NO. 73325-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

DAVID DALE THOMPSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
SAN JAUN, STATE OF WASHINGTON
Superior Court No. 14-1-05001-9

BRIEF OF RESPONDENT

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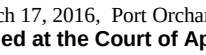
SERVICE		
	Thomas Michael Kummerow 1511 3rd Avenue, Ste 701 Seattle, Wa 98101-3647 Email: tom@washapp.org; wapofficemail@washapp.org	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED March 17, 2016, Port Orchard, WA  **Original e-filed at the Court of Appeals; Copy to counsel listed at left.** **Office ID #91103 kcpa@co.kitsap.wa.us**

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2. Whether testimony by a police officer explaining that a witness's demeanor and manner of reporting the incident lend the report credibility constituted an impermissible opinion where defendant failed to object and whether the prosecution errs in arguing that testimony in closing where defendant fails to object?

3. Whether imposition of LFOs should be reviewed where Thompson failed to object at sentencing?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

David Dale Thompson was charged by first amended information filed in San Juan County Superior Court with assault in the second degree (domestic violence), felony harassment (domestic violence), and possession of a dangerous weapon. CP 42. The dangerous weapon charge was later dismissed. After conviction, Thompson successfully moved for a new trial. CP 109. This appeal proceeds from the second trial.

Before trial, the defense moved to exclude reference to a pellet gun because the witnesses identified a firearm, not a pellet gun. 1RP 142. The trial court ruled that the 911 recording had Thompson's voice claiming that it was not a firearm but a pellet gun. 1RP 146-47. Thus the State was allowed to argue that even if it wasn't a firearm, a pellet gun would also be a deadly weapon. *Id*.

Thompson was found guilty of assault second degree and harassment. CP 137-38. The jury answered no on both domestic violence special verdicts. CP 139-40.

B. FACTS

Robert and Adrian Speers[1] lived in the basement of their grandparent's home. 1RP 163. Thompson lived in an separate apartment at the same address. *Id*.; 2RP 240. On the morning of the incident, the Speers brothers were watching TV with their friend Barry Sharp. 1RP 164; 2RP 248. Sharp had his dog, a male pit bull, with him. *Id*. They let Sharp's dog out and it was playing with Thompson's female pit bull. *Id*. When Thompson let another male pit bull out, the two male dogs began to fight. 1RP 165.

Hearing the fight, Speers ran out to pull them apart. 1RP 165. Soon, Thompson came out and joined in this effort to separate the dogs.

1RP 166. The dogs were separated and Thompson was "nipped" in the process. *Id*. Speers and Sharp took Sharp's dog to their house while Thompson took his dog to his house. *Id*. Thompson's hand was bleeding. *Id*.

Five minutes later, Thompson came into the basement. *Id*. Thompson said he was going to bring a gun down and shoot Sharp's dog. 1RP167. Speers thought Thompson seemed very serious about it. *Id*. Thompson left but Speers soon heard him coming down the stairs to the basement. 1RP 168. Speers came out of the bathroom and Thompson aimed the gun at him. Speers related what Thompson said:

> He said if I get in his way he'd shot [sic] me, and that he's going down there to kill the dog.

1RP 168. Sharp saw Thompson point the gun at Speers and threaten to shoot him. 2RP 31 Thompson used a serious tone. 1RP 169. Thompson was just a few feet away when he pointed the gun at Speers; the end of the gun was a foot to a foot and a half away from Speers's chest. *Id*. Speers pushed the gun away and hit Thompson. 1RP 170. The two engaged in pushing, Thompson grabbed Speers's throat, and Adrian jumped on Thompson's back to get him off. *Id*.

The men heard a car drive up and Thompson disengaged, grabbed

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[1] Hereafter, "Speers" will refer to Robert unless otherwise indicated.

the gun, and left the basement. 1RP 170. Speers called an emergency number. *Id*. While he was on the phone, Thompson returned and tried to convince Speers "that it wasn't a real gun that he brought down." 1RP 171. Thompson tried to convince Speers that it was a pellet gun that Speers had previously owned. *Id*. On the emergency call tape, Speers and Thompson can be heard arguing over whether it was a firearm or a pellet rifle.[2] 1RP 176. Speers testified that the pellet gun admitted into evidence was not the weapon Thompson pointed at him. 2RP 245.

