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DIVISION II

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STATE OF WASHINGTON

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DAVID LEE NEASE, Appellant.	No. 45733-4-II UNPUBLISHED OPINION

LEE, J. — A jury found David Lee Nease guilty of second degree rape and indecent liberties. We hold that (1) the prosecutor's conduct does not warrant reversal, (2) defense counsel was not ineffective, (3) the trial court did not violate Nease's public trial rights, and (4) the two contested conditions of community custody were improper. Accordingly, we affirm Nease's conviction, but remand to the trial court to address the improper community custody provisions.

FACTS

A. CHARGED INCIDENT

Nease lived in a building on property belonging to Russell Butler. T.V.[1] occasionally worked on Butler's property. T.V. and Nease had been friends for about 10 years prior to the charged offenses, but they had never been sexually involved during that time.

[1] We use the victim's initials, T.V., to protect her privacy.

On April 15, 2012, Nease picked up T.V. from a motel between 2:30 and 3:30 AM, and drove her to his residence on Butler's property. T.V. was supposed to do yard work at Butler's house the next day. Despite having taken a stimulant drug earlier, T.V. was tired when the two arrived at Nease's residence about 10 minutes later. T.V. suspected Nease may have slipped her a drug during the drive home. When the two arrived at Nease's residence, T.V. went to sleep in Nease's bed, fully clothed.

T.V. woke up sometime later to Nease performing oral sex on her. She was unable to stay awake and fell back asleep. She woke later and found her pants and underwear laying on the floor next to the bed, and Nease was at the end of the bed. When T.V. asked about her clothes, he responded, "I didn't do anything." 3 Report of Proceedings (RP) at 15. T.V. testified that she had not been "fully awake" during any of the events; however, she did remember "snippets" of what had happened. 3 RP at 24. She never gave Nease permission to perform oral sex on her or have any other physical contact with her.

T.V. put her pants back on and fell back asleep. T.V. remembered waking up at some point with Nease on top of her and pressure on her neck, then she passed out again. The next time T.V. woke, she felt dizzy, foggy, and numb. She also noticed her neck was hurting.

T.V. went to Butler's residence to use the bathroom. In the bathroom, she saw her neck was red and irritated, and her white pants were dirty and had a red stain along the zipper. She texted a friend to come pick her up.

The next day, T.V. went to the Family Health Center complaining of swollen glands, a pain in her neck, and rape. She was directed to St. John's Hospital because the nurse practitioner was

not trained to treat rape victims. T.V. did not go to the hospital until about three weeks later. She reported the rape to the police on April 22.

B. INVESTIGATION

Deputy Jason Hammer interviewed T.V. on April 22. At that time, Deputy Hammer collected the white pants T.V. had been wearing on April 15. Deputy Hammer submitted the pants to the crime laboratory for deoxyribonucleic acid (DNA) testing.

On May 8, before receiving the lab results, Deputy Hammer contacted Nease. Nease told Deputy Hammer he knew why the deputy was contacting him. Nease had heard from a bartender that T.V. was accusing Nease of drugging and raping her. At this time, Nease made his initial statement to Deputy Hammer and voluntarily provided a DNA sample.

In his initial statement, Nease told Deputy Hammer that he and T.V. had been friends for a long time, and did not have any sexual history. Nease told Deputy Hammer that he offered T.V. to stay with him, she accepted, he picked her up from the hotel, and they drove to his place. Nease stated that T.V. was intoxicated when he picked her up. Nease also stated that when they arrived at his place, they watched a little television, T.V. fell asleep on his bed, he covered her with a blanket, and he laid on the couch. Nease told Deputy Hammer that in the morning, he tried to wake T.V. before he left to babysit, that she was still sleeping when he checked on her at about 3:00 PM, and that she was awake and complaining about her neck hurting when he finished babysitting around 6:00 PM. Nease said he and T.V. then played video games together for a couple of hours before T.V. went to Butler's house and was then picked up by a friend.

In September, Deputy Hammer received the crime laboratory test results. The red staining on the fly area of the pants tested presumptive for blood, and the amount of DNA in the area was

consistent with a body fluid transfer. The DNA on the pants was a match to Nease. No semen was found.

Deputy Hammer met with Nease again on February 18, 2013. Deputy Hammer read Nease his *Miranda* rights and told Nease that Nease's DNA had been found on T.V.'s pants. Nease asked if the DNA could be from sleeping in his bed. Deputy Hammer relayed what the crime lab had said—that the DNA would have had to go directly onto the pants or onto T.V. and then be transferred to the pants. At this point, Nease changed his story.

