." *Mireles*, 16 Wn. App. at 661. When evaluating the prejudice of that comment, the *Mireles* court analyzed the prejudice in light of the State's evidence—part of that evidence was the victim's testimony, which the jury found credible. *Id.* at 661-62. Because the prosecutorial misconduct was encouraging the jury to draw an impermissible inference (which would not impact the credibility determination of the witnesses), the jury's credibility determinations were relevant to evaluating prejudice in *Mireles*.

In contrast, here Hiltbruner was prejudiced by his attorney's deficient performance *because* that deficient performance resulted in bolstering the complaining witness' credibility. To evaluate that prejudice, the court must look at all the evidence that would affect F.F.'s credibility—including her heavy intoxication (intoxicated enough to think it was okay to drive drunk to pick up her son at 2 a.m.), the fact that no other witnesses heard or observed this encounter (when her son was sleeping next to her and Grantham was sleeping down the hall through an open doorway), and the fact that she only reported

to police after she was unable to transfer away from the Pizza Hut where Hiltbruner *and* Garrison (her now-ex boyfriend) both worked without a police report. The Court of Appeals failed to do so, and failed to analyze the impact the deficient performance had on F.F.'s credibility determination.

This conclusory analysis of the Court of Appeals, deferring to a credibility determination by the jury to find a lack of prejudice, shortchanges any defendant from succeeding on future ineffective assistance of counsel claims alleging prejudice that bolstered the credibility of the State's witness. This Court should accept review of Hiltbruner's case to correct this kind of conclusory analysis and clarify that an actual evaluation of the prejudice means analyzing whether the result would have likely been different had defendant's attorney objected.

The conclusory analysis that the jury finding F.F. credible demonstrates a lack of prejudice conflicts with Washington Supreme Court precedent, which requires an individualized analysis of the impact these statements had on F.F.'s apparent credibility. RAP 13.4(b)(1). This conclusory

analysis guts ineffective assistance of counsel claims by relying upon the jury's verdict (and related credibility determination) as proof of a lack of prejudice, when the prejudice from the deficient performance *was* the impact on the credibility determination—severely hampering the promise of effective assistance of counsel guaranteed by the Sixth Amendment of the United States Constitution and Article 1, section 22 of the Washington Constitution. RAP 13.4(b)(3). And repeated use of this conclusory analysis to shortchange defendants' ineffective assistance of counsel claims will chill future defendants from making ineffective assistance of counsel claims. RAP 13.4(b)(4).

VI. CONCLUSION

Mr. Hiltbruner's trial was marred by two errors: the prosecutor's misconduct by commenting on his failure to testify at trial, and his ineffective counsel, who failed to object to both the prosecutor's misconduct and improperly admitted ER 404(b) character evidence that Hiltbruner was unfaithful to his girlfriend. Rather than fully evaluating 1) whether a curative instruction could have cured the prosecutor's misconduct, and

2) whether his ineffective assistance of counsel prejudiced Hiltbruner by failing to object to the prosecutor making Hiltbruner appear less-credible and bolstering the complaining witness' testimony, the Court of Appeals shortcut the analysis with conclusory reasoning that would foreclose many future defendants' claims. Hiltbruner respectfully requests this Court GRANT his petition for review to correct these errors for himself and future defendants.

This document contains 4,293 words, exclusive of words contained in the appendices, the title sheet, the table of contents, the table of authorities, the certificate of compliance, the certificate of service, signature blocks, and pictorial images.

Respectfully submitted this 20th day of June, 2024.

THE MARSHALL DEFENSE FIRM

James W. Herr, WSBA No. 49811
David S. Marshall, WSBA No. 11716
901 Fifth Avenue, Suite 280
Seattle, WA 98164
(206) 826-1400

CERTIFICATE OF SERVICE

I hereby certify that on the date shown below, I caused to be sent electronically to the following:

King County Prosecuting Attorney:
paoappellateunitmail@kingcounty.gov

and by USPS to:

James P. Hiltbruner
DOC No. 435524
Coyote Ridge Corrections Center, Unit H
PO Box 769
Connell WA 99326

DATED this 20th day of June, 2024.