Speers knew that Thompson had was a real gun because Thompson pulled back "the semi-auto action on it." 2RP 247. Further, it had a wood stock, it was "seven inches longer in the barrel than the other gun and [had] twice as thick of a barrel" and "didn't have a yellow site [sic] on it like a pellet gun would." 2RP 247. Sharp described the weapon used as a "full black rifle with large or thick barrel, about an inch which to me fits about a .30 caliber in size." 2RP 322. Sharp also examined the pellet gun introduced at trial, and concluded that it was not the same weapon used by Thompson during the incident. 2RP 323.

Firearm or pellet gun, there is no dispute that Thompson leveled it at Speers. 2RP 325. Brian Smelser, a forensic scientist from the Washington State Patrol Crime Laboratory examined the seized pellet gun.

[2] The reporter spelled "rifle" as "riffle" throughout. The State will use the correct

2RP 330. He noted that the product information for that pellet gun included a warning that "misuse or careless use may cause serious injury or death." 2RP 332. Further, the gun could be dangerous up to 475 yards away. *Id.* Mr. Smelser knew of a case where death had resulted from a chest shot from a BB gun. 2RP 337. The operable pellet gun was test-fired and found to propel a projectile fast enough to penetrate the skin. 2RP 336. The pellets penetrated the test medium from two and a half to four and a half inches. 2RP 335.

III. ARGUMENT

A. THE EVIDENCE WAS SUFFICIENT TO ESTABLISH ASSAULT WITH A DEADLY WEAPON REGARDLESS OF WHETHER THE RIFLE WAS A FIREARM OR PELLET GUN.

Thompson argues that insufficient evidence supports his conviction for assault. He claims that the State failed to prove that he was armed with a deadly weapon. Brief at 7. His argument includes the claim that the State's theory was that the assault was committed with a pellet gun. *Id.* This claim is without merit because the State's actual theory was that Thompson committed assault with either the seized pellet gun or the firearm described by the witnesses and either one is a deadly weapon under the circumstances of this case.

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spelling.

In a challenge to the sufficiency of the evidence, the evidence is viewed in a light most favorable to the prosecution and it must be determined whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). All reasonable inferences are drawn in favor of the State and interpreted most strongly against the defendant. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). The elements of a crime may be established by either direct or circumstantial evidence, and one type of evidence is no less valuable than the other. *State v. Thompson*, 88 Wn.2d 13, 16, 558 P.2d 202, *appeal dismissed*, 434 U.S. 898 (1977).

The State's theory that the deadly weapon was either a firearm or a pellet gun can be seen in closing:

> Now, what is interesting is obviously there's been this issue about whether the Defendant assaulted the boys with a firearm or was it a pellet rifle, and I submit to you that both of those things in this case are deadly weapons. A firearm loaded or unloaded is a deadly weapon.

3RP 425. Further, the prosecutor correctly argued "we don't need a physical gun for you to believe and find that the Defendant did point a firearm at Robbie Speers because, once again, testimony is evidence." *Id*. The State reviewed the description of the item by the witnesses and the crime lab expert who opined that the pellet gun is a deadly weapon and

argued:

> In this case, the boys are sure when they were being cross-examined by Defense counsel it was a gun, but even if you choose to believe what the Defendant is saying on the 911 tape, "that's all I got, a pellet rifle," that it's like the ring. That's a deadly weapon, too.

3RP 427. Thus it is clear that the State's theory was not simply that the assault was by pellet gun. The State's theory was that it was a firearm but since Thompson can be heard claiming that it was a pellet gun, the State covered all bases by proving that that that pellet gun was also a deadly weapon.

Such air guns do satisfy the deadly weapon element of the charge. In S*tate v. Taylor*, 97 Wn. App. 123, 982 P.2d 687 (1999), the Court convictions for second degree assault with a BB gun. Three trespassing youths were confronted by another youth with a BB gun that looked like a .45-caliber pistol. *Taylor,* 97 Wn. App. at 125. Under RCW 9A.04.110(6), "deadly weapon" –

> means any explosive or loaded or unloaded firearm, and shall include any other weapon, device, instrument, article, or substance, including a "vehicle" as defined in this section, which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.

