IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 64945-1-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
BARRY ROYCE DRAGGOO,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: June 1, 2010
	)	

Lau, J. — A jury convicted Barry Draggoo of three counts of first degree child molestation involving two young neighbor girls. Draggoo appeals, arguing that ineffective assistance of counsel, an erroneous unanimity jury instruction, and prosecutorial misconduct entitle him to a new trial. Because no deficient representation occurred, the unanimity instruction correctly stated the law, and the prosecutor's conduct was not improper or prejudicial, we affirm.

FACTS

The State charged Barry Draggoo with two counts of first degree child molestation involving N.J.D. and one count involving R.S. At trial, witnesses testified to

the following facts. Draggoo lived in an apartment with his wife, Kristi, step-daughter Danielle, and his two children. Draggoo's children befriended two children who lived next door, N.J.D., who was two years older than Danielle, and A.D.

While in Lewis County jail on a previous conviction, Draggoo told his cellmate, John Huggins, that in 2004 he had twice "raped" a neighbor girl who was a friend of and two years older than his step-daughter Danielle. Huggins revealed Draggoo's admission in a written statement he gave to Lewis County Detective Tom Callas. Detective Callas interviewed Huggins, which was tape recorded and later transcribed. Based on the Huggins statement and interview, Detective Callas contacted Kristi Draggoo, who gave him the names of "young girls in the neighborhood that were friends with her daughter Danielle that were slightly older." 3 Verbatim Report of Proceedings (VRP) (Feb. 6, 2009) at 297. This information led him to interview N.J.D. and R.S. Prior to this point, N.J.D. and R.S. had made no disclosures to anyone about the sexual assaults.

Although N.J.D. remembered only three particular sexual assaults, she estimated that Draggoo had touched her in a similar way about 20 times. She described an incident at Draggoo's home when he locked the door, forcefully sat her on the kitchen counter, pinched her nipples until it hurt, and rubbed her vagina over her clothing. N.J.D. tried to push him off, but he was too big. The next incident occurred at a swimming pool. N.J.D. said Draggoo was in the pool, throwing the girls up in the air. When N.J.D. took her turn, Draggoo "touched me by grabbing my thighs and then like his finger, his thumb, like it was going in my vagina because I could feel it and it used

to hurt." 2 VRP (Feb. 5, 2009) at 185. "[A]nd then he would go around me and touch my butt." 2 VRP (Feb. 5, 2009) at 189. And the third incident she described happened at Draggoo's home when the girls were playing "dress-up." While alone with N.J.D., Draggoo touched her breasts over her clothes, "[r]ubbing them and pinching them." 2 VRP (Feb. 5, 2009) at 187. As to R.S., a friend of Draggoo's children, she testified that Draggoo rubbed her breasts under her shirt while giving her a backrub.

During trial, juror 10 notified the bailiff that she knew N.J.D.'s mother and younger sister. The court immediately questioned the juror outside the presence of the other jurors about her contact with the mother and sister. After the prosecutor declined to question the juror, defense counsel briefly questioned the juror. The court asked the prosecutor and defense counsel if they had any objection to juror 10 "continuing on as a juror in this case." 2 VRP (Feb. 5, 2009) at 135. They both responded, "No."

The jury convicted Draggoo as charged and returned a special verdict, finding that he used "his position of trust or confidence to facilitate the commission" of the crimes. Clerk's Papers at 56.

ANALYSIS

Ineffective Assistance Claim

Draggoo contends that he received ineffective assistance of counsel because his trial counsel failed to move to disqualify juror 10 and failed to object to unfairly prejudicial evidence.

To demonstrate ineffective assistance of counsel, Draggoo must satisfy both prongs of a two-pronged test. See State v. McFarland, 127 Wn.2d 322, 334–35, 899

P.2d 1251 (1995). But we need not address both prongs if he makes an insufficient showing on one prong. State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d 56 (1986). First, Draggoo must establish that his counsel's representation was deficient. State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). To show deficient performance, he has the "heavy burden of showing that his attorneys 'made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment . . . .'" State v. Howland, 66 Wn. App. 586, 594, 832 P.2d 1339 (1992) (quoting Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). His attorney's conduct must have fallen below an objective standard of reasonableness considering all the circumstances. State v. Meckelson, 133 Wn. App. 431, 436, 135 P.3d 991 (2006). Matters that go to trial strategy or tactics do not show deficient performance; Draggoo bears the burden of establishing there were no legitimate strategic or tactical reasons behind his attorney's choices. State v. Rainey, 107 Wn. App. 129, 135–36, 28 P.3d 10 (2001). Where a claim of deficiency rests on trial counsel's failure to object, a defendant must show that an objection would likely have been sustained. See State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

Second, Draggoo must show that his attorney's deficient performance resulted in prejudice such that "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." Hendrickson, 129 Wn.2d at 78. Courts employ a strong presumption that counsel's representation was effective. McFarland, 127 Wn.2d at 335.

