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SUPREME COURT NO. 97540-0

NO. 50934-2-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RONALD WITTHAUER,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Robert Lewis, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Petitioner Ronald Witthauer asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

The petitioner seeks review of the Court of Appeals' unpublished decision in State v. Ronald Witthauer, filed July 16, 2019 ("Opinion" or "Op."), which is appended to this petition.

C. ISSUES PRESENTED FOR REVIEW

1. The rape complainant's pharmacy technician license was revoked based on diversion of prescription medication. The trial court found the underlying conduct probative of untruthfulness but precluded inquiry into the license revocation itself. Did the court deny the petitioner his constitutional right to confront the witnesses against him?

2. The complainant was the petitioner's adult niece, and the petitioner admitted having sex with her. During cross-examination, the prosecutor suggested the only reason the petitioner had not confessed to sex with his other nieces (some of them minors) was a lack of DNA evidence. Did the prosecutor's misconduct deny the petitioner a fair trial?

3. In closing, the State argued the concept of reasonable doubt requires that jurors articulate a reason for doubt. Did such incurably prejudicial misconduct deny the petitioner a fair trial?

4. The State also argued that defense counsel behaved shamefully by calling the complainant's physically infirm mother to the stand. Did these comments also constitute incurably prejudicial misconduct, denying the petitioner a fair trial?

5. Did combined prejudice resulting from the improper limitation on cross-examination and/or the several instances of prosecutorial misconduct require reversal?

D. STATEMENT OF THE CASE

1. Charges

The State charged Witthauer with second degree rape based on forcible compulsion and incapable-of-consent alternatives (count 1), as well as indecent liberties by forcible compulsion (count 2). CP 8-9. The State also alleged that the aggravating circumstance of abuse of "trust, confidence, or fiduciary responsibility"[1] applied. CP 8-9. The complainant as to each count was Witthauer's adult niece, C.Z. CP 8-9. Witthauer testified the contact was consensual. RP 758-59.

The jury convicted Witthauer as charged and found the aggravating circumstance applied to both charges. RP 889-92; CP 43-46. Finding the charges to be same criminal conduct, the court sentenced

[1] RCW 9.94A.535(3)(n).

Witthauer to an exceptional minimum sentence of 144 months of imprisonment. CP 64.

2. Trial testimony

On July 18, 2015, C.Z. and her friend went to the Woodland Bottoms. RP 146-49, 199. The Woodland Bottoms is locals' name for a sandbar on the Columbia River where people hang out and swim. RP 200. There, C.Z. used her cell phone to communicate with Witthauer via Facebook messaging. RP 202, 571-72. Witthauer asked C.Z. to call him. RP 202. On the phone, Witthauer sounded upset and asked to meet up with C.Z. They arranged meet at the nearby Wal-Mart. RP 204, 257. While waiting for Witthauer, C.Z. made several calls to family members. RP 590-97. C.Z.'s mother, a defense witness, testified C.Z. said she planned to go to Witthauer's residence. RP 802-03.

Witthauer arrived in a truck driven by Dan Hainley. RP 207. Hainley testified C.Z. was upset and didn't want to go home. RP 708-09, 713. C.Z. was drinking vodka out of a bottle she kept in her purse. RP 713. The three arrived at Witthauer's residence, a motor home on his mother's property. C.Z. was outside briefly but soon retired to the motor home with Witthauer. RP 714. Before leaving, Hainley went into the motor home to say goodbye, and C.Z. hugged him. RP 716.

Unlike the other witnesses, C.Z. testified that the original plan was for Witthauer to take her directly home. RP 212-13. C.Z. also claimed she planned to stay at Witthauer's only a short time and have Hainley take her home. RP 213, 310-11. C.Z. sat outside Witthauer's motor home with Witthauer and Hainley and watched her school-aged cousins play basketball. RP 215, 282, 300, 640. Witthauer brought C.Z. a beer. RP 218. After a few sips from the beer, C.Z. started to feel dizzy. RP 219. Witthauer picked her up. He told her she was drunk and needed to sleep it off. RP 220-21. Witthauer deposited C.Z. on the bed inside his motor home and went back outside with Hainley. RP 222.

C.Z. fell asleep but woke to the sound of Hainley's truck leaving. RP 223. Witthauer entered the motor home and asked C.Z. if she wanted to have sex with him. RP 225. C.Z., who still felt dizzy, told Witthauer he wasn't funny. RP 225. Witthauer said he wasn't joking. He then straddled C.Z., who lay on her stomach. RP 226. He pulled down C.Z.'s pants had intercourse over her objections. RP 227-29, 231.

C.Z. spent the night in the motor home with Witthauer only because she couldn't figure out how to leave. RP 232-33, 289, 305, 308. The next morning, Witthauer behaved as if nothing happened. He even stopped to pick up a terminally ill friend before dropping off C.Z. RP 235, 312-16. C.Z. did not raise any alarm to the friend. RP 316.

Once at home, however, C.Z. called her friend, who urged C.Z. to call the police and go to the hospital. RP 237, 468, 476. A nurse examiner collected blood and urine samples from C.Z. that afternoon. RP 366, 372. C.Z.'s urine, but not her blood, tested positive for metabolites of alcohol and clonazepam, a benzodiazepine. RP 623-24. Both are depressants and each may exacerbate the other's effects. RP 624-26, 628-29. A forensic scientist testified C.Z. may have ingested the substances about 12 hours earlier, or more, or less. RP 627-28, 631, 34.

Before trial, the State moved to limit inquiry into evidence that C.Z.'s Oregon pharmacy technician license had been revoked based on conduct occurring in December of 2014. RP 39, 243; CP 95-97.

> Specifically, the State expects the defense will attempt to impeach C.Z. with the fact that her pharmacy technician license was revoked by the Oregon State Board of Pharmacy. Assuming the [trial court] deems this material probative under ER 608(b), the State asks that any examination on this issue be limited to asking C.Z. whether her pharmacy technician license was revoked in 2015 due to allegations she engaged in prescription fraud to obtain oxycodone for personal use. Any further questioning or attempt to present extrinsic evidence would be improper.

CP 96; RP 31-33. C.Z. was notified of the disciplinary proceedings in May of 2015. RP 37. She failed to respond. RP 32-33. The resulting order revoked C.Z.'s license and imposed civil penalties. RP 36-37.

Witthauer, in contrast, initially argued the underlying documents related to license revocation should be admitted. RP 34-36.

The court ruled that, because the matter was probative of untruthfulness, defense counsel would be permitted under ER 608(b) to ask C.Z. if she had engaged in the underlying conduct—whether she diverted drugs for her own use. RP 38-40, 56-57, 241-43. But if C.Z. denied the allegation, defense counsel could not inquire further. RP 39.[2]

Inquiry was so limited even considering the assertion by C.Z.—who, as stated, had tested positive for a benzodiazepine metabolite the day after the incident—that she was drugged without her knowledge. RP 68. Defense counsel if C.Z. had ever diverted oxycodone for her own use. C.Z. said no. The court barred further inquiry. RP 295.

The State presented evidence that DNA collected during the sexual assault exam matched Witthauer's reference sample. RP 387, 672-73. Witthauer had initially denied sex with C.Z. RP 337-38, 766-67, 779-80. But, at trial, Witthauer admitted it; he thought it happened because both were upset and had been drinking. RP 757-58, 791-92. He felt ashamed. RP 759, 769-70, 791. But he adamantly denied drugging C.Z. RP 752.

