68815-4

68815-4

NO. 68815-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

PETER JAMES CARR,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JAMES CAYCE

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

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2. On a charge of communication with a minor for immoral purposes, was there sufficient evidence for a juror to conclude beyond a reasonable doubt that Carr had an immoral purpose of a sexual nature when he spoke to a 9-year-old girl in a store, followed her when she moved away, and then pulled his pants down in front of her, a few feet away, grinning and exposing a hot pink women's swimsuit that revealed the shape of his genitals, and where two weeks earlier he approached an 8-year-old girl in a store and rubbed his palm back and forth on her breast over her shirt?

3. Is Carr's conduct described in Issue 2 within the constitutional core of the crime of communication with a minor for

immoral purposes, defeating a claim that the statute is unconstitutionally vague as applied to that conduct?

4. Where Carr moved to sever trial of the two counts charged and that motion was denied, was it constitutionally ineffective assistance of counsel not to renew the motion, where there is no reason to believe that the trial court would have reversed its initial ruling?

5. Was the State's closing argument a proper summary of the evidence and reasonable inferences that could be drawn as to Carr's purpose, which was a necessary element of each crime, and were references to Carr as a predatory sex offender entirely proper when that is what a person is called when he commits the crimes charged in this case, and there was no implication that the prosecutor was referring to facts not in evidence?

6. Did the State's closing argument properly state the burden of proof, and given that there was no objection to the remarks challenged on appeal, could any error have been cured, so that any impropriety was not reversible error?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The defendant, Peter Carr, was charged with child molestation in the first degree as to ML[1] and communicating with a minor for immoral purposes as to KW, both occurring in June 2011. CP 47-48. Carr was tried in King County Superior Court, the Honorable James Cayce presiding. 3/13/12 RP 2.[2] A jury found Carr guilty as charged on both counts. CP 68-69.

The trial court sentenced Carr to the mandatory indeterminate term of life for child molestation, with a minimum term of 68 months. CP 70-75. The court imposed a suspended sentence on the second count, a gross misdemeanor. CP 80-82.

2. SUBSTANTIVE FACTS.

In summary, Carr approached 8-year-old ML in a store and when no one else was looking, walked up to her and rubbed his palm back and forth on her breast over her shirt. 3/27/12 RP 533, 536, 541-46, 599. About two weeks later, he initiated a conversation with 9-year-old KW in a store, followed KW when she

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[1] The children who are named victims will be referred to by initials in an attempt to protect their privacy. For the same reason, the State will not use the names of the relatives of the children, instead identifying each relative by that relationship.

[2] The Verbatim Record of Proceedings is cited by reference to the date of the hearing.

repeatedly moved away from him, and finally pulled down his pants, revealing a tightly fitting hot pink swimsuit bottom that exposed the shape of his genitals, grinning. 3/28/12 RP 646-49, 668, 680, 687-91,694-97, 701. Eight days later, Carr was in a Sears store when security staff recognized him from surveillance footage; he was arrested after he left the store, and was wearing a hot pink women's swimsuit under his clothing. Ex. 38, 39, 46, 49; 3/28/12 RP 733-41; 3/29/12 RP 797-800, 846-51.

One day in early June 2011, ML's mother took her three daughters with her to shop at Deseret Industries, a thrift store. 3/21/12 RP 177, 182. ML, the middle child, was 8 years old. 3/27/12 RP 533. ML's mother was examining merchandise when a stranger walked up to ML and rubbed his hand back and forth on her breast, then walked away. 3/27/12RP 543-46, 599. ML then clung to her mother and asked to leave, cried, and eventually told her mother and demonstrated that a man had touched her across her breasts. 3/21/12 RP 189-94; 3/26/12 RP 465-68. ML's mother did not report this to anyone in the store that day. 3/21/12 RP 197.

As ML's family shopped at the same store some days later, on June 17, the same man was there, wearing the same clothing. 3/26/12 RP 483-91, 493, 500-03. It was Carr. Id. at 500-03. ML

was very upset. 3/21/12 RP 219-21; 3/26/12 RP 439, 484-87. The family observed the man staring at them and following them around the store; finally they reported the initial incident to store staff. Ex. 9B; 3/21/12 RP 221-23; 3/26/12 RP 442, 483-87. Carr testified that when he walked toward ML that day, she was upset and afraid of him. 4/2/12 RP 9, 47-49. He said he was curious about this and so he did keep watching the family for some time. Id. at 50-52.

A manager approached Carr, saying "it's been reported that you caused a disturbance in the store." 3/29/12 RP 820. Carr turned and hurriedly walked out of the store before the manager reached him; at most he said "okay" before he left. Id. at 820-22.

When a police officer arrived, the family repeated what ML had reported and ML showed the officer how the man touched her, rubbing back and forth on her chest a few times. 3/27/12 RP 597-99. Surveillance video was obtained showing Carr in the store. Ex. 9A, 9B, 38, 39; 3/28/12 RP 721-22; 4/2/12 RP 45.

On July 18, 2011, ML was interviewed by a child interview specialist employed by the prosecutor's office; the interview was

video recorded, admitted at trial, and viewed by the jury. Ex. 3,[3] 4; 3/22/12 RP 283-85. Asked what the man's hand did when it touched her, ML said, "he just rubbed like that." Ex. 3 at 9.

At trial, ML demonstrated the touching again. 3/27/12 RP 545-46. Without objection, the prosecutor described that demonstration as "rubbing" and ML concurred. Id. When defense counsel asked how long the touching lasted, "one second or two?", ML said "one." Id. at 585. The actual length of time that 8-year-old ML understood as "one second" was not established. Id. ML said that there was room for the man to get by her without touching her, and that he seemed to touch her on purpose. Id. at 552-53, 572-73. ML identified Carr as the man who touched her. Id. at 573-74.

On June 29, 2011, KW went to a Goodwill store with her mother. 3/28/12 RP 646-49. KW was 9 years old. Id. at 680. KW was browsing alone in the girls section when she saw a man there looking at a leotard. Id. at 687-90. The man asked KW if she liked it, then said that he did. Id. at 654, 691. KW does not talk to strangers, so she walked away without responding. Id. at 691. She went to another aisle and the man followed her; she moved away from him again and he followed her again. Id. The man was

[3] Ex. 3 is the transcript of the recording, which was marked but not admitted at trial; it is referred to in this brief for the convenience of the court. 3/22/12 RP 286, 290.

standing in front of KW, facing her a few feet away when she saw him pull down his pants far enough to expose to her a tight-fitting hot pink, sparkly women's bathing suit bottom that showed the shape of his genitals. Id. at 668, 694-97, 701. KW believed that the man pulled his pants down on purpose; he did not say "oops" and was grinning after he pulled down his pants. Id. at 707. KW thought the man was "scratching his butt" when he pulled down his pants – she could not tell if he was scratching over or under his pants. Id. at 706.