Draggoo claims that his trial counsel's failure to move to disqualify juror 10, constituted deficient performance that resulted in prejudice. A trial judge has wide discretion in granting or denying a particular challenge for cause. State v. Witherspoon, 82 Wn. App. 634, 637, 919 P.2d 99 (1996). "A prospective juror must be excused for cause if the trial court determines the juror is actually or impliedly biased." State v. Gosser, 33 Wn. App. 428, 433, 656 P.2d 514 (1982); RCW 4.44.170. Implied bias is presumed from the factual circumstances, but actual bias must be established by proof. RCW 4.44.180; 190; State v. Noltie, 116 Wn.2d 831, 838, 809 P.2d 190 (1991). Courts ask "whether a juror with preconceived ideas can set them aside" and decide the case on an impartial basis. Noltie, 116 Wn.2d at 839; Gosser, 33 Wn. App. at 433. And "[a] juror's acquaintance with a party, by itself, is not grounds for a challenge for cause." State v. Tingdale, 117 Wn.2d 595, 601, 817 P.2d 850 (1991).

Our opinion in State v. Rempel, 53 Wn. App. 799, 770 P.2d 1058 (1989), rev'd on other grounds, 114 Wn.2d 77, 785 P.2d 1134 (1990) is instructive. There, during voire dire, a juror denied knowing the complaining witnesses in a burglary and rape prosecution, but when that witness appeared in court to testify, the juror realized that she actually knew the witness. The juror immediately informed the court, a hearing was held, and the court found that she could be impartial and denied a defense motion for a mistrial. On appeal, we held that the record did not establish improper juror bias and that "an unintentional failure to disclose information not directly connected with the case does not necessarily show a juror's prejudice sufficient to require a new trial." Rempel, 53 Wn. App. at 803.

The facts here are analogous. As in Rempel, juror 10's pretrial failure to disclose that she knew N.J.D.'s mother and sister was unintentional. And there is no evidence that juror 10 imparted any information to the jury outside the evidence. The record shows that the court and defense counsel questioned juror 10 about her contact with N.J.D.'s mother and sister and whether she could be fair and impartial.

> THE COURT: Why don't you tell me what you know or who you know or what the background is there.
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> JUROR NO. 10: I work at Fords Prairie Elementary. [A.D.] was a student at our school. And I was in charge of the computer lab so I saw all students at Fords Prairie, they all filtered through my computer lab in a week, and she just happened to be one of those students. And I was also [on] playground duty. And, you know, I just know [A.D.]. And I now am a secretary at Fords Prairie and so [A.D.'s] parents, even though they speak Spanish, have been to the office. I have not had any contact with them.
>
> THE COURT: So you know [A.D.]
>
> JUROR NO. 10: Mm-hmm.
>
> THE COURT: Do you know any of the other children?
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> JUROR NO. 10: No.
>
> THE COURT: All right. And do you -- with regard to the parents, would you recognize them by sight?
>
> JUROR NO. 10: The—yeah, I recognized them on the way out.
>
> THE COURT: All right. And have you ever had conversation with the mother?
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> JUROR NO. 10: She speaks Spanish so we—I have not spoken to her. I have asked an interpreter to ask what she needs. She will come and ask us a question. It will probably be—I believe the student is Fabion that goes to our school currently and it would be like he's going to be a pickup or take a bus home or what time are you getting out of school, those kinds of questions. But I go through an interpreter.
>
> THE COURT: How frequent have those contacts been and over what period of time have those contacts been with the mother?
>
> JUROR NO. 10: The mother, probably in the last week.
>
> THE COURT: All right. And it didn't happen before this last week? Or that was the most—last week was the most recent?
>
> JUROR NO. 10: Yes.
>
> THE COURT: And how long has that been going on? How long have you—
>
> JUROR NO. 10: That's the first time I've ever spoken to her or had contact with her. I didn't speak to her directly. I went through an interpreter.

