IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JACK DANIEL VESS, Appellant.	No. 39538-0-II UNPUBLISHED OPINION

Worswick, A.C.J. — Jack Vess was convicted by a jury of second degree rape and first degree incest against his daughter, D.V. Vess appeals, arguing that (1) the trial court erred by refusing to grant a mistrial, (2) the State improperly shifted the burden of proof during closing argument, (3) the trial court denied his right to a jury trial by finding him to be a persistent offender by a preponderance of the evidence, and (4) his sentence as a persistent offender violated his right to equal protection. Vess further asserts numerous errors in his statement of additional grounds (SAG).[1] We affirm.

FACTS

A jury convicted Vess of second degree rape and first degree incest against his adult daughter, D.V. The crime occurred at Vess's home. On the evening of July 12, 2008, D.V. came from Clackamas, Oregon to visit Vess's home in Yacolt, Washington. There was a small

[1] RAP 10.10.

gathering there, with participants drinking, riding all terrain vehicles, and singing karaoke. D.V. drank heavily. Vess also got drunk. During the karaoke, Vess started to fall asleep and D.V. helped him upstairs to his bed. Vess lay down and asked D.V. to lie next to him so they could talk. D.V. fell asleep on the bed. When she woke, she was naked and Vess was having intercourse with her. She initially pretended she was still asleep, but as the assault continued she stood and screamed at him. D.V. then dressed and fled the house.

D.V. got in her car and drove back toward Oregon. While driving, D.V. called her ex-boyfriend Michael Raymond and told him what happened. A police officer stopped D.V. for speeding around 2:20 AM on July 13, and she told the officer her father had just raped her and "he's done it before."[2] 3 Report of Proceedings (RP) at 246. This encounter was recorded using a police dashboard video camera. The officer called an ambulance which took D.V. to the hospital. A sexual assault exam at the hospital revealed no evidence of bodily fluids or lubricant, and no tearing, bruising or other injury, but did find blood on D.V.'s cervix.

Later that morning, the police executed a search warrant on Vess's house. During the execution, Detective Harper interviewed Vess. Detective Harper asked Vess who had been at the house on July 12, and Vess told him. Without further prompting, Vess continued with a narrative response, telling Detective Harper that he had gone to sleep and had been awakened by D.V. screaming at him. Vess said he had not known D.V. was in the room before she woke him. Detective Harper then read Vess his *Miranda*[3] rights. Vess said he understood his rights.

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[2] Vess was convicted of first degree sex abuse against D.V. in Multnomah County, Oregon, in 1993, when D.V. was under 12 years old.

[3] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Detective Harper then continued to interview Vess about the incident. After the interview, the police arrested Vess. Officers took DNA swabs from Vess while booking him into jail.

Two days after the rape, D.V. spoke with Detective Kevin Harper. Because she was ashamed to admit that she had been awake and had not initially resisted the assault, D.V. told Detective Harper that she had slept through most of the assault. After several months, D.V. corrected her statement, telling Detective Harper that she had been awake but had not resisted at first.

A forensic exam revealed blood on the crotch of the shorts D.V. had been wearing the night of the assault. A penile swab from Vess contained DNA from at least three individuals. Both Vess and D.V. were possible contributors of the DNA in this sample. The test results showed that only one in 2,700 people could have been a contributor to this sample.

Before trial, the trial court held a CrR 3.5 hearing to determine the admissibility of Vess's statements to Detective Harper. The court found that Vess was in custody and should have been read his rights before Detective Harper asked who had been at the house, excluding Vess's answer to that question. But the court found that the information Vess volunteered without being asked was admissible. The court further found that Vess knowingly waived his rights after they were read to him, making his post-*Miranda* statements admissible.

On the first day of trial, the State amended the information adding an alternative means of committing second degree rape by engaging in sexual intercourse when the victim was "physically helpless or mentally incapacitated." Clerk's Papers (CP) at 12. Vess objected, rejecting the possible remedy of a continuance and asking the court to require the State to proceed under its

original information. The trial court found that the amendment was not prejudicial and allowed the State to file the amended information.