Nease said that when he woke up at about 7:00 AM to babysit, he got in bed with T.V, removed her pants and underwear, and performed oral sex on her. Nease said he did not know whether she was asleep when he removed her pants and underwear, nor did he know whether she was asleep when he began performing oral sex on her. Nease said T.V. moaned while he performed oral sex on her, leading him to believe the sex was consensual. Nease explained to Deputy Hammer that he had heard that T.V. was telling people he had been "shooting her up with drugs" and "choking her out." 3 RP at 61. Nease was afraid that if he told Deputy Hammer the truth about performing oral sex on T.V., that he would also be admitting to drugging and choking her. Nease stated in his written statement that this was the reason he "missinformed" [sic] Deputy Hammer and that he "should of [sic] been completely honest the first time." Ex. 4.

The State charged Nease with second degree rape and indecent liberties under the theory that the victim, T.V., was mentally incapacitated or physically helpless. Nease relied on the affirmative defense that he reasonably believed T.V. was not mentally defective or incapacitated and/or physically helpless.

C. TRIAL

At trial, the attorneys exercised peremptory challenges at a sidebar conference, noted in the record as a "(PAUSE IN THE PROCEEDINGS.)." 1 RP at 150. The selection was documented on a "STRUCK JUROR LIST" by both parties, which was subsequently filed with the court. Clerk's Papers (CP) at 80-83. The prospective jurors were in the courtroom during the sidebar conference.

The jury found Nease guilty of second degree rape and indecent liberties. At sentencing, the trial court required Nease to undergo an evaluation for sex offender treatment, "[p]articipate in and successfully complete a WA DOC approved sex offender treatment program," CP at 58, and "[p]articipate in any therapy deemed necessary by [his] Corrections Officer." CP at 54. The trial court also imposed various community custody conditions, including conditions prohibiting Nease from using and possessing alcohol and requiring Nease to submit to a plethysmograph at the direction of his community custody officer. Nease appeals.

ANALYSIS

Nease claims that (1) the prosecutor committed three types of misconduct, the cumulative effect of which requires reversal, (2) his trial counsel was ineffective for failing to object and not requesting any curative instructions, (3) the trial court violated his right to public trial by allowing the parties to exercise preemptory challenges in writing at a sidebar conference, and (4) the trial court improperly imposed two conditions of his community custody. We disagree with Nease's claims except for his claim relating to conditions of community custody.

A. PROSECUTORIAL MISCONDUCT

Nease argues the prosecutor committed misconduct three times during the State's closing and rebuttal arguments, and that the repeated misconduct requires reversal. First, Nease argues that "[t]he prosecutor misstated the burden of proof in equating beyond a reasonable doubt with whether a juror's heart or gut said Nease was guilty" during the State's rebuttal. Br. of Appellant at 9. Second, Nease argues the prosecutor misstated Nease's burden of proof for his affirmative defense by stating during closing that Nease had to show it was more probable than not that the victim was awake during the sexual contact. Third, Nease argues the prosecutor maligned defense counsel during the State's closing and rebuttal by describing defense arguments as a "red herring," and "misdirection." Br. of Appellant at 18. Nease further asserts the cumulative effect of the alleged misconduct warrants reversal.

We hold that the prosecutor's head, heart, and gut comment was not misconduct; the prosecutor did misstate Nease's requisite showing for an affirmative defense, but Nease did not show sufficient prejudice for reversal; the prosecutor did malign defense counsel, but the trial court did not abuse its discretion in its response to the objection and Nease cannot show resulting prejudice; and, there is not sufficient prejudice to require reversal under the cumulative error doctrine.

1. Legal Principles

To prevail on a claim of prosecutorial misconduct, Nease must show that the prosecutor's conduct was both improper and prejudicial. *State v. Emery*, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). First, we must determine that the prosecutor's conduct was improper. *Id.* at 759. If we

determine that the prosecutor's conduct was improper, we then determine whether the prosecutor's improper conduct resulted in prejudice to Nease. *Id.* at 757-78, 760-61.

When analyzing prejudice, we do not look at the comment in isolation, but in the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury. *State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359 (2007), *cert. denied*, 554 U.S. 922 (2008). We presume the jury follows the court's instructions. *State v. Anderson*, 153 Wn. App. 417, 428, 220 P.3d 1273 (2009), *review denied*, 170 Wn.2d 1002 (2010). The defendant establishes prejudice when the misconduct had a substantial likelihood of affecting the verdict. *Emery*, 174 Wn.2d at 760.

