IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ROBERT CHARLES MAYO, Appellant.	No. 40643-8-II UNPUBLISHED OPINION

Worswick, A.C.J. — A jury found Robert Mayo guilty of first degree rape, felony harassment, first degree burglary with a sexual motivation, and second degree robbery. He appeals his convictions, arguing that the prosecutor committed misconduct during closing arguments by analogizing the State's burden of proof to assembling a puzzle. He also appeals his sentence, arguing that the trial court improperly instructed the jury that it must be unanimous on the sexual motivation special verdict. In a statement of additional grounds (SAG),[1] he challenges the sufficiency of the evidence for his burglary and robbery convictions, and he challenges his offender score. We affirm.

FACTS

On November 1, 2005, Mayo entered the hotel room where A.C. was staying and raped her. He threatened to kill her if she did not submit to the sexual assault. He also took a cellular phone from her possession. After the assault, A.C. managed to escape from Mayo and took

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[1] RAP 10.10.

shelter in the nearby hotel room of Martina White. In 2007, the State analyzed deoxyribonucleic acid (DNA) evidence that implicated Mayo in the crime.

In 2008, the State charged Mayo with first degree rape by forcible compulsion and felony harassment. The State subsequently amended the information to include first degree burglary and first degree robbery. The State alleged that Mayo committed the burglary with sexual motivation "as defined in RCW 9.94A.030,[2] and invoking the provisions of RCW 9.94A.835,[3] and adding additional time to the presumptive sentence as provided in RCW 9.94A.533.[4]" Clerk's Papers (CP) at 57.

At trial, in addition to the DNA evidence, the State presented A.C.'s testimony that her attacker had the name "Lisa" tattooed on his chest, and presented evidence that Mayo has such a tattoo. Also, both A.C. and White identified Mayo in court as A.C.'s attacker.

After the close of the evidence, the trial court instructed the jury, "Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form." CP at 97.

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[2] Under RCW 9.94A.030(47), "'Sexual motivation' means that one of the purposes for which the defendant committed the crime was for the purpose of his or her sexual gratification." Although this statute has been amended numerous times since the date of Mayo's offenses, the definition of "sexual motivation" has remained the same and we cite to the current version. *See* Laws of 2005, ch. 436, § 1(42).

[3] Former RCW 9.94A.127 (1999) was recodified as RCW 9.94A.835, effective July 1, 2006, which was amended in 2009. Laws of 1999, ch. 143, § 11; Laws of 2006, ch. 123, § 2; Laws of 2009, ch. 28, § 15. Both the current and former statutes provide the procedure for filing a special allegation of sexual motivation and do not differ in any way significant to this case.

[4] RCW 9.94A.533(8)(a) provides sentence enhancements for crimes committed with sexual motivation on or after July 1, 2006. Former RCW 9.94A.533 (2003), in effect at the time of Mayo's offenses, did not specify any sentence enhancements for a finding of sexual motivation. Laws of 2003, ch. 53, § 58.

At closing argument, the State explained the "beyond a reasonable doubt" standard to the jury using the following analogy:

> Think of reasonable doubt like a puzzle. A puzzle that you get at Christmas or for your birthday. As you get this puzzle, one family member tells you, hey, it's a puzzle of Portland. Another family member says no, it's a puzzle of Tacoma and another family member says no, it's a puzzle of Seattle. As you slowly fill in those puzzle pieces, you say, well, I think it's Tacoma, I guess it could be Portland, maybe it's Seattle but let's continue putting the pieces together.
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> So you see Mount Rainier and you think to yourself, well, it's definitely not Portland. Still, I think it's probably Tacoma, maybe Seattle. So you put in a little more, and you see part of the Tacoma Dome. It's at that point that you have an abiding belief. You know that you're putting together a puzzle of Tacoma, there's no doubt in your mind that you're putting together a puzzle of Tacoma, even though you're still missing some of those pieces. And that's reasonable doubt, Ladies and Gentlemen.
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> It's the State's burden. The State has met that burden, and we're to indicate that the State has embraced that burden on each and every element for each and every count.