KW immediately returned to her mother, who was in the women's section of the store. Id. at 701. She told her mother a man had talked to her, but did not report that the man showed her his underwear until they had left the store, because it was a private subject and "weird" to talk about. Id. at 654, 702. KW's mother called the police. Id. at 657. The police obtained surveillance video showing Carr entering the store at 3:56 (Ex. 32), leaving at 4:29 (Ex. 33), and re-entering at 5:09 (Ex. 34), KW and her mother entering at 5:16 (Ex. 35), and Carr leaving at 5:20 (Ex. 36). 3/28/12 RP 747-50. Carr was wearing exactly the same clothing as he wore at Deseret Industries on June 17. 3/28/12 RP 730.

Police circulated an alert to retail security with a still picture from the Deseret surveillance video. Ex. 31; 3/28/12 RP 723, 727, 733. On July 7, 2011, Sears security staff saw Carr in their store, wearing exactly the same clothing as in both surveillance videos. Ex. 31, 33, 38; 3/29/12 RP 842-44, 859-61. Carr left the store and drove away, but police quickly responded and arrested him in his van in a nearby parking lot. 3/28/12 RP 733-35; 3/29/12 RP 797-800, 846-51. Carr was wearing a hot pink shiny women's swimsuit under his clothing. Ex. 38, 39, 46, 49; 3/28/12 RP 738-41.

3. CARR'S DEFENSE.

Carr testified that he had never seen ML or her family before June 17 but also said that Deseret is always very crowded, and you can hardly walk down an aisle without bumping into other people.[4] 4/2/12 RP 9, 13, 40-41.

There was considerable confusion in the testimony as to the specific date that ML was molested. ML's mother stated that she believed it was on a Saturday, mid-day. 3/26/12 RP 425. ML's mother said she reported it to a Deseret employee (Norma Salazar) for the first time on Friday, June 17, which was at least her third

[4] This claim was contradicted by the Deseret surveillance video, which depicts Carr walking in aisles that are mostly empty. Ex. 9A, 9B.

(and maybe her fifth) visit to the store after the offense. 3/21/12 RP 216; 3/26/12 RP 418. ML's older sister could not recall which day the offense occurred, or the time, but believed that June 17 was the second visit after the offense (and that June 17 was a Saturday). 3/26/12 RP 474, 478. Salazar testified that she was informed of the incident and informed her supervisor, Amylean Akeang, about a week before June 17, the day the police arrived. 3/26/12 RP 431-34. Akeang testified that Salazar informed her of the report of the incident on June 8. 3/22/12 RP 381-84.

Carr argued that it was established that the offense occurred in the morning of Saturday, June 4, or June 11. 4/3/13 RP 29. Carr offered employment records showing that he worked at a business that provides parking for airport travelers, and worked until about 2 p.m. on both of those dates. 3/29/12 RP 891-93. Carr's boss testified that employees clock in and out, but that employees do not clock out when they take their breaks or their lunch. Id. at 890, 894. Carr's home was close to the Goodwill and Deseret Industries stores. 4/2/12 RP 7.

Carr testified that he went to the Goodwill store on June 29; he did not recall seeing KW but did interact with a girl. 4/2/12 RP 13-14. He conceded he was pictured in the Goodwill surveillance

video entering minutes before KW did. Id. at 57. Carr said that he was not in the girls section but in the women's clothing section when he saw a girl who was alone, and that she stared at him for a full 30 seconds as he looked at swimsuits before she walked away. Id. at 17-19. Carr said that he had carefully checked the area to make sure "the coast was clear" because he was embarrassed to be looking at women's swimsuits. Id. at 19, 59-60. Carr denied knowingly exposing himself to anyone and said he had no sexual interest in children. Id. at 30-31.

Then Carr asserted that his swimsuit had become painfully lodged "up my butt" while he was in the store and that he put both hands in his pants and readjusted the bottom of his tightly fitting swimsuit, from the back and front, including manipulating his genitals.[5] 4/2/12 RP 65-68. Carr added that his pants would fall down to his hips of their own accord – he wore the same pants regularly and is pictured in the pants in video footage and in photographs but there is no other report or image of his pants falling down. 3/29/12 RP 819; 4/2/12 RP 37-38; see Ex. 9A and 9B

[5] Carr did not mention to the police what he described at trial as an extremely painful problem that required public exposure of his women's swimsuit bottom, although the police asked how the child could have known what he had on underneath his clothing. 4/2/12 RP 69-72. Carr testified that he was too embarrassed to bring up the swimsuit during the interview but the police already had seen the pink undergarment and Carr already had told them he had on a pink swimsuit. Id. at 97-103.

(Deseret video footage), Ex. 31-34 and 36 (video stills from Deseret and Goodwill), Ex. 38-39 (photos of Carr after arrest). Carr told detectives that his pants never came down. 4/2/12 RP 95.

Carr testified that wearing a women's swimsuit was a matter that was private and that he kept secret from everyone. 4/2/12 RP 75-79. Initially Carr testified that he had worn the suit outside his home only twice, on June 29 and July 7, 2011. Id. at 75-76. Later in his testimony, he said that he was sure he had done so other times, he was just not aware of any. Id. at 86. Carr's home was searched completely and no other women's clothing was found. 3/22/12 RP 361, 368-69; 3/28/12 RP 752-55.

C. ARGUMENT

1. THE EVIDENCE SUPPORTED THE JURY'S VERDICTS THAT THE STATE PROVED BOTH CRIMES BEYOND A REASONABLE DOUBT.

Carr challenges the sufficiency of the evidence supporting both of his convictions. As to his conviction of child molestation in the first degree, he contends that there was insufficient of evidence that Carr had contact with ML's breast for purposes of sexual gratification. As to his conviction of communicating with a minor for immoral purposes, he contends that there was insufficient evidence

that he communicated with KW for immoral purposes of a sexual nature. These arguments both are without merit. The totality of the evidence supports the jury's verdicts.

a. Standard of Review.

When there is a claim that evidence is insufficient to support a conviction, the evidence is reviewed in a light most favorable to the State, and all reasonable inferences that can be drawn from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A trier of fact may infer a mental state where it is a logical probability. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

A conviction will be affirmed if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Salinas, 119 Wn.2d at 201. The trier of fact resolves conflicting testimony and weighs the persuasiveness of the evidence. State v. Carver, 113 Wn.2d 591, 604, 781 P.2d 1308 (1989). The trier of fact is the sole arbiter of credibility and credibility determinations cannot be reviewed on appeal. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

b. The Evidence Established Beyond A Reasonable Doubt That Carr Rubbed ML's Breast For The Purpose Of Sexual Gratification.

