63158-6

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NO. 63158-6-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

LARRY D. BAKER,

Appellant.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. ISSUES

1. Is it misconduct for a prosecutor to comment on defendant's failure to corroborate his testimony where the defendant identifies, but does not call, a witness who could provide that corroboration?

2. If the prosecutor's comment was improper, was the issue preserved for appeal when a timely objection was sustained, and there was no request for a curative instructions or a motion for a mistrial?

3. Where the prosecutor's argument about the credibility of a defense witness was based on reasonable inferences from the evidence, was that argument improper?

4. Did the prosecutor improperly disparage counsel by arguing that counsel "knew better" than to argue the police intentionally didn't bring a piece of evidence he requested because it didn't corroborate the victim's testimony when that piece of evidence had already been admitted through a different witness?

5. Did the prosecutor improperly disparage counsel by arguing counsel "knew better" than to imply the police planted the knife that was found near the scene of the rape?

6. Where the prosecutor asked the jury to consider the trauma a seventeen year old girl would have by being raped at knife point in evaluating argued inconsistencies in her testimony, did the prosecutor improperly appeal to the sympathy of the jury?

7. If the prosecutor's comments were improper, is a new trial warranted where defendant did not object or request a mistrial?

8. Where defendant does not show that certain comments were improper, does cumulative error require a new trial?

9. Where the defendant instructs counsel that he wants to waive having the jury instructed on lesser degrees of rape, was counsel ineffective by acceding to the defendant's instructions?

10. Where community custody conditions identical to the ones imposed here have been held to be unconstitutionally vague, must this Court remand the case for imposition of different conditions?

II. STATEMENT OF THE CASE

On the morning of August 19, 2007, the victim was walking to work at the McDonald's on 128th St. in Everett. 1/6 RP 174. As she passed the 4th Avenue Village Apartments, defendant came out and grabbed her arm. Defendant also put a knife to the victim's throat.

> And then he took me over by the carport and he told me to take off my clothes and he pulled me into the bushes and he raped me.

1/6 RP 188-89.

The victim was taken to the hospital where a rape exam was conducted. Four vaginal swabs were collected. The seamen on the swabs was a DNA match for defendant. 1 CP 109.

Defendant was arrested on September 28, 2007. He denied raping anyone. He also denied having sex outdoors at about 8:00 AM in the bushes outside an apartment complex. 2 CP Exhibit 65, p. 35.[1]

At defendant's trial, the first responding police officer described the location of the McDonald's as "about 8th and 128th." 1/6 RP 261.

Defendant testified that he was a social acquaintance of the victim. He said he first met her at a concert, then ran into her several times in the area where she worked and he lived. He said he was with her when she bought marijuana from "G" and smoked it with both of them. 1/9 RP 722.

Defendant testified that he saw the victim while he was driving home from a party on August 19, 2007. He parked and met

the victim in front of the 4th Avenue Village Apartments. 1/9 RP 729. Defendant and the victim walked into a carport because it was raining. 1/9 RP 734. Defendant said he kissed the victim on the neck, and she "started rubbing on my privates." 1/9 RP 736. Defendant then unbuttoned the victim's pants, and she "wiggled them down to her ankles." Defendant unbuttoned his own pants, but then told the victim they had to "find a better place." 1/9 RP 737.

Defendant testified that he and the victim walked out of the carport by the apartments, the victim took off her jacked and laid it on the ground, and took off one leg of her pants. Defendant said he had sex with the victim. 1/9 RP 744.

Defendant called three witnesses to corroborate his testimony. His fiancée testified that in mid-August, 2007, she went with a friend to a bar. When they got there, the friend pointed defendant out to her. At that time, defendant was talking to a girl the fiancée did not know. 1/9 RP 620, 624. When the fiancée went outside, defendant and his friend G were there, but the girl was not. 1/9 RP 626.

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[1] Defendant supplementally designated Exhibit 65, a transcript of the police interview with defendant.

Defendant's friend, Mr. Curtis, testified that he met defendant on several occasions when he was with a girl named Brittany. They were not together long on any of these occasions. 1/9 RP 641, 645.

About a month and a half before the trial, the witness was shown a series of photos by a defense investigator. The witness identified one picture as the girl, Brittany, he had seen with defendant. He also recognized her from seeing her at a McDonald's. 1/9 RP 648-49. The picture he selected was the only one showing a woman in a McDonald's uniform. 1/9 RP 657. When asked which McDonald's, the witness testified, "The one on 132nd, like around from 19th. You know, further down 128th. You know 128th turns into 132nd." 1/9 RP 653.