Also on the first day of trial, the parties notified the court that they had reached a stipulation regarding D.V.'s history of being sexually and physically abused. The parties agreed that the State could admit evidence that D.V. had suffered from sex abuse and domestic violence in the past, but could not reveal the perpetrator.

At trial, Raymond volunteered unasked for information on direct examination and the court admonished him to respond to the questions only and ordered him not to discuss prior sexual contact between Vess and D.V. In spite of this order, Raymond testified that D.V. told him that her father raped her "again." Vess immediately moved for a mistrial. The court denied Vess's motion, finding that the reference to Vess's sexual history with D.V. was brief and not deliberately elicited by the State. The court stated that if it happened again, the court would have no choice but to grant a mistrial. The court recommended against a curative instruction because it would highlight the testimony, but stated that it would give such an instruction if Vess wanted one.

Later at trial, the State introduced the police video showing D.V.'s traffic stop after leaving Vess's home, and played it for the jury. Early in the video, when the investigating officer asked, "where did this happen?" D.V. said, "he's done it before (inaudible). God." 3 RP at 246. Defense counsel did not object to this portion of the video.

On the fourth day of trial, a juror informed the court that he was unable to perform his duties because he was unable to continue presuming the defendant innocent. The juror stated that

he had not shared these misgivings with the other jurors. Vess moved for a mistrial on this basis. The trial court denied the mistrial, finding that there was no basis to believe that the juror had lied and discussed his misgivings, so there was no reason to disqualify the entire panel. After consulting with his client, defense counsel requested that the juror be replaced with an alternate, which the court did.

During its closing argument, the State highlighted the DNA evidence. The State pointed out that only one in 2,700 people could have provided the DNA found on Vess's penis, including Vess and D.V. The State argued that even though it was possible that someone other than D.V. had been a contributor, there was no evidence suggesting that Vess had had sex with anyone else. The State repeated this argument on rebuttal. Defense counsel did not object to this argument at any time. Moreover, the State clarified several times during closing that the State had the burden to show Vess's guilt. During Vess's closing argument, defense counsel argued that the State had not proved that sexual intercourse occurred, but that if it had occurred, the State had failed to prove a lack of consent. The jury found Vess guilty of second degree rape and first degree incest, as charged in the amended information.

At sentencing, the trial court heard evidence that Vess had been convicted of first degree sex abuse against D.V. in Oregon. The court found by a preponderance of the evidence that Vess had been convicted of this crime. The court also found that this crime was comparable to first degree child molestation in Washington. Finding that the Washington persistent offender act applied, the court sentenced Vess to a mandatory term of life without parole for the rape offense, and to a concurrent sentence of 75 months to life for the incest offense.

ANALYSIS

I. Refusal to Grant a Mistrial

Vess contends that the trial court erred by refusing to grant a mistrial after Raymond testified as to Vess's sexual history with D.V. This court reviews the refusal to grant a mistrial for abuse of discretion. *State v. Greiff*, 141 Wn.2d 910, 921, 10 P.3d 390 (2000). A mistrial is only appropriate when the defendant was so prejudiced that only a new trial can ensure a fair trial. *State v. Whitney*, 78 Wn. App. 506, 515, 897 P.2d 374 (1995). To determine whether an error was prejudicial enough to warrant a mistrial, this court examines "(1) the seriousness of the irregularity; (2) whether it involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard it." *Greiff*, 141 Wn.2d at 921 (citing *State v. Hopson,* 113 Wn.2d 273, 284, 778 P.2d 1014 (1989)).

Here, Raymond testified that D.V.'s father had raped her "again," in violation of the trial court's order. To argue that this testimony required a mistrial, Vess relies on *State v. Escalona*, 49 Wn. App. 251, 742 P.2d 190 (1987). There, Division One of this court held that a witness's statement that the defendant had a criminal record and had stabbed someone before warranted reversal. *Escalona*, 49 Wn. App. at 256. The facts of *Escalona* are distinguishable, however.