THE COURT: So it was just the one time?
JUROR NO. 10: I believe so, yes.
THE COURT: All right. Is there anything about that contact that gives you—or has any impact on your sitting here and hearing this case?
JUROR NO. 10: I believe I can be fair and I don't think that it would influence me.
THE COURT: All right.
JUROR NO. 10: Is that what you're asking?
THE COURT: Yes. All right.
JUROR NO. 10: I'm in a position of having a lot of confidential material, I'm [a] secretary and in the office. I'm in that position because I think I'm trusted.
THE COURT: All right. [Prosecutor], any questions?
[The State]: No.
THE COURT: [Defense counsel] ?
[Defense Counsel]: Just briefly. Did her sister—do you know if her sister went to Fords Prairie Elementary?
JUROR NO. 10: If she did, I did not have contact with her.
[Defense Counsel]: Okay. Okay.
JUROR NO. 10: I did not recognize the name when the names went up [sic]. But today when [the mother] was mentioned and Fabion and then [A.D.], I didn't know if I needed to raise my hand right away. That's why I mentioned it.
THE COURT: Okay. Anything else, [Defense counsel]?
[Defense Counsel]: And how long have you been at Fords Prairie Elementary?
JUROR NO. 10: Since '95.
[Defense Counsel]: Okay.
JUROR NO. 10: But in many different capacities.
[Defense Counsel]: Okay. Thank you. Nothing.
THE COURT: Anything else?
[The State]: No.
THE COURT: All right. That's all for right now. You can step back to the jury room for a few minutes.
THE COURT: Based on those questions, those answers, [Prosecutor], do you have any objection to her continuing on as a juror in this case?
[The State]: No, your honor.
THE COURT: [Defense Counsel]?
[Defense Counsel]: No.
THE COURT: All right.

2 VRP (Feb. 5, 2009) at 132–35. Like Rempel, the record does not establish any improper juror bias.[1] Draggoo also cites no factually relevant case to establish his

implied bias claim. Under these circumstances, defense counsel's decision not to move to disqualify juror 10 was objectively reasonable. And his failure to pursue a meritless strategy does not constitute deficient performance. See State v. Briggins, 11 Wn. App. 687, 692, 524 P.2d 496 (1974) ("The failure to argue a groundless matter does not constitute a denial of effective counsel.").

Draggoo next argues that defense counsel's failure to object to his statements to former cellmate, John Huggins, constitutes ineffective assistance.[2] Specifically, he argues that any reasonable attorney would have objected to this testimony because it was unfairly prejudicial under ER 403.[3] The State replies that Draggoo cannot show that the objection would have been sustained.

Under ER 403, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. "'[U]nfair prejudice' is that which is more likely to arouse an emotional response than a rational decision by the jury." State v. Gould, 58 Wn. App. 175, 183, 791 P.2d 569 (1990). The addition of the word "unfair" in ER 403 "obligates the court to weigh the evidence in the context of the trial itself, bearing in mind fairness to both the State and defendant." State v. Bernson, 40 Wn. App. 729, 736, 700 P.2d 758 (1985). "In almost any instance, a defendant can complain that the admission of potentially incriminating evidence is prejudicial in that it

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[1] Draggoo assigns no error to the trial court's failure to excuse juror 10.

[2] Draggoo did not testify at trial.

[3] Notably, Draggoo does not challenge Huggins's testimony on relevance grounds.

may contribute to proving beyond a reasonable doubt he committed the crime with which he is charged." Bernson, 40 Wn. App. at 736. As such, the focus must be on whether it was unfairly prejudicial evidence. State v. Stackhouse, 90 Wn. App. 344, 358, 957 P.2d 218 (1998).

Under ER 403, Draggoo must establish that, on balance, the relevance of the evidence outweighs its negative effect on the fact-finding process. Rule 403 is considered an extraordinary remedy, and the burden is on the party seeking to exclude the evidence to show that the probative value is substantially outweighed by the undesirable characteristics. 5D Karl B Tegland, Washington Practice: Courtroom Handbook on Washington Evidence, Rule 403 (2009–2010 ed.).

