IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. EMIR BESKURT, SAMET BIDERATAN, and TARGUT TARHAN, and each of them, Appellants, TANER TARHAN, Defendant.	)	No. 62268-4-I (consolidated with No. 62408-3-I and No. 62316-8-I) DIVISION ONE UNPUBLISHED OPINION FILED: July 6, 2010

Appelwick, J. — Tarhan, Beskurt, and Bideratan appeal their convictions for rape in the third degree of H.W. The defendants argue that the convictions should be vacated due to improper comments by the prosecutor during voir dire, the exclusion of a statement made by the complaining witness, and prosecutorial misconduct during closing argument. Additionally, the defendants claim the cumulative errors denied the defendants their rights to a fair trial. Tarhan also alleges that he received ineffective assistance of counsel. Finding no error, we affirm.

FACTS

On June 3, 2007, twenty year old H.W. and her friends, Caroline Concepcion and Spencer Crilly, were relaxing at H.W. and Concepcion's

apartment building in the Capitol Hill neighborhood of Seattle. On an unusually hot day for Seattle, the friends had planned to make dinner and have a few drinks. While cooking, H.W. and Concepcion looked out their open window and saw their male neighbors one floor below. The women waved and gestured to the men that they should come join them. A few minutes later, Emil Beskurt, Turgut Tarhan, and Samet Bideratan arrived at H.W.'s apartment. Taner Tarhan, Turgut Tarhan's twin brother, joined the group later.[1] The group introduced themselves and H.W. learned that the men, who spoke with strong accents, were from Turkey, visiting on student visas. After a few minutes of chatting and drinking beer, the group agreed to go to the apartment downstairs where Beskurt lived. Crilly, who had an intimate dating relationship with H.W., declined to join the group.

Once downstairs, the group continued to socialize. A few members of the group went to the store and returned to Beskurt's apartment. H.W. chatted with the four men while sitting on the futon in Beskurt's living room, with some flirting occurring. At some point, Concepcion slipped out unnoticed. H.W. then found herself alone with Beskurt, Bideratan, Tarhan, and Taner. Subsequently, oral and vaginal sexual intercourse occurred between the four men and H.W.

At trial, the factual dispute centered on whether the encounter was consensual. H.W. testified that she did not consent. She explained that after Concepcion left, the mood suddenly shifted. Beskurt and Taner began touching

[1] We refer to Taner by his first name to distinguish him from Turgut Tarhan, who we refer to as "Tarhan."

her intimately, on her legs and shoulders. The men laid her on her back on the futon. The men began touching her breasts and removed her shorts and bikini bottom. The defendants then began slapping H.W.'s face with their penises and orally and vaginally penetrating her. H.W. testified that when she tried to get up, she was pushed back onto the futon. She also testified while she did not scream or fight back, she did tell them to "knock it off" and to "stop," and repeatedly asked, "[W]here's [Concepcion]?"

Eventually, the group heard pounding on the door. H.W. answered the door, nude but for her untied bikini top. It was Concepcion. H.W. let her in and pulled Concepcion into the bathroom. H.W., crying and shaking, asked Concepcion to retrieve her clothes. Concepcion entered the dark living room and heard the men getting dressed. After giving H.W. her clothes, Concepcion reentered the living room and yelled, "What's going on, what did you guys do?" The men responded, "Nothing, just hanging out." When she returned to the bathroom, H.W. had left. Concepcion found her leaning over and crying in the stairwell. They returned to H.W.'s apartment. H.W. told Concepcion the men had pinned her down. Concepcion asked if the men had raped her. H.W. nodded yes. Concepcion called the police, who found H.W. in her bedroom having a panic attack and took her to Harborview Medical Center. An examination located two vaginal lacerations and semen later confirmed to contain the DNA (deoxyribonucleic acid) of Bideratan.

Bideratan and Tarhan testified at trial. They testified that H.W. had willingly participated in the sexual encounter. When H.W. inquired about

Concepcion, the men offered her a cell phone to call her, and Tarhan went upstairs to H.W.'s apartment to look for her. During intercourse, H.W. changed positions and appeared to be enjoying herself. Tarhan testified that H.W. reached out to touch him and invite him to join the encounter. Both men testified that Crilly had knocked on the door and H.W. said not to open it. Also, they stated that they did not respond to Concepcion's question "[W]hat did you do?" because they felt it was not Concepcion's business and rude to answer.

The State charged Beskurt, Bideratan, Tarhan and Taner (collectively "defendants") with rape in the second degree, contrary to RCW 9A.44.050(1)(a).[2] A jury convicted each defendant of rape in the third degree, contrary to RCW 9A.44.060.[3,4] Beskurt, Bideratan, and Tarhan timely appealed. This court consolidated the appeals.[5]

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[2] RCW 9A.44.050(1) states:

> A person is guilty of rape in the second degree when . . . the person engages in sexual intercourse with another person:
>
> (a) By forcible compulsion.

[3] RCW 9A.44.060(1)(a) states:

> A person is guilty of rape in the third degree when . . . such person engages in sexual intercourse with another person, not married to the perpetrator:
>
> (a) Where the victim did not consent . . . to sexual intercourse with the perpetrator and such lack of consent was clearly expressed by the victim's words or conduct.

[4] On September 4, 2008, the court sentenced the defendants to 10 months confinement and 36 to 48 months of community custody. Both parties agreed that the trial court imposed incorrect community custody and sexual assault protection orders. This court granted the trial court authority to correct the sentencing errors. These issues are now resolved and the defendants have been released from confinement

[5]The fourth defendant, Taner's appeal was not consolidated, because he had not perfected his record when the other three defendants filed their opening briefs.

DISCUSSION

I. Voir Dire

The defendants[6] contend that the prosecutor improperly commented on their Fifth Amendment rights in the following exchange, during voir dire:

> MS. KEATING:[7] . . . Is there anyone who thinks it's a bad thing that in a criminal case I have to give all of the evidence that I have or intend to present in court to the defense attorneys and their clients before trial, does anyone think that seems fair, unfair, that they get to know exactly what I've got? No?
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> Juror NO. 33: Do you know what they had?
>
> MS. KEATING: No. Do you think that seems unfair?
>
> Juror NO. 33: Yeah.
>
> MS. KEATING: And why does that seem unfair?
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> Mr. Savage:[8] Objection, Your Honor.
>
> THE Court: It's sustained. It's more complicated than that.
>
> MS. KEATING: Well, sir, let me ask you this: If you were to learn during the course of the trial that I had never -- that the State doesn't have an opportunity to speak with defendants, do you think that is unfair?
>
> JUROR NO. 33: Speak with them?
>
> MS. KEATING: To speak with them, talk to them, prior to a case.
>
> Mr. Savage: Your Honor, I object to the question. The Fifth Amendment says she can't.
>
> MS. KEATING: That doesn't mean a juror thinks the Fifth Amendment's a good thing.