Carr's argument that there was insufficient evidence that he had contact with ML's breast for the purpose of sexual gratification rests on two flawed premises. The first faulty premise is that Carr only brushed 8-year-old ML's breast: there was evidence that Carr rubbed the palm of his hand back and forth on ML's breast. The second faulty premise is that there was no other evidence that the contact was for purposes of sexual gratification: the circumstances of this secret touching by a stranger establish that there is no other explanation for it. Both premises are flawed, and rejection of either is fatal to this claim of insufficiency of the evidence.

A person is guilty of child molestation in the first degree when the person has sexual contact with a child who is less than twelve years old, where the perpetrator is at least thirty-six months older than the victim and not married to or in a domestic partnership with the victim. RCW 9A.44.083(1); RCW 9A.44.904. "'Sexual contact' means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party." RCW 9A.44.010(2).

Carr does not dispute that the State presented sufficient evidence that he touched an intimate part of a child who was a stranger to him. Proof that an unrelated adult with no caretaking function touched the intimate parts of a child supports the inference that the touching was to gratify sexual desire. State v. Harstad, 153 Wn. App. 10, 21, 218 P.3d 624 (2009).

Division 3 of the Court of Appeals in State v. Powell observed that in cases where the touching was over the child's clothing, courts have required some additional evidence of a sexual purpose. Powell, 62 Wn. App. 914, 917, 816 P.2d 86 (1991). All of the illustrative cases cited by Powell concluded that there was sufficient evidence of a sexual purpose. Powell, 62 Wn. App. at 917. It would be more accurate to state that each found that additional evidence of a purpose sexual gratification existed in each case and the court in each found that evidence sufficient.

Powell is distinguishable from the case at bar. Powell was an acquaintance of the child's family, addressed as "uncle." Id. at 916 & n. 1. Powell was alleged to have hugged the child around her chest and then touched her groin through her underwear when helping her off his lap, and on another occasion to have touched her thighs. Id. at 916. The court noted that each touch was outside

the child's clothes, was fleeting and susceptible to an innocent explanation, and that the defendant's purpose was equivocal. Id. at 917-18. The court determined that the evidence was insufficient to support the inference that the defendant touched the child for the purpose of sexual gratification. Id. at 918.

In a later case, Division 3 made clear that any requirement of additional evidence of a purpose of sexual gratification is satisfied if the touching "was not equivocal or fleeting in the sense the purpose of the contact was not open to innocent explanation." State v. Whisenhunt, 96 Wn. App. 18, 24, 980 P.2d 232 (1999). The court held that when a person with no caretaking function reached his arm over the seat of the bus to touch a child in the vaginal area (under her skirt but over a body suit), on three occasions, there was sufficient evidence of a purpose of sexual gratification. Id.

Division 2 also has concluded that the observation in Powell as to a requirement of additional evidence of sexual gratification is limited to a situation where the contact was fleeting and susceptible of innocent explanation. State v. Price, 127 Wn. App. 193, 202, 110 P.3d 1171 (2005), aff'd, 158 Wn.2d 630, 146 P.3d 1183 (2006). The court found that a purpose of sexual gratification could be inferred even though the defendant in Price was a caretaker, a day

care provider, because even if the contact was over clothing, Price rubbed the child's vagina and the rubbing was of sufficient duration to leave redness after the child arrived home. Id. Rubbing an intimate part was sufficient evidence in Price, and in this case, where the defendant was a stranger to ML, it is even clearer that the rubbing of ML's breast was not susceptible of an innocent explanation.

Carr improperly relies on State v. Young, 123 Wn. App. 854, 99 P.3d 1244 (2004), in his analysis of this issue. That opinion was published only in part. Id. at 855, 62. The analysis of the sufficiency of the evidence was not published and may not be cited as authority. GR 14.1(a); Young, 123 Wn. App. at 862.

In Harstad, supra, this Court cited the court's observation in Powell as a rule requiring additional evidence of a purpose of sexual gratification when a touching is over a child's clothing. Harstad, 153 Wn. App. at 21. However, even though Harstad was an adult living in the victim's home, the court concluded that rubbing the child over an intimate part ("over her underwear, near her 'private spot'") was sufficient additional proof to establish a sexual purpose. Id. at 18, 22 (as to child referred to as B).

This Court has made it clear that there is no additional element to be proven when an intimate part is touched over clothing. State v. Veliz, 76 Wn. App. 775, 888 P.2d 189 (1995). The Ninth Circuit Court of Appeals also recently held that Washington does not require proof of an additional element when a touching is through clothing. Norris v. Morgan, 622 F.3d 1276, 1294 n.20 (2010). The Washington Court of Appeals in that case had held that a child molestation conviction was not a de minimis touching, although it was a "brief one-second touch over clothing" between the legs of a 5-year-old girl. Id. at 1280, 1283.

The evidence presented at trial included the testimony of ML and her statements and demonstrations about the contact, made to her mother and sister immediately afterward, to police, and to a child interviewer. Taken in the light most favorable to the State, the evidence established that Carr approached an 8-year-old girl who was in a store with her family, and when no one else was looking, walked up to the child and rubbed his palm back and forth on her breast. 3/27/12 RP 533, 536, 541-46, 599. There is no indication the touching was accidental or innocent: it is difficult to conceive how rubbing a stranger's breast could be unrelated to a sexual purpose and ML believed the contact was on purpose. Id. at 552-

53, 572-73. Carr denied ever touching ML or even seeing ML before June 17. 4/2/12 RP 9, 13.

Carr's testimony that when he saw ML's frightened reaction to him on June 17 he "had to" walk up right next to the family to get a drink and then how he was "curious" and had to watch them for at least five minutes as they moved around the store also supports the inference of a sexual purpose. 4/2/12 RP 47-52. This behavior supports an inference that Carr wanted to know if ML had reported the contact or wanted to torment or tease ML. It is not the reaction of someone who had not had a previous interaction with ML. The evidence also established that about two weeks later, Carr approached a 9-year-old girl in a store, when she was shopping alone and "the coast was clear," showed her a leotard and asked her if she liked it, repeatedly followed her when she moved away from him, and then pulled down his pants far enough to expose to her a tight-fitting hot pink shiny women's bathing suit bottom that showed the shape of his genitals. 3/28/12 RP 646-49, 668, 680, 687-91,694-97, 701. The evidence established beyond a reasonable doubt that Carr's purpose in rubbing ML's breast was sexual gratification.

c. The Evidence Established Beyond A Reasonable Doubt That Carr Communicated With KW For An Immoral Purpose Of A Sexual Nature.