Defendant then called the woman who went to the bar with his fiancée. She identified a photo of the victim as the woman she saw with defendant in the bar. 1/9 RP 674.

Before argument, the court asked counsel about instructions on lesser degrees of rape. Counsel recommended that the lesser instructions be give, but defendant did not agree. 1/13 RP 812. The court then went over this with defendant. Defendant said he had thoroughly discussed the issue with counsel, understood the

risk of not having lesser degree instructions, but wanted the defense to be "all or none." 1/13 RP 813-15. The court then made the following findings:

> I'll find for purposes of the record that the defendant is going against the advice of his attorney and is asking the court not to give a lesser included offense of either second or third degree rape, which are against his interests, and he's doing that on his own, and he's making a free, intelligent decision to do so.

1/13 RP 815.

During argument, the prosecutor said of witness Curtis's testimony:

> Did you remember which McDonald's he was talking about, though? It was the one on 128th heading east where it turns into 132nd and 35th, which is north Mill Creek, south Everett. It's the wrong McDonald's, folks. He wasn't talking about the McDonald's that Brittany words at. It's the wrong place. It's the wrong girl.

1/13 RP 833.

Later, the prosecutor asked, "who and where is G?" 1/13 RP 834. Defendant objected, saying "That's shifting of the burden." The court ruled: "I'll sustain the objection to the extent that the prosecuting attorney is suggesting that the defendant has a duty to produce evidence. To that extent, and only to that extent, I'll sustain the objection." 1-1/ RP 835. Defendant did not move to

strike the comment, request further instructions, or move for a mistrial.

Defendant argued, "I told you in opening that I would prove to you that to find a knife as it was found is virtually impossible. I now want to amend that. It is totally impossible." 1/13 RP 854.

Later, defendant argued:

> I asked to bring the panties in. and the reason I asked that the panties be brought in is because if what she's saying is true and she kept the jacket on at all times and took the pants off and took them off and she was on the ground, her butt is touching the dirs. And if her butt is touching the dirt, that dirt is going to get on her butt. And if she puts the panties back on, the dirt is going to be on her panties. They didn't bring them in because that reason. Because there is none.

1-13 RP 866.

Then defendant argued:

> So when Raymond Curtis says [the McDonald's] is at 132nd by 19th that turns into 128th, that's exactly where it is. He's not talking about a different McDonald's. There is no other McDonald's there. That was a snow job you were told in closing statement by the State.

1-13 RP 869.

In rebuttal, the prosecutor reminded the jury that what was said in argument, "about the impossibility of various things being a certain way, you weigh what he said when you go back into the jury

room. In particular, the description of both the rape from Brittany and the finding of the knife." 1/13 RP 876.

The prosecutor then said:

> Well folks, the panties are right here in the rape kit. They've been here from the get-go. They came in through Barb Haner, State's 52. You want to take a look at those panties? You want to look for that sand? Do it. They're in evidence.
>
> So a suggestion that the police are hiding things from you or planting evidence is BS, and [counsel] knows better than to make those kind of arguments.

1/13 RP 876.

There was no objection.

The prosecutor then argued:

> [Defense counsel's] right in regards the fact that when I come before you and say Brittany may not know exactly where things happened in that breezeway because it probably was pretty traumatic for a 17-year-old kid to have this guy essentially jump out of the bushes at you and put a razor blade knife to your throat. I can't imagine as a child of that age anything more traumatic. And now the defense has the hutzpah [sic.] and come in here and say she's not accurate enough about where various things happened, where she put her clothes or where she was laid down in the dirt when she was raped, well, I'll leave that up to you whether that's reasonable or not.
>
> But I would suggest to you that when you go back there, you put yourself in her shoes. You put yourself in the position of being a 17-year-old girl walking to work at that time of day and somebody puts a razor blade to your throat and then a year and a half later have somebody just grill you and grill you and grill you

> about details, insignificant details and significant details, but just going after you, and when you get something either incorrect or inconsistent, say ah-ha, you're lying.

1/13 RP 881.

There was no objection, motion to strike, or motion for a mistrial.