Taylor noted that this definition includes two categories: first, explosives or firearms, "which are deadly per se regardless of whether they are loaded" and second, "any other weapon or instrument that may be deadly

in fact." *Taylor*, 97 Wn. App. at 126. A BB gun is in the second category and the deadly weapon label applies depending on the circumstances in which it is used, attempted to be used, or threatened to be used. *Id*. But, "[w]hether a BB gun is deadly weapon in fact is a question for the trier of fact." *Id*.

Taylor argued that there was no evidence that the BB gun was functional, citing *State v. Carlson*, 65 Wn. App. 153, 828 P.2d 30, *rev. denied* 119 Wn.2d 1022 (1992), as Thompson does here. But the *Carlson* Court had held that even an unloaded BB gun could be readily loaded and thus is readily capable. The *Taylor* Court distinguished the *Carlson* Court's holding that the instrumentality must be actually capable by noting that the statute includes "the circumstances in which [the weapon] is … *threatened to be used."* *Id*. at 128 (editing and emphasis the Court's). Moreover, "Mr. Taylor's repeated threats to shoot the boys with the BB gun created an inference that it was loaded." *Id*. at 128. Just as in *Taylor*, Thompson's threatened use of the instrumentality, in the light most favorable to the state, aptly raises a reasonable inference that the gun Thompson used was loaded.

And, as the State argued in closing, another reasonable inference is that Thompson would not have brought a pellet gun in order to kill Sharp's dog. 3RP 427. "The State need not introduce the actual deadly

weapon at trial." *State v. Bowman,* 36 Wn. App. 798, 803, 678 P. 2d 1273 (1984). Further, in a holding that could easily be applied to the present case "[t]he evidence is sufficient if a witness to the crime has testified to the presence of such a weapon, as happened here … The evidence may be circumstantial; no weapon need be produced or introduced." *Id*. And, again, *Bowman* noted that the verbal threat to shoot "necessarily implied that he had access to a firearm capable of killing or seriously injuring his victim." *Id*.

The Supreme Court agreed in *State v. Hentz*, 99 Wn.2d 538, 541-42, 663 P.2d 476 (1983). There, a plastic cap pistol was sufficient when coupled with a threat to shoot the victim. Although in the context of first degree rape, the concepts used are in accord with the cited assault cases.

In *Hentz*, the Court of Appeals had held that the rapist must have an actual deadly weapon. The Supreme Court disagreed, holding that a threat to use a firearm is "unambiguously a threat to use a deadly weapon." *Hentz,* 99 Wn.2d at 541. The Court discussed a rape case where the victim had been threatened with a knife but never saw or felt one. *Hentz,* 99 Wn.2d at 543. The Court held that "[i]t would be anomalous indeed to treat a defendant who threatened to shoot, while possessing what appeared to be a gun, more favorably than a defendant who threatened to use a knife where none was displayed." *Id*.; *see also*

State v. Gotcher, 52 Wn. App. 350, 354, 759 P.2d 1216 (1988) (in first degree burglary prosecution, a switchblade knife was not a deadly weapon because it was not used, offered, or threatened to be used).

Thus, the focus of the inquiry is not the presence of the alleged deadly weapon at trial. The gun described by the victims was per se a deadly weapon. The pellet gun was a deadly weapon under the circumstances in which it was used. Neither needed to be offered into evidence when the defendant threatened to shoot his victim. A reasonable inference from the testimony is all that is necessary when taking the evidence in a light most favorable to the state. The State covered all its bases by proving with substantial evidence that either the firearm per se or the pellet gun as threatened to be used constituted a deadly weapon. Any rational jury could easily have found this element proven. Thompson's argument fails.

B. THOMPSON'S CLAIM REGARDING TESTIMONY ON THE VERACITY OF A WITNESS WAS NOT PRESERVED FOR REVIEW, WAS NOT A MANIFEST CONSTITUTIONAL ERROR, AND WAS NOT IMPROPER; MOREOVER THOMPSON FAILS TO SHOW THE STATE'S COMMENTS IN CLOSING ARGUMENT WERE IMPROPER OR INCURABLY FLAGRANT.

Thompson next claims that a police witness improperly vouched

for the credibility of another witness. He claims that this vouching invaded the province of the jury and thus constitutes a manifest constitutional error that may be raised in the absence of an objection in the trial court. Further, Thompson claims prosecutorial misconduct because the State argued the alleged vouching in closing. This claim is without merit because the issue was not preserved below and because the testimony was not a personal opinion on credibility and made no mention of Thompson's credibility or guilt. Moreover, given the unrebutted nature of the testimony and the weight of the evidence in total any error would be harmless.