Tracey McDonald, Paralegal

THE MARSHALL DEFENSE FIRM, P.S.

June 20, 2024 - 4:54 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	84947-6
Appellate Court Case Title:	State of Washington, Respondent v. James Patrick Hiltbruner, Appellant

The following documents have been uploaded:

- 849476_Petition_for_Review_20240620163625D1277807_4474.pdf
  This File Contains:
  Petition for Review
  The Original File Name was Petition for Review final 062024.pdf

A copy of the uploaded files will be sent to:

- Samantha.Kanner@kingcounty.gov
- aleshiaj@mazzonelaw.com
- david@marshalldefense.com
- paoappellateunitmail@kingcounty.gov

Comments:

Sender Name: Tracey McDonald - Email: tracey@MarshallDefense.com
Filing on Behalf of: James Wayne Herr - Email: james@jamesherrlaw.com (Alternate Email: james@marshalldefense.com)

Address:
901 Fifth Avenue
Suite 2800
Seattle, WA, 98164
Phone: (206) 826-1400

Note: The Filing Id is 20240620163625D1277807

FILED
5/20/2024
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JAMES PATRICK HILTBRUNER, Appellant.	No. 84947-6-I DIVISION ONE UNPUBLISHED OPINION

FELDMAN, J. — A jury convicted James Patrick Hiltbruner of indecent liberties. On appeal, Hiltbruner argues we should reverse his conviction and remand for a new trial due to prosecutorial misconduct, erroneously admitted evidence in violation of ER 404(b), ineffective assistance of counsel, and cumulative error. We affirm.

I

In late October 2019, Hiltbruner worked as a delivery driver at Pizza Hut with F.F.[1] and Carl Garrison. F.F. and Garrison had been dating for around a month. Garrison and Hiltbruner had been friends for 30 years and lived together at a house owned by Hiltbruner and his girlfriend, Katie Grantham. F.F. was 22

[1] We refer to F.F. by her initials to protect her privacy.

years old and had a 5-year-old son. Hiltbruner and Garrison were both in their 40s.

After work on the night of October 21, 2019, Hiltbruner, Garrison, and F.F. went to a bar for drinks. F.F. rode with Garrison in his car, and Hiltbruner drove alone. At the bar, Hiltbruner told F.F. about "a sexual encounter that he had with [Grantham] and another couple." Garrison became upset and left the bar because he believed Hiltbruner and F.F. were flirting. F.F. and Hiltbruner stayed at the bar, and Hiltbruner eventually drove F.F. back to her car at Pizza Hut.

When Hiltbruner and F.F. arrived back at Pizza Hut, F.F. urinated in an alley because the doors to the business were locked. Hiltbruner helped F.F. stand up, and F.F. then thanked and hugged him. During this hug, Hiltbruner touched F.F.'s buttocks with his hand and F.F. swatted his hand away. Unbeknownst to Hiltbruner and F.F., Garrison was watching this interaction from behind a dumpster. When he saw Hiltbruner touch F.F.'s buttocks, Garrison emerged and began arguing with them. Hiltbruner then drove home, and Garrison drove to a friend's house to stay the night there.

After Hiltbruner and Garrison left, F.F. drove her car to Hiltbruner and Grantham's house with the intention of grabbing her belongings, picking up her son from his babysitter, and returning to her own home. F.F. arrived at Hiltbruner and Grantham's house around 2:00 a.m. on October 22, 2019. Grantham answered the door and offered to drive F.F. to pick up her son because F.F. had been drinking. The two of them drove to pick up F.F.'s son and returned to Hiltbruner and Grantham's house around 3:00 a.m. F.F. decided to sleep there,

so she changed into pajama pants and laid down to sleep next to her son on a mattress in the living room.