In analyzing the issue before us, we first characterize the statement by Raymond to be serious, but not extremely so. The offending testimony here was less direct and more brief than the statement in *Escalona.* Raymond said only that D.V.'s father had raped her "again." Without the word "again," Raymond's testimony would have been acceptable. This statement was brief enough that, unlike in *Escalona*, it was unlikely to have impressed itself on the minds of the

jurors. *See* 49 Wn. App. at 255.

The second factor we must consider is whether the statement was cumulative. *Greiff*, 141 Wn.2d at 921. There was no other evidence offered at trial regarding the prior sexual contact between Vess and D.V. The trial court here had excluded the very evidence that Raymond testified to. The evidence was not cumulative. This factor weighs against the State.

The third factor we must consider is whether the trial court properly instructed the jury to disregard the offending testimony. *Greiff*, 141 Wn.2d at 921. Here, the trial court recommended against a curative instruction because it would highlight the improper testimony, and no such instruction was given. This factor weighs against the State.

The final step we must take in reviewing a refusal to grant a mistrial is to analyze the strength of the State's case against Vess, considered "against the backdrop of all the evidence." *Escalona*, 49 Wn. App. at 254. The State's case against Vess was very strong and included the victim's testimony and DNA evidence. D.V.'s testimony was unequivocal. The DNA analysis showed that only one in 2,700 people could have contributed to the DNA on Vess's penis, and D.V. was one such possible contributor. The officer who stopped D.V. the night of the assault testified that D.V. was very upset at the time. The demeanor of D.V. is visible on the video recording taken by the officer that night, which showed D.V. extremely distressed and with her shorts unzipped. Viewing Raymond's improper remark against the wealth of evidence against Vess, we hold that Vess was not denied his right to a fair trial. The trial court did not abuse its discretion in refusing to grant a mistrial. Vess's argument on this point fails.

II. Burden of Proof

Vess next contends that the State, in closing argument, impermissibly shifted the burden of proof to Vess. "Allegedly improper statements should be reviewed in the context of the entire argument, the issues in the case, the evidence addressed in the argument, and the instructions given." *State v Gregory*, 158 Wn.2d 759, 810, 147 P.3d 1201 (2006). And the State "enjoys wide latitude 'in drawing and expressing reasonable inferences from the evidence.'" *Gregory*, 158 Wn.2d at 841 (quoting *State v. Gentry*, 125 Wn.2d 570, 641, 888 P.2d 1105 (1995)). The State may comment on the lack of evidence to support the defendant's exculpatory theory, but may not imply that the defendant had a duty to present evidence. *See State v. Anderson*, 153 Wn. App. 417, 428, 220 P.3d 1273 (2009); *cf. State v. Blair*, 117 Wn.2d 479, 491, 816 P.2d 718 (1991).

Here, the State argued that Vess's theories (that the DNA could have come from a third person or from secondary transfer) were unsupported by evidence. The State did not say that Vess was required to present evidence. Rather, the State argued that because Vess's theories were unsupported by evidence, they did not create a reasonable doubt as to his guilt. The State, moreover, reiterated three times that it bore the burden of proof.

Vess's citation to *State v. Fleming*, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996) is inapposite because that case is factually distinguishable from the instant case. *Fleming* was a rape case in which a prosecutor argued that to find the defendants not guilty, the jury was required to find that the victim either lied or fantasized the rape, and that if there had been any evidence of such facts, the defendants would have presented it. 83 Wn. App. at 213-14. Division One of this court found that these comments were flagrant and ill-intentioned and that these comments shifted the burden of proof to the defendants. 83 Wn. App. at 214. But here, the State argued that

Vess's theories on the DNA evidence failed to create a reasonable doubt, implicitly acknowledging the State's burden. These statements did not imply that Vess had a duty to present evidence, and were thus proper comments on the lack of evidence supporting Vess's exculpatory theory. Vess has failed to show that the comments at issue impermissibly shifted the burden of proof, and his argument on this point fails.

III. Rights at Sentencing

i. Right to Jury Trial

Vess argues that the trial court violated his right to a jury trial by finding him to be a persistent offender by a preponderance of the evidence. Vess argues that under *Apprendi v. New Jersey,* 530 U.S. 466, 477, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), *Blakely v. Washington*, 542 U.S. 296, 304-05, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), and *Ring v. Arizona*, 536 U.S. 584, 609, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), he was entitled to have his past convictions proved beyond a reasonable doubt to a jury.