The evidence supported the jury's conclusion that Carr communicated with KW for an immoral purpose of a sexual nature. Carr's argument to the contrary is premised on his own testimony about the circumstances of his communication with KW, but review of the sufficiency of the evidence is based on a review of all of the evidence, with all reasonable inferences drawn in favor of the State and interpreted most strongly against the defendant. Salinas, 119 Wn.2d at 201. The trial court denied a motion to dismiss this charge at the end of the trial, concluding that if the inferences were drawn in the State's favor, the crime was for a sexual purpose. 4/2/12 RP 107-09.

A person is guilty of communication with a minor for immoral purposes when the person communicates with a minor for purposes of sexual misconduct. RCW 9.68A.090(1); State v. McNallie, 120 Wn.2d 925, 933, 846 P.2d 1358 (1993); State v. Schimmelpfennig, 92 Wn.2d 95, 100, 594 P.2d 442 (1979). The communication prohibited may be by spoken word or a course of conduct. Schimmelpfennig, 92 Wn.2d at 103-04. The statute is

"aimed at protecting children from exposure to sexual misconduct for the gratification of another." State v. Hosier, 157 Wn.2d 1, 10, 133 P.3d 936 (2006).

The reasonable inference that a rational juror could draw was that Carr made contact with a small girl who was alone in the girls department, after assuring himself that he was not being observed, in order to have sexual contact with her or to induce her to have sexual contact with him. The evidence established that Carr rubbed the breast of an 8-year-old girl (ML) in a thrift store about two weeks before his contact with KW. See Section C(1)(b), supra. Carr held up a leotard for KW to see and asked her whether she liked it, saying that he did. 3/28/12 RP 654, 687-91. When she moved away from him without answering, he followed her; she moved away again and he followed her again. Id. at 691. Carr was face to face with KW, a few feet away, when he pulled down his pants, past his crotch, and displayed his genitalia tightly encased in a hot pink women's bathing suit. Id. at 668, 694-97, 701. Carr did not say anything to KW when he displayed his genitalia, but he "kind of grinned." Id. at 707.

A rational juror could infer that Carr's verbal and nonverbal communication were for purposes of inducing or suggesting sexual

contact, either by getting KW close enough to Carr that he could touch her intimate areas, or by attracting KW's attention to a pink shiny swimsuit that she might come over and touch, so touching his intimate areas. A trier of fact may infer a mental state where it is a logical probability. Delmarter, 94 Wn.2d at 638. No sexual contact with a 9-year-old would be legal, so the specific nature of the sexual contact Carr was suggesting is irrelevant.[6]

The court in Hosier rejected Carr's argument that the color pink is not relevant to the analysis of his purpose. The court concluded that underwear was a symbolic sexual message in that case, and that using underwear that was "bright pink" was "to attract children." Hosier, 157 Wn.2d at 13-14. While a sexually explicit note was written on the underwear in Hosier, the children who saw the underwear were too young to read. Id. at 4-5. Nevertheless, the court held that the facts established Hosier's intent to convince a young girl to take off her underwear to engage in sexual misconduct. Id. at 14.

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[6] Given KW's age, it is unclear why Carr relies upon State v. Luther, 65 Wn. App. 424, 830 P.2d 674 (1992), a Division 3 case that held that communication about conduct that would be legal is not prohibited. Moreover, this Court has rejected that construction of the statute, concluding that the underlying reasoning was rejected by McNallie. CJC v. Catholic Bishop of Yakima, 88 Wn. App. 70, 75, 943 P.2d 1150 (1997), and the Supreme Court's affirmance of that decision appears to approve that conclusion. 138 Wn.2d 699, 714-16, 985 P.2d 262 (1999).

It is not necessary that a child with whom a defendant communicated understood the sexual nature of the communication. Hosier, 157 Wn.2d at 13-14. As the Supreme Court has noted, the legislative findings in RCW 9.68A.001 reflect legislative concern with adults who exploit children for personal gratification. Id. at 11.

While inadvertently exposing one's underwear to a child would not be a crime, the jury rejected Carr's theory that his behavior was inadvertent. The trier of fact resolves conflicting testimony and weighs the persuasiveness of the evidence. Carver, 113 Wn.2d at 604. The evidence viewed in light most favorable to the State established beyond a reasonable doubt that Carr communicated with KW for immoral purposes of a sexual nature.

2. THE STATUTE PROSCRIBING COMMUNICATION WITH A MINOR FOR IMMORAL PURPOSES IS NOT UNCONSTITUTIONALLY VAGUE AS APPLIED.

Carr contends that his conviction for communication with a minor for immoral purposes must be reversed because the term "immoral purposes of a sexual nature" is unconstitutionally vague as applied to Carr's conduct. This claim should be rejected. His conduct falls within the constitutional core of the crime.

The Supreme Court has construed "immoral purposes" in RCW 9.68A.090 to apply only to communication for the predatory purpose of sexual misconduct. State v. McNallie, 120 Wn.2d 925, 933, 846 P.2d 1358 (1993) (RCW 9.68A.090); State v. Schimmelpfennig, 92 Wn.2d 95, 102, 594 P.2d 442 (1979) (former RCW 9A.88.020). With that construction, the court has held that the statute is not unconstitutionally vague. McNallie, 120 Wn.2d at 930-34; Schimmelpfennig, 92 Wn.2d at 102-03. WPIC 47.06, defining the elements of this crime, uses the term "immoral purposes of a sexual nature" to describe this limitation. That instruction was used in this case. CP 63. The WPIC language was approved by the Supreme Court in McNallie. 120 Wn.2d at 933.

A statute is unconstitutionally vague if its terms are "so vague that persons of common intelligence must necessarily guess at its meaning." City of Seattle v. Eze, 111 Wn.2d 22, 26, 759 P.2d 366 (1988), quoting O'Day v. King County, 109 Wn.2d 796, 810, 749 P.2d 142 (1988). A statute must provide adequate notice to citizens of the conduct prohibited and contain standards that prevent arbitrary enforcement. Id. A statute that is not vague on its face may be vague as applied to conduct that falls outside the

statute's constitutional core. State v. Maciolek, 101 Wn.2d 259, 266, 676 P.2d 996 (1984).

There are two significant limitations on the vagueness doctrine. First, the party challenging the statute has the burden of proving beyond a reasonable doubt that it is unconstitutional. Eze, 111 Wn.2d at 26. Second, the existence of possible disagreements does not render a statute vague; impossible standards of specificity are not required. Id. at 26-27. No more than a reasonable degree of certainty is required; one who goes perilously close to proscribed conduct takes the risk that he may cross the line. State v. Evans, 177 Wn.2d 186, 203, 298 P.3d 724 (2013). A statute "is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct." Eze, 111 Wn.2d at 27.