According to F.F., Hiltbruner walked out of his bedroom shortly after 4:00 a.m. wearing a T-shirt and underwear, boasted about the size of his penis, leaned over F.F., pulled down her pants, and then placed his penis on her thigh and buttocks. When F.F. resisted and told Hiltbruner to stop, Hiltbruner continued to hold her down and take off her clothes, and he then groped her breast and forcibly pushed his tongue into her mouth. F.F. then grabbed Hiltbruner's throat and threatened to hurt him, which caused Hiltbruner to return to his bedroom. F.F. left the house with her son around 4:15 a.m.

After F.F. left the house, she sent Garrison a text message telling him "everything that had happened" between her and Hiltbruner earlier that morning. Garrison forwarded F.F.'s message to Hiltbruner. Hiltbruner did not deny F.F.'s allegations and instead replied, "So this means you're not going to fix my bike?" Garrison was so angered by Hiltbruner's response that he moved out of Hiltbruner and Grantham's house that same day.

When F.F. showed up at work on October 22, 2019, she told her supervisor that she wanted to quit her job. Her supervisor did not want to lose F.F. as an employee and asked her if "everything was okay," at which point F.F. reluctantly told him what Hiltbruner had done to her earlier that morning and that she no longer wanted to work with him. F.F. also reported her concerns to the company's regional team leader, Christy Henry, about a week after the incident. Henry explained that F.F. would need to report the assault to the police in order for Pizza Hut to act on her internal complaint regarding Hiltbruner. Hiltbruner was later fired

from Pizza Hut because he failed to cooperate in the workplace investigation into F.F.'s allegations.

With Henry's assistance, F.F. contacted law enforcement and later provided a signed statement to a sheriff's deputy in which she reported that Hiltbruner had sexually assaulted her. A couple weeks after F.F. provided her statement to law enforcement, she again gave a "fairly comprehensive recounting" of the incident involving Hiltbruner during an interview with Detective Robin Ostrum and a deputy prosecutor. After this interview, Ostrum spoke with Hiltbruner, who claimed that at "no point ever [was he] alone with [F.F.]" and that he was "in bed asleep" while F.F. was at his and Grantham's house. Ostrum recalled that Hiltbruner was "very pointed in repeatedly telling me that he went home, went to bed, and that was it for him that evening, that he never got out of bed or left the bedroom."

The State charged Hiltbruner with indecent liberties by forcible compulsion in violation of RCW 9A.44.100(1)(a). The jury convicted Hiltbruner as charged. Hiltbruner appeals.

II

A. Prosecutorial Misconduct

Hiltbruner argues we should reverse his conviction and remand for a new trial because the prosecutor committed prosecutorial misconduct during closing argument by commenting on his right not to testify. We disagree.

To prevail on a prosecutorial misconduct claim, the defendant must show that the prosecutor's conduct was both improper and prejudicial. *State v. Emery*, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). Where, as here, the defendant did not object to the alleged instances of prosecutorial misconduct, the defendant must

show on appeal that "the misconduct was so flagrant and ill-intentioned that (1) no curative instruction would have obviated any prejudicial effect on the jury and (2) the resulting prejudice had a substantial likelihood of affecting the jury verdict." *State v. Mireles*, 16 Wn. App. 2d 641, 656, 482 P.3d 942 (2021). We review the prosecutor's conduct during closing argument in the context of the whole argument, issues of the case, evidence addressed in the argument, and jury instructions. *State v. Gouley*, 19 Wn. App. 2d 185, 200, 494 P.3d 458 (2021).

The Fifth Amendment right against self-incrimination prohibits the State from making arguments relating to a defendant's silence as substantive evidence of the defendant's guilt. *Id.* at 202-03. Courts consider two factors in determining whether a prosecutor's statement improperly comments on a defendant's silence: "(1) 'whether the prosecutor manifestly intended the remarks to be a comment on' the defendant's exercise of his right not to testify and (2) whether the jury would 'naturally and necessarily' interpret the statement as a comment on the defendant's silence." *State v. Barry*, 183 Wn.2d 297, 307, 352 P.3d 161 (2015) (quoting *State v. Crane*, 116 Wn.2d 315, 331, 804 P.2d 10 (1991)). While a prosecutor can argue that certain evidence is undenied, it is improper for the prosecutor to refer to the defendant as the person who could have denied it. *State v. Ramirez*, 49 Wn. App. 332, 336, 742 P.2d 726 (1987).