The jury convicted defendant of first degree rape. It found he was armed with a deadly weapon at the time. 1/15 RP 894, 1 CP 64, 65. The court sentenced defendant to a standard range sentence with a deadly weapon enhancement. 3/2 RP 910, 1 CP 18. The court also imposed community custody conditions, including, inter alia, "Do not possess or access pornographic materials, as directed by the supervising Community Corrections Officer," and "Do not possess or control sexual stimulus material for your particular deviancy as defined by the supervising Community Corrections Officer and therapist except as provided for therapeutic purposes." 1 CP 26.

III. ARGUMENT

A. INTRODUCTION.

Defendant attacks the closing and rebuttal arguments of the State. His first attack mischaracterizes the comments of the State about defendant's failure to call a witness as a "missing witness"

issue. Since the State was arguing about the lack of credibility of the witnesses defendant did call to corroborate his story, the comment of "Where's G?" did not ask the jury to infer that G's testimony, had he been called, would have been adverse to defendant. In any event, defendant's timely objection to this comment was sustained. He did not request any curative instruction or move for a mistrial. Defendant has not preserved this issue for appeal.

Defendant's second attack is on the State's comments about the credibility of one of defendant's witnesses. Defendant's failure to object to the argument waived this issue. On the merits, the State's argument drew reasonable inferences from the evidence and was not a statement of the prosecutor's personal opinion of that witness's credibility.

Defendant's next attack is a claim that his counsel was disparaged by the State. Again, the failure to object waived this issue. On the merits, counsel accused the police of not bringing a piece of evidence he had requested. That evidence was already in the court room and had been admitted during the testimony of a previous witness. Also, counsel argued that it was impossible for the police to have found the knife where and how they said they

found it. The comments that those arguments were "BS" and that counsel knew better," were fair comments on counsel's argument.

After counsel attacked the credibility of the victim, the State argued that the jury should "put itself in her shoes" when assessing her credibility. This was a direct response to the arguments of counsel, not an attempt to have the jury decide the case based on sympathy for the victim. To the extent it was an improper comment, reversal is not required where any prejudice could have been overcome by a curative instruction, and defendant failed to object or request such instruction.

Since only the comment on defendant's failure to call a corroborating witness was preserved for appeal, no cumulative errors require a new trial.

After attacking the State's arguments, defendant attacks his counsel for acceding to his request to not have the jury instructed on the lesser degrees of rape. Defendant made it crystal clear on the record that he understood he was entitled to those instructions, his counsel advised him to request those instructions, but he did not want the jury so instructed. Counsel was not ineffective for acceding to defendant's wishes in this area. A defendant is entitled to determine the desired outcome of litigation. Counsel's abiding

by the defendant's wishes does not call into question his professional judgment.

Defendant's last argument is that two of the conditions of community custody are unconstitutionally vague. The Supreme Court has ruled identical conditions were unconstitutionally vague. This Court is bound by the decisions of the Supreme Court.

B. STANDARD OF REVIEW.

"A trial court's ruling on a claim of prosecutorial misconduct is reviewed under an abuse of discretion standard." State v. Cheatam, 150 Wn.2d 626, 652, 81 P.3d 830 (2003).

> Reversal is not required if the error [in argument] could have been obviated by a curative instruction which the defense did not request. 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. Gentry, 125 Wn.2d 570, 596, 888 P.2d 1105 (1995).

"The State is generally afforded wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence. State v. Gregory, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006).

To prevail on a claim of ineffective assistance of counsel, defendant must show (1) that counsel's representation fell below an objective standard of reasonableness, and (2)there is a reasonable probability that but for counsel's errors, the result of the proceeding would have been different. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 12541 (1995).

C. THE STATE DID NOT INVOKE THE MISSING WITNESS DOCTRINE.

Defendant claims that the prosecutor improperly invoked the missing witness doctrine. Brief of Appellant 12-15. This mischaracterizes the State's argument.

> Under this [missing witness] doctrine, where a party fails to call a witness to provide testimony that would properly be a part of the case and is within the control of the party in whose interest it would be natural to produce that testimony, and the party fails to do so, the jury may draw an inference that the testimony would be unfavorable to that party.

Cheatam, 150 Wn.2d at 652.

Here, before defendant testified, he called three witnesses to corroborate his testimony that he knew the victim socially. The first witness, defendant's fiancée, testified she saw defendant talking to a girl one time in a bar named Shotze's. She did not recognize the girl, 1/9 RP 623-627.