A statute is not unconstitutionally vague simply because a person's conduct must be subjectively evaluated by a police officer to determine if the person violated the statute; otherwise, most criminal statutes would be void for vagueness. Maciolek, 101 Wn.2d at 267. What is forbidden is a statute with no standards to determine what is proscribed. Id.

As construed by the Supreme Court, RCW 9.68A.090 prohibits communication with a minor for the predatory purpose of sexual misconduct. McNallie, 120 Wn.2d at 933. Carr's conduct falls within the constitutional core of that statute. Two weeks before this incident at a thrift store, he molested 8-year-old ML by rubbing her breast. That incident is relevant to his intent during his interaction with KW. He first spoke to KW, a 9-year-old girl who was alone in the area, after he made sure there were no adults in the area. 4/2/12 RP 19, 59-60. He followed her when she repeatedly moved away from him, then as he was facing her a few feet away, pulled down his pants, exposing his bright pink very tight swimsuit bottom, with the shape of his genitals exposed; he was grinning as he did it. See Section C(1)(c), supra. This was communication for the purpose of sexual misconduct. Carr was not convicted based simply on brief exposure of his underwear in a public place.

The jury question, "What is the legal definition of immoral purpose of a sexual nature?" does not establish even confusion, let alone statutory vagueness. CP 142. Given the many terms that were defined for the jurors, it was reasonable to ask if there was a legal definition for that term as well. Carr proposed that the Court

decline to provide a definition of the term and that it instruct the jurors that they must rely on their own understanding of the term. 4/4/12 RP 2.

The phrase "immoral purpose of a sexual nature" is not the language of RCW 9.68A.090, nor is it the specific language the Supreme Court has used to construe "immoral purposes." Neither that term nor the prosecutor's closing argument alters the constitutional core of the crime. The court in McNallie construed the statutory term "immoral purposes" to be limited to the predatory purpose of promoting exposure to and involvement in sexual misconduct[7] and Carr's conduct falls within that constitutional core.

The McNallie opinion observed that an invitation or inducement to engage in sexual contact for purposes of sexual gratification[8] would satisfy the statute. 120 Wn.2d at 934. Carr's conduct is accurately characterized as an invitation to sexual contact (whether or not KW recognized that), so it falls well within the constitutional core of RCW 9.68A.090. Any "purpose of a sexual nature" relating to a 9-year-old who was unrelated to Carr would be misconduct within the core of the statute.

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[7] 120 Wn.2d at 933.

[8] Referring to the former crime of indecent liberties. RCW 9A.88.100.

3. NO CIRCUMSTANCES HAD CHANGED TO WARRANT CARR RENEWING THE MOTION TO SEVER THAT HAD BEEN PREVIOUSLY DENIED—CARR HAS NOT ESTABLISHED INEFFECTIVE ASSISTANCE OF COUNSEL.

Carr claims that his trial counsel was constitutionally deficient because he failed to renew a severance motion that had been denied by the trial court. The claim fails because Carr has not demonstrated that there was a reasonable chance the court would have reversed his ruling. Thus, Carr has not established that failure to renew the motion was deficient performance, or that it was prejudicial.

To establish ineffective assistance of counsel, a defendant must show both that defense counsel's representation was deficient, *i.e.,* that it "fell below an objective standard of reasonableness based on consideration of all the circumstances," and that deficient representation prejudiced the defendant. In re Pers. Restraint of Hutchinson, 147 Wn.2d 197, 206, 53 P.3d 17 (2002) (applying the test of Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). The benchmark for judging a claim of ineffective assistance of counsel is whether counsel's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686.

Judicial scrutiny of counsel's performance must be highly deferential and begins with a strong presumption that the representation was effective. Id. at 689; Hutchinson, 147 Wn.2d at 206. Every effort should be made to judge counsel's performance from counsel's perspective at the time and to "eliminate the distorting effects of hindsight." Strickland, 466 U.S. at 689.

In addition to overcoming the presumption of competence and showing deficient performance, the defendant must affirmatively show prejudice. Strickland, 466 U.S. at 693. Carr must establish a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Id. at 694. Speculation that a different result might have occurred is not sufficient. State v. Crawford, 159 Wn.2d 86, 99-102, 147 P.3d 1288 (2006).

a. Carr Concedes That He Has Waived Any Claim That Denial Of His Pretrial Motion To Sever Was Error.

Carr waived his right to appeal the denial of his pretrial motion for severance because he did not renew that motion before or at the close of the evidence. CrR 4.4(a)(2); Price, 127 Wn. App. at 203. He concedes as much. App. Br. at 27. Despite that

concession, Carr's fifth assignment of error is a challenge to the pre-trial motion to sever the two counts for trial. App. Br. at 2.

This assignment of error should be rejected because of Carr's correct concession that he has waived the issue. This assignment of error also should be rejected because Carr has presented no argument or legal analysis supporting the contention that the original ruling was error. RAP 10.3(a)(6) requires the appellant's brief contain argument supporting the issues presented for review, citations to legal authority, and references to relevant parts of the record. This Court should conclude that Carr has waived this assignment of error and not consider it further. State v. Bello, 142 Wn. App. 930, 932 n.3, 176 P.3d 554 (2008).

b. Carr Has Established Neither Deficient Performance Nor Prejudice As There Is No Reasonable Chance That The Judge Would Have Reversed His Previous Ruling.

To prevail on a claim of ineffective assistance of counsel that is based on the failure to renew a motion to sever, Carr must show that the failure to renew the motion was deficient performance and must show both that the motion would likely have been granted and that, if severance had been granted, there is a reasonable

probability that the jury would not have found him guilty. State v. Sutherby, 165 Wn.2d 870, 884, 204 P.3d 916 (2009).

A defendant seeking severance must demonstrate that a trial on multiple counts "would be so manifestly prejudicial as to outweigh the concern for judicial economy." State v. Bythrow, 114 Wn.2d 713, 718, 790 P.2d 154 (1990). In evaluating possible prejudice, a trial court considers (1) the strength of the State's evidence on each count; (2) clarity of defenses; (3) instructing the jury to consider each count separately; and (4) the cross-admissibility of the evidence of each crime even if there were separate trials. State v. Russell, 125 Wn.2d 24, 63, 882 P.2d 747 (1994).