Here, Draggoo cannot establish deficient performance because he fails to show that the trial court would have sustained an ER 403 objection to Huggins's testimony. The trial court could have properly admitted Huggins's testimony on three independent grounds.

First, Draggoo's 2008 admission to Huggins is highly probative to establish guilt by demonstrating that Draggoo committed child molestation involving N.J.D. The jury could reasonably infer from the evidence that the neighbor girl he "bragged" to Huggins about "raping" in 2004 was N.J.D. given the particular facts he disclosed to Huggins.[4] For example, at trial N.J.D. and R.S. testified that the events occurred about early 2004. The jury could credit this evidence as tending to corroborate N.J.D. and R.S.'s

[4] Draggoo used the term "rape" to describe what he did, the jury also heard evidence that he was just "bragging" to his jail cellmate, who had been convicted of child rape and child molestation.

testimony because 2004 is the same year Draggoo said he "raped" a neighbor girl who was a friend of his daughter. And the jury also heard testimony that N.J.D. was Draggoo's neighbor and his daughter's friend. See State v. Finch, 137 Wn.2d 792, 975 P.2d 967 (1999) (In a prosecution for murder, the State was properly allowed to introduce a letter written by the defendant from jail, in which the defendant expressed hostility towards the victims and implied that he had killed them. The court said the letter tended to prove guilt by demonstrating motive and intent and that there was a nothing unfair about admitting the letter as evidence.).

The prosecutor's closing remarks also underscore the relevance of Draggoo's admission.

> Think about what the defendant told Mr. Huggins down in the cell, it happened about four years ago, when he was talking about this neighbor girl. Well, four years prior to the beginning of 2008 would have been the very beginning of 2004 and it's around the time that [R.S.] and [N.J.D.] are saying this happened, in that time line. Specifically we know that sleepover was the last half of 2003, most likely in December of 2003. So it's all around the same time. That part lines up. The girls saying yeah, I was ten or eleven, that lines up too. The time line fits.

3 VRP (Feb. 6, 2009) at 353–54.

And as we reasoned above, Draggoo's admission was relevant to guilt. It also explained to the jury the circumstances that led Detective Callas to investigate and identify Draggoo's molestation victims who had never disclosed the sexual assaults until contacted by Detective Callas.

Finally, the evidence was admissible under the "lustful disposition" exception to ER 404(b).[5] Our Supreme Court "has consistently recognized that evidence of

collateral sexual misconduct may be admitted under ER 404(b) when it shows the defendant's lustful disposition directed toward the offended female." State v. Ray, 116 Wn.2d 531, 547 806 P.2d 1220 (1991); see also State v. Camarillo, 115 Wn.2d 60, 70, 794 P.2d 850 (1990); State v. Ferguson, 100 Wn.2d 131, 133–34, 667 P.2d 68 (1983). The key inquiry is whether the evidence demonstrates sexual desire for the particular victim. Ferguson, 100 Wn.2d 133–34. To fit within this exception, the evidence must pertain to conduct that would naturally be interpreted as an expression of sexual desire such as sexual intercourse. State v. Thorne, 43 Wn.2d 47, 60–61, 260 P.2d 331 (1953). And "[t]he testimony is admissible even if it is not corroborated by other evidence." Ray 116 Wn.2d at 547 (citing Camarillo, 115 Wn.2d at 68 (uncorroborated testimony about two prior incidents of sexual contact admissible)). Here, Draggoo's admission to Huggins would have been admissible as evidence of his lustful disposition towards N.J.D. Draggoo's rape admission to Huggins that included specific facts tied to N.J.D. satisfies admission under the lustful disposition exception to ER 404(b).

Under these circumstances, Draggoo's counsel was not required to make an objection that reasonably appeared unlikely to be sustained. See Saunders, 91 Wn. App. at 578. And whether or when to object is well within the realm of trial tactics. State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). Furthermore, the record shows that Draggoo's trial counsel argued vigorously over the permissible scope

[5] ER 404(b) provides, "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

of Huggins's testimony,[6] further indicating that he made a strategic decision to object only when he thought it would be sustained. On this record, Draggoo has not met the "heavy burden of showing that his attorneys 'made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment . . .'" Howland, 66 Wn. App. at 594 (quoting Strickland, 466 U.S. at 687). Since there was no deficient performance, Draggoo cannot show that there is a reasonable probability that, but for counsel's acts, the result of the trial would have been different. Hendrickson, 129 Wn.2d at 78. His ineffective assistance claim fails.

