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

STATE OF WASHINGTON, Respondent, v. LOGAN LENOX GORE, Appellant.	))))))))))	No. 66665-7-I UNPUBLISHED OPINION FILED: May 23, 2011

Ellington, J. — Logan Gore was convicted of two counts of rape in the second degree. He contends he was denied a fair trial by prosecutorial misconduct, ineffective assistance of counsel, and the court's failure to question jurors who complained about having to pass close to him in the hallway. He also contends the evidence was insufficient and, for the first time on appeal, argues the court erred in sentencing. We agree his convictions should be treated as same criminal conduct and remand for resentencing. We otherwise affirm.

BACKGROUND

Sixteen-year-old J.L.C. was visiting from Kentucky. She attended a party where she was introduced to twenty-year-old Logan Gore, and they spent most of party together. When she refused to leave with her friends, her best friend, Taylor Gibbs, noticed J.L.C. was intoxicated and decided to stay with her.

J.L.C. and Gore were partners in a drinking game. Over the course of about three hours, J.L.C. consumed two mixed drinks, five or six quarter cups of beer during the drinking game, three pints of beer from the keg, and three or four shots of vodka. She became very intoxicated. "I remember having to hold myself up. I was like—I was like leaning up against the wall, and that was holding me up. I felt really dizzy."[1] When she tried to speak, she felt she "wasn't making sense."[2]

J.L.C. did not feel good and wanted to use the restroom, but needed help to walk there. Gore offered to take her, but took her to a bedroom instead. There, J.L.C. collapsed or was pushed onto the bed. Gore closed the door, turned off the lights and started kissing her. She repeatedly told him, "I'm a virgin, don't have sex with me."[3] Gore digitally penetrated J.L.C.'s vagina, performed oral sex on her, and penetrated her vagina and anus with his penis. J.L.C. testified at length about her difficulty remaining conscious during the encounter, which lasted 15 to 30 minutes. She felt unable to talk and that if she did, she would not make sense. Eventually, people tried to get into the room. J.L.C. could not dress herself, so Gore did it for her. He led her down the hallway and out of the house.

Meanwhile, Gibbs had been unable to find J.L.C. and called her friend Marina Kaminsky, who came with her boyfriend Elan Marmaduke to help. Shortly after they arrived, J.L.C. emerged from the house. Gore was holding her up and helping her walk. When J.L.C. tried to walk away from Gore, she fell down and could not get up.

---

[1] Report of Proceedings (RP) (Nov. 4, 2009) at 537.

[2] Id.

[3] Id. at 552.

Marmaduke and Gibbs asked Gore what he had done to J.L.C. He either did not respond or denied that anything had happened.

After leaving the party with her friends, J.L.C. was moaning and crying and her speech was fragmented. She repeated that she was in pain, her vagina hurt, and she felt like she was bleeding. The teens went to a friend's house and asked her mother, Karen Swift, for help.

Swift is a nurse practitioner and midwife. She spoke to J.L.C., who was distressed, couldn't stop talking, had trouble walking, had bloodshot, glassy eyes, and was disheveled. It was apparent to Swift that J.L.C. was under the influence. Swift took J.L.C. and her friends to the hospital but no sexual assault nurse examiner was available. They returned the next day and J.L.C. was examined by sexual assault nurse examiner Casey Stewart. Stewart noted abrasions and redness in the vaginal and anal areas and the hymen had been torn away. Her condition was consistent with J.L.C.'s reports. Stewart collected swabs from J.L.C.'s vagina, anus, and perineal area, which revealed the presence of semen later found to match Gore's DNA profile.

The State charged Gore with two counts of rape in the second degree. After a six day trial, the jury convicted Gore as charged.

DISCUSSION

Jurors

On the third day of trial, the bailiff informed the judge that several of the jurors "independently and individually had mentioned to the bailiff that they were

uncomfortable coming into the jury deliberation room because they had to walk by the defendant."[4] The court called counsel in to discuss the matter, and the bailiff was sworn and examined. The bailiff reported that four jurors had expressed discomfort in having to pass the defendant at very close proximity. One of the jurors "used the term 'tactic,' felt that it was a conscious tactic. Another juror used the term 'staging.'"[5]