Where an objection was made, a defendant must "show that the prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict." *Id.* at 760-61. However, if "the defendant did not object at trial, the defendant is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." *Id.* A defendant is presumed to have waived any error by not objecting because objections are required to prevent additional improper remarks and abuse of the appellate process. *Id.* at 762. Therefore, when there is no objection, we apply a heightened standard requiring the defendant to show that "(1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.'" *Id.* at 761 (quoting *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)). When reviewing a prosecutor's misconduct that was not objected to, we must "focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured." *Id.* at 762.

"In closing argument, a prosecutor is afforded wide latitude to draw and express reasonable inferences from the evidence." *State v. Reed*, 168 Wn. App. 553, 577, 278 P.3d 203, *review denied*, 176 Wn.2d 1009 (2012). In rebuttal, prosecutors are allowed to respond with remarks that would otherwise be improper when the response is invited by the defense counsel's argument, "'*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. Davenport*, 100 Wn.2d 757, 761, 675 P.2d 1213 (1984) (quoting *State v. La Porte*, 58 Wn.2d 816, 822, 365 P.2d 24 (1961)); *see also State v. Jones*, 144 Wn. App. 284, 300, 183 P.3d 307 (2008) (holding the same).

2. "Head, Heart, and Gut" Statement

Nease alleges that the prosecutor equated "Proof Beyond [A] Reasonable Doubt With A Feeling In The Heart And Gut" during the State's rebuttal, and that this constituted misconduct.[2] Br. of Appellant at 8. Nease points to the following statements as misconduct: "What does your head, what does your heart, what does your gut say? Okay. If it says that he's guilty, then you are convinced beyond a reasonable doubt." 3 RP at 140; Br. of Appellant at 9. Nease did not object to these statements at trial.

In support of his claim that instructing the jurors to rely on their "heart and gut" was misconduct, Nease cites several cases from other jurisdictions to argue that prosecutors' references to a "gut feeling" constitute misconduct. Br. of Appellant at 10-12. Notably, Nease does not cite

[2] Nease does not, however, argue that this alleged misconduct alone warrants reversal.

any Washington authority for this proposition. However, the "heart and gut" argument has been addressed by our court in *State v. Curtiss*, 161 Wn. App. 673, 250 P.3d 496 (2011).

In *Curtiss*, the prosecutor, in rebuttal, asked the jury to:

> Consider all the evidence as a whole. Do you know in your gut—do you know in your heart that [the defendant] is guilty as an accomplice to murder? The answer is yes.
>
> We are asking you to return a verdict that you know is just, a verdict of guilty to Murder in the First Degree.

Id. at 701. We held that while the "gut and heart rebuttal arguments" may have been overly simplistic, they were not misconduct. *Id.* at 702.

Here, the prosecutor's rebuttal argument responded to Nease's characterization of what the "reasonable doubt" standard meant by reading the reasonable doubt jury instruction to the jury and then endeavoring to parse out its language. 3 RP at 140. The prosecutor stated:

> The instruction on beyond a reasonable doubt is No. 4. It says: A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt that would exist in the mind of a reasonable person after fully, fairly and carefully considering all of the evidence or lack of evidence. If from such consideration you have an abiding belief in the truth of the charge, you are convinced beyond a reasonable doubt.
>
> First, an abiding belief in the truth of the charge. *What does your head, what does your heart, what does your gut say? Okay. If it says that he's guilty, then you are convinced beyond a reasonable doubt.*

3 RP at 140 (emphasis added).

The language used by the prosecutor here is very similar to that used in *Curtiss*, which we held did not constitute misconduct. 161 Wn. App. at 701. Moreover, the prosecutor's argument was a fair reply to the defense's closing argument. The trial court instructed the jury that if they had "an abiding belief in the truth of the charge," that "abiding belief" satisfied the reasonable

doubt standard. CP at 15. Thus, under the facts of this case, we hold that such a characterization of an "abiding belief" by the prosecutor does not constitute misconduct.

3. Burden of Proof on Affirmative Defense

Nease next argues the prosecutor committed misconduct by misstating his burden of proof for the affirmative defense described in instruction 18.[3] We disagree.

In closing arguments, the prosecutor discussed instruction 18 as follows:

> [A] defendant has the burden of proving by a preponderance of the evidence that at any time the defendant reasonably believed that [T.V.] was not mentally defective, mentally incapacitated and physically helpless. Okay. He has to show that it was more probably true than not true that she was awake. . . . Would a reasonable person believe that she was awake? No. Is it more probably true that she was awake than asleep? No.