There was a legitimate reason for Carr's counsel not to renew the motion to sever – the trial court already had denied the motion and there was no significant change in circumstances to suggest that the court would reverse its original decision. A claim of ineffective assistance cannot be based on a matter of trial strategy. State v. Cienfuegos, 144 Wn.2d 222, 227, 25 P.3d 1011 (2011). Counsel is not ineffective for declining to pursue a strategy that reasonably appears unlikely to succeed. State v. McFarland, 127 Wn.2d 322, 334-37 & n.2, 899 P.2d 1251 (1995).

The pretrial severance motion was fully litigated. The motion had been briefed at length in the defense trial memorandum and in a written response by the state. CP 41-46; Supp. CP __ (Sub no. 111, Defense Trial Brief) at 5-8. The trial court carefully articulated its analysis. 3/15/12 RP 4-5. It concluded that the incidents were "clearly" cross-admissible, as "fairly strong evidence" admitted for a valid purpose: to establish motive, intent and common scheme or plan. Id. at 4. The court concluded that cross-admissibility was not unduly prejudicial, and that the State had strong evidence as to each count. Id. at 5. The court also concluded that the jury would not consider the evidence for any improper purpose and offered to give a limiting instruction if requested by the parties. Id. The court did instruct the jury to decide each count separately. CP 67. Carr did not assert prejudice to his ability to present separate defenses. Defense Trial Brief at 6-7.

When the trial court denied the severance motion, it was well acquainted with the facts. It reviewed trial memoranda, heard testimony of central witnesses in a child hearsay hearing, 3/14/12 RP 64-148, and read the transcripts of and viewed the video of interviews of both victims by the prosecutor's child interview

specialist, in which each discusses the respective offenses. 3/13/12 RP 17, 62-63; 3/14/12 RP 148; Ex. 4, 5.

Carr argues a renewed severance motion would have been granted because it was "then clear the evidence of each count was not cross-admissible." App. Br. at 27. Carr cites no new evidence at trial that was relevant to cross-admissibility, he simply argues that the court's original ruling was incorrect.[9] The court already had carefully considered the issue and exercised its discretion and Carr has not established that the judge would have reversed the ruling. If anything, the court's conclusion that the evidence was cross-admissible was strengthened when Carr claimed that he may have accidentally exposed himself to KW and that he always bumped into people walking down the aisles at Deseret Industries, the store in which the incident with ML. Each incident was relevant to rebut the defense of accident. ER 404(b); Price, 127 Wn. App. at 205.[10]

Carr also argues that a renewed severance motion would have been granted because he asserted an alibi defense as to the

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[9] The propriety of the original ruling as to cross-admissibility of the evidence of the two incidents has not been challenged in this appeal.

[10] Carr appears to suggest that the trial court improperly found that the offenses were relevant to motive or intent because neither crime has an intent element. App. Br. at 39. He concedes, however, that the purpose of his actions in each instance was an element, and the evidence of each incident was probative of that purpose, as the trial court concluded. 3/15/12 RP 4-5.

child molestation charge[11] but a possible accident defense to the charge of communication with a minor for immoral purposes. App. Br. at 34. Prejudice is not established because defenses differ, but only if "joinder will cause a jury to be confused" as to the defenses. Russell, 125 Wn.2d at 64. The incidents were distinct, occurred at different locations and on different dates, and the victims were unrelated. There is nothing contradictory or confusing about Carr's defenses to the two charges.

Carr contends that severance should have been granted because the prosecutor relied upon evidence relating to each incident to establish his sexual purpose as to both and because impeaching cross-examination as to one incident was prejudicial to his defense. That argument and impeachment would be proper even in separate trials because the trial court had ruled that the evidence was cross-admissible.

Carr has not established deficient performance because the decision not to renew the motion was reasonable, where there was no reason to believe that the trial court would reverse its previous ruling. Even if defense counsel should have renewed the motion,

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[11] Carr offered two defenses to the molestation charge: he testified that he had never seen ML before June 17; he also suggested he may have accidentally bumped into ML, testifying that he always bumped into people walking down the aisles of that store. 4/2/12 RP 9, 13, 40-41.

Carr has not demonstrated prejudice: first, because he has not established that the trial court would have reversed its ruling, and second, because the court had ruled the evidence of the two offenses cross-admissible, so all of the same evidence would have been admitted at any separate trial and there is no reason to believe that the jury's verdicts would change.

4. THE PROSECUTOR'S CLOSING ARGUMENT DID NOT CONSTITUTE REVERSIBLE ERROR.

Carr contends that three aspects of the prosecutor's comments in closing argument constitute misconduct and warrant reversal. Carr did not object to any of these arguments in the trial court and none of the comments was improper.

A defendant who claims on appeal that prosecutorial misconduct deprived him or her of a fair trial generally bears the burden of establishing that the conduct was both improper and prejudicial. State v. Emery, 174 Wn.2d 741, 756-59, 764 n.14, 278 P.3d 653 (2012); State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). If misconduct is proven, it is grounds for reversal if the defendant establishes a substantial likelihood that the improper conduct affected the jury's verdict. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006).

A defendant who does not make a timely objection at trial waives any claim on appeal unless the misconduct in question is "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice" that could not have been neutralized by a curative instruction to the jury. Fisher, 165 Wn.2d at 747 (quoting State v. Gregory, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006)).

The Supreme Court recognizes that the absence of an objection by defense counsel "*strongly suggests* to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of trial." McKenzie, at 53 n.2 (emphasis in original) (quoting State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990)). That Court has stated, "Counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the misconduct as a life preserver ... on appeal." State v. Russell, 125 Wn.2d 24, 93, 882 P.2d 747 (1994) (citing Jones v. Hogan, 56 Wn.2d 23, 27, 351 P.2d 153 (1960)).

A prosecutor is afforded wide latitude in closing argument to draw reasonable inferences from the evidence for the jury. Stenson, at 727. The prosecutor's remarks must not be viewed in isolation, but "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the

jury." State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), aff'd on other grounds, Uttecht v. Brown, 551 U.S. 1 (2007).

a. Relevant Instructions To The Jury.

At the start of the trial, the court orally advised the jurors that the lawyers' remarks, statements, and arguments are not evidence and "you should disregard any remarks, statements, or arguments which are not supported by the evidence or by the law as I will instruct you." 3/20/12 RP 166. The court stated: "The evidence you're to consider consists of the testimony of the witnesses and the exhibits admitted in evidence." Id. The court also cautioned the jurors: "Throughout the trial, you should be impartial and permit neither sympathy nor prejudice to influence you." Id.

The court's first written instruction informed the jury that it was their duty to accept the law from the court's instructions. CP 50. It stated that the lawyers' statements and arguments were not evidence and did not constitute the law to be applied, as follows:

> The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or

argument that is not supported by the evidence or the law in my instructions.