Vess was sentenced to incarceration for life without the possibility of early release under the persistent offender accountability act (POAA). RCW 9.94A.570. Under this statute, a person found to be a persistent offender receives a mandatory sentence of life without the possibility of early release. RCW 9.94A.570.

The constitutionality of finding past convictions by a preponderance of the evidence was first addressed in *Almendarez-Torres v. United States*, 523 U.S. 224, 226-27, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998). There, the United States Supreme Court held that, under a federal statute authorizing enhanced sentences for recidivist criminals, recidivism was not an element of

the offense required to be charged in the indictment. *Almendarez-Torres*, 523 U.S. at 226-27. In *Apprendi*, the Court held that any fact that increases the penalty beyond the statutory maximum must be proved to a jury beyond a reasonable doubt, but specifically carved out an exception for prior convictions that preserved *Almendarez-Torres*. *Apprendi*, 530 U.S. at 489-90.

Vess recognizes that *Apprendi* carved out an exception for recidivism, but argues that *Blakely* requires a jury to find all sentencing factors that increase a sentence beyond the statutory standard range. But our Supreme Court explicitly rejected this argument as applied to proof of prior convictions under the POAA in *State v. Thiefault*, 160 Wn.2d 409, 418, 158 P.3d 580 (2007). We have also rejected similar arguments. In *State v. Ball*, we held that *Blakely* does not apply to sentencing under the POAA. 127 Wn. App. 956, 959, 113 P.3d 520 (2005). And in *State v. Rudolph*, we found no authority that would allow us to sidestep the recidivism exception recognized by *Apprendi.* 141 Wn. App. 59, 69, 168 P.3d 430 (2007). Accordingly, Vess's argument that the trial court violated his right to a jury trial fails.

ii. Equal Protection

Vess also contends that the POAA's classification of his prior convictions as sentencing factors rather than as additional elements of the crime violates his equal protection rights. He argues that no rational basis exists to require prior convictions to be proved beyond a reasonable doubt in some cases, and to allow a judge to find them by a preponderance of the evidence in others.

Under both the state and federal constitutions, persons similarly situated with respect to the legitimate purpose of a law must receive equal treatment. U.S. Const. amend. XIV; Const.

art. I, § 12; *State v. Thorne*, 129 Wn.2d 736, 770-71, 921 P.2d 514 (1996). When a statutory classification does not implicate a semi-suspect class, this court reviews it under the rational basis standard. *Thorne*, 129 Wn.2d at 771. Recidivist criminals are not a suspect class, so this court applies rational basis scrutiny to Vess's challenge. *Thorne*, 129 Wn.2d at 771.

Under the rational basis test, a statute is constitutional if "(1) the legislation applies alike to all persons within a designated class; (2) reasonable grounds exist for distinguishing between those who fall within the class and those who do not; and (3) the classification has a rational relationship to the purpose of the legislation." *State v. Smith*, 117 Wn.2d 263, 279, 814, P.2d 652 (1991). The challenging party bears the burden of showing that the classification is purely arbitrary. *Thorne*, 129 Wn.2d at 771.

Vess takes issue with our Supreme Court's reasoning in *State v. Roswell*, 165 Wn.2d 186, 196 P.3d 705 (2008). In that case, the defendant was charged with communication with a minor for immoral purposes, a crime that is elevated from a gross misdemeanor to a felony if the defendant has a prior conviction for the same crime or for a felony sex offense. *Roswell*, 165 Wn.2d at 190; RCW 9.68A.090. The court concluded that the prior conviction was an essential element of the felony that needed to be proved to the jury beyond a reasonable doubt because the defendant could not have been convicted of the felony version of the crime without proof of the prior conviction. *Roswell*, 165 Wn.2d at 194. Vess argues that Washington's legislative distinction between a prior conviction as a sentencing aggravator and a prior conviction as an element of a crime is arbitrary. Vess argues that his prior conviction is analogous to the prior conviction in *Roswell* because, as in *Roswell*, it merely increases the maximum sentence available.