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[2] Defense counsel later asked for clarification of the court's ruling, and whether counsel would be permitted, consistent with the State's initial motion, to inquire into the license revocation. RP 52-56. The State, having changed its original position, argued Witthauer should not because such inquiry would constitute "extrinsic evidence." RP 55.

3. Prosecutorial misconduct in cross-examination and closing.

On cross-examination, the prosecutor questioned Witthauer about the fact that he changed his story and was only then admitting to sex with C.Z. RP 779-80. The prosecutor's inquiry continued as follows:

> Q. And when a man doesn't tell us the truth, should we take him at his word? Would you? I'll withdraw that.
>
> A. If you --
>
> Q. You don't have to answer that.
>
> Now, is it normal for you to have sex with your niece?
>
> A. No.
>
> Q. How many nieces do you have?
>
> A. Four.
>
> Q. I'm sorry?
>
> A. Four, I believe.
>
> Q. How many have you had sex with?
>
> A. One.
>
> Q. Okay. Would that answer change if there was DNA evidence about other people?
>
> A. What do you mean?
>
> [Defense counsel]: I'm going to object to this line of questions.
>
> THE COURT: Sustain the objection. Disregard any questions or answering concerning allegations of misconduct with anyone else. They don't have anything to do with this case.
>
> Proceed to something else, Counsel.

RP 781-82. Earlier, the prosecutor had asked Witthauer a series of questions designed to elicit that Witthauer, who was 18 years older than C.Z., had known C.Z. since she was a little girl and had observed the passage of various milestones in her life. RP 775.

In closing argument, near the end of its initial argument, the State misstated the burden of proof as follows:

> We've talked about the evidence but then – and we talked about the law. Finally, we come to the burden of proof where the facts meet the law. What must the State prove to you? To what level? Is it beyond all doubt? Is it a hundred percent? Is it to a scientific certainty? Well, we got a lot of scientific certainty in this case. *But, no, the answer is the State must prove the case to you beyond a reasonable doubt, and you don't have to take my word for it. We don't have to guess what that is because Judge Lewis defined it for us.* ***And he tells us that a reasonable doubt is a doubt for which a reason can be given.***

RP 856 (italics and bold type supplied). There was no objection.

In closing, the defense attempted to challenge C.Z.'s credibility by pointing out inconsistencies in C.Z.'s account of the day leading up to the incident. RP 857-69. But in rebuttal, the prosecutor disparaged the defense case (and defense counsel) for calling C.Z.'s mother as a witness to point out some of these inconsistencies. The State argued her testimony was trivial. The State went further, suggesting that it was inappropriate to solicit the mother's testimony at all given her ailing health.

> And – and we get the claim that, you know, well, gee. [C.Z.] is lying because of the testimony of her mother[.]. *And you know, that – that's just really kind of a shame. I mean, [the mother], she's called to the stand as a surprise witness. I really don't why. She's got some serious medical problems. Some serious memory problems. She's got trouble even making it back off the stand.* She didn't say that [C.Z.] told her one way or the other. She basically – she can't remember. She said she

> can't remember what she did the day before. *I don't say that to be, you know, rude to her. But, I mean, what is that? Who hangs their hat on that in a case? Why would you even present that evidence if not as a distraction? It's just – it's a shame.*

RP 876-77 (emphasis added).

4. Appeal.

The Court of Appeals rejected Witthauer's claims on the issues raised above, and it affirmed his convictions. He now asks that this Court grant review, reverse the Court of Appeals, and reverse his convictions.

E. REASONS REVIEW SHOULD BE ACCEPTED

1. WITTHAUER WAS DENIED HIS RIGHT TO CONFRONT HIS ACCUSER. REVIEW IS APPROPRIATE UNDER RAP 13.4(b)(1) AND (3).

The trial court deprived Witthauer of his right to confront the most important witness. Review is appropriate under RAP 13.4(b)(1) and (3).

The Sixth Amendment to the United States Constitution and article 1, section 22 of the state constitution guarantee accused persons the right to confront and cross-examine adverse witnesses. Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); State v. McDaniel, 83 Wn. App. 179, 185, 920 P.2d 1218 (1996). The most important component of the right to confront witnesses has long been held to be the right to conduct meaningful cross-examination. State v. Foster, 135 Wn.2d 441, 455-56, 957 P.2d 712 (1998). "Cross examination is the

principal means by which the believability of a witness and the truth of his testimony are tested." Davis, 415 U.S. at 315.

This Court reviews a trial court's limitation of the scope of cross-examination for abuse of discretion. Yet, the more essential the witness is to the prosecution's case, the more latitude the defense should be given to explore fundamental elements such as motive, bias, credibility, or foundational matters. State v. Darden, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002). Moreover, if the trial court excluded relevant defense evidence, the reviewing court determines as a matter of law whether the exclusion violated the constitutional right to present a defense. State v. Clark, 187 Wn.2d 641, 648-49, 389 P.3d 462 (2017). This Court applies a three-part test to determine whether confrontation rights were violated:

> First, the evidence must be of at least minimal relevance. Second, if relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial. Finally, the State's interest to exclude prejudicial evidence must be balanced against the defendant's need for the information sought, and only if the State's interest outweighs the defendant's need can otherwise relevant information be withheld.

Darden, 145 Wn.2d at 621; accord State v. Jones, 168 Wn.2d 713, 720-21, 230 P.3d 576 (2010). Thus, before a trial court may preclude a relevant area of inquiry, it must demonstrate a compelling state interest. State v. Hudlow, 99 Wn.2d 1, 15-16, 659 P.2d 514 (1983).

A defendant's constitutional right to present evidence or cross-examine witnesses does not exempt him from basic rules of evidence. But he may be given more latitude under those rules to ensure compliance with those important rights. Darden, 145 Wn.2d at 61.

Under ER 608(b), specific instances of a witness's prior conduct may be inquired into on cross-examination for purposes of impeaching the witness if the conduct is probative of the witness's untruthfulness and the cross-examiner has a good faith basis for the inquiry. Conduct involving fraud or deception is indicative of the witness's general disposition with regard to truthfulness. State v. Johnson, 90 Wn. App. 54, 71, 950 P.2d 981 (1998). An accused should be given extra latitude in cross-examination to show motive or credibility, especially when the witness is essential to the State's case. Any fact that goes to trustworthiness of the witness may be elicited if it is germane to that topic. State v. York, 28 Wn. App. 33, 36, 621 P.2d 784 (1980).

The York decision is itself instructive. York was convicted of two counts of delivery of a controlled substance. He was convicted primarily upon the testimony of Gary Smith, an undercover investigator for the sheriff's department, who testified he bought two bags of marijuana from York. On direct examination, Smith testified about his background, military service, and work experience after leaving the military. Smith

had held jobs doing undercover work, initially in the military, and then for the Wenatchee Police Department. Id. at 34. But the defense sought to elicit, on cross-examination, that Smith had also been employed by the Mineral County, Montana sheriff's department but had been fired because of irregularities in the paperwork he produced and his general unsuitability for the job. The trial court, in granting the State's motion to exclude such evidence, held any related inquiry would deal with a collateral matter. Id. The defense, attempting to salvage its case, presented several alibi witnesses indicating York had not been present at the location where the alleged buy occurred. The defense also attempted to show Smith had a motive to fabricate the sale. Id. at 35.