Here, the prosecutor told the jurors during his closing argument that they were "going to have questions" based on the testimony they heard because "there are things that cannot be proven . . . which I could never prove to you." The prosecutor then asked the jurors a series of rhetorical questions about why Hiltbruner acted the way he did towards F.F.:

> Why did Mr. Hiltbruner go out of his way to be so nice to [F.F.]? After [Garrison] left, why did he stay with her, continue drinking, continue talking to her about [Garrison], bashing a guy he's known for 30 years for a girl he's known for two weeks?
>
> Instead of giving her a lift home, to go home to his girlfriend, why did he take time, after drinking, to drive her to Pizza Hut, to stay in that alleyway with her? Why, when he was in that alleyway, did he touch her butt, and why did he get so mad at [Garrison] when [Garrison] saw them coming out?
>
> Why would he wait until 4:00 in the morning, after [Grantham] was asleep, to come out and start talking to [F.F.] again about [Garrison]? Why would he shift that to his skill in bed, to the size of his appendage? Why would he try and show her that? Why did he do that, knowing that her son was asleep next to her? What would have happened if [F.F.] couldn't keep her legs in and couldn't fight him to keep her pajama pants up?

The prosecutor then told the jury again, "The answers to those questions I can never prove to you, but you will have them. And there are some things in those answers that you can never know, not for sure."

Later, the prosecutor asked another series of rhetorical questions that focused on Hiltbruner's subjective intentions:

> So why would he do all those things? . . . Why stay and endear himself? Why go out of his way to be so nice? Why . . . help her at Pizza Hut? Why touch her butt? Why react to [Garrison] the way that he did? Why get out in front of things as soon as he gets home, to control the narrative? And then not mentioning the . . . accusations for even a week.
>
> Why respond the way he did? . . . And why would he need to have some input on what [Grantham] says?

The prosecutor then told the jury, "[T]he only two people that could possibly know about what happened during 4:05 and 4:15 a.m. on the morning of October 22, 2019, are [F.F.] and Mr. Hiltbruner. And [F.F.] told you exactly what happened. She told you what happened to her."

On this record, the prosecutor's statements and rhetorical questions improperly commented on Hiltbruner's right not to testify at the trial. The prosecutor asked the jurors over a dozen rhetorical questions about Hiltbruner's motivations for his behavior that only Hiltbruner could have answered. The prosecutor bookended these questions by stressing that "I could never prove to you" and "you can never know" the answers to these questions, which heavily implied that the jury could only have learned these answers had Hiltbruner testified. Most problematic, after emphasizing that "the only two people that could possibly know what happened" are F.F. and Hiltbruner, the prosecutor immediately reminded the jury that F.F. "told you exactly what happened," which highlighted the absence of testimony from the other eyewitness: Hiltbruner. *See State v. Fiallo-Lopez*, 78 Wn. App. 717, 729, 899 P.2d 1294 (1995) (prosecutor's argument was improper because "no one other than Fiallo-Lopez himself could have offered the explanation the State demanded"). As a whole, the prosecutor's repeated emphasis on Hiltbruner's decision not to testify shows that the prosecutor manifestly intended his statements to comment on Hiltbruner's right against self-incrimination, and the jury would have naturally and necessarily interpreted these remarks as a comment on Hiltbruner's decision not to testify.