Defense counsel conceded the irregularity did not rise to the level of a mistrial but asked the court to bring the jurors in to inquire individually whether "they are aware of it, if there's been any discussions amongst the panel, because if in fact these jurors—even if one of these jurors feels intimidated by Mr. Gore my concern is—my legitimate concern is that he's not going to get a fair trial."[6] The prosecutor opposed individual questioning because doing so would "put in their head well, I'm intimidated by this defendant, and it's going to create the issue of it."[7]

The court concluded such questions "would be creating more of a problem,"[8] observing that defense counsel had spoken to Gore about sitting elsewhere and that if necessary, jurors could be advised of a different route to the courtroom to avoid inadvertent contact. The court invited counsel to raise the matter again "if you have additional authority or additional information you want me to consider."[9] Defense

---

[4] RP (Nov. 3, 2009) at 349.

[5] Id. at 350.

[6] Id. at 356.

[7] Id. at 357.

[8] Id.

[9] Id. at 358.

counsel moved for a mistrial "just to preserve the issue for appeal," but did not raise the issue again or present additional authority.[10]

Gore now contends the court was required to interrogate the jurors to determine whether any juror could no longer be fair, and that its failure to do so violated its duty to excuse any juror who has manifested an unfitness to serve.[11]

Washington courts have discretion as to how to determine whether jurors have engaged in misconduct "in a way that avoids tainting the juror, and, thus, avoids creating prejudice against either party."[12] Here, the court found there had been nothing "close to a showing of any kind of misconduct or any basis that the jury is tainted in any way,"[13] and reasonably determined that individually questioning the jurors "would create more problems than it would fix."[14] There was no error.[15]

Prosecutor's Conduct

---

[10] Id. at 358-59.

[11] See RCW 2.36.110 ("It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service").

[12] State v. Jorden, 103 Wn. App. 221, 229, 11 P.3d 866 (2000).

[13] RP (Nov. 3, 2009) at 357.

[14] Id. at 358.

[15] In his statement of additional grounds for review, Gore relies on State v. Caruthers, 909 N.E.2d 500 (Ind. App. 2009). There, the court did not poll jurors after some reported intimidation by the defendant, his family, or the victim's family. The Indiana Court of Appeals reversed the conviction and remanded for a new trial. The facts here are not similar, but in any case, the Indiana Supreme Court reversed the court of appeals, concluding the defendant failed to show "fundamental error" allowing him to raise the issue for the first time on appeal. Caruthers v. State, 926 N.E.2d 1016, 1020-22 (Ind. 2010).

Gore contends the court erred by failing to grant a mistrial based upon the prosecutor's misconduct during closing argument. A decision to grant or deny a mistrial is reviewed for abuse of discretion.[16] Denial of a mistrial will be overturned "only when there is a 'substantial likelihood' the prejudice affected the jury's verdict."[17] In determining whether an irregular occurrence affected the outcome, a reviewing court considers: (1) the seriousness of the irregularity; (2) whether it involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard it.[18]

When a mistrial motion is based upon prosecutorial misconduct, a defendant must first establish the improper conduct and then demonstrate its prejudicial effect.[19] "[A]llegedly improper statements should be viewed within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in argument, and the jury instructions."[20]

During closing argument, and despite numerous objections sustained by the court, the prosecutor used the words "lie," "lied," "lying," and "not telling the truth" to describe Gore and his testimony. She also suggested a defense witness was "a liar." Gore contends these comments improperly appealed to the passions of the jury and were not obviated by the court's reminder that arguments of counsel are not evidence and that the jury is the sole judge of credibility. Although we agree the

---

[16] State v. Rodriguez, 146 Wn.2d 260, 269, 45 P.3d 541 (2002).

[17] State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994).

[18] State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989).

[19] State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

[20] Id.

prosecutor's behavior was improper, her comments were not reversible misconduct.

The State has wide latitude in drawing and expressing reasonable inferences from the evidence, including inferences about credibility.[21] "Where a prosecutor shows that other evidence contradicts a defendant's testimony, the prosecutor may argue that the defendant is lying."[22] Here, each time the prosecutor argued Gore was lying, she cited to evidence in the record.