On appeal, the Division Three reversed York's conviction. Smith was the only witness to the sale. His credibility, based on his apparently spotless background, was stressed heavily by the prosecution. Credibility was not, therefore, collateral; it was the very essence of the defense. Id. at 35-37. Correspondingly, the court found that the error was not harmless beyond a reasonable doubt and reversed York's conviction. Id.

As York indicates, the trial court abused its discretion in prohibiting inquiry into C.Z.'s license revocation on cross-examination. Moreover, a careful balancing of the factors set forth in Hudlow and Darden establishes that the trial court violated Witthauer's right to cross-

examine the State's primary witness. The trial court's basis for limiting inquiry appears to have been that the allegations were never adjudicated because C.Z. did not respond to the allegations. Moreover, C.Z. never explicitly admitted to the conduct. RP 36-37. The trial court surmised, therefore, that permitting inquiry into the revocation would necessitate a mini trial on the subject. This would implicate extrinsic evidence and, moreover, confuse the jury. RP 37-38.

Witthauer was not seeking a mini trial. Rather, he simply sought to engage in targeted cross-examination about relevant subject matter. See California v. Green, 399 U.S. 149, 125, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970) (characterizing cross examination as "the greatest legal engine ever invented for the discovery of truth") (internal quotations omitted). By its very nature, the disciplinary proceeding and resulting license revocation were "probative of untruthfulness" and therefore relevant to the matter of C.Z.'s credibility. Contrary to the court's ruling, the disciplinary action was itself relevant. C.Z.'s failure to respond to the allegation of drug diversion—essentially theft—arguably constituted an admission to such conduct. See State v. Lounsbery, 74 Wn.2d 659, 662, 445 P.2d 1017 (1968) (to constitute an implied admission, a statement must be incriminating or accusatory, made in the presence and hearing of the party, and not denied by the party).

Relatedly, and contrary to the court's oral ruling, inquiry into the result of a disciplinary proceeding in addition to (or instead of) the underlying conduct would not constitute presentation of "extrinsic" under ER 608(b). See United States v. Dawson, 434 F.3d 956, 958-59 (7th Cir. 2006) ("[t]here would have been a problem in this case had the defendants' lawyer asked 'has any federal judge ever found that you lied on the stand?' and when the witness answered 'no' the lawyer sought to have the judge's finding placed in evidence;" but cross-examination regarding the findings themselves would not violate the rule).

The inquiry was relevant. Like informant Smith's credibility in York, complainant C.Z.'s credibility was the linchpin of the State's case, and her history of dishonest conduct his most cogent line of defense. The desired area of inquiry was even more critical given that C.Z. had claimed she did not know how prescription drugs entered her system. Crucially, the desired cross-examination did not seek to suggest that C.Z. was dishonest *because* she was a drug user.[3] Rather, the defense sought to inquire into conduct probative of untruthfulness, as permitted by ER 608(b). By implication, C.Z.'s claim that she didn't know how the clonazepam got into her system was an accusation that Witthauer had drugged her to facilitate rape. Access to prescription drugs, and the

[3] Cf. State v. Hardy, 133 Wn.2d 701, 709-10, 946 P.2d 1175 (1997) (in general, "prior drug convictions . . . are not probative of a witness's veracity").

revocation of her access to such based on dishonest conduct, was relevant to C.Z.'s credibility in general, and relevant to this specific topic.

As in York, the trial court's ruling precluding Witthauer from targeted cross-examination left C.Z.'s credibility deceptively intact. On cross-examination, C.Z. could (and did) simply deny that she had diverted prescription drugs for her own use. And, although Witthauer attempted to impeach C.Z. with relatively insignificant details about events leading up to the incident—such as who called whom and at what time—his inability to confront C.Z. with the fact that her license had been revoked for such conduct hamstrung his defense. As in York, where the defense also did its best to impeach Smith with limited tools, the trial court's ruling unfairly limited cross-examination in this case.

Finally, under the Hudlow / Darden test, because the area of inquiry was relevant, only a compelling state interest could preclude such cross-examination. The State cannot establish that cross-examination on license revocation was "so prejudicial as to disrupt the fairness of the fact-finding process." Hudlow, 99 Wn.2d at 5, 15-16.

The trial court abused its discretion in limiting cross-examination, resulting in a constitutional violation. McDaniel 83 Wn. App. at 187-88. The error was not harmless beyond a reasonable doubt. The Court of Appeals erred, Op. at 11-12, and review is appropriate under the criteria.

2. PROSECUTORIAL MISCONDUCT DENIED WITTHAUER A FAIR TRIAL. REVIEW IS ALSO APPROPRIATE UNDER RAP 13.4(b)(1), (2), AND (3).

Misconduct in cross-examination and in closing denied Witthauer a fair trial. Review is appropriate under RAP 13.4(b)(1), (2), and (3).

a. Prosecutorial misconduct may be so pervasive as to deny an accused person due process of law.

The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments, as well as article 1, section 3 and article 1, section 22 of the Washington Constitution. State v. Finch, 137 Wn.2d 792, 843, 975 P.2d 967, cert. denied, 528 U.S. 922 (1999). Prosecutorial misconduct may deprive an accused of his constitutional right to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). An accused person cannot demonstrate misconduct where a curative instruction could have cured any error and alleviated any prejudice. State v. Aquarius Walker, 164 Wn. App. 724, 737, 265 P.3d 191 (2011). But an objection is unnecessary in cases of incurable prejudice because "'there is, in effect, a mistrial and a new trial is the only and the mandatory remedy.'" State v. Emery, 174 Wn.2d 741, 762, 278 P.3d 653 (2012) (quoting State v. Case, 49 Wn.2d 66, 74, 298 P.2d 500 (1956)).

Reviewing courts focus less on whether the misconduct was flagrant or ill-intentioned and more on whether resulting prejudice could

have been cured. Emery, 174 Wn.2d at 762. "'The criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?" Id. (quoting Slattery v. City of Seattle, 169 Wash. 144, 148, 13 P.2d 464 (1932)).

In addition, reviewing courts recognize that the cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase the combined prejudicial effect. Walker, 164 Wn. App. at 737 (citing Case, 49 Wn.2d at 73).

b. The prosecutor committed incurable misconduct by suggesting during cross-examination that Witthauer had victimized or would victimize other family members.

The prosecutor committed flagrant, incurable misconduct by suggesting on cross-examination that Witthauer victimized other nieces. RP 780. Although the trial court struck the questions and related answers, the prosecutor's suggestion of uncharged offenses was improper and so inflammatory as to be incurable. The line of questioning implicated Witthauer in other uncharged acts, despite no support in the record for such. Courts have repeatedly held such questioning to be improper. State v. Miles, 139 Wn. App. 879, 887, 162 P.3d 1169 (2007); State v. Babich, 68 Wn. App. 438, 444-46, 842 P.2d 1053 (1993); State v. Beard, 74

Wn.2d 335, 338-39, 444 P.2d 651 (1968); State v. Yoakum, 37 Wn.2d 137, 143-44, 222 P.2d 181 (1950).