CP 52. The court concluded this instruction with an admonition to act impartially, based on the facts in evidence, as follows:

> As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

CP 53.

In its second written instruction, the court informed the jury of the burden of proof, in pertinent part as follows:

> The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.
>
> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

CP 54. In its instructions setting out the elements of each crime, the court advised the jury, twice in each instruction, that they must be convinced of each element beyond a reasonable doubt in order to return a verdict of guilty. CP 60, 63.

The jury was instructed that each count must be decided separately, and that their verdict on one count should not control their verdict on the other. CP 67.

b. The Prosecutor Did Not Misstate The Facts In Evidence And Properly Relied On Inferences Supported By The Evidence.

Carr claims that the prosecutor committed misconduct in closing by using two words that constituted facts not in evidence. This argument should be rejected. The statements that Carr "groped" ML and "exposed" his genitals to KW were a fair characterization of the evidence presented and would not have been understood as suggesting facts not in evidence. There was no objection. If these remarks were improper, any prejudice could have been cured by a simple instruction, and any error was waived by failure to request one.

A prosecutor making a closing argument is permitted to draw reasonable inferences from the evidence presented at trial. Stenson, at 727. The prosecutor's references to Carr exposing himself and exposing his genitals did not suggest that the prosecutor had special knowledge of facts that were not in evidence. The prosecutor 's first use of the word "expose" was in this sentence: "And then he just

decides to go ahead and pull his pants down and expose to her the hot pink underwear that he has got on underneath." 4/3/12 RP 8. Carr cites two later references as misconduct, but in context both make it abundantly clear that the prosecutor was not relying on evidence outside the record, because the prosecutor referred specifically to KW's testimony. 4/3/12 RP 12, 17-18.[12]

In his closing argument, Carr responded to the prosecutor's use of the phrase "exposing his genitalia," arguing "He didn't expose his genitalia in the sense that any other person [–] is a woman wearing a bathing suit exposing her genitalia?" 4/3/12 RP 35. The final reference to exposure that Carr cites is the State's response to that defense argument, in rebuttal.[13] The prosecutor again made it clear that she was referring to exposure in the swimsuit: "And when he pulled his pants down to show just her what he had on underneath. Yes, that means he exposed himself." 4/3/12 RP 42. At the same time the prosecutor specifically reminded the jurors:

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[12] The prosecutor argued: "as long as the things happened the way that [KW] said that they did, there is no question that that was communication for an immoral purposes [sic] of a sexual nature, because there is no reason for a grown man to go pulling down his pants and exposing himself to a nine-year-old girl." 4/3/12 RP 12. Later she argued: "[KW] knew this wasn't an accident, his pants didn't accidently fall down, he pulled his pants down and she showed you how he pulled his pants down so that his genitals were exposed. And that's how she saw the pink bikini bottom, what she described as a pink bikini bottom, sparkly one." 4/3/12 RP 18.

[13] Carr cites this passage as at page 24 of 4/3/12 RP, but it appears at page 42.

"Evidence that you consider is -- includes testimony of witnesses, and these physical exhibits...." 4/3/12 RP 42.

While Carr argues that he did not expose his genitals, it is clear that he did; although his genitals were not bare (and the prosecutor did not argue that they were), they were visible tightly encased in a shiny pink swimsuit bottom, as seen in the photographs taken by the police on the day of his arrest. 3/28/12 RP 701; Ex. 46, 49. KW told her mother that she saw "the shape of" the man's genitalia because of the tight-fitting bikini bottom. 3/28/12 RP 668. That Carr exposed his genitals to KW was a fact presented to the jury, the prosecutor did not err by repeating it.

Carr claims that the prosecutor's argument that Carr "groped" ML was improper because the word implies fondling for sexual purposes. Assuming that is true, there is no error in making such an argument – it was a reasonable inference from the evidence that Carr rubbed back and forth on the breast of an 8-year-old girl who was a stranger to him, in the aisle of the store, when no other adult was looking. There certainly is no requirement that a child victim of sexual abuse be able to articulate that an offender acted for the purpose of sexual gratification before the State can argue that inference.

No reasonable juror would consider the challenged choices of words, in context, a suggestion that the prosecutor was referring to facts not in evidence.

If either term was improper, any prejudice could have been cured by a simple instruction. In analyzing potential prejudice, improper comments are not viewed in isolation, but in the context of the total argument, the issues, the evidence, and the instructions given to the jury. State v. Warren, 165 Wn.2d 17, 28, 195 P.3d 940 (2008). The oral instruction given to the jury at the beginning of the trial included an instruction that the remarks made by the attorneys are not evidence. 3/20/12 RP 166. The written instructions here also properly stated that the statements of the attorneys are not evidence. CP 52. The jury was instructed to "disregard any remark, statement, or argument that is not supported by the evidence or the law in [the] instructions." CP 52.

Russell has made it clear that an isolated statement generally can be cured by an instruction to the jury. In that case, Russell was tried for three murders, and the prosecutor stated in closing that "[t]he killing stopped with these three women and it should go no further." 125 Wn.2d at 88. The court found that even if the statement was improper as a statement based on facts not in

evidence, the prejudicial effect could have been cured if the defendant had objected. Id. The effectiveness of a curative instruction is even more apparent here, where the prosecutor clearly was drawing inferences from the evidence presented at trial, and did not imply that she was aware of any other information.

c. Argument Inferring The Defendant's Mental State Was Proper, Was Based On Facts In Evidence, And Was Not An Appeal To Passion Or Prejudice.

The State's argument that the defendant was acting for the purpose of sexual gratification was integral to the crimes charged in the case. Carr's claim that it was improper to suggest that he was a sexual predator borders on frivolous, because that is the core of the charges before the jury. The inference that Carr's motivation for these crimes was "lik[ing] little girls" was based on the evidence, and the argument was made for the purpose of establishing an element of each crime, not as an appeal to passion or prejudice. 4/3/12 RP 42. Carr's purpose in touching ML and in communicating with KW was an element of each offense and the prosecutor could not have avoided discussing what that purpose was and arguing that his purpose was sexual gratification.

Prosecutors have an obligation to seek verdicts based on reason and free of appeals to prejudice. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). Appeals to racial, ethnic, or religious prejudice are prohibited;[14] no claim of any such error is made in this case. Carr claims that the prosecutor improperly appeal to jurors' "fear and repudiation of criminal groups." App. Br. at 48. Carr relies upon State v. Perez-Mejia, in which the court concluded that the prosecutor erred in exhorting jurors to join a mission to stop gang violence and send a message to those who "dwell in the underworld of gangs." 134 Wn. App. at 917-18. Perez-Mejia allegedly was a member of a Central American gang and the prosecutor also made an improper nationalistic appeal. Id.