Unanimity Instruction

Draggoo next argues that the court's erroneous unanimity instruction entitles him to a new trial. The State responds that the instruction satisfies unanimity requirements and has been expressly approved by this court.

A jury must unanimously agree on the act that supports a conviction. State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984). When the State alleges multiple acts, any of which are sufficient to prove a count charged, the State must either elect the act upon which it will rely for conviction or the court must instruct the jury that it must unanimously agree that one particular act was proved beyond a reasonable doubt. Petrich, 101 Wn.2d at 572. Here, because the State made no election, the court was required to give a unanimity instruction.[7] Such an instruction is adequate

[6] Draggoo, for example, successfully moved to prohibit testimony by Huggins that Draggoo possessed child pornography. He also argued, without success, that he should be allowed to elicit whether Huggins had ever been offered a deal in exchange for any information regarding Draggoo.

[7] The parties do not dispute that the State alleged Draggoo engaged in multiple

where it addresses the requirement of jury unanimity "such that the ordinary juror would interpret it to mean that the jury must be unanimous on the act underlying the conviction." State v. Moultrie, 143 Wn. App. 387, 394, 177 P.3d 776 (2008). We review a challenged jury instruction de novo in the context of the instructions as a whole. State v. Bennett, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007).

Instruction 4 informed the jury,

> The State alleged that the defendant committed acts of Child Molestation in the First Degree on multiple occasions. To convict the defendant on any count of Child Molestation in the First Degree, one particular act of Child Molestation in the First Degree must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of Child Molestation in the First Degree.

In Moultrie, we examined a substantially identical instruction and held that the "instruction adequately addressed the requirement of jury unanimity such that the ordinary juror would interpret it to mean that the jury must be unanimous on the act underlying the conviction." Moultrie, 143 Wn. App. at 394. Accordingly, the court's unanimity instruction was proper.

But Draggoo maintains that the "instructions . . . also fail to inform that [sic] jury that it was required to find a separate instance of abuse to correspond with each charge."[8] Br. of Appellant at 24. The court's "to-convict" instructions for each count

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acts of sexual misconduct.

[8] This argument is more applicable to a double jeopardy claim. Division Two of this court described the fundamental differences between the two types of contentions. "[An argument] asserting that all jurors must agree on the same act underlying any given count has to do with jury unanimity and the right to jury trial. [An argument] asserting that the jury could not use the same act as a factual basis for more than one

informed the jury that the elements for each count must be proven beyond a reasonable doubt.

> To convict the defendant of the crime of Child Molestation in the First Degree as charged in Count I[/II], each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about and between April 24, 2002, and April 23, 2005, the defendant had sexual contact with [N.J.D.];
>
> (2) That [N.J.D.] was less than twelve years old at the time of the sexual contact and was not married to the defendant;
>
> (3) That the defendant was at least thirty-six months older than [N.J.D.]; and
>
> (4) That the acts occurred in the State of Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all of the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

And instruction 4 informed the jury that it must unanimously agree that the same act of child molestation had been proved beyond a reasonable doubt. A separate instruction also informed the jury, "A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count." "[T]he ordinary juror would understand that when two counts charge the very same type of crime, each count requires proof of a different act." State v. Ellis, 71 Wn. App. 400, 406, 859 P.2d 632 (1993). Read as a whole, the jury instructions correctly informed the jury that a separate act must be proved for each charge and that

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count has to do with the right against double jeopardy; at least in the context here, to use one act as the basis for two counts is to convict twice for the same crime." State v. Ellis, 71 Wn. App. 400, 404, 859 P.2d 632 (1993). Because Draggoo does not specifically articulate a double jeopardy argument, we do not address it. We also note that Draggoo cites no relevant controlling authority that supports this assertion.

they must unanimously agree on which act was proved.

Prosecutorial Misconduct

Draggoo next contends that the prosecutor committed misconduct because "the state's argument that the defendant had brutally raped [N.J.D.] . . . constituted highly prejudicial propensity evidence that compelled the jury to convict."[9] Br. of Appellant at 33. The State counters that the argument was a permissible inference from the evidence.