Juries are presumed to follow a court's instructions. State v. Weber, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983). But no instruction can "'remove the prejudicial impression created [by evidence that] is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors.'" State v. Escalona, 49 Wn. App. 251, 255, 742 P.2d 190 (1987) (alteration in original) (quoting State v. Miles, 73 Wn.2d 67, 71, 436 P.2d 198 (1968)).

The Court of Appeals agreed misconduct occurred but found the trial court's instruction cured any error. Op. at 14-15. However, the prosecutor's misconduct did not end with cross-examination.

c. The prosecutor also committed misconduct by subtly, yet incurably, diminishing the State's burden of proof in closing argument.

The prosecutor also committed misconduct in closing argument. The prosecutor acknowledged the law was contained in the jury instructions. And those instructions, according to the prosecutor, informed jurors that a reasonable doubt is a doubt for which a reason *can be given.* RP 856. This is incorrect, and it is inconsistent with the pattern instruction defining the burden of proof. This subtle yet profound abridgment of the

State's burden of proof, explicitly portrayed as an instruction from the trial court itself, was incurably prejudicial.

Arguments by the prosecution that shift or misstate the State's burden constitute misconduct. State v. Lindsay, 180 Wn.2d 423, 434, 326 P.3d 125 (2014). Such misstatement of the law is a serious irregularity with grave potential to mislead the jury. Davenport, 100 Wn.2d at 764.

Due process requires that the State bear the burden of proving every element of a crime beyond a reasonable doubt. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 713, 286 P.3d 673 (2012) (citing In re Winship, 397 U.S. 358, 361, 90 S. Ct. 1068, 25 L. Ed.2d 368 (1970)). The defense has no obligation to produce evidence. Emery, 174 Wn.2d at 760. "The law does not require that a reason be given for a juror's doubt." State v. Kalebaugh, 183 Wn.2d 578, 585, 355 P.3d 253 (2015).

Here, the prosecutor's remarks misstated the reasonable doubt standard and shifted the burden of proof to Witthauer to provide a basis for doubt. The argument parallels the "fill-in-the-blank" arguments that Washington courts have repeatedly held misstate the law and constitute misconduct. State v. Johnson, 158 Wn. App. 677, 682, 243 P.3d 936 (2010); State v. Anderson, 153 Wn. App. 417, 424, 220 P.3d 1273 (2009). Courts have consistently condemned these arguments because they tell jurors they must be able to articulate their reasons for having reasonable

doubt. A fill-in-the-blank argument "improperly implies that the jury must be able to articulate its reasonable doubt" and "subtly shifts the burden to the defense." Emery, 174 Wn.2d at 760. One Iowa court long ago illustrated the problems caused by an instruction requiring jurors to find an articulable doubt:

> One juror may declare he does not believe the defendant guilty. Under this instruction, another may demand his reason for so thinking. Indeed, each juror may in turn be held by his fellows to give his reasons for acquitting, though the better rule would seem to require these for convicting. The burden of furnishing reasons for not finding guilt established is thus cast on the defendant, whereas it is on the state to make out a case excluding all reasonable doubt. Besides, jurors are not bound to give reasons to others for the conclusion reached.

State v. Cohen, 78 N.W. 857, 858 (Iowa 1899).

The prosecutor's argument here suffers from the same affliction as the arguments in those cases. There was, however, no objection. And the jury was instructed, consistent with the pattern instruction, that a reasonable doubt is "a doubt for which a reason *exists*." CP 23 (instruction 4). But, given the subtle distinction between the wording of the instruction and the prosecutor's argument, it is unlikely the standard curative instruction (instructing jurors to rely on the court's instructions rather than the parties' arguments) would have sufficed to cure the error.

The Court of Appeals appears to have concluded, inexplicably, that no error occurred. Or, perhaps in the alternative, the State cured its own error by reciting abiding belief language form the pattern instruction. Op. at 16. This reasoning is specious. See State v. Allen, 182 Wn.2d 364, 377, 341 P.3d 268 (2015) ("[C]orrectly stating the law once hardly can compensate for misstating the law multiple other times." (Internal quotation omitted.)). The prosecutor's misconduct—a subtle yet profound misstatement of the bedrock principle of American jurisprudence—was incurably prejudicial. And, given the relative strength of the parties' cases, it denied Witthauer a fair trial.

d. The prosecutor again committed misconduct by disparaging defense counsel in rebuttal argument.

The prosecutor also committed misconduct by disparaging defense counsel in rebuttal. The Court of Appeals agreed but held the error was "waived." Op. at 18. As discussed below, this does not erase the error from existence or preclude it from being considered as a component as cumulative error denying an accused a fair trial.

3. CONTRARY TO THE COURT OF APPEALS FLAWED ANALYSIS, CUMULATIVE ERROR DENIED WITTHAUER A FAIR TRIAL.

The cumulative effect of the foregoing errors—the improper limitation on cross-examination, as well as the several instances of

prosecutorial misconduct—also denied Witthauer a fair trial. See State v. Venegas, 155 Wn. App. 507, 228 P.3d 813 (2010) (where errors occurred in admission of evidence and in closing argument, finding that "[e]ach of these errors was significant, and we believe that their cumulative impact on Venegas's trial was severe enough to warrant reversal of her convictions under the cumulative error doctrine."). For this reason, as well, this Court should grant review and reverse his convictions.

The Court of Appeals held that cumulative error did not require a new trial. But its analysis was flawed. As indicated, the Court of Appeals incorrectly upheld the limitation on cross-examination.

And, citing no authority, the Court of Appeals held that Witthauer "waived" any error with respect to disparagement of defense counsel, erasing it from cumulative error analysis. Op. at 18. But misconduct (even if it is not objected to) is properly considered in evaluating whether cumulative error denied an accused a fair trial. Venegas, 155 Wn. App. at 526; see also State v. Gorman-Lykken, ___ Wn. App. 2d ___, ___ P.3d ____, 2019 WL 3797976 at *8 n. 3 (Aug. 13, 2013) (Melnik, J., concurring).

Moreover, the Court of Appeals was simply incorrect in finding no error as to misstatement of reasonable doubt. Op. at 16.

Thus, in finding no prejudice from the only "preserved" error, the Court of Appeals engaged in fundamentally flawed cumulative error analysis. For this reason, as well, this Court should grant review.

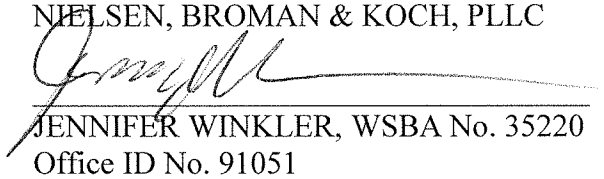
F. CONCLUSION

This Court should accept review under RAP 13.4(b)(1), (2), and (3) and reverse the Court of Appeals.

DATED this 14th day of August, 2019.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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APPENDIX

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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent/Cross Appellant, v. RONALD WITTHAUER, Appellant/Cross Respondent.	No. 50934-2-II UNPUBLISHED OPINION

GLASGOW, J. — Ronald Witthauer appeals from his convictions of second degree rape and indecent liberties with forcible compulsion, where his victim was his adult niece, CZ. At trial, the State presented DNA and other physical evidence, whereas Witthauer's account of what happened changed several times up to and including at trial.