3 RP at 125. Nease did not object to these statements at the time.

Statements by counsel to the jury regarding the law "must be confined to the law set forth in the instructions of the court." *State v. Estill*, 80 Wn.2d 196, 199, 492 P.2d 1037 (1972). Misstating the law to the jury constitutes misconduct. *Davenport*, 100 Wn.2d at 763.

Two of the prosecutor's statements misstated the law. The prosecutor stated that Nease had to prove more probably than not that T.V. was awake and that the applicable standard was whether a reasonable person believed that T.V. was awake. What Nease actually needed to show was that it was more probably true than not that *Nease reasonably believed* T.V. was "not mentally incapacitated and/or physically helpless." RCW 9A.44.030(1). Thus, the prosecutor's statements here were improper.

[3] Again, Nease does not argue that this alleged misconduct alone warrants reversal.

However, the prosecutor's conduct was not prejudicial. The prosecutor's misstatement of Nease's burden on his affirmative defense could have been cured by an instruction as to the proper burden of proof. Furthermore, the trial court did properly instruct the jury on Nease's burden of proof. The trial court also instructed the jury that the lawyers' remarks, statements, and arguments are not evidence. We presume that the jury follows the court's instructions. *Anderson*, 153 Wn. App. at 428.

Also, the record does not reflect, and Nease does not argue, that the prosecutor's conduct was flagrant or ill intentioned. *Emery*, 174 Wn.2d at 762. Further, Nease does not present any argument as to why a curative instruction would have been insufficient, nor as to why jury instruction 18 was insufficient. RAP 10.3(a)(6); *Emery*, 174 Wn.2d at 761; *Anderson*, 153 Wn. App. at 428. Therefore, because a curative instruction would have cured any prejudicial effect and Nease has not demonstrated any prejudice resulting from the prosecutor's misconduct, we hold that Nease has waived this argument.

4. Maligning Defense Counsel

Nease argues that the prosecutor committed misconduct because the prosecutor "maligned defense counsel" by telling the jury that the defense was "raising red herrings," and "misdirecting the jury." Br. of Appellant at 19. Nease points to three instances that constitute misconduct. We disagree.

Prosecutor's statements that malign or impugn defense counsel are impermissible. *State v. Lindsay*, 180 Wn.2d 423, 432, 326 P.3d 125 (2014). Prosecutorial statements held to constitute misconduct requiring reversal include those statements that imply deception or dishonesty by defense counsel. *Id.* at 433. Statements implying deception or dishonesty include calling the

defense's case "'bogus,'" "'a crock,'" or as involving "'sleight of hand.'" 180 Wn.2d at 433 (quoting *Thorgerson*, 172 Wn.2d at 451-52). But, to the extent the prosecutor's statements "can fairly be said to focus on the evidence before the jury," no misconduct will be held to have occurred. *Thorgerson*, 172 Wn.2d at 451. We hold that only one of the statements by the prosecutor constitutes misconduct because only one implies deception or dishonesty on the part of defense counsel. However, we also hold that no prejudice has been shown from the one instance of misconduct.

a. "Red Herring" in Closing

First, in closing, the prosecutor argued:

> Don't get caught up on whether she was drugged or she wasn't. *It's a red herring*, and let me explain why. Because it's not required. The State does not have to show that she was drugged. The State only has to show that she was physically helpless for any reason. Okay. Physically helpless being unconscious, being asleep. Okay. It doesn't matter why she was asleep. If she was tired, she had a hard day, she had been up that long, whether she was drugged or not, the State doesn't have to prove that. The State only has to prove that she was physically helpless.

3 RP at 125-26 (emphasis added). The prosecutor was attempting to focus the jury on the evidence which was relevant to the charged offense. The prosecutor told the jury that the State did not need to show whether T.V. was drugged, because all the State needed to show was that T.V. was physically helpless. The statement reflected testimony received earlier in the trial and was an accurate statement under RCW 9A.44.030(1) and jury instruction 18.