The second witness, Mr. Curtis, testified that defendant introduced him to a girl at a 7-Eleven where he talked to defendant for a few minutes. 1/9 RP 641-43. A few weeks later, the witness again saw defendant "with the same girl." 1/9 RP 645. Months later, the witness picked the victim's picture from an array of pictures shown to him by the defense investigator. He identified the woman in the picture as the one he had seen with defendant. 1/9 RP 648. The identification made the witness recall that he had seen that woman working at a certain McDonald's restaurant because she was wearing "a McDonald's thing" in the photo. 1/9 RP 641-49.

The third witness had gone to Shotze's with defendant's fiancée. She saw defendant talking to a girl. She identified the girl as the victim by viewing a photo of the victim. 1/9 RP 670-74. This was the only time that witness saw the girl she identified in the photo. 1/9 RP 676.

Defendant testified that he met the victim socially several times. 1/9 RP 706, 708, 711, 714, 718. Defendant said the victim knew defendant's friend "G." Defendant was with G when the victim approached G to purchase marijuana. The victim then hung

out with defendant and G and "she got what she had and we smoked some of his and she left." 1/9 RP 712-13.

Defendant testified that he met the victim again at Shotze's. 1/9 RP 714, 718. At Shotze's, G was waiting for defendant in G's car. Defendant went out and got into G's car to "smoke weed." The victim joined them in the car, and they were all three in the car for "maybe five, ten minutes." 1/9 RP 722.

In closing, after discussing the witnesses defendant called to corroborate his testimony, the prosecutor said:

> Which leads to my next question is who and where is G? You've heard about G, the one person who can actually put the two of these together. And what I mean by that, the defendant and [the victim] in an unambiguous fashion. I sold weed to her, she bought from me and I was with these people on several occasions when marijuana was purchased and they smoked.

1/13 RP 834.

After an objection was sustained, the prosecutor said:

> Okay, the defendant has no burden of putting anything on, but wouldn't it have been interesting to hear from G.
>
> What you get are people who are shown incredibly suggestive montages a year after the fact, after they've seen some girl with the defendant in circumstances that last no more than a few moments.

1/13 RP 835.

The State was not trying to invoke the missing witness doctrine. Rather, "Lack of a particular witness' testimony might often indicate a weakness in the case which can properly be called by counsel to the jury's attention." Burgess v. United States, 440 F.2d 226, 235 (D.C. Cir. 1970).

> When a defendant advances a theory exculpating him, the theory is not immunized from attack. On the contrary, the evidence supporting a defendant's theory of the case is subject to the same searching examination as the State's evidence. The prosecutor may comment on the defendant's failure to call a witness so long as it is clear the defendant was able to produce the witness and the defendant's testimony unequivocally implies the uncalled witness's ability to corroborate his theory of the case.

State v. Contreras, 57 Wn. App. 471, 476, 788 P.2d 1114 (1990).

In Contreras, the defendant testified that he was with a female friend at Longacres racetrack when the victim was attacked. He said that two other friends saw him at various times during the evening. The defendant called the two other friends, but did not call the female friend. Id. at 472-73. The Court found no impropriety in the prosecutor's arguing, "where is she? You have the obvious witness that you would expect to be called not here[.]" Id. at 476.

Here, defendant's theory of the case was that he had met the victim several times and had smoked marijuana with her on at least two occasions. Based on that relationship, when the victim saw defendant while walking to work, she initiated sexual contact and had consensual intercourse.

The witnesses defendant called to corroborate his relationship with the victim only had limited contact with the woman they saw with defendant. Defendant's fiancée was not asked if the woman in a picture of the victim was the woman she saw with defendant. The other two corroborating witnesses picked the victim's photo out of very suggestive photo arrays.

Defendant claimed G knew the victim before defendant met her, sold drugs to the victim, and was with both the victim and defendant in conversation and in smoking marijuana for extended periods of time. It was not improper for the prosecutor to call attention to the weakness of defendant's corroboration by asking why G did not testify.

D. THE PROSECUTOR DID NOT GIVE HIS PERSONAL OPINION OF THE CREDIBILITY OF A DEFENSE WITNESS.

Defendant next asserts that the prosecutor committed misconduct by "opining Curtis's identification of B.C. in the montage

was not accurate." Brief of Appellant 16. The prosecutor did not express his personal opinion.

> It is improper for a prosecutor personally to vouch for the credibility of a witness. Prosecutors may, however, argue an inference from the evidence, and prejudicial error will not be found unless it is "clear and unmistakable" that counsel is expressing a personal opinion.