Prosecutorial misconduct requires a showing that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and circumstances at trial. State v. Hughes, 118 Wn. App. 713, 727, 77 P.3d 681 (2003) (citing State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997)). A defendant who alleges prosecutorial misconduct must "first establish the prosecutor's improper conduct and, second, its prejudicial effect." State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). It is improper for a prosecutor to invite the jury to decide any case based on emotional appeals or their passions and prejudices. In re Det. of Gaff, 90 Wn. App. 834, 841, 954 P.2d 943 (1998); State v. Claflin, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984). And we review a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. State v. Boehning, 127 Wn. App. 511, 519, 111 P.3d 899 (2005). "A prosecutor has wide latitude in closing argument to draw reasonable

[9] Our review of the closing remarks demonstrates that the prosecutor never used the words "brutal" or "brutally raped" as Draggoo's brief asserts.

inferences from the evidence and to express such inferences to the jury." Boehning, 127 Wn. App. at 519. But a prosecutor may not make statements that are unsupported by the evidence and unfairly prejudicial to the defendant. Boehning, 127 Wn. App. at 519. Where the defense fails to timely object to an allegedly improper remark, the error is deemed waived unless the remark is "so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994).

A defendant establishes prejudice only if he shows a substantial likelihood that the instances of misconduct affected the jury's verdict. State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995). The defendant bears the burden of showing both prongs of prosecutorial misconduct. Hughes, 118 Wn. App. at 727.

Draggoo argues that a portion of the prosecutor's closing argument was improper.

> [The State]: So defendant gives him some details, neighbor, older girl. And counsel may say, well, that's not a believable story for Mr. Huggins because the defendant told Mr. Huggins that he held her down and. raped her two times. Well, he didn't go into any more detail than that. He just said rape. And what the defendant's version of rape may be, who knows.
>
> Fishermen get together and they tell each other how big the fish they catch were. Fish that may have been that big, well, when you retell the story it may be that big. Same thing when they were down there trading their war stories. So either Mr. Draggoo was exaggerating what he had done or it's actually true.
>
> [N.J.D.] was molested around 20 times. She can only remember about three of them. He may have actually done that one of those 17 other times. When you think about it, when a traumatic event happens to a child, are they going to remember every detail about it? No. First off, is there a chance that she may have blocked those two out of her mind? Yeah, there is.
> So he was either exaggerating what he had done --
>
> [Defense Counsel]: Objection; arguing facts not in evidence, speculative.

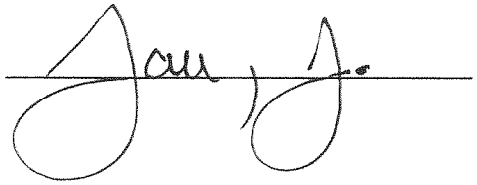
> THE COURT: Overruled.
>
> [The State]: Either exaggerating what he had done to her or he did do it. But that's how this whole case started. If Mr. Huggins hadn't shared the information he had gotten we wouldn't be here and these two young girls would still be carrying around this horrible secret inside eating away at them. [N.J.D.] said—"How did you feel after you told Detective Callas?" She said, "I felt better." She'd gotten that horrible secret off her chest and finally told someone, like a weight had been lifted off of her. These poor girls would still be carrying that around. Who knows if they ever would have told anyone.

3 VRP (Feb. 6, 2009) at 349–50.

Draggoo contends that the prosecutor's closing argument quoted above suggested to the jury that Draggoo "must have committed the crimes of molestation, because his commission of two brutal rapes proved his propensity to commit molestations that actually were charged." Br. of Appellant at 30–31. On appeal, Draggoo relies on ER 404(b) to support this claim. But he failed to make an ER 404(b) objection to this argument at trial. So we review his misconduct claim under the "flagrant and ill intentioned" standard. Russell, 125 Wn.2d at 86.

A fair reading of the prosecutor's remarks in the context of the issues and evidence at trial shows that the remarks fall well within the broad latitude granted prosecutors to argue inferences from the evidence and to express such inferences to the jury. The prosecutor's argument was not improper, let alone flagrantly ill intentioned. Similarly, Draggoo has not demonstrated prejudice or that a proper instruction would not have cured any error. As a result, Draggoo's failure to properly object waived this claim.

We affirm the convictions.



WE CONCUR:

Appelwick, J.

Cox, J.