5 Report of Proceedings (RP) at 419-20. Mayo did not object to this argument.

The jury found Mayo guilty of first degree rape, felony harassment, and first degree burglary. The jury returned a "yes" verdict on the sexual motivation special verdict. The jury found Mayo not guilty of first degree robbery, but found him guilty of the lesser included offense of second degree robbery.

Mayo stipulated to his criminal history and offender score, agreeing that the rape conviction carried a standard range between 240 months and 318 months to life, the burglary conviction carried a standard range between 87 months and 116 months to life, and the robbery charge carried a standard range between 63 and 84 months. Mayo also stipulated to a 24 month sentence enhancement to the burglary charge. The trial court ruled that the felony harassment

conviction was the same criminal conduct as the rape conviction for sentencing purposes. The trial judge sentenced Mayo to 22 months, the low end of the standard range, on the felony harassment charge and sentenced him to the high end of the standard range on each of the other offenses. The trial court did not impose an exceptional sentence or add any sentence enhancements to the standard ranges.[5]

ANALYSIS

I. Prosecutorial Misconduct

Mayo argues that the State committed misconduct during closing argument by analogizing the reasonable doubt standard to assembling a puzzle. We disagree.

To establish prosecutorial misconduct, the defendant bears the burden to establish that a prosecutor's conduct was both improper and prejudicial. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). Prejudice is established "where there is a substantial likelihood the improper conduct affected the jury." *Fisher*, 165 Wn.2d at 747. Where a defendant fails to object at trial, the issue cannot be raised on appeal unless the misconduct is "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice incurable by a jury instruction." *Fisher*, 165 Wn.2d at 747 (internal quotation marks omitted) (quoting *State v Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006)). We review a prosecutor's purportedly improper remarks in the context of the entire argument, the issues in the case, the evidence addressed in the argument, and the instructions to the jury. *Gregory*, 158 Wn.2d at 810.

[5] Mayo argues that the trial court erred by imposing a sentence enhancement under RCW 9.94A.533(8)(a), even though his crime occurred before July 1, 2006. A review of the record reveals that the trial court added no such enhancement, and we do not address this argument.

Mayo did not object to any of the statements that he now alleges were improper, therefore we look to see whether the arguments are so flagrant and ill-intentioned that they evince an enduring and resulting prejudice incurable by a jury instruction. *Fisher*, 165 Wn.2d at 747. Mayo argues that the prosecutor's puzzle analogy constituted flagrant and ill-intentioned misconduct because it trivialized and misstated the State's burden. We disagree.

During closing argument, the prosecutor explained to the jury that they can have an "abiding belief" and have "no doubt" what the pieces depict without having every piece of the puzzle in place. 5 RP at 419-20. In fact, the prosecutor's argument here implied that "beyond a reasonable doubt" requires that the jury have no doubts whatsoever, which is a more stringent standard than required by law.

Moreover, the trial court correctly instructed the jury, "You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions." CP at 62. And the jury was also correctly instructed, "A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence." CP at 64. We presume the jury to have followed its instructions. *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007).

Mayo relies primarily on *State v. Johnson*, 158 Wn. App. 677, 243 P.3d 936 (2010), to argue that the prosecutor's puzzle analogy was reversible misconduct. But in *Johnson*, the prosecutor argued that reasonable doubt was met when the jury had "half" of the puzzle, whereas here the prosecutor argued that the jury needed enough pieces to have "no doubt." 158 Wn. App.

at 682; 5 RP at 419. Moreover, the prosecutor in *Johnson* made another argument which this court had already held improper in *State v. Anderson*, 153 Wn. App. 417, 220 P.3d 1273 (2009). 158 Wn. App. 684-85. *Johnson* held the multiple improper arguments, including a more prejudicial version of the "puzzle" argument, to be flagrant and ill-intentioned misconduct. 158 Wn. App. at 685-86. But it does not follow that the same is true here, where the only argument challenged on appeal is a version of the "puzzle" argument that stated the standard of proof as "no doubt."