State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), quoting State v. Sergent, 40 Wn. App. 340, 344, 698 P.2d 598 (1985).

In Brett, the prosecutor argued that a reason the jury might find one witness credible was that "she was watching her husband of 33 years being blown away by a .410 shotgun. And maybe that's the kind of scenario of events that she's going to remember fairly well[.]" The Supreme Court found "the prosecutor was drawing an inference from the evidence as to why the jury would want to believe one witness over another." Brett, 126 Wn.2d at 175.

Here, the prosecutor argued the jury should not find Mr. Curtis' picking the picture of the victim as the woman he had seen the defendant with because the witness was first ready to pick another picture because the woman had bruises and black eyes. He then saw the picture of the victim in a McDonald's uniform and picked that one because he thought he had seen her at a certain

McDonald's. The prosecutor argued "It's the wrong place. It's the wrong girl." 1/13 RP 833. It was not "clear and unmistakable" that the prosecutor was expressing his personal opinion. Rather, the prosecutor was "drawing an inference from the evidence."

E. THE PROSECUTOR DID NOT ARGUE FACTS NOT IN EVIDENCE.

Defendant claims that the prosecutor's argument that his witness had the wrong McDonald's was "unsupported by the evidence." Brief of Appellant 16. Defendant misstates the record.

The victim said she worked at the McDonalds on 128th Street. 1/6 RP 174. The first responding officer testified that he was dispatched to the McDonald's at "about 8th and 128th." 1/6 RP 261.

Defendant's witness testified that the woman in the photograph worked at the McDonald's "on 132nd, like around from 19th."

These intersections are different. Arguing that the witness had the wrong McDonalds was arguing an inference from the evidence.

F. THE PROSECUTOR DID NOT DISPARAGE DEFENSE COUNSEL.

Defendant argued that it was impossible for the police to have found the knife where and how the officer described finding it. 1/13 RP 854. Defendant then argued the reason the police didn't bring in the victim's panties was because there was no dirt on the panties. 1/13 RP 866. In response, the prosecutor argued "So a suggestion that the police are hiding things from you or planting evidence is BS, and [counsel] knows better than to make those kinds of arguments." 1/13 RP 876.

Defendant now argues that the prosecutor's rebuttal disparaged counsel and "exceeded the bounds of proper response by arguing defense counsel should have known better than to proffer such 'BS.'" Brief of Appellant 19-20. The rebuttal argument by the prosecutor was an appropriate response to the arguments of counsel.

> The prosecutor may reply to defense arguments even if the remarks might otherwise be improper. But the remarks may not go beyond what is necessary to respond to the defense and must not bring before the jury matters not in the record, or be so prejudicial that an instruction cannot cure them.

State v. Dykstra, 127 Wn. App. 1, 8, 110 P.3d 758 (2005), review denied, 156 Wn.2d 1004 (2006).

As to the argument that the police didn't bring the victim's panties because they would not have corroborated her testimony, the prosecutor pointed out that the panties were already in evidence and invited the jury to examine them. 1/13 RP 876. The prosecutor's comment that counsel's argument that the police were hiding the panties "was BS" was clearly an appropriate response to that argument.

As to the inference that the police planted the knife, again, the prosecutor's argument was an appropriate response. The prosecutor did not imply superior knowledge or refer to evidence that was not in the record. While the characterization of counsel's argument as "BS" might have more articulate, it was not improper.

A comparison of the prosecutor's comments here with those found to be improper in the cases defendant cites underscores that there was no impropriety. See Bruno v. Rushen, 721 F.2d 1193, 1195 (9th Cir. 1983) (the defense is Judas in this case); Walker v. State, 790 A.2d 1214, 1218 (Del. 2002) (rapid-fire cross-examination to confuse the witness; don't let counsel's lack of respect for the victim color the way you look at the evidence); People v. Thompson, 313 Ill. App.3d 510, 514, 730 N.E.2d 118 (2000) (accused counsel of trying to "fix" the case and presenting

fabricated testimony); State v. Negrete, 72 Wn. App. 62, 66-67, 863 P.2d 137 (1993), review denied, 123 Wn.2d 1030 (1994) (counsel is being paid to twist the words of the witnesses); and United States v. McLain, 823 F.2d 1457, 1462 (11th Cir. 1987), overruled on other grounds by United States v. Lane, 474 U.S. 438 (1986) (counsel intentionally misleading jurors and lying in court).