First, referring to Gore's insistence to Gibbs and Marmaduke that "nothing happened," the prosecutor pointed out that Gore admitted he had had sex with J.L.C. She argued that "[h]e lied" and "[h]e admitted to lying to everyone."[23]

Referring to Gore's testimony that he did not ejaculate during intercourse, she called it "a big fat lie," given that Gore's semen was found in J.L.C.'s body.[24] She asked, "Why lie about that?"[25]

Next, the prosecutor discussed Gore's friend Casey Jones, who testified he had watched the encounter through an open window and believed J.L.C. was a willing and conscious participant. She argued, "Folks, he had four beers on this night. He's good friends with the defendant. He was probably mistaken. I'll

---

[21] State v. Millante, 80 Wn. App. 237, 250, 908 P.2d 374 (1995).

[22] State v. McKenzie, 157 Wn.2d 44, 59, 134 P.3d 221 (2006); see also State v. Copeland, 130 Wn.2d 244, 291–92, 922 P.2d 1304 (1996); State v. Jefferson, 11 Wn. App. 566, 569-70, 524 P.2d 248 (1974) (finding no impropriety in prosecutor's use of word "liar" where evidence showed defendant was untruthful); State v. Luoma, 88 Wn.2d 28, 40, 558 P.2d 756 (1977) (finding that evidence supported prosecutor's comments in closing argument that defendant was a liar).

[23] RP (Nov. 9, 2009) at 915–16.

[24] Id. at 918.

[25] Id. at 919.

probably draw another objection if I call him a liar, but the point is—."[26] The evidence supported the inference that Jones was mistaken or may have observed other people. There was disagreement as to whether Jones was looking into the room J.L.C. and Gore were in, the room was dark, and Jones testified he consumed four beers during the course of the night. And Jones's friendship with Gore arguably supported an inference of bias.

Finally, the prosecutor urged the jury to consider the inconsistencies between Gore's testimony and the other evidence:

> Look at the fact that he's not telling the truth and he's been proven . . . [t]o be inconsistent with the actual forensic evidence in this case. It's impossible for him to have the story that he has in this case and be consistent with the medical findings.[27]

Because the prosecutor relied on specific evidence to illustrate inconsistencies in Gore's testimony, her argument that Gore was lying was permissible.[28]

Gore relies upon State v. Reed, in which the prosecutor offered his opinion that the defendant was a liar who "couldn't tell the truth under torture" and made other comments about his veracity.[29] But in holding that prosecutorial misconduct required reversal, the Supreme Court focused on comments disparaging the defense experts as outsiders who drove expensive cars, which the court described as striking

---

[26] Id. at 922.

[27] Id. at 923.

[28] See State v. Adams, 76 Wn.2d 650, 660, 458 P.2d 558 (1969) (no misconduct where prosecutor cited specific evidence demonstrating that defendant had lied on 32 occasions), rev'd on other grounds, Adams v. Washington, 403 U.S. 947, 91 S. Ct. 2273, 29 L. Ed. 2d 855 (1971).

[29] 102 Wn.2d 140, 143, 684 P.2d 699 (1984).

"directly at the evidence which supported petitioner's theory by appealing to the hometown instincts of the jury" and "calculated to align the jury with the prosecutor and against the petitioner."[30] Here, the comments were not merely statements of the prosecutor's opinion but were based upon conflicts between Gore's statements and the other evidence. They were thus within the bounds of permissible argument under Adams.[31]

Gore next objects to the prosecutor's argument about estimations of blood alcohol content. Again, the first question is whether the argument was improper. During trial, the prosecutor elicited testimony from nurse Stewart and Dr. Gilday about estimating blood alcohol level from the number of drinks consumed and the amount of time elapsed. There was no objection to the general testimony that each drink contributes 0.025 to a person's blood alcohol level and takes about one hour to burn off.

Gore objected, however, when the State asked Stewart about "the legal limit . . . for intoxication."[32] Outside the jury's presence, the parties argued over the admissibility of estimates of J.L.C.'s blood alcohol level and the relevance of both the legal intoxication standard for driving and the hospital's threshold for capacity to consent to treatment. The court ruled that the legal intoxication standard was irrelevant and that Stewart could not testify about J.L.C.'s actual condition at the time of the party.

---

[30] Id. at 147.

[31] See Adams, 76 Wn.2d at 660.

[32] RP (Nov. 4, 2009) at 253.

But the court permitted Stewart to testify "as to what the level was, if she is able to render that information."[33] Without objection, Stewart then confirmed that seven drinks would have given J.L.C. a blood alcohol level of 0.175. Stewart also testified that her hospital requires a patient to have a level no higher than 0.10 to consent to an examination. When the prosecutor asked whether J.L.C. would have been able to consent to an examination immediately after the party, the court sustained Gore's objection based on facts not in evidence. Stewart did not answer the question and Gore did not ask that any evidence be stricken.