In the law of opinion testimony, many fine distinctions are made. Opinions about a defendant are particularly suspect but opinions about witnesses are not as critical. The Supreme Court has succinctly noted the difference:

> Generally, no witness may offer testimony in the form of an opinion regarding the veracity of the defendant. Such testimony is unfairly prejudicial to the defendant because it invades the exclusive province of the jury. This is true unless the defendant offers affirmative testimony raising the issue of credibility.
>
> As to the victim, even if there is uncontradicted testimony on a victim's credibility, the jury is not bound by it. Juries are presumed to have followed the trial court's instructions, absent evidence proving the contrary. The constitutional role of the jury requires respect for the jury's deliberations. The assertion that the province of the jury has been invaded may often be simple rhetoric.

State v. Kirkman, 159 Wn.2d 918, 927-28, 155 P.3d 125 (2007) (internal citation omitted); *accord State v. Johnson*, 152 Wn. App. 924, 930, 219 P.3d 958 (2009). Experts may express opinions from their fields if those opinions will assist the trier of fact. ER 702. "Lay witnesses also may now give opinions or inferences based upon rational perceptions that help the jury understand the witness's testimony and that are not based upon scientific or specialized knowledge" under ER 701. *State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008). Under ER 704, an opinion is not inadmissible simply because it embraces an ultimate issue in the case. Thus, "[t]he mere fact that an expert opinion covers an issue that the jury has to pass upon does not call for automatic exclusion." *Montgomery*, 163 Wn.2d at 590; *see also Seattle v. Heatley*, 70 Wn. App. 573, 854 P.2d 658 (1993), *rev. denied*, 123 Wn.2d 1011 (1994).

Juries pass upon is credibility. Here, as always, the jury was so instructed:

> You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of

his or her testimony.

CP 142-43 (WPIC 1.02). This instruction is important in that, as noted in *Kirkman*, juries are presumed to follow the instructions of the court. *See Montgomery,* 163 Wn.2d at 595. At bottom, " witnesses should not tell the jury what result to reach and that opinion testimony should be avoided if the information can be presented in such a way that the jury can draw its own conclusion." *Montgomery,* 163 Wn.2d at 591.

Whether or not a particular opinion told the jury what result to reach is decided in a case-by-case manner:

> In determining whether such statements are impermissible opinion testimony, the court will consider the circumstances of the case, including the following factors: "(1) 'the type of witness involved', (2) 'the specific nature of the testimony,' (3) 'the nature of the charges,' (4) 'the type of defense,' and (5) 'the other evidence before the trier of fact.'"

Kirkman, 159 Wn.2d at 928 (internal citation omitted).

1. Type of witness and specific testimony.

Here, Deputy Harvey, an investigating police officer, came upon Speers at the scene of the incident. 2RP 290. Harvey described his demeanor as breathing heavily and "very point blank with his story to me." 2RP 291. This exchange with the prosecutor continued:

> Q. What do you mean by point blank?
>
> A. Meaning there wasn't any hesitation in what he relayed to me.
>
> Q. Why is that significant?

A. Generally, somebody making a story up has some hesitation because they actually have to think about what they are saying rather than recalling the information from memory.

Q. Are you saying that based on your experience as a law enforcement officer?

A. I am.

2RP 291. The opinion, then, does not provide the jury with Officer Harvey's personal opinion as to Speers's credibility or Thompson's guilt. It is, rather, a comment on that witness' demeanor and manner of imparting the information. Notably, the officer did not testify to Speers's actual remarks, nor did the State seek to illicit that hearsay. This is particularly significant in that the remarks about Speers say nothing about David Thompson. There simply is not enough here to support an argument that the remarks were an opinion as to Thompson's guilt. *See State v. Barr,* 123 Wn. App. 373, 378-79, 98 P.3d 518 (2004) (improper opinion where interrogating officer testified, *inter alia,* that defendant acted like people who "feel guilty").