The State acknowledges that the prosecutor's statements "may have inadvertently inferred reference to Hiltbruner's failure to testify." But the State argues that the statements were not improper because they were "so subtle and so brief" that they did not "naturally and necessarily" emphasize Hiltbruner's silence. *State v. Crane*, 116 Wn.2d 315, 331, 804 P.2d 10 (1991). This argument ignores the extent to which the prosecutor repeatedly focused on the fact that

Hiltbruner did not testify regarding the many issues highlighted in the prosecutor's closing argument despite being one of "only two people that could possibly know about what happened." The State also argues that the prosecutor's statements focused on the credibility of Hiltbruner's statements as opposed to his silence at trial. This argument similarly overlooks several of the prosecutor's statements that had nothing to do with Hiltbruner's credibility, such as the prosecutor's statements that he "could never prove" certain facts because Hiltbruner did not testify and that Hiltbruner is one of "only two people that could possibly know" what happened to F.F. The State has not persuaded us how the prosecutor's statements were anything but a comment on Hiltbruner's silence.

Although the prosecutor's statements were clearly improper, Hiltbruner's counsel failed to object to the impropriety of the statements, so Hiltbruner must now show that the statements were so flagrant and ill-intentioned that no curative instruction would have obviated any resulting prejudice. Hiltbruner has not made this heightened showing. Had Hiltbruner's counsel objected, the trial court could have sustained the objection (as required by *Barry* and similar case law, *see supra* at p. 6), promptly ordered the prosecutor to stop commenting on the lack of testimony from Hiltbruner, and reminded the jury that it must not use Hiltbruner's silence as substantive evidence of guilt or to prejudice him in any way. We presume the jury would have followed such an instruction. *Gouley*, 19 Wn. App. 2d at 203-04. Thus, we conclude that Hiltbruner has not met the heightened showing required for us to reverse based on prosecutorial misconduct in the absence of an objection.

B. ER 404(b) Evidence

Hiltbruner also argues we should reverse his conviction and remand for a new trial based on improperly admitted evidence that he was unfaithful to Grantham (his longtime girlfriend). Again, we disagree.

At trial, the prosecutor asked Garrison, "Has Mr. Hiltbruner had consensual sex with women who are not his girlfriend?" Garrison replied "yes." Then, during the cross-examination of Grantham, the prosecutor asked her, "To your knowledge, has [Hiltbruner] ever had sex with any other women while you've been dating him?" She, too, answered "yes." Grantham also explained that Hiltbruner "only cheated on me one time," which occurred in 2013. Hiltbruner argues that the trial court erred in admitting this evidence without analyzing whether it should be excluded under ER 404(b) and without reading a limiting instruction to the jury.

Under ER 404(b), evidence of a defendant's other crimes, wrongs, or acts is presumptively inadmissible to "prove character and show action in conformity therewith." *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). But this evidence may be admissible for "other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b). To admit evidence of a defendant's prior bad acts over an ER 404(b) objection, the trial court must conduct a four-part analysis, which requires the court to "(1) find by a preponderance of the evidence the misconduct actually occurred, (2) identify the purpose of admitting the evidence, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value against the prejudicial effect of the evidence." *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009).

Rather than seriously contest Hiltbruner's ER 404(b) argument, the State argues that Hiltbruner failed to preserve the argument by not objecting on that basis below.[2] Washington courts have long recognized that "[a] party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial." *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985). "When the trial court overrules a specific objection and admits evidence, we 'will not reverse on the basis that the evidence should have been excluded under a different rule which could have been, but was not, argued at trial.'" *State v. Korum*, 157 Wn.2d 614, 648, 141 P.3d 13 (2006) (quoting *State v. Ferguson*, 100 Wn.2d 131, 138, 667 P.2d 68 (1983)). Similarly, a defendant who does not request a limiting instruction before the trial court may not argue on appeal that the trial court erred by not giving a limiting instruction. *State v. Stein*, 140 Wn. App. 43, 68-69, 165 P.3d 16 (2007); *see also State v. Russell*, 171 Wn.2d 118, 124, 249 P.3d 604 (2011) ("A trial court is not required to sua sponte give a limiting instruction for ER 404(b) evidence, absent a request for such a limiting instruction.").