The State also asked Dr. Gilday about retrograde extrapolation to estimate a person's blood alcohol level. Gilday confirmed the basic calculation to which Stewart had already testified. But when the prosecutor began to ask Gilday to confirm the estimate of a person's blood alcohol level assuming seven drinks over the course of two hours, Gore objected based on "facts that are not in evidence."[34] The court sustained the objection, Gilday did not answer the question, and Gore did not ask that any testimony be stricken.

In closing argument, the prosecutor reviewed the evidence and began to argue, "Well, folks, if you take the retrograde extrapolation—that's why we had testimony on that, so you could figure it out—it's .25, .025."[35] Gore objected that there had been no testimony on retrograde extrapolation, asserting that it had been stricken. The court sustained the objection. The prosecutor went on to argue that

---

[33] Id. at 261.

[34] Id. at 308.

[35] RP (Nov. 9, 2009) at 906.

by an estimate of six drinks contributing 0.025 each, J.L.C.'s blood alcohol level was at 0.15, "double the limit" for driving.[36] By J.L.C.'s testimony that she had more to drink, she then argued, "We're up to a .20 now, folks."[37] The court sustained another defense objection. Immediately afterwards, the prosecutor argued, "Add it up, folks. Add it up for yourself, all right? It's real simple math, folks."[38] She went on to apply the same calculation to another partygoer's account of how much J.L.C. had to drink, arriving at a blood alcohol level of 0.0875. The court sustained another defense objection.

Gore contends the prosecutor's argument is reversible misconduct because the retrograde extrapolation evidence had been stricken. The record is to the contrary. First, there was no request to strike evidence and no ruling doing so. Second, Stewart and Gilday both testified without objection to the means for estimating a person's blood alcohol level from the number of drinks consumed and the amount of time that had elapsed. Given the State's "wide latitude in drawing and expressing reasonable inferences from the evidence," it was not improper for the prosecutor to apply this calculation to the various accounts of how much J.L.C. had consumed.[39] And although the trial court had sustained Gore's objection to evidence linking J.L.C.'s estimated alcohol level to the driving under the influence standard for intoxication, the State's reference to this standard accurately stated that J.L.C. would

---

[36] Id.

[37] Id. at 907.

[38] Id.

[39] Millante, 80 Wn. App. at 250.

have been over the limit for driving, not that this proved she could not consent to intercourse.[40] The argument was not improper.

We are greatly concerned, however, about the conduct of the prosecutor. Defense counsel objected to the prosecutor's comments and the court sustained those objections *nine times*. The prosecutor ignored the court and kept on. The court later denied Gore's motion for mistrial on grounds that any prejudice would be sufficiently ameliorated by orally reminding the jury, "You are the sole judges of credibility of the witnesses. The lawyers' statements and arguments are not evidence."[41] But the court remarked that the prosecutor's conduct left the court "at a loss for words."[42]

We too are dismayed at the disrespect demonstrated by the prosecutor. No lawyer, and especially no public prosecutor, is free to ignore the court and proceed in defiance of the court's rulings, whether those rulings be right or wrong. That the prosecutor was ready to risk contempt of court rather than attempt to comply with the rulings or persuade the court to change them is frankly baffling.

The remedy for disrespect to the court, however, is not ordinarily a mistrial. Here, the arguments to which objections were sustained were not in fact improper.

---

[40] The prosecutor argued, "Now, nobody is saying that she's out there driving or anything else or that there's this legal limit for being too intoxicated, but if she were driving, it would have been a .08. She's double the limit now, double the limit." RP (Nov. 9, 2009) at 906.

[41] Id. at 944.

[42] Id. at 929. In denying a mistrial, the court remarked that "the only reason I am not granting it at this time is because we are five days into a five-day trial." Id. at 930. We do not address this comment because there were no grounds for a mistrial.

The prosecutor committed misconduct, but it was directed toward the court and did not deny Gore a fair trial.