The one comment, not objected to by counsel, did not disparage counsel.

G. THE PROSECUTOR DID NOT INVITE THE JURORS TO DECIDE THE CASE BASED ON SYMPATHY FOR THE VICTIM.

Defendant asserts that in arguing that the jurors should put themselves in the shoes of the victim when judging her credibility, the prosecutor invited them "to decide the case based on sympathy for [the victim] rather than to rationally evaluate her credibility." Brief of Appellant 22. The argument of the prosecutor was not improper.

Defendant and the victim presented starkly different versions of what happened on the morning of August 19, 2007. The victim testified she had been raped at knife point. Defendant testified that the sex was consensual and initiated by the victim. There were some inconsistencies in the victim's testimony about where the

events took place. The juror's evaluation of the relative credibility of the victim and the defendant would determine the case.

The prosecutor anticipated that defendant would argue that inconsistencies in the victim's testimony about were the intercourse actually took place should lessen her credibility. He argued that the jury should evaluate her testimony from the perspective of a young woman who had been raped at knife point having to recall the details of that event. It would have been preferable for the prosecutor to make this argument without asking the jurors to put themselves in the victim's shoes. However, since the argument was couched in terms of evaluating the credibility of the victim, it was not improper. See State v. Gregory, 158 Wn.2d 579, 808, 147 P.3d 1201 (2006) (asking the emotional cost of victim's testimony to support her credibility not improper appeal to sympathy).

H. DEFENDANT DID NOT PRESERVE ISSUES OF IMPROPER ARGUMENT FOR APPEAL.

Generally, when a defendant does not object to argument, the issue is not preserved for appeal unless the remarks are "so flagrant and ill-intentioned that no curative instruction could have obviated the prejudice engendered by the misconduct." State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). Comments

are flagrant and highly prejudicial when they encourage a verdict that was not based on properly admitted evidence. Belgarde, 110 Wn.2d at 507-08. If a defendant does object, and the objection is sustained, he waived the issue unless he requests curative instructions or a mistrial. Negrete, 72 Wn. App. at 67-68.

Defendant did not object to the arguments that the witness identified the wrong McDonald's, the counsel's suggestions of police misconduct were BS and counsel knew better, or that the jurors should consider the victim's credibility from the perspective of a traumatized 17-year old woman. None of these remarks invited the jury to decide the case on anything other than the evidence. They were not so flagrant that any potential prejudice could not have been cured by an instruction. Clearly, during the argument, defendant did not perceive that the comments were improper. See State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990) (failure to request a curative instruction or mistrial "strongly suggests . . . that the argument . . . did not appear critically prejudicial to an appellant in the context of the trial"). Defendant did not preserve these issue for appeal.

The only remark defendant now challenges that he did object to was the question, "Where's G." There, the court sustained

the objection on the grounds stated. Defendant made no motion to strike, asked for no curative instructions, and did not move for a mistrial. He did not preserve this issue.

I. DEFENDANT HAS NOT SHOWN THAT THE COMMENTS OF THE PROSECUTOR HAD ANY PREJUDICIAL EFFECT.

When making a claim of prosecutorial misconduct, "[t]he defense bears the burden of establishing both the impropriety and prejudicial effect." In re Detention of Law, 146 Wn. App. 28, 50, 204 P.3d 230 (2008). As discussed above, defendant has not established the impropriety. To the extent this Court determines that there was some impropriety, defendant has not shown prejudice.

"In analyzing prejudice, we do not look at the comments in isolation, but in the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury." State v. Warren, 165 Wn.2d 17, 28, 195 P.3d 940 (2008).

As in Swan, defendant's lack of objection, motion to strike, or request for a mistrial "strongly suggests" that defendant himself did not consider the remarks prejudicial. Swan, 114 Wn.2d at 661. Further, the court instructed the jury "The lawyers' remarks are not evidence. . . . You must disregard any remark, statement, or

argument that is not supported by the evidence or the law[.]" CP 46. It also instructed the jurors, "You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference." CP 47. The jury is presumed to follow those instructions. Warren, 165 Wn.2d at 29.

Given the prosecutor's total argument, defendant has not established that the isolated comments he identifies on appeal resulted in prejudice.