Nonetheless, "testimony from a law enforcement officer regarding the veracity of another witness may be especially prejudicial because an officer's testimony often carries a special aura of reliability." *Kirkman* 159 Wn.2d at 928. In *Kirkman,* a detective who interviewed a child sex abuse victim testified as to the protocol used to ascertain whether or not the child will tell the truth. The detective testified that he was interested

"in this person being able to distinguish between truth and lies." *Kirkman* 159 Wn.2d at 930. The detective found and testified that the child victim was in fact able to distinguish the truth from lies and had expressly promised to tell the truth. *Kirkman* 159 Wn.2d at 931. The Court of Appeals reversed the conviction in part because it found that this was an impermissible opinion.

The Supreme Court reversed the Court of Appeals. *Kirkman* 159 Wn.2d at 938. The Court observed that "[the detective] did not testify that he believed [the victim] or that she was telling the truth." *Kirkman* 159 Wn.2d at 931. There was thus no impropriety:

> By testifying as to this interview protocol, Kerr "merely provided the necessary context that enabled the jury to assess the reasonableness of the ... responses." *Demery*, 144 Wn.2d at 764. Detectives often use a similar protocol in all child witness interviews, whether they believe the child witness or not.
>
> An interview protocol as employed by Kerr does not carry a "special aura of reliability" beyond the "special aura of reliability" conferred upon a witness when a judge swears him or her to tell the truth in front of the jury at trial. *See* RCW 5.28.020. A jury must still determine credibility and truthfulness of each witness. Kerr's testimony was not a manifest error of constitutional magnitude.

Kirkman 159 Wn.2d at 931 (editing the Court's).

Similarly, in the present case, Deputy Harvey did not say he believed that Speers was telling the truth. His testimony was akin to the testimony in *Kirkman.* He merely provided "necessary context" for the

jury's job of determining Speers's credibility. Moreover, it is questionable whether or not this was even expert testimony; the foundation is likely inadequate to allow the officer to be endorsed as an expert. *See State v. Demery*, 144 Wn.2d 753, 760, 30 P.3d 1278 (2001) (opinion testimony can be defined as testimony based on one's belief or idea rather than direct knowledge of facts at issue). The remarks are more consistent with common sense and observation of facts than with any special training a police officer may have received. And this provides even less reason to find that these remarks had any special aura of reliability.

2. The charge, the defense, and the other evidence.

The charges were second-degree assault and harassment. The ultimate facts, then, were that Thompson pointed a firearm (or deadly weapon) at the victim and threatened to shoot if the victims did not get out of his way. The defense was a general denial. 1RP 144. More particularly, the trial court asked of defense counsel "you are saying that Mr. Thompson never engaged in any of the acts the State is alleging he engaged in?" 1RP 144. Defense counsel responded "that's his position." *Id*. Upon further inquiry defense counsel confirmed:

> So the defense is that Mr. Thompson wasn't there. This is all made up by Robbie Speers and Adrian Speers in terms of the alleged pointing of the gun and the wrestling of it away, the fist to cuffs [sic] that occurred and all of that?

Id. Thus the defense theory was denial and fabrication by the victims.

Finally, without quoting at length from the defense closing argument, the defense theory can be seen in a single rhetorical question "So is this a set up?" 3RP 432. Under the defense theory, then, Speers was a not-credible conspirator trying to set up Thompson. The defense thus placed credibility in issue in opening statement, asking the jury to "question their motives, question their objectivity, question what relationship they had with each other and what relationship they had with David Thompson." 1RP 159.

In sum, the story related by the Speers brothers and Sharp was consistent and substantial. Thompson does not claim here that the evidence in total was insufficient. The testimony of the three victims was unrebutted and overwhelming. Placing Speers's report of the incident in its necessary context served only to rebut the defense theory of fabrication. *See State v. Graham,* 59 Wn. App. 418, 424, 798 P.2d 314 (1990) (where defense is that witness is not telling the truth, state allowed to rebut that inference). Admission of testimony about his manner and demeanor was not error.

3. The issue was not preserved and is not a manifest constitutional issue.

Thompson lodged no objection to Harvey's comment about Speers's demeanor nor to the State's argument on the point. He claims that the issue may still be reviewed because it is an issue of manifest

constitutional error. Thus, he may seek relief of this unpreserved issue under RAP 2.5 (a)(3). His sole ground for this argument is that Harvey's testimony was an "explicit or nearly explicit" opinion on the witness's credibility. Brief at 14-15 (*citing Kirkman*)

However, Thompson has not met his burden under *Kirkman*:

> The defendant must identify a constitutional error and show how the alleged error actually affected the defendant's rights at trial. It is this showing of actual prejudice that makes the error "manifest," allowing appellate review.