Here, Hiltbruner failed to properly assert an ER 404(b) objection at trial or request a limiting instruction regarding the evidence of his infidelity. The record indicates that evidence of Hiltbruner's infidelity was repeatedly discussed by the

[2] On appeal, the State concedes the trial court erroneously admitted evidence of Hiltbruner's infidelity under the open door doctrine. As the State correctly notes, the open door doctrine does not render this evidence of infidelity admissible because it was the State, not Hiltbruner, that first elicited testimony on this subject. We accept the State's concession. *See State v. Olsen*, 187 Wn. App. 149, 158, 348 P.3d 816 (2015) (doctrine applies when "otherwise inadmissible evidence may become admissible *due to the other party's questioning*") (emphasis added); *State v. Jones*, 144 Wn. App. 284, 298, 183 P.3d 307 (2008) (party opens the door to the introduction of otherwise inadmissible evidence when they either (1) introduce evidence of questionable admissibility or (2) are the "first to raise a particular subject at trial") (quoting 5 KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 103.14, at 66-67 (5th ed. 2007)).

parties and trial court throughout the trial, both during sidebars off the record and in front of the jury. Yet Hiltbruner only raised a single objection to this evidence when the prosecutor indicated (outside the presence of the jury) that he would ask Garrison about his knowledge of Hiltbruner's infidelity. Hiltbruner's objection did not reference ER 404(b) or request that the trial court conduct the four-part analysis required to admit evidence that is subject to ER 404(b). And during a later sidebar, Hiltbruner declined to object to the prosecutor asking Grantham about Hiltbruner's infidelity, including her testimony that he was unfaithful once in 2013, because "it probably doesn't rise to the level of 404(b)." Because Hiltbruner failed to assert an ER 404(b) objection at trial or request a limiting instruction, the trial court did not have an opportunity to correct the error Hiltbruner now claims on appeal. *See Demelash v. Ross Stores, Inc.*, 105 Wn. App. 508, 527, 20 P.3d 447 (2001) (purpose of preservation rule is "to afford the trial court an opportunity to correct errors, thereby avoiding unnecessary appeals and retrials").

In his briefing on appeal, Hiltbruner makes no attempt to respond to the State's argument that he has failed to adequately preserve his ER 404(b) argument. Indeed, during oral argument in this case, Hiltbruner's appellate counsel conceded that an ER 404(b) objection "was not made" at trial. Wash. Ct. of Appeals oral argument, *State v. Hiltbruner*, No. 84947-6-I (April 18, 2024), at 20 min., 25 sec. to 20 min., 35 sec. (on file with court). Accordingly, pursuant to RAP 2.5(a), we decline to address the admissibility of evidence of Hiltbruner's infidelity under ER 404(b). *See State v. Garcia*, 177 Wn. App. 769, 785-86, 313 P.3d 422 (2013) (finding waiver where defendant failed to "provide argument or legal

authority supporting our review on any other ground we could address for the first time on appeal under RAP 2.5(a)").

C. Ineffective Assistance of Counsel

Recognizing, as he must, that his trial lawyer failed to properly object to the prosecutor's improper statements and evidence of infidelity, Hiltbruner asserts an ineffective assistance of counsel argument based on those purported deficiencies. Although it is possible that trial counsel's performance was deficient as Hiltbruner claims, we need not reach that issue because Hiltbruner has not shown there is a reasonable probability that the result of the proceeding would have been different had his lawyer objected to the prosecutor's improper argument and successfully asserted an ER 404(b) objection at trial.