Divisions One and Three of our court recently addressed this issue in *State v. Langstead*, 155 Wn. App. 448, 456-57, 228 P.3d 799 (2010), and *State v. Williams*, 156 Wn. App. 482, 496-98, 234 P.3d 1174 (2010) respectively, finding that this distinction satisfied the rational basis test. Under the POAA's purposes of protecting public safety, reducing the number of serious repeat offenders, simplifying sentencing, and restoring public trust, it is rational to conclude that persons charged with serious felonies are distinguishable from persons facing felony charges only because of a prior conviction for a similar offense. RCW 9.94A.555(2). As such, treating Vess's prior convictions as a sentencing factor rather than an element did not violate Vess's equal protection rights, and his argument on this point fails.

Statement of Additional Grounds

I. "Erroneous References" — Inadequate Specificity

In his SAG Vess asserts that his right to a fair trial was violated by the prosecutor eliciting repeated "erroneous references" at trial. Although RAP 10.10 does not require an appellant to refer to the record or cite authority in an SAG, he must inform the court of the "nature and occurrence of alleged errors." This assignment of error is too vague to allow us to identify the issue, so we do not consider it.

II. Errors Lacking Basis in the Record

Vess further asserts that he was arrested without probable cause, that several witnesses committed perjury during his trial, and that defense counsel failed to investigate his case and call certain witnesses. All of these assertions pertain to matters outside the record, which we do not address on appeal. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Vess next asserts that he was prejudiced by the State amending the information before trial. The State added this amendment to include second degree rape by engaging in sexual intercourse when the victim was "physically helpless or mentally incapacitated." CP at 12. Vess objected, and asked the court to require the State to proceed on its original information, but the court allowed the amendment. Under CrR 2.1(d), the trial court may permit amendment of the information at any time before the verdict if the defendant's substantial rights are not prejudiced. The record does not show any basis to conclude that Vess's substantial rights were prejudiced by the amendment, so his claim on this point fails.

Vess further asserts that his right to a fair trial was violated when the State avoided eliciting testimony from Raymond that, according to Vess, would have shown D.V.'s story to be false. As there is no sign of such evidence in the record, we do not consider Vess's claim on this point. *McFarland*, 127 Wn.2d at 335.

Vess also argues that his right to a fair trial was violated when a juror asked to be excused and was replaced with an alternate. Vess asserts that "[w]e have no idea what may have been said or done around other jury members." SAG at 4. Defense counsel made a motion for a mistrial when the juror asked to be excused, and the trial court denied this motion. This court reviews the refusal to grant a mistrial for abuse of discretion, which occurs "when no reasonable person would take the view adopted by the trial court." *Greiff*, 141 Wn.2d at 921. "A trial court's denial of a motion for mistrial 'will be overturned only when there is a "substantial likelihood" the prejudice affected the jury's verdict.'" *Greiff*, 141 Wn.2d at 921 (quoting *State v. Russell,* 125 Wn.2d 24, 85, 882 P.2d 747 (1994)). Here, the trial court found that the jury was not tainted because there

was no reason to believe that the excused juror had shared his misgivings with the rest of the panel. Nothing in the record indicates that Vess was prejudiced by the juror's excusal. Because the record does not show prejudice affecting the jury's verdict, Vess's argument on this point fails.

III. Evidentiary Errors

Vess next asserts that Detective Harper perjured himself at trial because his testimony at trial differed from his testimony at the CrR 3.5 hearing. Vess points to Detective Harper's various statements about when he read Vess his *Miranda* rights, but taken in context, none of these statements are inconsistent. Vess also points out that at trial and at the CrR 3.5 hearing, Detective Harper's statements were inconsistent as to whether Detective Swenson was present during Vess's interview. Although these statements were inconsistent, they touch on an ancillary issue not material to Vess's guilt or innocence, and are easily attributable to a lapse of memory rather than deliberate perjury. Because the record does not support Vess's claim of perjury, and because false testimony on this issue could not have prejudiced Vess, this claim fails.