Kirkman, 159 Wn.2d at 926-27. RAP 2.3 provides a narrow exception to the rule. *Kirkman*, 159 Wn.2d at 934-35. "Appellate courts will not approve a party's failure to object at trial that could identify error which the trial court might correct (through striking the testimony and/or curative instruction." *Kirkman*, 159 Wn.2d at 935. Further, a decision to object may be tactical. *Id*. Moreover, an error is not "manifest" absent a showing of actual prejudice. *Id*.; *accord*, *Montgomery*, 163 wn.2d at 595. There must be a "plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case." *Kirkman*, 159 Wn.2d at 935.

Thompson fails to make such a showing of actual prejudice. It remains unclear how excision of that bit of Deputy Harvey's testimony would have changed the result. In *Kirkman*, the Supreme Court's researched its precedent:

> No case of this court has held that a manifest error infringing a constitutional right necessarily exists where a witness expresses an opinion on an ultimate issue of fact that is not objected to at trial.

Kirkman, 159 Wn.2d at 935; *see also Montgomery*, 163 Wn.2d at 596 (even when the Supreme Court believes an objection would have been sustained, no actual prejudice found). Thus "[a]dmission of witness opinion testimony on an ultimate fact, without objection, is not automatically reviewable as a "manifest" constitutional error." *Kirkman*, 159 Wn.2d at 936. And, thus, the requirement alluded to by Thompson that manifest error requires a "nearly explicit statement by the witness that the witness believed the accusing victim." *Id*.

As has been seen, Deputy Harvey's testimony was in no wise an explicit assertion that he believed the witness. Thompson advances no argument as to how the result of the case was affected. Nor is there argument as to how the jury was or could be prejudiced in light of all the evidence in the case. As *Kirkman* noted, a jury is presumed to follow the instructions of the trial court and an appellate court should "[o]nly with the greatest reluctance and with the clearest cause … consider second-guessing jury determinations or jury competence." *Kirkman*, 159 Wn.2d at 938. The same consideration was found to be important in *Montgomery*.

4. Any error would be harmless.

It has been established that this issue is not of constitutional magnitude. Even if it were, harmlessness could be established beyond a reasonable doubt. *See State v. Barr*, 123 Wn. App. 373, 383-84, 98 P.3d 518 (2004), *review denied*, 154 Wn.2d 1009 (2005). Thompson presented no evidence. The testimony of the three victims remained unrebutted. That is, there simply is no evidence in the record, tainted or otherwise, that supports Thompson's denial of the charge or his attempt to discredit the witnesses as to their accounts of the incident. The trial would have ended the same way without Harvey's brief testimony about Speers's demeanor.

But since the error was not of constitutional magnitude, the question is whether the error was prejudicial and "the error is not prejudicial unless, within reasonable probabilities, it materially affected the outcome of the trial." *State v. Wilbur*, 55 Wn. App. 294, 299, 777 P.2d 36 (1989). It did not. Under either standard, the admission of and argument about Harvey's observations was harmless.

5. The prosecution did not commit misconduct in closing.

Thompson claims that the State committed misconduct by arguing Harvey's statement vouched for Speers's credibility. Brief at 15. Notably, Thompson never quotes any passages from the prosecutor's closing that he claims constitute misconduct.

In closing, the prosecutor did argue that Harvey found Speers

credible. 3RP 421. She argued that given Harvey's observation of Speers's demeanor and manner, Speers "sounded truthful to Deputy Harvey." She made no personal statement of belief in Speers's truthfulness; she merely argued that Harvey's testimony was "evidence" that he was telling the truth. 3RP 421-22. And this was done in the context of a defense that questioned the credibility of all three of the State's percipient witnesses.

Trial court rulings on improper prosecution arguments generally are reviewed for abuse of discretion. *Montgomery,* 163 W.2d at 597. Here, the trial court could not exercise its discretion because Thompson did not object. "Failure to object to a prosecutor's improper remark constitutes waiver unless the remark is deemed to be so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *State v. Edvalds,* 157 Wn. App. 517, 522, 237 P.3d 368 (2010) (*citing State v. Belgarde,* 110 Wn.2d 504, 507, 755 P.2d 174 (1988)). "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 the trial." *Edvalds,* 157 Wn. App. at 525-26. "A court must consider the comments 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." *Edvalds,* 157 Wn. App. at 522.