The prosecutor's statement here was appropriate because it focused the jury on the evidence. *Thorgerson*, 172 Wn.2d at 451. Furthermore, the prosecutor's statements here cannot be equated to calling the defense's case "bogus" or "a crock." *Cf. Lindsay*, 180 Wn.2d at 433. Finally, characterizing an argument as a "red herring" is not the same as asserting an argument

involves "sleight of hand" because "sleight of hand" involves deception, and "red herring" does not.[4]

b. Pronoun Confusion in Rebuttal

Second, in rebuttal, the prosecutor argued:

> We talked a little bit about the defendant's statement, and defense counsel opened up about saying, well, you know, he was misguided, he lied to the officer, but what was interesting is defense counsel never used the word "lie." He said the defendant was mistaken. Think about all your definitions of the term "mistake." Does lie come into that? Is lie an accident? Is lie inadvertent? No. A lie is intentional, and that's exactly what he did, he intentionally told Deputy Hammer that he didn't have sex with her, that they hadn't even kissed. That is not a mistake. *So what does that tell you about everything the defendant has said in this case and even about defense counsel's argument? If he is telling you a lie is a mistake, why should you believe what he says?* He's not being upfront with that. You have no evidence that this was a mistake.
>
> The evidence that you do have is in the defendant's own words. He said that I should have admitted to it and that he misinformed the deputy. Misinformed? Again, that minimizing language. So what else has the defendant minimized?

3 RP at 141-42 (emphasis added). At this point, defense counsel requested a sidebar to voice an objection outside the hearing of the jury.[5]

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[4] *Thorgerson*, 172 Wn.2d at 452, states, "In particular, 'sleight of hand' implies wrongful deception or even dishonesty in the context of a court proceeding. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2141 (2003) ('sleight of hand' defined in part as 'adroitness and cleverness in accomplishing a deception' and 'a cleverly executed trick or deception')." In contrast, a "red herring" is, "a diversion intended to distract attention from the real issue." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1902 (1969). Thus, by definition, claiming an argument is a "red herring" does not imply deceit.

[5] The sidebar conference was off the record. But, after the jury left the courtroom, the court made a record of the content of the sidebar conference.

The grounds for the objection were that the prosecutor had impugned counsel's credibility.[6] Defense counsel said the basis for the objection was his confusion over the repeated use of the pronoun "he." 3 RP at 150. Defense counsel did not know whether the prosecutor was referring to Nease, or defense counsel, when the prosecutor repeatedly used the pronoun "he." 3 RP at 150. In making the objection, defense counsel stated he was not looking for a curative instruction, nor was he "setting the stage for a motion for a mistrial," and he did not "think that it was that bad." 3 RP at 150. Upon hearing the objection, the trial court found there was not a comment on credibility.

The objection preserved the allegation of misconduct for appeal. *Emery*, 174 Wn.2d at 761. "'Allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard.'" *Lindsay*, 180 Wn.2d at 430 (quoting *State v. Brett*, 126 Wn.2d 136, 174-75, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121 (1996)). In reviewing a decision for abuse of discretion, we do not substitute our opinion for that of the trial court, but give deference to the trial court's first-hand interpretation of the alleged errors. *State v. Borg*, 145 Wn.2d 329, 336, 36 P.3d 546 (2001).

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[6] Defense counsel argued:

> I was mostly wanting to see if it resonated with the court what I believe that I had heard, and if the court was in agreement that that had happened, I was looking just for an admonition to counsel, not any kind of curative instruction or setting the stage for a motion for mistrial. I don't think that it was that bad, but again the use of the pronoun "he" kind of – as I remember what was said – tripped me up a little bit about whether it was my client or myself who was being referred to. And then as I processed it, I believe that it was myself and I just wanted to air that.

3 RP at 150-51.

A review of the record shows that defense counsel is the only person who used the word "mistake" during the trial.[7] 3 RP at 128. This means that the prosecutor's statement, "If he is telling you a lie is a mistake, why should you believe what he says," can only be referring to defense counsel. 3 RP at 141. Therefore, this statement by the prosecutor constituted misconduct because it implied deception or dishonesty on the part of defense counsel. *Lindsay*, 180 Wn.2d at 433.

However, Nease cannot establish that any prejudice flowed from the prosecutor's misconduct. Nease cannot establish the existence of any prejudice because the prosecutor's argument was confusing—so confusing, in fact, that even defense counsel was unsure whether he had been maligned.

The sentence preceding the complained-of statements, "So what does that tell you about everything the defendant has said in this case and even about defense counsel's argument," does not provide an answer because the prosecutor leads by naming Nease and ends by naming defense counsel—both males. 3 RP at 141. The specifically complained-of statements, "If he is telling you a lie is a mistake why should you believe what he says? He's not being upfront with that," provide no indication as to whom the pronoun "he" is referring. 3 RP at 141. The next time the prosecutor uses "he," the prosecutor says, "He said that I should have admitted to it and that he misinformed the deputy," using the pronoun "he" in reference to Nease. 3 RP at 141-42. But, this

[7] During closing, defense counsel argued:

> [T]he main point that I tried to make here which is that [Mr. Nease] not having been upfront with the deputy the first time that he talked to them, *which was a mistake*, is just as consistent with the *mistake* that an innocent person who's scared to death of rumors going around would make as with a guilty person.