[6] Arguments raised by any of the appellants in their various briefs will simply be referred to as raised by the "defendants" generally.
[7] Ms. Christine Keating was the deputy prosecuting attorney.
[8] Mr. Anthony Savage acted as Bideratan's counsel at trial.

> THE COURT: Perhaps you could rephrase the question.
>
> MS. KEATING: Sir, let me ask you this: Obviously if somebody is arrested with a crime, charged with a crime, they have the right to remain silent, they don't have to talk, and we come in here for this trial, not any of these four defendants has to get up and testify, they don't have to put on a shred of evidence, the burden is on me to prove the case. If they don't want to tell me before the case what they might testify to, they don't have to, because that's their right.
>
> Does that seem like a good thing, a bad thing, unfair to the State?
>
> MR. SAVAGE: Your Honor, I have a legal matter to take up before the court.

All defense counsel moved for a mistrial in chambers.

The defendants argue that the prosecutor's comments improperly discussed their Fifth Amendment right to silence and privilege against incrimination.[9] The State properly concedes that the prosecutor's conduct during voir dire was improper. The conduct was inexcusable for an officer of the court. It was clear error.

However, the court ruled that the remarks did not require a mistrial. We must determine whether a new trial is necessary. If the misconduct violates a constitutional right, as the defendants here contend, then it is subject to the stricter standard of constitutional harmless error. See State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). A constitutional error is only harmless if

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[9] In pertinent part, the Fifth Amendment states, no person "shall be compelled in any criminal case to be a witness against himself." The Fifth Amendment is applied to the states through the Fourteenth Amendment. Malloy v. Hogan, 378 U.S. 1, 6, 85 S. Ct. 1489, 12 L. Ed. 2d 653 (1964). The Washington State Constitution also protects this right: "No person shall be compelled in any criminal case to give evidence against himself." Const. art. I, § 9.

the appellate court is convinced, beyond a reasonable doubt, that the prosecutor's comment did not affect the verdict. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). The reviewing court "decides whether the actual guilty verdict was surely unattributable to the error; it does not decide whether a guilty verdict would have been rendered by a hypothetical [trier of fact] faced with the same record, except for the error." State v. Jackson, 87 Wn. App. 801, 813, 944 P.2d 403 (1997), aff'd, 137 Wn.2d 712, 976 P.2d 1229 (1999). Because constitutional error is presumed to be prejudicial, the State bears the burden of showing the error was harmless. Guloy, 104 Wn.2d at 425. Whether error is harmless is a question of law that this court reviews de novo. State v. Bird, 136 Wn. App. 127, 133, 148 P.3d 1058 (2006).

This case was a credibility contest.[10] The State argues the error was

[10] The defendants argue that "evidence of guilt was not otherwise overwhelming and there were reasons to doubt [H.W.]'s story." The defense argued that: H.W. participated in the sexual encounter willingly and then regretted having done so; there was evidence that H.W. was drunk, reducing her inhibition; she described the sexual encounter as "awkward" and that she was "confused," which are not generally words one would ascribe to a sexual assault; she gave nonverbal indications of consent; and were the men really supposed to infer from her statements, "[W]here's [Concepcion]" that she was declining consent. They argue H.W. could not remember facts alleged by the defense, such as flirting, hugging Taner in her bedroom, and grabbing Bideratan's butt and allowing Beskurt to put his arm around her in the elevator. The defense brought out numerous examples, reviewed extensively in closing argument, where H.W. testified incorrectly or failed to remember certain facts.

The State argues that its case was extremely strong. H.W. testified that she told the men to "knock it off" and asked repeatedly, "[W]here's [Concepcion]?" H.W. opened the door to Concepcion while basically naked, which seems unlikely after an embarrassing but consensual encounter. Witnesses who saw H.W. immediately after the rape described her as traumatized, scared, shaking, very withdrawn, in a fetal position, overwhelmed, and in shock. Even a defense witness testified that H.W. had traits of someone who had gone "through something traumatic."

nonetheless harmless beyond a reasonable doubt. First, the defendants offered no evidence that the individuals actually selected as jurors in this case were biased or that they were denied a fair trial. Second, the court offered a curative instruction:

> The court needs to clarify a few points regarding the preparation of a criminal case.
>
> Both, the State and the defendants, are required to comply with court rules that govern the sharing of information with one another. Under the Fifth Amendment to the United States Constitution, a defendant is never required to speak to the State or the police at any point, or to testify at trial, and the fact that a defendant has not done so cannot be used to infer guilt or prejudice him in anyway.[11]

Jurors are presumed to have followed instructions. See State v. Brown, 132 Wn.2d 529, 618, 940 P.2d 546 (1997).

Finally, the defendants failed to use seven peremptory challenges.[12] This court presumes "that each juror sworn in a case is impartial and above legal exception, otherwise, he would have been challenged for cause." State v. Kender, 21 Wn. App. 622, 626, 587 P.2d 551 (1978); see also State v. Collins, 50 Wn.2d 740, 744, 314 P.2d 660 (1957) (following improper inquiry of venire by

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[11] The trial court also instructed the jury before testimony and before deliberation that:

> The lawyers remarks, statements and arguments are intended to help you understand the evidence and apply the law. They are not evidence, however, and you should disregard any remarks, statements or arguments that are not supported by the evidence or by the law as The Court gives it to you.

[12] The court granted the defense 18 peremptory challenges and the State 12. The defense used 11 peremptory challenges. The State used 11 peremptory challenges. The defense had seven peremptory challenges remaining. The State had one.

both the State and defense, error, if any, was not prejudicial where defendant accepted the jury while having four peremptory challenges available); Dean v. Group Health Coop. of Puget Sound, 62 Wn. App. 829, 836, 816 P.2d 757 (1991) ("[A] party accepting a juror without exercising its available challenges cannot later challenge that juror's inclusion.").