Witthauer argues that the trial court erred when it prevented him from cross-examining CZ about the prior revocation of her pharmacy technician license and that the prosecutor committed misconduct during cross-examination of him and during closing argument. He also asserts cumulative error deprived him of a fair trial. He contends that the court erred in imposing a condition of community custody requiring him to obtain a chemical dependency evaluation. He also filed a statement of additional grounds.

The State cross-appeals, arguing the trial court improperly merged Witthauer's convictions of second degree rape and indecent liberties with forcible compulsion during sentencing.

We affirm Witthauer's convictions. We affirm in part and reverse in part Witthauer's sentence and remand for the trial court to either make the requisite chemical dependency finding or strike the challenged community custody condition.

FACTS

I. CZ'S ALLEGATIONS AND THE INVESTIGATION

CZ[1] and her friend took their children swimming at a river on a midsummer day. While they were there, CZ was talking to Witthauer about his recent breakup, first via Facebook and then via phone call. Witthauer told CZ he was depressed about the breakup and asked her if she would meet him so they could talk.

Witthauer, driven by his friend, Dan Hainley, then picked CZ up from a nearby Wal-Mart while her friend took the children to her house. CZ's friend testified that the plan was for CZ to come pick up her son later that evening.

Witthauer was visibly intoxicated when he arrived. CZ denied drinking or consuming drugs earlier that day, but she did have a couple sips of vodka in the car as Hainley drove them. Rather than take CZ home as she expected, Hainley drove them to the home of CZ's grandmother (Witthauer's mother), where Witthauer had a motor home parked on the property.

Witthauer asked CZ to stay and have a beer with him, and she agreed to stay for a short while. Witthauer then brought CZ a beer—already opened—and they sat outside and started to

[1] We use initials to protect the victim's privacy.

drink. After a few sips, CZ began to feel dizzy; she tried to stand but fell down because her legs "were like jello." Verbatim Report of Proceedings (VRP) (Vol. 3) at 219-20. CZ testified that she was terrified and wanted to call her husband, but she had left her phone in Hainley's truck.

Witthauer picked CZ up and carried her into the motor home, telling her that she was drunk and she needed to "sleep it off." VRP (Vol. 3) at 220-21. CZ said she yelled at Witthauer to call her husband to pick her up and take her home; Witthauer told CZ he had called her husband, but she did not believe him. Witthauer put her on the bed in the motor home, and then went back outside with Hainley.

CZ testified that she laid face down on the bed, unable to move, until she eventually lost consciousness. She woke up to the sound of Hainley's truck starting up and Hainley and Witthauer saying goodbye as Hainley drove off.

Witthauer then came into the motor home and asked CZ if she wanted to have sex with him. CZ, still unable to move, told him: "No; you're not funny. This is why people don't like you when you drink." VRP (Vol. 3) at 225. Witthauer responded that he was not joking and asked again if CZ wanted to have sex. She again said no, but Witthauer got on the bed and straddled the backs of her legs. CZ tried to push him away, but he grabbed her arm and pinned it to the bed as he pulled down her pants. CZ then tried to protect her vagina with her hand, but Witthauer pulled it away, pressed down on her neck, and put his penis in her vagina. At some point during the rape, Witthauer also put his finger in CZ's anus. CZ lost consciousness during part of the rape, but was awake when Witthauer finished, at which point he threw a blanket over her, told her he loved her, and went to bed a few feet away.

CZ eventually got up and tried to leave, but the door was locked so she was forced to spend the night in the motor home. She testified that she was terrified and thought Witthauer would kill her if she tried to get away. She also testified that she never thought he would do something like that to her, and she never would have gone with him that day if she had not trusted him as her uncle.

The next morning, Witthauer behaved as though nothing had happened. He told CZ her husband had been calling his phone. Witthauer then called CZ's husband and put the phone on speaker and stayed with CZ as she talked to her husband. CZ testified that she did not tell her husband anything about the rape because Witthauer was standing right there with the phone on speaker.

Witthauer then drove CZ home, still acting as though nothing had happened. They stopped to see Witthauer's friend, Tom Goringe, on their way, but CZ did not disclose anything to Goringe because she was humiliated and worried about what Witthauer might do. CZ testified that her goal was to "get out of that car alive" and to "[g]et home safe." VRP (Vol. 3) at 235-36.

When CZ got home, she called a close friend, Ramona Lowe, and disclosed what happened. Lowe testified that CZ was hysterical and crying so much she could barely talk. Lowe told CZ to call the police and go to the hospital for a sexual assault examination. CZ and her husband went to a hospital in Portland, Oregon later that day, where she underwent a sexual assault examination and made a report to the police.

CZ told her examining nurse, Jane Valencia, about how Witthauer had raped her and held her down by her neck. During the examination Valencia noted abnormal redness and swelling in and around CZ's vagina, white fluid in her vagina, and scratches on CZ's arms and the back of

her neck. However, Valencia could not say whether the vaginal redness and swelling resulted from the rape or from CZ's sexual intercourse with her husband two days prior. Valencia took blood and urine samples from CZ, and also collected oral, vaginal, and cervical swabs.

CZ's blood samples showed no signs of drugs or alcohol, but her urine samples contained alcohol and the prescription drug clonazepam, a central nervous system depressant that slows down brain activity, impairs motor skills, and can cause drowsiness and confusion, particularly when combined with alcohol. Justin Knoy, a forensic toxicologist, testified that the test results were consistent with a person consuming alcohol and clonazepam about 12 hours prior to the sample being taken, though consumption could have occurred earlier or later.

In early August, Detective Elizabeth Luvera interviewed Witthauer, who told her that CZ was drunk when he picked her up, that he slept in his truck that night, and that he did not have sex with CZ. Witthauer also voluntarily gave Luvera a sample of his DNA.

CZ said that she and her husband use condoms when they have sex because she has a sensitivity to semen that causes a burning sensation; she testified that she knew Witthauer had ejaculated in her because her vagina was burning badly. The sample that Witthauer provided matched DNA from sperm cells found in CZ's vaginal and cervical swabs. After receiving the DNA results, Detective Fred Nieman went to Witthauer's motor home and took him into custody. Also after the DNA test results revealed his DNA was in CZ's vagina, Witthauer told family members that there was a conspiracy against him to plant his DNA inside CZ.

II. PRETRIAL MOTION AND ORDER

Before trial, the State moved to exclude extrinsic evidence and limit cross-examination regarding the Oregon Board of Pharmacy's prior revocation of CZ's pharmacy technician

license. Witthauer sought to admit a letter from the Board to CZ, along with a certified copy of a default order against her, revoking her license based on an allegation that she had used patients' prescriptions to illegally obtain oxycodone for her own use. The trial court noted on the record that the order was entered by default, because CZ never responded to the notice of proposed disciplinary action.

The trial court found that whether CZ dishonestly obtained prescriptions and then diverted oxycodone was probative of CZ's truthfulness. The trial court ruled that the defense could ask whether she did these things on cross-examination. But under ER 608(b), the inquiry would end with CZ's answer and Witthauer could not further inquire, even if she denied it. The court also ruled that Witthauer could not ask CZ about her license revocation or present extrinsic evidence to show her license had been revoked. The court reasoned that the revocation order

> does not state where the allegations arose from; in other words, which people advised the investigator, or testified at the hearing, or otherwise let the Board of Pharmacy know that [CZ] was alleged to have done these things in December of 2014. There's no admission or other indication from her that, in fact, she did these things, only that she didn't contest the proceeding.