Vess also asserts that his right against self incrimination was violated when the trial court admitted the pre-*Miranda* statements that Vess made to the police. At the CrR 3.5 hearing, the trial court excluded Vess's answer to a pre-*Miranda* question that the police asked, but admitted nonresponsive information that Vess spontaneously volunteered after being asked that question. This court reviews *Miranda* issues de novo. *State v. Daniels*, 160 Wn.2d 256, 261, 156 P.3d 905 (2007). *Miranda* protections apply whenever a person is subjected to custodial interrogation. *Daniels*, 160 Wn.2d at 266. "Interrogation" means questioning initiated by law enforcement after

a person has been taken into custody. *Daniels*, 160 Wn.2d at 266. Voluntary statements that are not the product of interrogation do not invoke the *Miranda* rule. *See State v. Eldred*, 76 Wn.2d 443, 447-48, 457 P.2d 450 (1969). Here, the statements admitted were not the product of interrogation, but rather spontaneously volunteered after an unrelated question. The statements were therefore admissible, and Vess's argument on this point fails.

IV. Prosecutorial Misconduct

Vess further argues that the prosecutor committed misconduct by deliberately eliciting prejudicial statements from witnesses, and by stating her opinion and making inflammatory statements in closing argument. "Failure to object to a prosecutor's improper remark constitutes a waiver, unless the remark was 'so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice' that could not have been cured by an instruction to the jury." *Gregory*, 158 Wn.2d at 841 (quoting *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997). The State "enjoys wide latitude 'in drawing and expressing reasonable inferences from the evidence.'" *Gregory*, 158 Wn.2d at 841 (quoting *Gentry*, 125 Wn.2d at 641). It is misconduct for a prosecutor to state his or her opinion on the credibility of a witness, or to comment on facts not in evidence. *State v. Warren*, 165 Wn.2d 17, 30, 44, 195 P.3d 940 (2008). The defendant bears the burden to show that the remarks were improper. *Gregory*, 158 Wn.2d at 841. Vess has failed to meet this burden. The statements that Vess points to were permissible within the prosecutor's wide latitude to draw inferences from the evidence, not impermissible comments on the evidence or statements of the prosecutor's opinion. If any of the statements were improper, they were not so flagrant and ill-intentioned that Vess may raise them on appeal without having objected at trial,

so Vess's argument on this point fails.

V. Ineffective Assistance

Vess next asserts in his SAG that his right to a fair trial was violated based on irrelevant and prejudicial statements by Detective Harper. Evidence is inadmissible if irrelevant, or if its probative value is substantially exceeded by the danger of unfair prejudice. ER 401; ER 403. Vess failed to object to these statements at trial, but we view his argument as one of ineffective assistance of counsel, which is reviewable for the first time on appeal. *See State v. Holley*, 75 Wn. App. 191, 196-97, 876 P.2d 973 (1994); RAP 2.5(a). Vess must show that the objection would have been successful. *Cf. McFarland*, 127 Wn.2d at 333-34.

Although most of the statements that Vess identifies fall far short of reversible error, one of detective Harper's statements merits discussion. When identifying Vess in court during his testimony, Harper identified Vess as "seated between the two custody officers." 5 RP at 568. The fact that Vess was in custody was irrelevant and unfairly prejudicial. Had counsel objected, his objection would have succeeded.

But to prevail on an ineffective assistance claim, a defendant must show both deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A defendant shows prejudice by demonstrating "that there is a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). A legitimate trial strategy cannot serve as the basis for ineffective assistance. *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). Counsel's failure to object here could have been a legitimate trial strategy

because Detective Harper's reference to Vess's custody was indirect and brief. An objection could have drawn the jury's attention to the testimony, prejudicing Vess's case. And as Division One of this court held in *State v. Mullin-Coston*, 115 Wn. App. 679, 692-93, 64 P.3d 40 (2003), a reference to the defendant's custody status is not highly prejudicial. There is no reasonable possibility that counsel's objecting to Detective Harper's testimony would have changed the outcome of the case. Because counsel's actions could have been part of a legitimate trial strategy and because Vess has not shown prejudice, his ineffective assistance claim fails.