Any error resulting from the prosecutor's improper comments was harmless beyond a reasonable doubt.[13]

Even if the improper comments were not harmless, the State asserts that the defense waived any error when their counsel declined the opportunity to obtain a new jury. The court struggled to seat a jury in this case. A combination of the length of the trial and the fact that the trial occurred in the summer when many jurors had vacations scheduled resulted in a large number of hardship excusals. Also, because the parties had, in total, thirty peremptory challenges, the pool had to be sufficiently large to get a panel seated. The day after counsel's motion for a mistrial, the extent of the difficulty became apparent. The court considered the possibility, raised by the prosecutor, of restarting the process of jury selection. Contrary to his previous motion, Bideratan's counsel sought to keep the jurors rather than start over, explaining, "With all due respect to the court, we now have a potential error on appeal because of the Court's denial of my motion. If I voluntarily surrender the 27 jurors that are still here, I

[13] Although commentary regarding the right to remain silent was raised by one of the defendant's own counsel, it cannot be said that any prejudice occurred just as much as a result of defense's own actions as the prosecutor's. The defense may not have made the statements but for the prosecutor's inappropriate comments.

give that up. I'm very reluctant to give up a Constitutional argument on behalf of a client." All other defense counsel agreed that they should "plow ahead" and "press forward." The court then agreed that "we ought to keep trying."

Later that afternoon, the prosecutor again suggested that it was "time to simply start over." Again, all defense counsel advocated moving forward with the existing jurors. After considering the issue, the trial court was on the verge of restarting jury selection, lamenting, "So I really do think we're going to have to start over on Monday . . . ." The defense attorneys then jumped in, stating, "You're essentially declaring this a mistrial? This is what I'm hearing." They then determinedly persuaded the court to continue with the existing panel. Each time defense counsel advocated continuing with the existing panel, they reminded the court of the cost to their clients of restarting jury selection. Taner's counsel explained, "[W]e have four private practitioners here who have invested a week, as have the clients who retained them, and the court's time is equally valuable, and I think we press forward." When the discussion was raised for a second time, Taner's counsel again emphasized the "huge economic investment" the defendants were making in their defense. None of the other defense counsel disputed this assertion.

The next day, the parties again discussed the issue:

> MS. KEATING: . . . If I've been hearing the defense attorneys correctly, it has been their desire to go forward, we've picked 27 jurors from the first panel, I don't know how many we now have from the second panel.
>
> . . .

> MS. KEATING: And then to start with a third panel on Monday. I think part of the reason for that [was] articulated by Mr. Savage yesterday, was that there had originally been a motion for a mistrial with the first panel of jurors, the court denied that motion, and of course the State's position that the court did that appropriately, and that Mr. Savage, and I assume the other counsel at the table, want to preserve that issue on appeal.
>
> I want to make it clear, so that everyone's aware, it would certainly be the State's issue or State's position on appeal that when given -- if the defense has now been given an opportunity to cure whatever error they think occurred and have declined to accept that opportunity, they've waived their constitutional issue on appeal, because at that point it's invited error.
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> . . .
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> THE COURT: I had already sort of figured that out, in terms of a mistrial issue, so I wasn't particularly concerned about that, in terms of whether or not it would be error and so forth on appeal.

Defense counsel did not intercede. The parties then proceeded with voir dire.

In sum, after the mistrial motion, the prosecutor twice raised the desire to restart the jury selection. Although Bideratan's counsel's comments were the most blatant, each defendant similarly declined the opportunity to reseat not once but twice. The defendants respond on appeal only that the prosecutor, not the court, offered to restart voir dire anew and that waiver could only occur if the court endorses the prosecutor's suggestion. Defendants cite no law for this assertion, so we must presume they have found none. State v. Young, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978).

The prosecutor offered a new panel. The defendants resisted it. This is sufficient to waive the previous error.

II. Exclusion of Victim's Statement

The next issue here is whether the trial court properly excluded a

statement made by H.W.[14] On the day of the incident, the investigating officer inquired about what H.W. wanted to have happen to the defendants. H.W. stated, "I don't want to tell you, yeah send them to jail, but I just don't want to see them."[15] The defendants claim that the statement raises a question as to whether H.W. consented to the intercourse and challenged the credibility of H.W. They argue that the exclusion of the statement violated their rights to present a defense and to confront their accuser.

In a motion in limine, the State asked the trial court to exclude the statement. The trial court agreed, prohibiting the defendants from using the statement in cross-examination. While recognizing that the statement might be relevant to show ambivalence by H.W., the trial court agreed with the State that the statement would be misleading without its context. The trial court reasoned that rehabilitation of the witness would raise improper issues such as possible punishment and plea negotiations.

After four days of testimony by H.W., just before the State called the investigating officer to the stand, the defense raised the issue again. The defense argued that H.W.'s statement would challenge her credibility and be consistent with the defense theory that she did not act like a rape victim. The trial court affirmed its pretrial ruling, stating that the pretrial concerns remained.

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[14] The trial court made two rulings on this evidentiary question, pretrial and during trial immediately before the investigating officer's testimony. The defendants do not specify which ruling constituted the error. Therefore, we review both rulings.

[15] The record does not include a transcript of the investigating officer's interview, so we can only rely on the parties' representations of the statement.

The court also recognized that reversal of the pretrial ruling would have been particularly prejudicial to the State, given that the State had relied on the ruling in formulating its strategy. Also, H.W. had already testified. The defense found it "frustrating" that "we can't ask that question because it might inconvenience [H.W.] from coming back later on in recall . . . ."

A criminal defendant has the right to present a defense. State v. Hudlow, 99 Wn.2d 1, 14–15, 659 P.2d 514 (1983) (citing Washington v. Texas, 388 U.S. 14, 23, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967)). A defendant also has a right to "be confronted with witnesses against him." U.S. Const. amend. VI.[16] The goal of the confrontation clause is to allow reliability of the accuser to be assessed through cross-examination. Crawford v. Washington, 541 U.S. 36, 61, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). The right to confront must be zealously guarded. State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). But, even when the right to confrontation applies, the evidence the defendant seeks to admit on cross-examination must still be relevant and not unfairly prejudicial.[17] Hudlow, 99 Wn.2d at 15. Relevant evidence can be deemed inadmissible if the State can show a compelling interest to exclude prejudicial or inflammatory evidence. Darden, 145 Wn.2d at 620–21. The more essential the witness is to the prosecution's case, the more latitude the defense should be

[16] The federal confrontation right applies to the states through the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 403, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965).

[17] Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence more probable or less probable than it would be without the evidence. ER 401.

given to explore fundamental elements such as motive, bias, credibility, or foundational matters. Id. at 619.

We review a claim of a denial of Sixth Amendment rights de novo. State v. Iniguez, 167 Wn.2d 273, 280–81, 217 P.3d 768 (2009). We review the trial court's ruling on the admissibility of evidence for abuse of discretion.[18] State v. Moran, 119 Wn. App. 197, 218, 81 P.3d 122 (2003). A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds or reasons. Id. Evidence may be excluded if it would confuse the issues, mislead the jury, or cause the jury to decide the case on an improper or emotional basis. Hudlow, 99 Wn.2d at 13–14.