Conduct of Defense Counsel

Gore contends his counsel was ineffective for failing to request an instruction on the inferior degree offense of third degree rape. To prevail on a claim of ineffective assistance of counsel, Gore must show his attorney's performance fell below an objective standard of reasonableness based on consideration of all the circumstances, and that the deficient performance prejudiced the result.[43] We engage in a strong presumption of effective representation and require a defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct.[44] To show prejudice, a defendant must prove that, but for the deficient performance, there is a reasonable probability that the outcome would have been different.[45] Where the claim of ineffective assistance is based upon counsel's failure to request a particular jury instruction, the defendant must show he was entitled to the instruction, counsel's performance was deficient in failing to request it, and the failure to request the instruction caused prejudice.[46]

A defendant is entitled to an instruction on an inferior degree offense when:

> (1) the statutes for both the charged offense and the proposed inferior degree offense "proscribe but one offense"; (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence that

[43] 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).

[44] State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).

[45] In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

[46] State v. Johnston, 143 Wn. App. 1, 21, 177 P.3d 1127 (2007).

the defendant committed only the inferior offense.[47]

Rape in the third degree is an inferior degree offense of rape in the second degree.[48] The question is thus whether the evidence would permit the jury to find Gore guilty of third degree rape and acquit him of rape in the second degree.

Gore relies on J.L.C.'s testimony that she repeatedly told him she was a virgin and "don't have sex with me" as evidence that she was capable consenting, but did not. Based on this evidence, he contends the jury could have found he merely engaged in unforced, nonconsensual intercourse as required for rape in the third degree.[49]

But Gore's defense was that J.L.C. was capable and consented. He testified and presented several witnesses to undermine the State's evidence of J.L.C.'s intoxication. Gore was emphatic that not only did J.L.C. give consent, she directed the entire encounter. This defense is inconsistent with, and would be weakened by, an argument that Gore was guilty only of nonconsensual intercourse constituting rape in the third degree. Although inconsistency does not preclude instructing on an inferior degree offense, it lends support to the view that counsel reasonably pursued an "all or nothing" defense strategy.[50] Indeed, at sentencing, Gore's counsel

---

[47] State v. Tamalini, 134 Wn.2d 725, 732, 953 P.2d 450 (1998) (citations omitted).

[48] State v. Wright, 152 Wn. App. 64, 71, 214 P.3d 968 (2009), review denied, 168 Wn.2d 1017 (2010).

[49] See RCW 9A.44.060(1)(a).

[50] See State v. Fernandez-Medina, 141 Wn.2d 448, 459-61, 6 P.3d 1150 (2000) (where substantive evidence supports a rational inference that the defendant committed only the inferior degree offense to the exclusion of the greater offense, defendant is entitled to the instruction despite presenting a defense theory

indicated, "He has maintained his innocence throughout the pendency of this case. When he first came to me, he advised me that he was not interested in accepting any sort of offer from the State. We were prepared for trial from day one."[51]

Gore contends such a strategy was unreasonably risky given the great disparity in potential sentences for second and third degree rape.[52] State v. Grier resolves this issue against him.[53] The Grier court specifically rejected the idea that an unsuccessful "all or nothing" strategy can constitute ineffective assistance of counsel just because in hindsight, it appears too risky:

> Even where the risk is enormous and the chance of acquittal is minimal, it is the defendant's prerogative to take this gamble, provided her attorney believes there is support for the decision. Just as a criminal defendant with slim chances of prevailing at trial may reject a plea bargain nevertheless, a criminal defendant who genuinely believes she is innocent may prefer to avoid a compromise verdict, even when the odds are stacked against her. Thus, assuming that defense counsel has consulted with the client in pursuing an all or nothing approach, a court should not second-guess that course of action, even where, by the court's analysis, the level of risk is excessive and a more conservative approach would be more prudent.[54]

The strong presumption that counsel's performance was reasonable requires the defendant to establish the absence of any "'*conceivable* legitimate tactic explaining counsel's performance.' Although risky, an all or nothing approach was at

---

inconsistent with guilt).

[51] RP (Dec. 3, 2009) at 14.

[52] Gore states that the potential jeopardy included sentencing on two class A felonies with an offender score of 4 and standard range of 111 to 147 months, whereas sentencing on rape in the third degree, a class C felony, under the same offender score is only 22 to 29 months.

[53] 171 Wn.2d 17, 246 P.3d 1260 (2011).