3 RP at 128 (emphasis added).

comes two sentences after the allegedly maligning comments. Thus, the prosecutor's ambiguous use of the pronoun "he," when both the defendant and defense counsel are male, could have reasonably allowed the trial court to find that the prosecutor was not maligning defense counsel, especially because the trial court was in the best position to perceive the argument.

Based on the ambiguous use of "he" in the prosecutor's statements, we hold that the trial court did not abuse its discretion in finding that the prosecutor did not malign defense counsel during the State's rebuttal. *Lindsay*, 180 Wn.2d at 430 (stating, "'Allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard.'") (quoting *Brett*, 126 Wn.2d at 174-75). Furthermore, even after reviewing the record and realizing the prosecutor did malign defense counsel, we cannot conclude the misconduct prejudiced Nease because the statement was so confusing that even defense counsel was not sure if his integrity had been attacked.

c. "Red Herring" and "Misdirection" in Rebuttal

Finally, in response to defense counsel's closing,[8] the prosecutor concluded in rebuttal:

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[8] In closing, defense counsel argued:

> [D]oesn't it seem likely that given that claim, that extraordinary claim by Mr. Nease that he had hung out for a couple of hours with [T.V.] playing video games, wouldn't Deputy Hammer have wanted—should he have wanted to get more information about that from [T.V.]? Is this true? Did you hang out and play video games with him for a couple of hours? He didn't seek her out. It doesn't make sense I would submit to you that he wouldn't. It just does not make sense that he would not want to find out more about that. And if he had, if he had sought her out, she might have said no, that's absolutely untrue, that's completely false, we did not hang out and play video games. I believed he raped me, but Deputy Hammer didn't even try to seek her out to find out what she had to say about that extraordinary piece of information.

3 RP at 134.

> He says start with doubt. The officer should have gone back to talk to [T.V.] about if they were hanging out, really? She [sic] just confessed. What does that do? *That's a misdirection.* A misdirection of look here at the officer, what the officer didn't do rather than focusing on the evidence that you do have. Because if the officer had gone back and said to [T.V.], well did you hang out, she would have said no, just like she told you. So what's he doing there? *Misdirection.* Focus on something that's not necessary and don't focus on the true evidence, the true evidence of his client' [sic] confession.

3 RP at 145-46 (emphasis added). This third instance of alleged misconduct was not improper for the same reasons explained earlier—the prosecutor's argument attempted to focus the jury on the evidence presented to them, instead of what was not in evidence, and it was a pertinent reply to Nease's closing argument.

The prosecutor's comments were a fair rebuttal to defense counsel's attempt in closing to draw the jury's attention to questions the police did not ask Nease. *See Davenport*, 100 Wn.2d at 761 (holding that prosecutors are allowed to respond with remarks that would otherwise be improper when the response is invited by the defense counsel's closing, "'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.'") (quoting *La Porte*, 58 Wn.2d at 822). The prosecutor's use of the terms "misdirection" and "red herring," do not stoop to the level of misconduct because these terms do not imply deception or dishonesty on the part of defense counsel. *Lindsay*, 180 Wn.2d at 433. Therefore, we hold the prosecutor's use of the terms "misdirection" and "red herring" in reference to the defense's closing arguments did not malign defense counsel.

5. Cumulative Error Doctrine

Nease argues that the prosecutor's repeated misconduct requires reversal under the cumulative error doctrine. In support of his argument, Nease relies on the "prosecutor's misstatement of the burden of proof, misstatement of what is required to prove the affirmative defense, and disparagement of defense counsel." Br. of Appellant at 25. We disagree.

Under the cumulative error doctrine, the appellate court will reverse a trial court verdict when it appears reasonably probable that the cumulative effect of errors materially affected the outcome, even when no one error alone mandates reversal. *State v. Russell*, 125 Wn.2d 24, 93, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995).

We hold there is not a reasonable probability that the cumulative effect of the alleged misconduct materially affected the outcome. First, the prosecutor did not commit misconduct in suggesting the jurors consult the head, heart, and gut when determining an "abiding belief." 3 RP at 140. Second, the prosecutor did misstate the law on the affirmative defense; but, the error is waived. Third, the prosecutor's use of "red herring" and "misdirection" did not malign defense counsel. Finally, although the ambiguous use of the pronoun "he" may have maligned defense counsel, no prejudice can be shown because the arguments were so confusing to everyone that even defense counsel could not determine if he had been maligned. Thus, we hold that the two instances of misconduct do not create a reasonable probability that their cumulative effect materially affected the outcome of the trial. *Russell*, 125 Wn.2d at 93.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Nease argues that "[i]n the event this Court finds proper objection or request for a curative instruction could have cured the prejudice, then defense counsel was ineffective in failing to take

such action." Br. of Appellant at 26. Because only one of the alleged instances of misconduct was not objected to, and Nease does not demonstrate resulting prejudice, Nease's claim that he received ineffective assistance of counsel fails.