J. DEFENDANT HAS NOT SHOWN THERE WAS CUMULATIVE ERROR.

Defendant claims "the four instances challenged here combined to deny [defendant] a fair trial, and this Court should reverse based on the combined effects of the misconduct." Brief of Appellant 24. Mere challenges do not demonstrate misconduct or prejudice.

The cumulative error doctrine "applies only if there were several trial errors, none of which standing alone is sufficient to warrant reversal, that when combined may have denied the defendant a fair trial." State v. Hartzell, ____ Wn. App. ____, ____ P.3d ____, 2009 WL 3807645 (2009). Here, defendant has shown only one argument that was error. An objection to that argument

was sustained. "Because the defendants have not shown there were several trial errors, reversal based on cumulative error is not warranted. Hartzell.

K. DEFENDANT DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL.

Despite the advice of counsel to have the jury instructed on the lesser degrees of rape, defendant, himself, insisted on an "all or nothing" defense. 1/13 RP 812-815. The court had an extensive colloquy with defendant. It then entered the following:

> I'll find for purposes of the record that the defendant is going against the advice of his attorney and is asking the court not to give a lesser included offense of either second or third degree rape, which are against his interests, and he's doing that on his own, and he's making a free, intelligent decision to do so.

1/13 RP 815.

Defendant now claims the performance of counsel was deficient because counsel acceded to his decision on the desired outcome of the trial. Defendant is wrong.

The Supreme Court has considered a similar issue and determined that abiding by the request of a defendant to not call mitigation witnesses did not constitute deficient performance.

> Even had defense counsel based his decision not to call the witnesses solely on petitioner's request, abiding by that request would not imply that reasonable professional judgment was absent.

> Obviously, defense counsel's judgment may include the wishes of a defendant.

In re Petition of Jeffries, 110 Wn.2d 326, 332, 752 P.2d 1338 (1988), cert. denied, 479 U.S. 922 (1986).

Likewise, there was no lack of reasonable professional judgment in not asking for the instructions on lesser degrees of rape here.

Further, defendant has not shown prejudice. In this instance, defendant would have to show that the court would likely have given the instructions had counsel requested them, despite defendant's objections. McFarland, 127 Wn.2d at 334. This is a showing defendant cannot make.

The court was clearly aware of the disagreement between counsel and the defendant over whether to request instructions on lesser degrees of rape. The court informed defendant that not having the instructions was "against his interests[.]" 1-13 RP 815. There is nothing in the record to indicate that the court would have agreed to give the instructions had counsel requested them over the objections of the defendant.

The Supreme Court has determined that a court has no duty to sua sponte give lesser included instructions over the objections

of the defendants. State v. Hoffman, 116 Wn.2d 51, 112-13, 804 P.2d 577 (1991).

The United States Supreme Court has cautioned "[courts] should not 'force any defense on a defendant in a criminal case', particularly when advancement of the defense might 'end in disaster.'" North Carolina v. Alford, 400 U.S. 25, 33, 91 S.Ct. 160, (1970), quoting Tremblay v. Overholser, 199 F. Supp. 569, 570 (D.C. 1961).

Since defendant has not shown that counsel's performance was deficient or that he suffered prejudice because of the asserted deficiencies, defendant has not shown he received ineffective assistance of counsel.

L. THE TWO CONDITIONS OF COMMUNITY CUSTODY RELATING TO POSSESSION OF PORNOGRAPHY AND SEXUAL STIMULUS MATERIAL MUST BE REVERSED.

Defendant claims two of the conditions of community custody imposed by the court were unconstitutionally vague. Brief of Appellant 36-38. The Supreme Court has decided that issue in defendant's favor. State v. Bahl, 164 Wn.2d 739, 758, 761, 193 P.3d 672 (2008). This Court is bound by that decision. State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984). The sentence

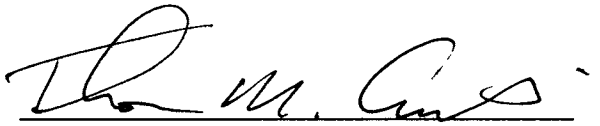
must be reversed and remanded for re-sentencing. Bahl, 164 Wn.2d at 762.

IV. CONCLUSION

The judgment should be affirmed. The case should be remanded for re-sentencing without the community custody conditions relating to possession of pornography and possession of sexual stimulus material.

Respectfully submitted on December 8, 2009.

JASON J. CUMMINGS
Snohomish County Prosecuting Attorney

By: 

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