Carr claims that the prosecutor's argument depicted him as a "frightening and predatory pedophile" and was "designed to inflame the juror's passion against those who commit sexual offenses against children." App. Br. at 46, 48. However, Carr's status as a sex offender and a pedophile was the subject of this trial on charges of child molestation and communication with a minor for immoral purposes. Proof of the elements of the crimes charged in this case would establish that Carr was sex offender and a predatory

[14] State v. Monday, 171 Wn.2d 667, 676-81, 257 P.3d 551 (2011) (racial prejudice); State v. Perez-Mejia, 134 Wn. App. 907, 918, 143 P.3d 838 (2006) (ethnic prejudice).

pedophile. The evidence at trial established that he targeted the two young girls who were the named victims, and had contact with ML for sexual gratification and with KW for the predatory purpose of sexual misconduct. The prosecutor did not act improperly in arguing that the evidence as a whole and the reasonable inferences from that evidence proved these elements of the crimes charged. The prosecutor was not arguing that Carr should be convicted because sex offenders are frightening, but that he should be convicted of these sex offenses because he committed these offenses (and so is a predatory pedophile), as demonstrated by the evidence.

A prosecutor is not prohibited from describing the defendant based on the crimes proven in the current case. The Supreme Court has held that a defendant charged with child rape is properly referred to as a rapist if the evidence supports that inference. State v. McKenzie, 157 Wn.2d 44, 57-58, 134 P.2d 221 (2006).

When sex offenses are the subject of a trial, any discussion of the facts could inflame passion and prejudice. There is no dispute that the victims in this case, who were 8 and 9 years old, were little girls. The evidence established that Carr preyed upon them for purposes of his sexual gratification. That the defendant's behavior is likely to offend many jurors cannot preclude the

prosecutor from discussing that behavior. The prosecutor's argument as to the reasonable inferences to be drawn from the defendant's behavior was not misconduct.

d. The Prosecutor's Argument Did Not Shift The Burden Of Proof.

The trial court repeatedly instructed the jury that the State had the burden of proving the elements of the charge beyond a reasonable doubt. CP 54, 60, 63. In her initial closing argument, the deputy prosecutor also twice reminded the jury that it was the State's burden to prove the elements of the crimes beyond a reasonable doubt. 4/3/12 RP 9-10, 24. Again in her concluding remark, she stated that the jurors must be convinced of "the elements of each crime that are listed in that to convict instruction." Id. at 27.

Carr takes two sentences out of context to argue that the State undermined the burden of proof. The context of those sentences make it clear that the prosecutor was not arguing that they were required to convict if they believed the victims, but that evidence beyond the testimony of the victims was not required to meet the burden of proof. That argument is not error.

This section of the argument, which is all in a single paragraph in the transcript, began with a statement of the State's burden of proof beyond a reasonable doubt:

> The State's burden of proof in a criminal case is proof beyond a reasonable doubt. And you have a definition in your instructions of what a reasonable doubt is. It's 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 the evidence or lack of evidence.

4/3/12 RP 24. The prosecutor discussed that definition of reasonable doubt. Id. at 24-25. The prosecutor continued:

> When you go back into that jury room and you start deliberating, and finally you get to talk about this case with each other, you do not check your common sense at the door. You take that in there with you and you use it during your deliberations. It doesn't mean that you go back into the jury room and start making up possibilities about things that are not supported by the evidence. When the defense stands up before you and presents his arguments, listen to everything he has to say. And when you do, ask yourself, "Okay, well, is that reasonable? Is that possibly reasonable? Is it supported by any evidence at all?" And if not, that doesn't rise to a reasonable doubt. If, as you sit in that deliberation room, you can say, "I believe [ML]," and you can say, "I believe [KW]," that is enough to end your inquiry. That is enough to convict the defendant. You may be sitting there right now, reluctant to convict the defendant because there hasn't been any evidence that you see on CSI in this case; right? There is no DNA, there is no fingerprints. We had some video, but none of the video actually caught the crimes on tape, unfortunately. But the law doesn't require that. The law, I mean, it would be nice if we strapped cameras on to our children before they left the house every day, just in case they would be attacked by a predator that day, but it doesn't

> work that way. If you can accept the testimony of a credible witness, that's all that the law says that you need to do in order to convict somebody. In this case, you have got more than enough. You have got the testimony of [ML], her sister, her mother, all of the witnesses
> that you heard from Deseret. You have got the testimony of [KW], the testimony of her mother, the police officers, plenty of witnesses. All of them played parts in putting together this puzzle that shows that defendant is guilty.

Id. at 25-26.

The prosecutor's remarks must not be viewed in isolation, but "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." Brown, 132 Wn.2d at 561. The context of these remarks demonstrates that the prosecutor was arguing that no scientific evidence or recording of the crimes was necessary in order to satisfy the State's burden. The prosecutor was arguing that the testimony of the girls, if believed, was enough to support convictions. That is not incorrect or error.

A prosecutor misstates the burden of proof if he or she argues that in order to acquit, the jury must believe that the State's witnesses are lying. State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996). No such argument was made in this case.

Before the State's rebuttal closing argument, the trial court expressed concern that this remark could be burden shifting .

4/3/12 RP 39. Given the context of the prosecutor's remark, the court was incorrect. More importantly, even when the court suggested the possibility of an error, Carr did not indicate that he believed that there was any error and did not request a curative instruction. This makes it apparent that Carr did not believe the remark was prejudicial given the entire context of the instructions and the State's argument as a whole.

Moreover, because there was no objection to these remarks in the trial court on the basis that they shifted the burden of proof, they are not reversible error unless they were not curable. Emery, 174 Wn.2d at 762-63. The court in Emery observed that a remark that could confuse the jury about the burden of proof did not have an inflammatory effect. Id. at 763. The court stated that if there had been an objection, the trial court could have properly explained the jury's role and the State's burden of proof, and such an instruction "would have eliminated any possible confusion and cured any potential prejudice" from the improper remarks. Id. at 764. On that basis alone, the Court concluded that the claim of error failed. Id.

Likewise, in this case the trial court could have provided a curative instruction as to the burden of proof. The prosecutor's

remarks were not inflammatory and any possibility of prejudice would have been eliminated.

D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Carr's convictions and sentence.

DATED this 6TH day of September, 2013.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Elaine Winters, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief Of Respondent, in STATE V. PETER JAMES CARR, Cause No. 68815-4-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

L Brame
Name

9/6/13
Date

Done in Seattle, Washington