We review ineffective assistance of counsel claims de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). A defendant claiming ineffective assistance of counsel has the burden to establish that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defendant's case. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Failure to establish either prong is fatal to an ineffective assistance of counsel claim. *Strickland*, 466 U.S. at 700.

Counsel's performance is deficient if it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). Our scrutiny of counsel's performance is highly deferential; we strongly presumes reasonableness. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). To rebut this presumption, a defendant bears the burden of establishing the absence of any legitimate trial tactic explaining counsel's performance. *Id.* "If trial counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel." *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). "To establish prejudice, a defendant must show that but for counsel's performance, the result would have been different." *McNeal*, 145 Wn.2 at 362.

Nease's argument for ineffective assistance of counsel fails because he cannot establish that he was prejudiced. In the only instance of misconduct defense counsel did not object to, the prosecutor misstated the burden of proof for Nease's affirmative defense by arguing that "[h]e has

to show that it was more probably true than not that she was awake," and asked whether a reasonable person would believe that she was awake. 3 RP at 125. The correct standard required Nease to show that it was more probably true than not that Nease reasonably believed T.V. was not mentally incapacitated or physically helpless. RCW 9A.44.030(1).

However, this correct standard was reflected in the court's instructions to the jury, and the jury is presumed to follow those instructions.[9] *Anderson*, 153 Wn. App. at 428. Nease's burden on his affirmative defense required him to show by a preponderance of the evidence that he reasonably believed T.V. was not mentally incapacitated or physically helpless. RCW 9A.44.030. The only evidence at trial relating to Nease's belief as to T.V.'s condition showed that Nease "was not sure if [T.V.] was asleep or not" when he removed her pants and underwear and began performing oral sex on her. 3 RP at 59. Thus, in light of the evidence, even if defense counsel's performance was deficient for failing to object, Nease fails to demonstrate that the trial outcome would have been different.

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[9] Jury instruction 18 stated:

> It is a defense to a charge of rape in the second degree and/or indecent liberties that at the time of the acts the defendant reasonably believed that [T.V.] was not mentally defective, mentally incapacitated and/or physically helpless.
>
> The defendant has the burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty.

CP at 29.

Because Nease does not show reversible prejudice stemmed from the prosecutor's misconduct, Nease cannot successfully argue he was prejudiced by his attorney's failure to object to the prosecutor's misconduct. Accordingly, Nease failed to show that "but for counsel's performance, the result would have been different." *McNeal*, 145 Wn.2 at 362. Thus, we hold Nease's trial counsel was not ineffective for failing to object to the prosecutor's misstatement of his affirmative defense.

C. PEREMPTORY CHALLENGES AND A RIGHT TO PUBLIC TRIAL

Nease argues that the trial court violated his right to a public trial by conducting the peremptory challenges at a sidebar conference. In support, Nease argues that the trial court did not announce which party removed each juror, nor did the trial court announce that a struck juror list had been filed. We hold the peremptory challenges at a sidebar conference do not violate Nease's right to public trial.

In *State v. Marks*, 184 Wn. App. 782, 788, 339 P.3d 196 (2014), *State v. Webb*, 183 Wn. App. 242, 247, 333 P.3d 470 (2014), *review denied*, 182 Wn.2d 1005 (2015), and *State v. Dunn*, 180 Wn. App. 570, 574, 321 P.3d 1283 (2014), *review denied*, 181 Wn.2d 1030 (2015), we held that the trial court did not violate the defendant's right to a public trial when peremptory challenges were made on paper or during a sidebar. Recently, in *State v. Love*, No. 89619-4, slip op. at 9 (Wash. 2015), our Supreme Court similarly held that "written peremptory challenges are consistent with the public trial right so long as they are filed in the public record." *Love*, slip op. at 9.

Here, the prosecutor and defense counsel documented the jury selection on a "STRUCK JUROR LIST," during a sidebar conference noted in the record as "PAUSE IN THE PROCEEDINGS." CP at 80-83; 1 RP at 150. The "STRUCK JUROR LIST" was subsequently

filed with the court. CP at 80-83. Thus, the peremptory challenges conducted as they were here do not implicate the right to public trial. *See e.g. Love,* slip op. at 9; *Marks*, 184 Wn. App. at 788; *Webb*, 183 Wn. App. at 247; *Dunn*, 180 Wn. App. at 574. Therefore, we hold Nease was not deprived of his right to public trial.