The defendants argue that the exclusion of the evidence unfairly prejudiced their defense, citing Holley v. Yarborough, 568 F.3d 1091 (9th Cir. 2009). In Holley, the Ninth Circuit held that to completely exclude any statement regarding sex by the alleged victim in a child molestation case unreasonably precluded "the very type of impeachment that Holley was entitled to engage in under the Confrontation Clause." Id. at 1100. Although this case is similar in that the credibility of the complaining witness is the key issue of the case, the ruling did not prohibit the defendants from putting on their defense.

Instead, the defendants presented a thorough defense. They argued at trial a theory of "drunken regret," relying primarily on general credibility challenges. For example, the defense attorneys put forth a litany of inconsistencies in H.W.'s testimony, including her denial that she attempted to

[18] This is consistent with Hudlow. 99 Wn.2d at 14.

entice the men into the apartment by taking off her shirt while waving at them out her window, her denial that she had met the men before, her denial that she was flirting with the men at her apartment, her denial that they went to the store because they ran out of beer, and her confusing testimony regarding the amount of alcohol she consumed. The defense also argued that "[H.W.] did not act like a rape victim;" she described the sexual encounter as "awkward" and that she was "confused," which are not generally words one would ascribe to a sexual assault; the men were being expected to infer from her statements, "[W]here's [Concepcion]," that she was declining to consent to the activity; and she gave nonverbal indications of consent. This list of facts is not the distorted, one sided picture that the defendants would have this court believe that the defendants were forced to present. Unlike in Holley, the defendants were able to present a full defense despite the exclusion of the contested evidence. The exclusion of this evidence did not deny the defendants their right to present a defense.

To determine whether evidence should be admitted, a trial court must balance the State's interest in the integrity of the truthfinding process with the defendant's interest in a fair trial.[19] Hudlow, 99 Wn.2d at 15. The trial court excluded the evidence in part because the context could not be provided. The defense was clearly focused on the apparent ambivalence the victim showed in sending them to jail. But, it is for the prosecutor to decide whether to prosecute,

[19] The defendants argued that the State must present a "compelling state interest" under Hudlow in order to prevent admission of evidence. No additional "state interest" is required beyond ensuring that the evidence is not so prejudicial as to disrupt the fairness of the fact-finding process. Hudlow, 99 Wn.2d at 15.

not the victim. It is for the jury to decide guilt, not the victim. It is for the judge to decide punishment, not the victim. A criminal trial is not a private right of action where the victim's desires control whether to proceed and what sanctions are sought. State v. Gentry, 125 Wn.2d 570, 680–81, 888 P.2d 1105 (1995) (Johnson, J., dissenting) (purpose of criminal proceedings is not for victim to obtain vengeance, and only evidence of the facts and circumstances of the crime, not evidence relating to victim's opinions or the impact on the victim, is relevant). Generally, it is improper to discuss the penalty for a crime. State v. Smith, 150 Wn.2d 135, 154, 75 P.3d 934 (2003) (the court, not the jury, imposes punishment through sentencing). The investigating officer's purpose for eliciting the statement, specifically to make his own credibility determination, also could not be admitted. State v. Casteneda-Perez, 61 Wn. App. 354, 362, 810 P.2d 74 (1991) ("Unquestionably, to ask a witness to express an opinion as to whether or not another witness is lying does invade the province of the jury."). Therefore, the statement, if entered, would have been removed from its context. In isolation, the remark painted a skewed picture of H.W.'s view that would prejudice the State's case by giving the jury the impression that H.W. did not care about the result.

Additionally, the court determined that the prejudice could not be overcome through rehabilitation. The trial court found no manner in which the State could overcome the prejudice without introducing issues that would distract the jury. The trial court determined that exclusion was the only way to maintain the integrity of the truthfinding process while not distracting the jury.

The defendants argue that such rehabilitation would not have been required. We disagree. The statement at issue was susceptible to multiple interpretations. The defendants wished to draw an inference that, because H.W. was not concerned with prosecution or punishment of the defendants, the defendants must not have committed the crime. In order to refute that inference, H.W. would have needed to testify regarding her desire to see the defendants prosecuted and punished. Such matters are the province of the prosecutor and the judge respectively, not the victim. Gentry, 125 Wn.2d at 680–81; Smith, 150 Wn.2d at 154. While necessary, rehabilitation of H.W. would have been problematic. The trial court's rationale was not untenable and therefore not an abuse of discretion. Moran, 119 Wn. App. at 218. The trial court did not err in excluding the statement pretrial.

The trial court also did not err in affirming its ruling when the defense raised the issue again midtrial. By the time the detective testified, nothing suggested that the trial court's original concerns had abated. In fact, the court noted additional complexities which reinforced the need for its original ruling. The State had already put on a portion of its case. The victim had testified for four days. The State had relied on the pretrial ruling in its opening statement and in its strategic decisions made while H.W. sat as a witness. The trial court had greater reason to exclude midtrial than it did pretrial. We find no error.

The trial court also sought to avoid putting H.W. back on the stand. Hudlow instructs that prejudice and embarrassment to the complaining witness is an improper focus of the balancing process. Hudlow, 99 Wn.2d at 13; see also

Davis v. Alaska, 415 U.S. 308, 319, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974) (holding that whatever temporary embarrassment the witness might have suffered was outweighed by the defendant's right to probe the witness' credibility). Instead, the review should be of the potential prejudice to the truth-finding process itself. Hudlow, 99 Wn.2d at 13. If difficulty for H.W. had been the court's only concern, the defense would be correct that this reason would not support exclusion of the evidence. But, here the trial court expressed concern not just for the victim's comfort, but also for the prejudice to the State. Because admitting the evidence midtrial would affect the integrity of the truth-finding process by prejudicing the State's case, it was not an improper ruling. Hudlow, 99 Wn.2d at 14.

Therefore, exclusion of the evidence was not manifestly unreasonable and did not constitute an abuse of discretion.

III. Prosecutorial Misconduct

The defendants next contend that the prosecutor committed misconduct in several distinct instances during closing arguments. We review the trial court rulings on alleged prosecutorial misconduct for abuse of discretion. State v. Finch, 137 Wn.2d 792, 839, 975 P.2d 967 (1999). A defendant claiming prosecutorial misconduct who has preserved the issue by objection bears the burden of establishing the impropriety of the prosecuting attorney's comments and their prejudicial effect. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). Failure to object to a prosecutor's improper remark constitutes waiver unless the remark is deemed to be so flagrant and ill intentioned that no curative

instructions could have obviated the prejudice engendered by the misconduct. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).

A. DNA Evidence

The defendants argue that the prosecutor committed misconduct when she argued in closing that DNA evidence confirming that intercourse occurred "forced" the defendants to argue that the sexual encounter was consensual. They contend that her misconduct undermined the presumption of innocence, violated their right to present a defense, and urged the jury to decide the case based on matters outside the record.