[54] Id. at 39.

least conceivably a legitimate strategy to secure an acquittal."[55] Such is the case here.[56]

Sufficiency of Evidence

Gore contends the evidence was insufficient to prove that J.L.C. was incapable of consent by reason of being physically helpless or mentally incapacitated. In a challenge to the sufficiency of the evidence, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the accused.[57] Evidence is sufficient if, when viewed in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt.[58]

"'Physically helpless' means a person who is unconscious or for any other reason is physically unable to communicate unwillingness to act."[59] "'Mental incapacity' is that condition . . . which prevents a person from understanding the nature or consequences of the act of sexual intercourse."[60] The evidence was plainly sufficient. J.L.C. testified she lost consciousness during the encounter with

---

[55] Id. at 42 (quoting State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)).

[56] Gore relies on a passage from Keeble v. United States, 412 U.S. 205, 212-13, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973). But Keeble considered an Indian defendant's right to a lesser included offense instruction in federal court where the lesser offense is not among those giving rise to federal jurisdiction under the Major Crimes Act of 1885. Id. at 206. The Grier court observed that Keeble "is inapposite in the context of ineffective assistance of counsel." Grier, 171 Wn.2d at 41.

[57] State v. Gentry, 125 Wn.2d 570, 597, 888 P.2d 1105 (1995).

[58] Id. at 596-97.

[59] RCW 9A.44.010(5).

[60] RCW 9A.44.010(4).

Gore,

woke up not knowing how she came to be in different positions, and felt pain in her anus and vagina but did not understand what was causing the pain. She further testified that she felt she could not speak and would not make sense if she tried and that she could not walk, stand, or dress herself on her own.

Sentencing

Gore contends the trial court miscalculated his offender score by failing to consider the two rape convictions as same criminal conduct. This issue may be raised for the first time on appeal.[61] Review is for abuse of discretion.[62]

Under RCW 9.94A.589(1), multiple current offenses encompassing the same criminal conduct are counted as one crime in determining the defendant's offender score. For multiple crimes to be the "same criminal conduct," they must (1) be committed at the same time and place; (2) involve the same victim; and (3) involve the same objective criminal intent.[63]

It is undisputed that Gore's offenses involved the same victim, occurred at the same place, and took place during the same 15 to 30 minute period. The only issue is whether the rapes were committed with the same criminal intent.

The State relies on State v. Grantham.[64] In Grantham, as here, the defendant raped the victim by penetrating two different orifices within a short period of time. But the "use of distinct methods to accomplish each rape, although significant, does

---

[61] State v. Roche, 75 Wn. App. 500, 513, 878 P.2d 497 (1994).

[62] State v. Tili, 139 Wn.2d 107, 122, 985 P.2d 365 (1999).

[63] Id. at 123; RCW 9.94A.589(1)(a).

[64] 84 Wn. App. 854, 859-60, 932 P.2d 657 (1997).

not alone prove different intents."[65] Rather, the evidence was that Grantham "completed the first rape before committing the second; that after the first and before the second he had the presence of mind to threaten L.S. not to tell; that in between the two crimes L.S. begged him to stop and to take her home; and that Grantham had to use new physical force to obtain sufficient compliance to accomplish the second rape" indicated that he had formed a new intent to commit the second rape.[66] Thus, "[t]he crimes were sequential, not simultaneous or continuous."[67]

In State v Tili, the defendant penetrated the victim's anus and vagina with his finger and then penetrated her vagina with his penis, all within two minutes.[68] He was convicted of three counts of rape and received consecutive sentences. The Supreme Court distinguished Grantham on its facts and held the three rapes constituted the same criminal conduct because the three penetrations "were continuous, uninterrupted, and committed within a much closer time frame [than in Grantham]. This extremely short time frame, coupled with Tili's unchanging pattern of conduct, objectively viewed, renders it unlikely that Tili performed an independent criminal intent between each separate penetration."[69]

Here, the evidence was that Gore alternated between vaginal and anal penetration during one continuous, uninterrupted encounter, with the sole intent to accomplish sexual intercourse. These facts are more similar to those in Tili than to

---

[65] Id. at 859.

[66] Id.

[67] Id.

[68] 139 Wn.2d 107, 111, 124, 985 P.2d 365 (1999).

[69] Id. at 124.

those in Grantham. Under Tili, the rapes were part of the same criminal conduct. We remand for resentencing.