D. CONDITIONS OF COMMUNITY CUSTODY

Nease argues the trial court erred by imposing two community custody provisions: (1) prohibiting Nease from possessing or using alcohol and (2) requiring Nease to submit to a plethysmograph at the direction of a community corrections officer. The State concedes that the community custody provisions are improper. We agree and remand to the trial court to address the improper community custody provisions consistent with this opinion.

Under RCW 9.94A.703(3)(f), the trial court may require the defendant to "[c]omply with any crime-related prohibitions." A crime-related prohibition is "an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10). We review the trial court's imposition of crime-related prohibitions for an abuse of discretion. *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008), *cert. denied*, 556 U.S. 1192 (2009).

Here, the trial court ordered Nease, as part of his community placement/custody to "not use/possess/consume alcohol." CP at 58. Under RCW 9.94A.703(3)(e), a sentencing court may order an offender to refrain from *consuming* alcohol. Such a condition is authorized regardless of whether alcohol contributed to the offense. *State v. Jones*, 118 Wn. App. 199, 207, 76 P.3d 258 (2003) (analyzing former RCW 9.94A.700 (1988), which contained the same operative language

as RCW 9.94A.703(3)(e)). Therefore, the trial court had the authority to prohibit Nease from consuming alcohol. RCW 9.94A.703(3)(e); *Jones*, 118 Wn. App. at 207.

A trial court may also order an offender to comply with any crime-related prohibitions. RCW 9.94A.703(3)(f). Here, there is no evidence that Nease's crime involved alcohol. Therefore, prohibitions on *using* or *possessing* alcohol are not crime-related. We hold that the trial court abused its discretion by imposing community custody provisions prohibiting Nease from using or possessing alcohol.

The trial court also ordered Nease to "[s]ubmit to, and at your expense, a polygraph examination and a plethysmograph as directed by Corrections Officer or treatment provider." CP at 54. The trial court also ordered Nease to "[p]articipate in any therapy deemed necessary by your Corrections Officer," CP at 54, and "[p]articipate in and successfully complete a WA DOC approved sex offender treatment program," CP at 58.

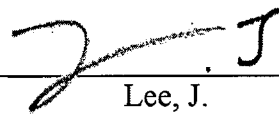
Plethysmograph testing implicates the due process rights to be free from bodily intrusions. *State v. Land*, 172 Wn. App. 593, 605, 295 P.3d 782 (2013). Plethysmograph testing may not be ordered as a monitoring tool, but may be properly ordered by a qualified treatment provider. *Land*, 172 Wn. App. at 605-06. Further, a community corrections officer's "scope of authority is limited to ordering plethysmograph testing for the purpose of sexual deviancy treatment." *State v. Johnson*, 184 Wn. App. 777, 781, 340 P.3d 230 (2014).

We hold that "sexual deviancy treatment" is sufficiently similar to "sex offender treatment" to necessitate applying the same standard to community corrections officers' scope of authority in ordering plethysmograph testing. Accordingly, we hold that a community corrections officer may order plethysmograph testing for the purpose of sex offender treatment. Therefore, the trial court

did not abuse its discretion, insofar as its sentencing order allowed a community corrections officer to direct Nease to submit to plethysmograph testing for the purpose of his sex offender treatment. However, because the sentencing order is not clear that the plethysmograph testing may only be ordered by the community corrections officer in conjunction with his sex offender treatment, we remand this case for the trial court to clarify the sentencing order.

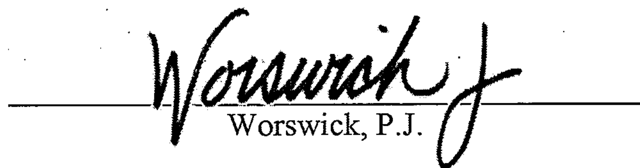
We affirm Nease's convictions, but remand to the trial court to conform the community custody provisions as outlined in this opinion.

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

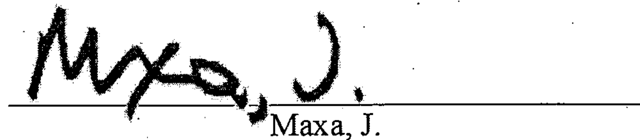


Lee, J.

We concur:



Worswick, P.J.



Maxa, J.