VRP (Vol. 1) at 37.

III. Relevant Trial Testimony and Argument

At trial, during his cross-examination of CZ, defense counsel asked if she had ever been "accused" of diverting oxycodone, but the State objected based on the court's pretrial ruling and the court sustained the objection. VRP (Vol. 4) at 295. Defense counsel then asked if CZ had ever diverted oxycodone for her own use, and she said she had not. Counsel asked once more, and CZ again said "[n]o." VRP (Vol. 4) at 295. Counsel then moved on to another line of inquiry.

A DNA expert testified to the DNA match. During his testimony, Witthauer admitted that he had sex with CZ, but said it was consensual. Witthauer also admitted that he had lied many times to detectives and his friends and family when he said he had not had sex with CZ, and he invented a conspiracy theory in order to protect himself.

During cross-examination, the State asked Witthauer how many nieces he had, and how many of them he had had sex with. Witthauer responded that he had four nieces, and he had had sex with one of them. The State responded: "Would that answer change if there was DNA evidence about other people?" VRP (Vol. 7) at 780. Defense counsel promptly objected, and the trial court sustained the objection, instructing the jury to "[d]isregard any questions or answering concerning allegations of misconduct with anyone else." VRP (Vol. 7) at 781. The State then moved on to another topic.

As a final and last minute witness, Witthauer called CZ's mother. Defense counsel tried to elicit from her details about multiple phone calls to family members that CZ allegedly made on the day of the rape. Defense counsel apparently hoped to support the defense theory that CZ was upset with her husband that day and had turned to consensual sex with her uncle for comfort. CZ's mother testified that she could not remember the details of that day and that she had significant health problems, including recent strokes, that affected her memory.

The trial instructed the jury that "[a] reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence." Clerk's Papers (CP) at 23. In closing argument, the prosecutor reiterated the definition of a "reasonable doubt" as "a doubt for which a reason can be given." VRP (Vol. 8) at 856. Witthauer did not object.

Also during closing argument, as part of a broader discussion of the relative credibility of witnesses, the prosecutor discussed Witthauer's last minute decision to call CZ's mother as a defense witness. The prosecutor noted CZ's mother's serious medical and memory problems and said: "And you know, that—that's just really kind of a shame. . . . I don't say that to be, you know, rude to her. But, I mean, what is that? Who hangs their hat on that in a case? Why would you even present that evidence if not as a distraction? It's just—it's a shame." VRP (Vol. 8) at 876-77. Witthauer did not object.

The jury convicted Witthauer of second degree rape and indecent liberties with forcible compulsion. The jury also found that he had used his position of trust, confidence, or fiduciary responsibility to facilitate the commission of both crimes.

IV. SENTENCING

During sentencing, the court stated in its oral ruling that the two crimes merged, and that it would only sentence Witthauer on his conviction for second degree rape. The State disagreed, noting that merger and same criminal conduct are different concepts. The trial court did not revisit the issue in the hearing. However, in its final written ruling, the court found that the two crimes encompassed the same criminal conduct. The court sentenced Witthauer to 144 months to life imprisonment. The court also imposed a condition of community custody requiring Witthauer to complete a chemical dependency evaluation, without making a finding that such a dependency had contributed to the commission of his crimes.

Witthauer appeals his conviction and sentence, and the State cross-appeals the court's verbal finding that the two crimes merged.

ANALYSIS

I. CROSS-EXAMINATION OF CZ

Witthauer argues the trial court denied him his right of confrontation by limiting the scope of his cross-examination of CZ. Specifically, he asserts the trial court improperly prevented him from asking her about the disciplinary proceeding that led to the revocation of her pharmacy technician license. We disagree.

A. Right of Confrontation, ER 608(b), and Standard of Review

Criminal defendants have a constitutional right to confront and cross-examine adverse witnesses. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22; *Davis v. Alaska*, 415 U.S. 308, 315, 94 S. Ct. 1005, 39 L. Ed. 2d 347 (1974). In *State v. Jones*, our Supreme Court reiterated its analysis for determining whether the exclusion of evidence violates a defendant's constitutional right to present a defense. 168 Wn.2d 713, 720, 230 P.3d 576 (2010). The evidence that a defendant desires to introduce "'must be of at least minimal relevance'" because a defendant has no right to present irrelevant evidence. *Id.* (quoting *State v. Darden*, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002)). To prevail on a claim that he was deprived of his Sixth Amendment right, the defendant must at least make some plausible showing of how the subject of his cross-examination would have been both material and favorable to his defense. *State v. Gonzalez*, 110 Wn.2d 738, 750, 757 P.2d 925 (1988); *see also United States v. Valenzuela-Bernal*, 458 U.S. 858, 867, 102 S. Ct. 3440, 73 L. Ed. 2d 1193 (1982).

Even though there has been a recent split of authority about the structure of the legal test for establishing a Sixth Amendment violation when a trial court excludes a defendant's proffered evidence, all of the cases agree that our first step is to review for abuse of discretion the trial

court's assessment of whether the excluded evidence was relevant. *State v. Lee*, 188 Wn.2d 473, 486-88, 396 P.3d 316 (2017); *State v. Clark*, 187 Wn.2d 641, 648-49, 389 P.3d 462 (2017); *State v. Blair*, 3 Wn. App. 2d 343, 350-52, 415 P.3d 1242 (2018); *State v. Horn*, 3 Wn. App. 2d 302, 310-11, 415 P.3d 1225 (2018).

In this case, Witthauer argued in the trial court that he should have been permitted to cross-examine CZ about her license revocation based on ER 608(b). Under that rule, a party may inquire into specific instances of a witness's prior conduct, for purposes of impeachment, if the conduct is probative of the witness's truthfulness or untruthfulness. ER 608(b). Conduct involving fraud or deception can be indicative of the witness's general disposition with regard to truthfulness. *State v. Johnson*, 90 Wn. App. 54, 71, 950 P.2d 981 (1998). However, a witness's prior bad act may not be relevant when it is unrelated to the issues of the case. "The confrontation clause primarily protects 'cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness *as they may relate directly to issues or personalities in the case at hand.*'" *Lee*, 189 Wn.2d at 489 (quoting *Davis*, 415 U.S. at 316). Although a trial court's ruling limiting the scope of a defendant's cross-examination of a witness under ER 608(b) may implicate the constitutional right to confrontation, a defendant nevertheless has no constitutional right to the admission of irrelevant evidence. *See State v. O'Connor*, 155 Wn.2d 335, 348-49, 119 P.3d 806 (2005).

Moreover, ER 608(b) expressly does not permit introduction of extrinsic evidence to prove specific instances of conduct. Instead, the party attacking the witness's credibility may only inquire into those instances on cross-examination. ER 608(b). "Specific instances on the conduct of a witness . . . may not be proved by extrinsic evidence." ER 608(b). As a result, if a

witness denies the alleged conduct, the examining attorney cannot impeach using extrinsic evidence.