Statement of Additional Grounds

In his pro se statement of additional grounds, Gore argues the prosecutor committed reversible misconduct by asking a defense witness whether Gore lied in his testimony.

Casey Jones testified he spied on Gore and J.L.C. by peeking through a window while they had sex. He described J.L.C. as appearing coherent, using a "seductive" and "sexual" voice, and said it "seemed like she was liking it."[70] The prosecutor asked whether he heard J.L.C. say "ow, that hurts."[71] Jones said he did not. The prosecutor then asked, "So if the defendant himself testified that she told him that ow, it hurt, would he be lying?"[72] Before Gore objected, Jones responded, "Probably not."[73] The court sustained the objection.

It is improper for a prosecutor to ask a witness whether he thinks another witness is lying.[74] But to prevail on his claim that the inquiry amounts to reversible misconduct, Gore must show both misconduct and prejudice.[75] Gore seems to argue that Jones's equivocal response suggested a willingness to speculate in order to

---

[70] RP (Nov. 9, 2009) at 875.

[71] Id. at 878.

[72] Id.

[73] Id.

[74] State v. Jerrels, 83 Wn. App. 503, 507, 925 P.2d 209 (1996).

[75] State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) ("Once proved, prosecutorial misconduct is grounds for reversal where there is a substantial likelihood the improper conduct affected the jury.").

render testimony favorable to Gore, thereby reflecting a bias and undermining Jones's credibility. But Jones's potential bias was already an issue because he was "good friends" with Gore, and his credibility was already an issue because he had consumed several beers before he decided to secretly watch people having sex. Additionally, since Jones was peeping for "less than five minutes" of an encounter that lasted at least 15 minutes, his failure to hear J.L.C.'s statement is not probative of anything.[76] Jones was thus accurate in his testimony that his failure to hear J.L.C.'s statement "probably" does not mean that Gore lied in saying she made it. The response did not undermine his credibility. Gore demonstrates no prejudice from this exchange.

Gore also contends his counsel was ineffective for failing to request a curative instruction following the prosecutor's improper inquiry. Given the improbability that the question or response affected the jury, Gore cannot establish prejudice even if counsel was ineffective.

Finally, Gore contends his counsel was ineffective in presenting a closing argument that undermined the presumption of innocence. Gore's counsel conceded that what happened at the party was "distasteful."[77]

> It's wrong what happened. No halo over there because you're not innocent. He had sex with a girl who is 16. It's not against the law. It's wrong. He went to a party, had sex with somebody. That's what happens. You get charged with crimes. But when you're charged with a crime, when the government charges you with a crime, they have got to prove it. . . They have not proved it, and they have to prove it beyond a reasonable doubt.

---

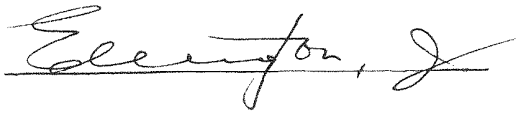
[76] RP (Nov. 9, 2009) at 876.

[77] Id. at 959.

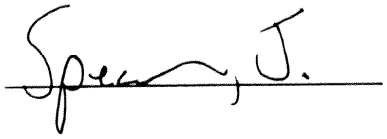
> So don't find him innocent because he's not. He might be a good guy, might be a bad guy, might be somewhere in between, not innocent. You are, I am, [the prosecutor] is, everyone in this room is. It's up to you. The proper verdict in a court of law, the proper verdict for you to return based on the evidence and lack of evidence is a verdict of not guilty.[78]

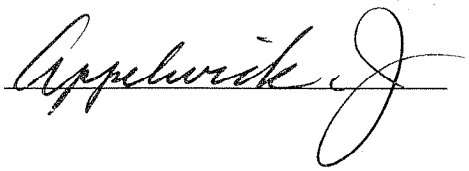
This argument reflected the fact that 20-year old Gore admitted he had "aggressive" oral, vaginal and anal sex with J.L.C., a 16-year-old virgin.[79] Many people would find this distasteful even without the evidence of her extreme intoxication, her request that Gore not have sex with her, and the physical injuries she suffered as a result. Counsel's strategy of acknowledging the moral wrong without conceding the legal culpability was likely the most reasonable approach under the circumstances. Counsel was not ineffective in his argument.

We affirm Gore's convictions and remand for resentencing.



WE CONCUR:





[78] Id. at 959-60.

[79] Id. at 859.