Police identified Bideratan's DNA in swabs taken from H.W.'s vagina, anus, and mouth.[20] In closing argument, the prosecutor made the following comments:

> In addition to [H.W.'s testimony] you have DNA. Mr. Bideratan made a big mistake that night, because his DNA was found in [H.W.'s] mouth, it was found in her vagina, and it was found where it, apparently, leaked down by her anus, and the fact that that DNA was there prevented Mr. Bideratan or any of the other defendants from getting up here and saying, "Never happened, don't know what she's talking about, we never had sex."
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> MR. SAVAGE: Your Honor, I object, the suggestion that such a thing would have happened is entirely improper.
>
> THE COURT: Could you move on, counsel.
>
> MS. KEATING: What that DNA forced Mr. Bideratan to do --
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> MR. SAVAGE: Objection, Your Honor, didn't force him to do anything.
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> THE COURT: Sustained.

[20] Testing excluded the other defendants as possible contributors to the semen located on H.W.'s body.

> MS. KEATING: Ladies and gentlemen, if that DNA had not been there, I would suggest to you that it would have been a lot easier to say no sex had happened, but there was DNA in her mouth, there was DNA in her vagina, and so the only way out of this --
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> MR. SAVAGE: Objection, Your Honor, I'd like to have a sidebar.

After a sidebar conference, the court sustained the objection and then permitted the State to proceed. The court then overruled the defense's objection to the prosecutor's final statement on the issue: "[B]efore our break we were talking about all the different reasons you had to believe [H.W.], and one of those reasons is that Mr. Bideratan's DNA was found in [H.W.'s] mouth and in her vagina, and with that, the only available defense is that this was consensual." After the State completed its closing argument, the parties memorialized the sidebar, and the trial court explained that "I, frankly, was not persuaded that if there was improper argument, it was serious enough to justify a curative instruction."

To prevail, the defendant must show that the prosecutor's conduct was both improper and prejudicial. McKenzie, 157 Wn.2d at 52. The statement has a different impact on the defendants who testified than it does on Beskurt, who exercised his Fifth Amendment right to remain silent.

A defendant is not insulated from suspicion of manufacturing an exculpatory story consistent with the available facts. State v. Miller, 110 Wn. App. 283, 284, 40 P.3d 692 (2002). Because Bideratan's DNA was found on the victim, the prosecutor's comment that Bideratan's only viable defense was to argue consent falls within the bounds of a "tailoring" argument. Id. at 285. No

misconduct occurred as it related to Bideratan.

Beskurt argues that because he did not testify the argument was improper to the extent that it constituted a comment on his Fifth Amendment rights. Even though the DNA evidence implicated only Bideratan, the prosecutor alleged that the DNA evidence prevented *any* of the defendants from denying that intercourse had occurred.

It is misconduct to comment on a defendant's silence. Griffin v. California, 380 U.S. 609, 614–15, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965). However, we hold the comment addressed the defendant's theory of the case, not Fifth Amendment rights. Neither before nor after this remark had the defendants asserted that intercourse had not occurred. The defense theory was consent. The comment of the prosecutor challenged the basis of that theory, but did not challenge the silence of the defendants on that or any other theory. The DNA evidence was correctly attributed solely to Bideratan. The statement was argumentative and arguably of little value, but it did not infringe on Beskurt's constitutional rights. Though the trial court did not give a specific curative instruction in response to the remark, it instructed the jury that it should not to consider arguments made by counsel as evidence. The jury is presumed to have followed the court's instructions. See Brown, 132 Wn.2d at 618. We find there was no substantial likelihood that this comment affected the verdict.

The trial court did not abuse its discretion in concluding that prosecutorial misconduct had not occurred.

B. Appeal to Juror Passion

The defendants argue that the prosecutor improperly appealed to emotion during closing argument. The State's closing argument focused heavily on the emotional impact the rape had on H.W. For example, the prosecutor stated in the initial closing argument:

> Let's talk about the [H.W.] that you all know and the [H.W.] that the defense has tried to create for you, the [H.W.] that you all know is a young woman, who was clearly terrified and overwhelmed by what she endured in this courtroom, who, despite that, came back, day after day after day after day, and told you what happened to her, with a great deal of poise and resilience.
>
> [H.W.] sat in that chair and she answered questions that I'm sure for her felt like they would never end, questions by me that led her down paths or made her think about things maybe she hadn't thought about in awhile, and then she had to relive it again and again and again, as she answered, patiently and respectfully, the questions of the four defense attorneys. She was always polite, she was always trying very hard to answer the questions the best that she could, and she was clearly overwhelmed, but she tried. She tried to put what must have been an absolutely indescribable experience into words, into words that would help all of you understand what she endured on June 3rd, 2007.
>
> Her words were sometimes unsophisticated, but over and over [H.W.] told you that she did not make the choices that ended up with her on her back, naked, in a strange apartment, she did not choose that. It was not her decision to have these four men take their turns on her, one by one by one by one, and yet over and over again, without fail, [H.W.] answered questions.
>
> . . . [H.W.] could have said, "The heck with all of you, I am not going through this, I am not going to sit there and be humiliated and answer these questions. I am not going to have my life put on display. I am not going to talk about what was done to me in front of a room full of strangers." . . .
>
> She bravely came back, day after day, to answer the questions, she told you she was running on empty, she had no sleep, she was having nightmares when she did sleep, she was losing pay every day that she missed work, and yet, without fail, she came back and told you what happened to her.

In response, Beskurt's counsel referred to the prosecutor's closing argument as an emotional speech. Tarhan's counsel argued:

> This is not a case about [H.W.], and I think the prosecutor gave a very dramatic performance to you about what a horrible rape can be, but I really don't think she spent much time discussing the evidence. . . . I ask you to listen critically to what [the prosecutor] said so far today, and I would submit that it was, in large part, a lot of emotion, a lot of hyperbole, and not a lot of the facts . . . .

Tarhan's counsel also discussed the burden of proof:

> Now, many of you are parents. What would you demand if it were one of your children that was on trial for this or another serious crime, what proof would you demand the State bring in order for your son or daughter to be convicted? And I think that's a way to give you sort of a gut feeling of what is required in proof beyond a reasonable doubt, because you can look at my client, and you know he has a family, they've been pointed out to you, and he may not be a perfect person, he may not be a perfect son, he may not be, certainly on June of last year, a perfect boyfriend, but he is not a rapist, and the evidence has not overcome that presumption of innocence, which he deserves.