Vess also argues that he was entitled to a mistrial because the State played a video where D.V. said that her father had raped her once before, after Raymond had already testified about Vess's sexual history with D.V. In the video of D.V.'s traffic stop, D.V. said "he's done it before," probably referring to her father having raped her in the past. 3 RP at 246. We view this argument as an ineffective assistance of counsel claim.

Just as with Detective Harper's reference to Vess's custody status, D.V.'s statement on the video was brief. It was also somewhat ambiguous. It could have been counsel's legitimate trial strategy to avoid objecting to this remark because an objection would have highlighted the remark in the minds of the jury. As such, defense counsel's failure to object to this remark cannot form the basis of an ineffective assistance claim and Vess's argument on this point fails.

Vess also argues that defense counsel improperly conceded his guilt. Defense counsel may not concede guilt without approval from his client unless the evidence of guilt is overwhelming and conceding a lesser count is a sound trial tactic to win the jury's confidence. *State v. Silva*, 106 Wn. App. 586, 595-96, 24 P.3d 477 (2001). However, the record shows that

defense counsel did not concede guilt here. Defense counsel made arguments in the alternative, stating that there was no evidence proving intercourse, but if there was intercourse, it was consensual and not rape. Because defense counsel never conceded Vess's guilt, Vess's argument on this point fails.

VI. Cumulative Error

Vess finally argues that cumulative error deprived him of his right to a fair trial. SAG at 18. The cumulative error doctrine "is limited to instances when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial." *Greiff*, 141 Wn.2d at 929. Vess has not shown errors sufficient to demonstrate that he was denied a fair trial and his argument on this point fails.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Worswick, A.C.J.

I concur:

Casey, J.P.T.

Quinn-Brintnall J. (concurring) — I agree with the entirety of the majority opinion with the exception of its analysis that Jack Daniel Vess II does not have a right for a jury to find he is a persistent offender and subject to incarceration for life without the possibility of parole under the Persistent Offender Accountability Act (POAA), RCW 9.94A.570. For reasons stated in my dissenting opinions in *State v. McKague*, No. 39087-6-II, 2011 WL 174941 (Wash. Ct. App. Jan. 19, 2011), and *State v. Rudolph*, 141 Wn. App. 59, 72, 168 P.3d 430 (2007), *review denied*, 163 Wn.2d 1045 (2008), I continue to question a trial court's constitutional authority to impose a sentence beyond that supported by a jury verdict based on a trial court's factual finding that a defendant is a persistent offender. But because of a key factual distinction between the present case and those considered in my dissenting analyses on this issue, I conclude that any violation of Vess's jury trial rights in this instance is harmless and concur with the majority's result on the POAA issue.

In *McKague*, I discussed that the sentence imposed exceeded the legislature's maximum statutory penalty for the offense of conviction. McKague's second degree assault conviction, a class B felony, had a statutory maximum penalty of 10 years confinement. *McKague*, 2011 WL 174941 at *17 (Quinn-Brintnall, J., concurring in part and dissenting in part). The trial court sentenced McKague to life without the possibility of parole. I believe that by imposing a sentence that exceeds the one supported by the jury verdict, as in *McKague*, a defendant's Sixth Amendment right to have his sentence supported by a jury's verdict remains unfulfilled.

But here, a jury entered guilty verdicts on second degree rape and first degree incest charges. Second degree rape is a class A felony. RCW 9A.44.050(2). The statutory maximum

sentence for class A felonies is confinement for life. RCW 9A.20.021(1)(a). The trial court sentenced Vess to life without the possibility of parole under the POAA. Our Supreme Court has previously determined that, in the context of the POAA, there is no significant difference between a life sentence with the possibility of parole and a sentence of life without the possibility of parole. *State v. Thomas*, 150 Wn.2d 821, 847-48, 83 P.3d 970 (2004); *State v. Rivers*, 129 Wn.2d 697, 714, 921 P.2d 495 (1996). Accordingly, in contrast with *McKague*, the trial court in Vess imposed a sentence within the permitted statutory maximum of the offense of conviction. Therefore, Vess's sentence is supported by the jury's verdict and any violation of Vess's jury trial rights in this instance is harmless.

QUINN-BRINTNALL, J.