A defendant alleging ineffective assistance of counsel must satisfy the two-prong *Strickland* test by showing that (a) "counsel's performance was deficient" and (b) "the defendant was prejudiced by the deficient performance." *In re Pers. Restraint of Crace*, 174 Wn.2d 835, 840, 280 P.3d 1102 (2012) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). "Because the defendant must show both prongs, a failure to demonstrate either prong will end the inquiry." *State v. Wood*, 19 Wn. App. 2d 743, 779, 498 P.3d 968 (2021). To establish the prejudice prong, the defendant must show that "in the absence of counsel's deficiencies, there is a reasonable probability that the result of the proceeding would have been different." *Matter of Lui*, 188 Wn.2d 525, 539, 397 P.3d 90 (2017). A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." *State v. Crawford*, 159 Wn.2d 86, 100, 147 P.3d 1288 (2006) (quoting Strickland, 466 U.S. at 694). Even if counsel's

performance is deficient, a defendant is not entitled to a new trial "if the error had no effect on the judgment." *Id.* at 99 (quoting *Strickland*, 466 U.S. at 691). Instead, the error must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Lui,* 188 Wn.2d at 538-39 (quoting *Harrington v. Richter*, 562 U.S. 86, 104, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011)). "In other words, '[t]he likelihood of a different result must be substantial, not just conceivable.'" *Id.* at 539 (quoting *Harrington*, 562 U.S. at 112).

Hiltbruner's ineffective assistance of counsel arguments fail on the prejudice prong. Notwithstanding the prosecutor's improper conduct and evidence of infidelity, the jury's verdict shows that it found F.F.'s testimony to be credible. *See Mireles*, 16 Wn. App. 2d. at 662 (no prejudice from counsel's failure to object to prosecutor's improper argument because its exclusion would not have changed the fact that "[t]he jury must have believed [the victim's] testimony was credible in order to return a guilty verdict"). When she was interviewed by Ostrom a few weeks after the assault, F.F. provided a comprehensive and consistent account of Hiltbruner's actions. At trial, F.F. similarly testified in detail about how Hiltbruner attempted to force her to have sexual contact with him. F.F. also was willing to quit her job and suffer financially to avoid working with Hiltbruner.

Hiltbruner's version of events, in contrast, is marred by inconsistency. When he was interviewed by Ostrom a few weeks after the assault, Hiltbruner told Ostrom he was never alone with F.F., but F.F. and Garrison both testified that Hiltbruner was alone with F.F. at the bar, where he discussed sexual topics with her, and later that evening in the alley near Pizza Hut, where he grabbed her buttocks. Hiltbruner also told Ostrum he had not talked to Garrison since the night

of the incident, but Garrison testified that he texted Hiltbruner the following afternoon and, instead of denying F.F.'s allegations, Hiltbruner only replied, "So this means you're not going to fix my bike?" Additionally, Hiltbruner was willing to lose his job at Pizza Hut rather than cooperate with the workplace investigation into F.F.'s allegations. And while Grantham testified that Hiltbruner did not leave the bedroom between 3:00 and 5:30 a.m., she acknowledged she fell asleep around 4:00 a.m., which was just prior to when Hiltbruner, according to F.F., left the bedroom to assault her in the living room.

Because Hiltbruner has not shown there is a substantial, and not just conceivable, probability that the result of the proceeding would have been different had his lawyer objected to the prosecutor's improper argument and successfully asserted an ER 404(b) objection at trial, his ineffective assistance of counsel argument based on these alleged deficiencies fails.

D. Cumulative Error

Lastly, Hiltbruner contends that even if the alleged errors at issue here are individually harmless, reversal is required due to their cumulative effect. Under the cumulative error doctrine, we may reverse a conviction where multiple errors deny the defendant a fair trial, even where the individual errors are harmless. *In re Pers. Restraint of Cross*, 180 Wn.2d 664, 678, 327 P.3d 660 (2014). The doctrine does not apply where "the errors are few and have little or no effect on the outcome of the trial." *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 252 (2006). As stated above, Hiltbruner has failed to show that the prosecutor's improper statements or evidence of his infidelity affected the outcome of trial. Because the alleged errors

are few and had little or no effect on the outcome of trial, we conclude that Hiltbruner is not entitled to relief under the cumulative error doctrine.

Affirmed.

Feldman, J.

WE CONCUR:

Díaz, J.

Coburn, J.