The prosecutor then responded to the allegation that her closing argument had been "emotional":

> [H]e's right, there was emotion in my remarks to you. Why? Because this case screams with emotion, and, in fact, emotion is part of the evidence, and rape is emotional, it's emotional, regardless of what unsophisticated words you use to describe it. Whether it's the most awkward thing you can imagine or whether it's terrifying and horrific, it is emotional, and the fact that one uses unsophisticated words doesn't make it not rape.

Finally, the prosecutor inquired of the jury, "Mr. McFarland[21] asked you if your sons were on trial, what evidence would be enough. Well, ladies and gentlemen, if your daughter had been the victim, what kind of evidence would be

[21] Mr. Raymond McFarland was Tarhan's counsel.

enough?" The defendants did not object.

Arguments that appeal to the jury's passions and prejudices invite the jury to determine guilt based on improper grounds and are misconduct. Belgarde, 110 Wn.2d at 507. It is the prosecutor's duty to ensure a verdict free of prejudice and based on reason. State v. Claflin, 38 Wn. App. 847, 849–50, 690 P.2d 1186 (1984). But, the prosecutor's remarks are not misconduct if they are invited by defense counsel or are in reply to or in retaliation for defense counsel's acts, "'unless such remarks go beyond a pertinent reply and bring before the jury extraneous matters not in the record, or are so prejudicial that an instruction would not cure them.'" State v. Dennison, 72 Wn.2d 842, 849, 435 P.2d 526 (1967) (quoting State v. LaPorte, 58 Wn.2d 816, 822, 365 P.2d 24 (1961)); State v. Jones, 144 Wn. App. 284, 299, 183 P.3d 307 (2008).

The defendants allege that the prosecutor effectively told the jury to ignore the evidence, instead appealing to their emotions. Because defense counsel did not object, defendants have waived review of this claim unless the conduct was flagrant and ill intentioned. Belgarde, 110 Wn.2d at 507. But, unlike the facts of the cases cited,[22] here the defendants fail to prove that the

[22] In Belgarde, the prosecutor made comparisons, outside the record, of the American Indian Movement to Sean Finn of the Irish Republican Army, calling them "a deadly group of madmen" and "butchers that kill indiscriminately." 110 Wn.2d at 506–07. The court found that these comments were "flagrant" and a "deliberate appeal to the jury's passion and prejudice." Id. at 507–08. Similarly, in State v. Boehning, 127 Wn. App. 511, 522, 111 P.3d 899 (2005), the court found that discussion of three dismissed rape counts that were not in evidence impermissibly appealed to the passion and prejudice of the jury. Finally, in Claflin, the prosecutor read a poem about the emotional impact of rape victims. 38 Wn. App. at 850 n.3. The reading of the poem was found to be so prejudicial that no curative instruction would have erased the prejudice. Id. at 851. Beskurt

prosecutor's remark was flagrant and ill intentioned. Her comments were limited to issues in the case and merely addressed the effect of the rape and the trial on H.W. See State v. Fleetwood, 75 Wn.2d 80, 84, 448 P.2d 502 (1968) ("A prosecutor is not muted because the acts committed arouse natural indignation.").

Also, the State contends that the comments were invited by defense counsel. In closing, defense counsel told the jury that the prosecutor's speech was "dramatic" and contained a lot of "emotion" and "hyperbole." They also argued that H.W. lacked credibility because she used the word "awkward" to describe the incident. The prosecutor responded by explaining that the words H.W. used to describe the rape did not remove the emotion of the act. Her comments in response were not extraneous or overly prejudicial.

None of the four defense attorneys objected. The absence of an objection suggests that the argument or event did not appear critically prejudicial in the context of the trial. State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

We hold the prosecutor's comments were not flagrant or ill intentioned.

C. Right to Be Present at Trial, Confront Witnesses, and Have Counsel

The defendants next argue that the prosecutor's comments during closing argument violated their rights to cross-examine the complaining witness, to have counsel, and to be present at trial. The prosecutor's comments were not

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claims that this court should determine that the dramatic argument here similarly inflamed the prejudices of the jury. The argument here was not comparable.

misconduct.

All four defendants attended trial. During direct, the prosecutor asked the victim:

> Q: [H.W.], is this the first time since the incident that you've had to be in a room, staring at the defendants?
>
> A: Yes
>
> Q: And how has that been for you?
>
> A: It's awkward, uncomfortable, really, really uncomfortable.

During redirect, the prosecutor asked H.W., "What has this experience of testifying been like for you?" After a defense objection for relevance, H.W. responded, "It's been horrendous," explaining that she had missed work and couldn't sleep.

In closing, the prosecutor stated that H.W. had no idea "that the events of that evening would end up over a year later in this courtroom, where what was taken from her and how it was taken would be analyzed in excruciating detail, in front of a room full of strangers. She had no idea that she would be questioned about that evening as if she were the one on trial." In support of H.W's credibility, the prosecutor said:

> And then you saw how [H.W.] came back to court, as we've discussed, not just one day, not even just two days, [H.W.] came back four days. She sat on the witness stand for four days and answered questions, and she told you, with these four men staring at her, with their families staring at her, she told you what they did, she told you how she got through it.

The prosecutor then stated that she could "only guess" what defense counsel would argue. But, she speculated: "[T]hey will probably beat [H.W.] up about

what she doesn't remember, what she doesn't know, they'll probably beat her up about why she didn't fight harder, and in doing that they'll likely be either suggesting that she simply doesn't remember that she agreed to this, or she's lying about it."

The prosecutor opened rebuttal argument by saying:

> There's a saying in the courthouse, when you have the facts on your side, pound the facts, when you have the law on your side, pound the law, and when you don't have either one, pound the victim, and ladies and gentlemen, yesterday afternoon and this morning, that is exactly what you have seen happen.

In response to Beskurt's counsel's assertion that H.W.'s crying decreased her credibility, because she became emotional only when she did not have an answer to a question on cross-examination,[23] the prosecutor continued:

> . . . [O]ne cannot be human and ignore the emotion that [H.W.] showed on the stand when she recounted what these four men did to her, and that emotion did not reveal itself, as Mr. Meryhew[24] would have you believe, when she was only on cross-examination and couldn't answer a question.
>
> Apparently, Mr. Meryhew missed a very significant portion of [H.W.'s] testimony on direct, where when we got to the tough stuff I had to go slow, I had to give her a moment so that she could get through it, and, apparently, Mr. Meryhew missed the part of [H.W.'s] direct, where she was so emotional she begged me, please, just ask me another question that will make this easier. Apparently, he missed the part of [H.W.'s] testimony where she sat there in tears, bullied by Mr. Savage's questions, while she tried to describe exactly how it was these men slapped her in the face with their penises. She was mortified to say it, there's no doubt, but she

[23] Beskurt's counsel stated, "I think what you'll see is this interesting correlation between crying and not really having an answer to the question." He continued, "[I]t was when we pushed her in cross-examination that she would cry, and so that crying, ladies and gentlemen, actually turns out to be a reason to question her credibility."