We have recognized that the "puzzle" argument is not flagrant and ill-intentioned per se. *State v. Curtiss*, 161 Wn. App. 673, 700-01, 250 P.3d 496 (2011). We decided *Johnson* in the specific context of the arguments made there; we did not announce a bright-line rule that any mention of a "puzzle" during closing arguments warrants a new trial. Because the "puzzle" argument here gave the State's burden as proof with "no doubt," because the jury instructions properly instructed the jury to disregard arguments not supported by the law, and because this is the only argument challenged on appeal, we hold that the argument here was not sufficiently flagrant and ill-intentioned to be raised for the first time on appeal.[6]

Even assuming that the argument was flagrant and ill-intentioned, we would hold it was not sufficiently prejudicial to constitute misconduct. In *State v. Emery*, 161 Wn. App. 172, 195-

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[6] Mayo argues that because we decided *Anderson* three months before his trial, the "puzzle" argument was flagrant and ill-intentioned per se, citing *State v. Fleming*, 83 Wn. App. 209, 213-14, 921 P.2d 1076 (1996). There, Division One of this court held that an argument was flagrant and ill-intentioned because the court had held it to be improper in a prior case over two years earlier. 83 Wn. App. at 214. We did not hold the "puzzle" argument to be improper in *Anderson*, but rather in *Johnson*, which we decided after Mayo's trial. Even if the "puzzle" argument here was analogous to that in *Johnson*, which it was not, we would not hold that the prior publication of *Anderson* made it flagrant and ill-intentioned per se.

96, 253 P.3d 413 (2011), we considered two arguments found improper in *Anderson*, holding that these arguments were not sufficiently prejudicial to constitute misconduct. In reaching this conclusion, we relied on the fact that "the State presented multiple witnesses and evidence corroborating [the rape victim's] version of events, including the DNA evidence and the contents of her pockets recovered from where she was abducted." 161 Wn. App. at 196. We thus held that, when viewing the prosecutor's improper arguments in the context of the evidence, we could not conclude that there was a substantial likelihood that they affected the verdict. 161 Wn. App. at 196.

So too here, the State presented DNA evidence as well as multiple eye witnesses who identified Mayo. Moreover, as noted, the "puzzle" argument here misstated the standard of proof in Mayo's favor, and was the only potentially problematic argument. As such, even if the argument was sufficiently flagrant and ill-intentioned to be reviewed for the first time on appeal, we would hold it was not sufficiently prejudicial to constitute misconduct. Mayo's claim on this point fails.

II. Jury Instructions

Mayo next argues that the trial court erred by instructing the jury that it must unanimously agree on an answer to the special verdict. We hold that Mayo may not raise this issue for the first time on appeal.[7]

An appellant generally may not raise an error for the first time on appeal except for

[7] Although the special verdict here did not enhance Mayo's sentence, the issue is not moot because a finding of sexual motivation imposes a sex offender registration requirement. RCW 9A.44.128(10)(a), .130; RCW 9.94A.030(46).

manifest error affecting a constitutional right. RAP 2.5(a). In *State v. Grimes*, 165 Wn. App. 172, 188-89, 267 P.3d 454 (2011), we held that instructing the jury that unanimity is required to answer "no" on a special verdict is not constitutional error. We further held that the error was not manifest where uncontroverted evidence supported the special verdict and the record did not show that the jury disagreed about the answer to the special verdict. 165 Wn. App. at 189-90. In light of our Supreme Court's pending review of the issue, we additionally held that any error was harmless because, due to the uncontroverted evidence supporting the special verdict, the erroneous instruction could not have affected the jury's deliberation process. 165 Wn. App at 190-91.

Here, Mayo raises the same non-constitutional error as in *Grimes*. Moreover, the evidence that the burglary occurred with sexual motivation was uncontroverted and the record reflects no difficulty on the jury's part in coming to a unanimous conclusion on the special verdict. Accordingly, under *Grimes*, we hold that Mayo may not raise this error for the first time on appeal because he has shown neither that the error is manifest, nor that it is constitutional. We further hold that the error was harmless because, as in *Grimes*, the uncontroverted evidence supporting the special verdict shows beyond a reasonable doubt that the erroneous instruction could not have affected the jury's deliberations.