ER 608(b) expressly leaves the scope of cross-examination "in the discretion of the court." We therefore review a trial court's decision to admit or exclude evidence under ER 608(b) for abuse of discretion. *See Lee*, 188 Wn.2d at 486. Even where a defendant raises a Sixth Amendment argument regarding the exclusion of evidence, we review for abuse of discretion whether the trial court properly evaluated the relevance or probative value of the evidence. *See, e.g.*, *Id.* at 486-88; *Clark*, 187 Wn.2d at 648-49.

B. Evidence of CZ's License Revocation

Witthauer argues the trial court erred in limiting cross-examination to asking CZ only whether she had ever diverted oxycodone for her own use. He was not permitted to ask whether she had ever been accused of doing so or ever had her pharmacy technician license revoked in a disciplinary proceeding for that reason. He argues that an inquiry into the disciplinary proceeding was relevant because "CZ's credibility was the linchpin of the State's case, and her history of dishonest conduct [Witthauer's] most cogent line of defense." Br. of Appellant at 24. Witthauer reasons that an inquiry into disciplinary proceedings for diverting oxycodone was also relevant because CZ claimed she did not know how the clonazepam got into her system, implying that Witthauer had drugged her.

However, the trial judge explained on the record that CZ's license revocation occurred as the result of a default order against her because she never responded to the allegations. Therefore, evidence of her license revocation was not probative of her truthfulness because all it

would demonstrate was that she was accused of doing something dishonest and she did not respond to the accusation, not that she actually engaged in any dishonest conduct.

We hold that the trial court did not abuse its discretion. Testimony or evidence that actually demonstrated that CZ committed dishonest acts would be relevant to her truthfulness, and the trial court engaged in the appropriate ER 608(b) analysis allowing cross-examination of the alleged dishonest conduct—whether she diverted oxycodone. But the Board's default order shows only that she was accused of dishonesty and did not contest the resulting disciplinary proceeding. Such evidence is not relevant. Nor would it be reliably probative of whether she actually committed the acts she was accused of because parties default for reasons other than guilt. It was within the trial court's discretion to allow cross-examination regarding whether CZ had ever committed the specific instances of dishonest conduct, but to prohibit any inquiry into whether she had been accused of or disciplined for such conduct, when evidence of this particular disciplinary proceeding would not reveal the truth of the underlying accusation.

We hold that the trial court properly limited Witthauer's cross examination. Because a disciplinary proceeding resolved by default was not relevant or probative, its exclusion did not violate ER 608 or the Sixth Amendment.

II. PROSECUTORIAL MISCONDUCT

Witthauer claims the prosecutor committed misconduct during his cross-examination of Witthauer, when arguing the State's burden of proof, and when commenting on the role of defense counsel. We conclude that none of the challenged statements require reversal.

A. Burden to Show Prosecutorial Misconduct

To prevail, Witthauer bears the burden to show that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial. *See State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). When a claim is made that the prosecutor committed misconduct during closing argument, we review the prosecutor's statements "within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions." *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

Where the defendant objected at trial, they must show there is a "substantial likelihood" the improper statements affected the jury's verdict. *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008). However, "[t]he 'failure to object to an improper remark constitutes a waiver of error 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.'" *Thorgerson*, 172 Wn.2d at 443 (quoting *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994)). Moreover, the "[f]ailure to request a curative instruction or move for a mistrial 'strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.'" *In re Det. of Law*, 146 Wn. App. 28, 51, 204 P.3d 230 (2008) (quoting *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990)).

B. Cross-Examination of Witthauer

Witthauer first argues that the prosecutor committed misconduct by suggesting during cross-examination that Witthauer had victimized his other nieces. Witthauer objected. The court sustained Witthauer's objection and told the jury to disregard that line of questioning. The prosecutor moved on to another topic.

We presume the jury follows the court's instructions absent evidence to the contrary. *State v. Montgomery*, 163 Wn.2d 577, 596, 183 P.3d 267 (2008). Where the trial court has sustained an objection, to warrant reversal for prosecutorial misconduct, the defendant must show a substantial likelihood the exchange affected the jury's verdict. *Magers*, 164 Wn.2d at 191.

Witthauer has failed to show that the jury ignored the trial court's instruction that it should disregard the questions and answers about Witthauer's other nieces or that a substantial likelihood exists that the exchange affected the jury's verdict. Witthauer argues that admission of extrinsic evidence concerning commission of other crimes is inherently difficult for the jury to disregard, citing *State v. Escalona*, 49 Wn. App. 251, 255-56, 742 P.2d 190 (1987).

This case is distinguishable from *Escalona*. In that case, the victim gave unsolicited testimony that the defendant, who was charged with assaulting him with a knife, "already ha[d] a record and had stabbed someone." *Escalona*, 49 Wn. App. at 255. On appeal, the court held that although the trial court had sustained Escalona's objection and instructed the jury to disregard the testimony, the statement was "inherently prejudicial," in light of the weakness of the State's case, because it suggested the defendant had committed a nearly identical crime in the past. *Id.* at 256.

Here, unlike in *Escalona*, there was a brief series of questions from the prosecutor improperly implying that Witthauer may have victimized his other nieces, but there was no testimony to lend credence to the improper questioning. Given the brief exchange, Witthauer's denial, the court's swift and decisive ruling on the matter, and the instruction to the jury to disregard the question, it is unlikely the jury understood the questions to mean that Witthauer had committed other crimes. Also, defense counsel's failure to move for mistrial suggests he did not conclude that the State's question so prejudiced the jury that it would deprive Witthauer of a fair trial. *See Law*, 146 Wn. App. at 51.

Furthermore, the State's evidence here was not weak. CZ's account of what happened was unwavering from the morning after the incident through trial. Her testimony was corroborated by DNA evidence as well as visible physical injuries observed on the day after the rape. Witthauer constantly changed his account of what happened. He initially denied sexual contact with CZ. Then, after DNA results showed the presence of his semen in CZ's vagina, he said there was a conspiracy to steal his DNA and plant it on CZ. At trial Witthauer testified that he had consensual sex with CZ.

The prosecutor's questions here, while improper, were not so prejudicial in light of all of the evidence that they denied Witthauer a fair trial. We hold that Witthauer has not shown a substantial likelihood that the State's line of questioning improperly affected the jury's verdict.

C. State's Explanation of Its Burden of Proof

Next, Witthauer argues the prosecutor committed misconduct by misstating the reasonable doubt standard thereby shifting the burden of proof to the defense during closing argument. Specifically, Witthauer argues the prosecutor's statement here is analogous to "fill-in-

the-blank" arguments, which Washington courts have held to be improper. Br. of Appellant at 35. We disagree.