[24] Mr. Brad Meryhew served as Berskurt's counsel.

was very capable of giving you an answer, and she did just that.

She argued:

> [T]he bottom line that defense counsel would have you believe is that [H.W.] has perpetrated a lie on all of you and on this court, that because she regrets a decision or wishes she had been raped, or is loyal to a friend, that she is willing to come in here and testify against these four men, about these very serious allegations. . . . [D]on't you think you would have seen some glimmer of that in her testimony? Don't you think there would have been a hint of that in the four days she spent on the stand? You didn't -- you didn't get a glimmer of that. Instead you saw a young woman, who, if anything, minimized what these men did to her, and then when she was face to face with the men that raped her, or one of the men that raped her, she apologized to him because she didn't know his name. Does that really strike you as a mean and vindictive person?

The prosecutor continued to discuss the manner in which questions were asked of H.W. by the defense counsel:

> And yeah, there were times during her testimony when [H.W.] seemed to get clear about a few things. Perhaps that was because among four days of testimony she had time to go back and really revisit this in a way she had not before. Perhaps it was because over the weekend she finally got some sleep, or perhaps it was because the questions -- questions themselves and the bullying manner in which they were asked were designed to elicit just those types of responses from [H.W.], designed to confuse her, designed to make her think she'd given a different answer before.

Defendants did not object.

Accused persons have the right to confront witnesses against them. U.S. Const. amend. VI;[25] Const. art. I, § 22.[26] They have the right to counsel. U.S.

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[25] The Sixth Amendment secures the right of an accused person "to be confronted with the witnesses against him." The Sixth Amendment is applied to the states by the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 403, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965).

[26] The Washington State Constitution expressly protects the right of an accused person to "appear and defend in person, or by counsel" and to "meet the witnesses against him face to face." Const. art. I, § 22.

Const. amend. VI,[27] Const. art. I, § 22. Also, they have the right to be present at trial. Illinois v. Allen, 397 U.S. 337, 338, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970). Every prosecutor is a quasi-judicial officer of the court, charged with the duty of ensuring that an accused receives a fair trial. Jones, 144 Wn. App. at 290. The State may take no action which will unnecessarily chill or penalize the assertion of a constitutional right, and the State may not draw adverse inferences from the exercise of a constitutional right. State v. Gregory, 158 Wn.2d 759, 806, 147 P.3d 1201 (2006). But, the prosecutor has some latitude to argue facts and inferences from the evidence. Jones, 144 Wn. App. at 293. Also, not all arguments touching upon a defendant's constitutional rights are impermissible comments on the exercise of those rights. See Portuondo v. Agard, 529 U.S. 61, 69–70, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000); Miller, 110 Wn. App. at 284. Arguments are only improper when the prosecutor manifestly intended the remarks to be a comment on that right. Gregory, 158 Wn.2d at 806–07. Because the defense counsel failed to object, the defendants must prove that the misconduct here was flagrant or ill intentioned and that any prejudice could not have been cured by objection and curative instruction. Belgarde, 110 Wn.2d at 507.

The defendants argue the prosecutor improperly commented on their right to confront witnesses against them by discussing the manner of cross-examination.

[27] The Sixth Amendment to the United States Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI.

Two cases are relevant. In State v. Jones, 71 Wn. App. 798, 805–06, 863 P.2d 85 (1993), the prosecutor suggested that Jones stared at the victim and that the victim's courtroom contact with Jones was so traumatic that she could not return to court. The court held that the prosecutor's statements amounted to an improper comment on the defendant's right to confront his accuser, because it invited the jury to draw a negative inference from the defendant's exercise of his right. Id. at 812–13.

In Gregory, the prosecutor used the victim's statements that testimony and cross-examination had been "horrific" in closing argument to bolster the victim's credibility, arguing that the complaining witness "would not have subjected herself to the trial process just to avenge a broken condom." 158 Wn.2d at 805–06. The court held that the comments were not improper because the comments focused on the credibility of the victim. Id. at 808. The court noted the absence of citation to any case holding that "general discussion of the emotional cost of victim testimony, offered to support the victim's credibility, amounts to an improper comment on the defendant's right to confrontation." Id. Such comments are acceptable as long as they focus on the "credibility of the victim as compared to the credibility of the accused." Id. The court reasoned that "[t]he State did not specifically criticize the defense's cross-examination of R.S. or imply that Gregory should have spared her the unpleasantness of going through trial." Id. at 807.

Here, the comments were merely for focusing on H.W.'s credibility, similar to the comments in Gregory. As in Gregory, the credibility of H.W., the

complaining witness, was a crucial issue here. The prosecutor appropriately tied her comments regarding the manner of cross-examination to credibility.

The State also argues that the comments were invited.[28] Mere vigorous cross-examination is insufficient to invite such commentary.[29,30] But, defense counsels' specific arguments regarding the witness's behavior in response to cross-examination invited the prosecutor's comments as long as they were specifically tied to the credibility of the witness. The comments regarding the manner in which defense counsel conducted cross-examination did not constitute misconduct.

The defendants allege that the prosecutor asked the jury to draw a negative inference from the defendants' attendance at trial. The prosecutor's comments regarding the defendant's presence at trial were not improper.

In State v. Jordan, 106 Wn. App. 291, 296–97, 23 P.3d 1100 (2001), the prosecutor told the jury that the witness was "sitting here in the witness stand with the defendant looking at him here and worried about getting what they call the snitch jacket in prison" after the witness had changed his testimony from a

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[28] Again, prosecutor remarks are not misconduct if they are invited by defense counsel or are in reply to or in retaliation for defense counsel's acts, "'unless such remarks go beyond a pertinent reply and bring before the jury extraneous matters not in the record, or are so prejudicial that an instruction would not cure them.'" Dennison, 72 Wn.2d at 849 (quoting LaPorte, 58 Wn.2d at 822).

[29] Tarhan points out that some of the challenged comments occurred in the State's opening round of closing argument, so they could not have been made in response to defense closing.

[30] Beskurt also argues that the doctrine of "invited error" does not apply to prosecutorial misconduct. While he is correct that the "invited error doctrine" only applies to errors by the court, a separate rule states that prosecutor remarks are not misconduct if they are invited by defense counsel or are in reply to defense counsel's acts or statements. Jones, 144 Wn. App. at 298–99.

previous pretrial statement. The court found that the prosecutor was not "flagrantly and with ill intent" trying to comment on Jordan's right to confront witnesses against him. Id. at 297. Rather, the statements went to the credibility of the witness. Id.