STATEMENT OF ADDITIONAL GROUNDS

I. Sufficiency of Evidence

In his SAG, Mayo argues that he could not be convicted of burglary or robbery because the police did not recover the cellular phone he allegedly stole, and because the only evidence of

these crimes was hearsay. We disagree.

In evaluating the sufficiency of the evidence, we review the evidence in the light most favorable to the State. *State v. Drum*, 168 Wn.2d 23, 34, 225 P.3d 237 (2010). "The relevant question is 'whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt.'" *Drum*, 168 Wn.2d at 34-35 (quoting *State v. Wentz*, 149 Wn.2d 342, 347, 68 P.3d 282 (2003)).

A person commits robbery by unlawfully taking personal property from the person or presence of another against the other's will by the use or threatened use of immediate force, violence, or fear of injury. RCW 9A.56.190. The evidence that Mayo robbed A.C. was A.C.'s testimony that he took her cell phone from her presence, and that based on the assault and his prior threat, she was too afraid to object. A.C. testified about personally witnessing the robbery; she did not give hearsay. Viewing the evidence in the light most favorable to the State, there was sufficient evidence to convict Mayo of robbery for taking A.C.'s cellular phone.

A person commits burglary by entering or remaining unlawfully in a building with the intent to commit a crime against a person or property therein. RCW 9A.52.030. Mayo's argument that he cannot be convicted of burglary because the police did not recover A.C.'s cellular phone appears to be premised on the mistaken notion that a conviction for burglary requires proof of a theft. But simply entering a building with the intent to commit a crime against a person or property therein is sufficient to support a burglary conviction. Based on A.C.'s testimony, there was sufficient evidence at trial to show that Mayo entered A.C.'s hotel room with the intent to rape her, which is sufficient to sustain his conviction.

II. Offender Score

Mayo also argues in his SAG that the trial court incorrectly calculated his offender score. He argues that he should have had five points "at the most." SAG. The State responds that Mayo waived his challenge to his offender score. Although we agree that Mayo may argue this issue for the first time on appeal, his argument fails because he premises his challenge to his offender score on each of his convictions being worth only one point, which is incorrect.

The State argues that Mayo waived any challenge to his offender score by stipulating to it. But in general, a defendant cannot waive a challenge to a miscalculated offender score. *State v. Wilson*, 170 Wn.2d 682, 688, 244 P.3d 950 (2010). A defendant can waive a challenge to an offender score only where the challenge is based on a factual issue, or on a matter within the trial court's discretion. *Wilson*, 170 Wn.2d at 689. Here, the question of Mayo's offender score is purely legal and is not based on any factual dispute or any matter within the trial court's discretion. As such, he did not waive his right to challenge his offender score.

Mayo argues that his offender score should have been five "at the most" and "maybe less." SAG. On a conviction for first degree rape, current and prior violent felony offenses that are not serious violent offenses are worth two points. RCW 9.94A.525(9). Current and prior nonviolent adult felony convictions are worth one point. RCW 9.94A.525(9). Mayo's felony harassment conviction was the same criminal conduct as the rape and was not included in the offender score. He received two points each for two juvenile second degree robbery convictions, one point for an adult controlled substances conviction, two points each for the current burglary and robbery convictions, and one point for being on community custody, adding up to 10.

Mayo received the same score for the burglary conviction based on the same score for his prior offenses and community custody, two points for the rape, and two points for the robbery. RCW 9.94A.525(10). Mayo should have had an offender score of 10 for the robbery conviction as well (the same score for the prior offenses and community custody, plus two points for the burglary and two for the rape), but the trial court scored that conviction at nine without specifying why. If this calculation was error, it was error in Mayo's favor, though it did not affect the standard range for his sentence. Regardless, Mayo's argument that his offender score should have been "no more than five" 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 in accordance with RCW 2.06.040, it is so ordered.

Worswick, A.C.J.

We concur:

Armstrong, J.

Quinn-Brintnall, J.