In closing, the prosecutor recited the definition of a "reasonable doubt" as "a doubt for which a reason can be given." VRP (Vol. 8) at 856. Witthauer did not object. The court's actual instructions to the jury defined "reasonable doubt" as "one for which a reason exists and may arise from the evidence." CP at 23

"[T]he law does not require that a reason be given for a juror's doubt." *State v. Kalebaugh*, 183 Wn.2d 578, 585, 355 P.3d 253 (2015). It is improper for the State to argue, "in order to find the defendant not guilty, you have to say 'I don't believe the defendant is guilty because,' and then you have to fill in the blank." *State v. Anderson*, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009) (quoting VRP (Vol. 4) at 327-28). But, the *Anderson* court explained that a prosecutor's statement that "a 'reasonable doubt' is one for which reason exists," was "not inaccurate." *Id.* at 430

Here, the prosecutor's explanation of the State's burden of proof did not amount to an improper fill-in-the-blank argument. The prosecutor did not elaborate to suggest the jury actually had to articulate a reason why Witthauer was innocent. Moreover, after making the statement Witthauer complains of, the prosecutor correctly explained the State's burden of proof, using language that adhered to the relevant jury instruction, saying: "[I]f, as you discuss the case, as you consider the evidence, fairly and fully, you have an abiding belief, a belief that lasts, a belief that endures that the defendant did these things to [CZ], [then] you are convinced as the law requires." VRP (Vol. 8) at 856; *see* CP at 23. Unlike in *Anderson*, here, the prosecutor directed the jurors to the instruction given by the trial court.

In sum, the prosecutor's statement did not impermissibly subvert Witthauer's presumption of innocence. It was not a fill-in-the-blank argument and, in context, it did not suggest that Witthauer had the burden to prove his innocence. We hold this statement was not improper.

D. State's Comments on Defense Counsel

Witthauer also argues the prosecutor committed misconduct by "disparaging . . . defense counsel" during his closing argument. Br. of Appellant at 38. In discussing CZ's mother's testimony, the prosecutor noted her serious medical and memory problems and stated: "And you know, that—that's just really kind of a shame. . . . I don't say that to be, you know, rude to her. But, I mean, what is that? Who hangs their hat on that in a case? Why would you even present that evidence if not as a distraction? It's just—it's a shame." VRP (Vol. 8) at 876-77. Witthauer did not object.

"It is improper for the prosecutor to disparagingly comment on defense counsel's role or impugn the defense lawyer's integrity." *Thorgerson*, 172 Wn.2d at 451. *Thorgerson* held it was improper for the prosecutor to refer to defense counsel's arguments as "bogus" or involving "sleight of hand" because such arguments imply "wrongful deception or even dishonesty." *Id.* at 451-52. Other cases holding a prosecutor's statement to be improper in this context have likewise involved suggestions that defense counsel was being dishonest or untrustworthy. *See State v. Warren*, 165 Wn.2d 17, 29-30, 195 P.3d 940 (2008) (claim that defense counsel's argument was "taking these facts and completely twisting them to their own benefit, and hoping that you are not smart enough to figure out what in fact they are doing."); *State v. Gonzales*, 111 Wn. App. 276, 283-84, 45 P.3d 205 (2002) (claim that prosecutors, unlike defense counsel, take

an oath to "see that justice is served."); *State v. Negrete*, 72 Wn. App. 62, 66-67, 863 P.2d 137 (1993) (claim that defense counsel was being paid to twist the words of a witness).

The prosecutor suggested defense counsel only called CZ's mother as a distraction, and in doing so impugned his integrity. The comment also disparaged the choice to rely on a witness with CZ's mother's health problems. Nevertheless, Witthauer has not established that the remark was so flagrant and ill-intentioned that it could not have been cured by instruction. *See Negrete*, 72 Wn. App. at 67-68; *Warren*, 165 Wn.2d at 30. Therefore, because Witthauer did not object, he waives any error.

III. CUMULATIVE ERROR

The cumulative error doctrine does not warrant reversal where the errors are few and have little or no effect on the trial's outcome. *State v. Venegas*, 155 Wn. App. 507, 520, 228 P.3d 813 (2010). Witthauer bears the burden of showing cumulative error. *State v. Asaeli*, 150 Wn. App. 543, 597, 208 P.3d 1136 (2009). He has failed to do so here.

As discussed above, Witthauer waived any claim of error with respect to the prosecutor's statements disparaging defense counsel. And there was no error with respect to the trial court's limitation of his cross-examination of CZ or the State's explanation of its burden of proof. Hence, the State's improper cross-examination of Witthauer was the only preserved error, and we have already concluded that Witthauer was not prejudiced. Accordingly, we reject Witthauer's claim of cumulative error.

IV. CONDITIONS OF COMMUNITY CUSTODY

Witthauer challenges his condition of community custody that requires him to obtain a chemical dependency assessment. We agree that this condition should be reversed.

A trial court lacks authority to impose a community custody condition unless it is authorized by statute. *State v. Kolesnik*, 146 Wn. App. 790, 806, 192 P.3d 937 (2008). In order to require an offender to obtain a chemical dependency evaluation, the court must find that the offender has a chemical dependency that contributed to his or her offense. RCW 9.94A.607(1); *State v. Warnock*, 174 Wn. App. 608, 612, 299 P.3d 1173 (2013).

The State concedes that the trial court made no express finding that Witthauer suffers from chemical dependency, and so this condition must be stricken unless the court makes such a finding on remand. We reverse the condition of community custody that requires Witthauer to obtain a chemical dependency assessment and remand for the court to either make the requisite finding or strike the condition.

V. STATE'S CROSS-APPEAL

In its cross-appeal, the State argues the trial court improperly merged Witthauer's convictions for indecent liberties and second degree rape. During sentencing, the court stated: "I find the two cases merge, so I will not impose a separate sentence on Count II of that crime." VRP (Vol. 8) at 909. However, Witthauer's judgment and sentence states only that the two crimes constituted the same criminal conduct, a conclusion that the State agreed to at sentencing and concedes is correct on appeal.

Although the State claims the court "enter[ed] a finding" that the two offenses merged, Reply Br. of Resp't. at 1, a superior court's verbal ruling is not binding unless it is formally

incorporated into the written findings, conclusions, and judgment. *In re Det. of B.M.*, 7 Wn. App. 2d 70, 84, 432 P.3d 459 (2019). "When the superior court's written findings are unambiguous, it is unnecessary to look to the oral ruling." *Id.*

Witthauer's judgment and sentence unambiguously listed both convictions and their offender scores, and shows that the two convictions encompassed the same criminal conduct. Any verbal ruling that the crimes merged was not binding, and we need not look any further than the trial court's unambiguous written ruling. *Id.* Because the State concedes the crimes constitute same criminal conduct, the State shows no error in the judgment and sentence.

VI. STATEMENT OF ADDITIONAL GROUNDS

In his statement of additional grounds, Witthauer raises several claims of ineffective assistance of counsel. None of his claims supports reversal.

Witthauer argues that his defense counsel was ineffective for failing to call an expert rebuttal witness to counteract nurse Valencia's testimony, and for failing to interview his friend, Goringe, whom he and CZ visited the morning after the rape and who died before trial. Both of these alleged errors rely on evidence that is outside the record before us so we do not consider them in this direct appeal. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Next, Witthauer argues he received ineffective assistance of counsel when his trial counsel failed to object to the prosecutor's allegedly improper remarks during closing argument discussed above. Because we held above that the prosecutor's comments during closing argument did not amount to misconduct requiring reversal, counsel was not ineffective for failing to object.

CONCLUSION

We affirm Witthauer's convictions. We affirm in part and reverse in part Witthauer's sentence and remand for the trial court to either make the requisite chemical dependency finding or strike the challenged community custody condition.

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

Glasgow, J.

We concur:

Worswick, J.

, A.C.J.

Lee, A.C.J.

NIELSEN, BROMAN & KOCH P.L.L.C.

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