Similarly, here, the prosecutor defended H.W.'s credibility by commenting that H.W. testified with the defendants and their families staring at her. The prosecutor stated that H.W. did not exaggerate and that her behavior during trial in the face of such hardship "gave you a really good picture into who [H.W.] is." She used the facts relating to H.W.'s state of mind at the trial, including her discomfort at facing the defendants, her lack of sleep, and her reaction to the general experience, to provide a plausible alternative for inconsistent statements and crying on the witness stand. Even if the statements touched on constitutional rights, there is no evidence that the comments regarding the defendants' presence at trial were flagrant and ill intentioned or that they were intended to comment on the defendants' constitutional right. Gregory, 158 Wn.2d at 805. The prosecutor's statements were not improper.

The defendants finally argue that the prosecutor improperly disparaged defense counsel, citing State v. Warren, 165 Wn.2d 17, 195 P.3d 940 (2008). In Warren, the prosecutor made the statements that "mischaracterizations" by defense counsel were "'an example of what people go through in a criminal justice system when they deal with defense attorneys,'" and that defense counsel was "'taking these facts and completely twisting them to their own benefit, and hoping that you are not smart enough to figure out what in fact they

are doing.'" Id. at 29–30 (quoting Report of Proceedings (Nov. 18, 2003) at 62–63). These were clear misconduct. The prosecutor's comments here do not rise to the level of those in Warren.

No misconduct occurred here.

D. Discussion of Victim's Sexual History

The defendants argue that the prosecutor erred by taking advantage of the "rape shield" statute, RCW 9A.44.020, to urge the jury to find H.W. credible because she was chaste.

The prosecutor made the following statement in closing argument:

> And so what you have to ask yourselves is in light of everything that you know, in light of everything you know about that night and everything that you know about [H.W.], does their story make sense? They have painted for you the picture of a woman who was a flirt and a tease, a sexual aggressor, who trapped these four men into an experience that at least two of them later decided they didn't very much care for.
>
> . . .
>
> Now, I'm sure that somewhere out there you all could find a woman who after only two hours of knowing four men would agree to have sex with them, but the real question, the real question for this trial is[:] is [H.W.] one of those women? Is she the kind of girl that says come hither, and then says come hither, come hither, and come hither again? Is she the kind of girl that has sex with four men that she's known for less than two hours while her friend goes to get cigarettes? And you all can answer that question, because after four weeks of testimony you know [H.W.], in fact, you all spent more time with [H.W.] than these men ever did. And if [H.W.] is the victim that they want you to believe she is, the in control, in charge kind of girl, don't you think that after four days on the stand you would have seen some tiny glimmer of that, some suggestion that there's a different [H.W.]? That's a duplicity that's pretty amazing, if we're to accept what the defendants want you to believe.

No defendant objected.

RCW 9A.44.020[31] prohibits the use of a rape victim's past sexual behavior on the issue of credibility. In limited circumstances, use of a rape victim's past sexual behavior is admissible on the issue of consent, provided that proper procedure is followed. RCW 9A.44.020(3). Because the defendants did not object to the prosecutor's remark that may have implicated the rape shield statute, the remark must have been "flagrant and ill intentioned" to warrant review. Belgarde, 110 Wn.2d at 507.

The trial court limited the use of the victim's sexual history to an effort to show any bias the witness Crilly had and to offer an alternative explanation for the vaginal lacerations located during the Harborview examination. Defense counsel violated the court's order, making argument in closing based on the possible overlap of H.W.'s relationship with Crilly with her relationship with her ex-boyfriend. Counsel also argued that H.W. was no "Rebecca of Sunnybrook Farm."

As a result, the prosecutor's comments about the "kind of woman" H.W. was did not constitute error. Rather, the comments responded to the defense

[31] RCW 9A.44.020(2) reads:

> Evidence of the victim's past sexual behavior including but not limited to the victim's marital history, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards is inadmissible on the issue of credibility and is inadmissible to prove the victim's consent except as provided in subsection (3) of this section, but when the perpetrator and the victim have engaged in sexual intercourse with each other in the past, and when the past behavior is material to the issue of consent, evidence concerning the past behavior between the perpetrator and the victim may be admissible on the issue of consent to the offense.

insinuation that H.W. was promiscuous. While some of the comments did implicate H.W.'s sexual history, they were ultimately responsive to the violation of the rape shield statute by the defendants and therefore were not flagrant and ill intentioned.

We hold that the prosecutor's statements made in closing argument did not constitute prosecutorial misconduct.

IV. Ineffective Assistance of Counsel

Tarhan argues in the alternative that he received ineffective assistance of counsel when his counsel failed to object to prosecutorial misconduct. To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness based on consideration of all the circumstances and that the deficient performance prejudiced the trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). The reasonableness inquiry presumes effective representation and requires the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct. State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). To show prejudice, the defendant must prove that, but for the deficient performance, there is a reasonable probability that the outcome would have been different. In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). If one of the two prongs of the test is absent, we need not inquire further. Strickland, 466 U.S. at 697; State v. Foster, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

Tarhan's defense counsel's performance did not fall below the standard of reasonableness. Because there was no misconduct, Tarhan's counsel had no duty to object. The decision not to object or request a curative instruction was a legitimate tactical decision likely intended to avoid drawing unfavorable juror attention. Tarhan's counsel acted reasonably.

Because counsel's performance was not deficient, we need not address prejudice. Foster, 140 Wn. App. at 273. Tarhan was not denied effective assistance of counsel.

V. Cumulative Error

"It is well accepted that reversal may be required due to the cumulative effects of trial court errors, even if each error examined on its own would otherwise be considered harmless." Russell, 125 Wn.2d at 93. This court may exercise its discretion under RAP 2.5(a)(3) to review all claims, even those that were not properly preserved for appeal, where it finds that the cumulative effect of errors is to deny the defendant a fair trial. State v. Alexander, 64 Wn. App. 147, 150–51, 822 P.2d 1250 (1992).

In this case, the only error occurred during voir dire, which was waived. Even if it had been preserved, this error did not deny the defendants a fair trial. First, the defendants offered no evidence that the individuals actually selected as jurors in this case were biased or that they were denied a fair trial. Second, the defendants had remaining peremptory challenges which they declined to use to cure the error by removing tainted jurors. Third, the court offered a curative instruction, which the jurors are presumed to have followed. See Brown, 132

Wn.2d at 618.

No error here denied the defendants a fair trial. We affirm.

Appelwick, J.

WE CONCUR:

Schindler, J. Cox, J.