In *Edvalds*, the prosecutor prefaced impeachment questions to the defendant with the words "in truth." Other questions were prefaced with the phrase "you expect the jury to believe," and "you expect the jury to believe that you're being up front with them with that testimony; is that right?" Edvalds claimed that these questions constituted misconduct; but the Court of Appeals disagreed, holding

> Edvalds fails to meet his burden to prove that the comments here were improper or that prejudice resulted. A prosecutor does not commit misconduct anytime he mentions credibility. It is improper for a prosecutor to make comments which express a personal opinion of witness veracity. But, a prosecutor may comment on a witness's veracity as long as a personal opinion is not expressed and as long as the comments are not intended to incite the passion of the jury. Because the prosecutor did not offer a personal opinion or incite the passion of the jury, the comments here do not rise to the level of the reversible comments made by the prosecutor in *Stith*.

Edvalds, 157 Wn. App. at 525 (internal citation omitted). The reference is to *State v. Stith*, 71 Wn. App. 517, 237 P.3d 368 (1993), wherein reversal was had when the prosecution argued that to believe the defendant was to call the police liars, that the defendant had only recently gotten out of prison, and that guilt was already established by a previous judicial finding of probable cause. *See Edvalds*, 157 Wn. App. at 525-26. Similarly, in the present case, the prosecutor's argument does not rise to the level of *Stith.*

In the present case, the prosecutor (or Harvey), as noted above, expressed no personal opinion as to Speers's credibility. The prosecutor

commits no misconduct merely because she argued credibility in a case where the entire defense was that the witnesses were not telling the truth. Moreover, it must be remembered that this is only argument and the jury was so instructed.

> Greater latitude is given in closing argument than in cross examination. Counsel may comment on a witness's veracity or invite the jury to make reasonable inferences from the evidence so long as counsel does not express a personal opinion.

State v. Stover, 67 Wn. App. 228, 232, 834 P.2d 671 (1992). Moreover, the record is clear that the prosecutor's remarks were not ill-intentioned and intended to incite the passion of the jury. Thompson's failure to object raised his burden on this issue and he has not satisfied that burden.

C. THOMPSON'S LEGAL FINANCIAL OBLIGATIONS WERE IMPOSED WITHOUT OBJECTION AND THUS THE ISSUE IS NOT PRESERVED FOR APPEAL.

Thompson next claims that the trial court imposed various legal financial obligations without first inquiring as to Thompson's future ability to pay. This claim is without merit because it was not preserved below.

In *State v. Blazina*, 182 Wn.2d 827, 832, 344 P.3d 680 (2015), the Washington Supreme Court specifically held that it is not error for this Court to decline to reach the merits on a challenge to the imposition of

LFOs made for the first time on appeal. 182 Wn.2d 832. "Unpreserved LFO errors do not command review as a matter of right under *Ford* and its progeny." *Blazina,* 182 Wn.2d at 833 (*citing State v. Ford,* 137 wn.2d 472, 478, 973 P.2d 452 (1999)). The decision to review is discretionary with the reviewing court under RAP 2.5. *Blazina*, 182 Wn.2d at 835; *see also State v. Duncan,* 180 Wn. App. 246, 250-253, 327 P.3d 699 (2014), *review granted*, 183 Wn.2d 1013 (2015) (defendant's failure to object was not because the ability to pay was overlooked, rather the defendant reasonably waived the issue, considering "the apparent and unsurprising fact that many defendants do not make an effort at sentencing to suggest to the sentencing court that they are , and will remain, unproductive.").

RAP 2.5 reflects a policy which encourages the efficient use of judicial resources and discourages late claims that could have been corrected with a timely objection. *State v. Scott,* 110 Wn.2d 682, 685, 757 P.2d 492 (1988). *Duncan* appropriately balances the efficient use of judicial resources with fairness. Nor is there obvious error in the record. This Court should decline review of this issue.

IV. CONCLUSION

For the foregoing reasons, Thompson's conviction and sentence should be affirmed.

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Respectfully submitted,

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