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Court of Appeals  
Division I  
State of Washington

Supreme Court No. \_\_\_\_\_

No. 75077-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

SCOT CHRISTOPHER CUPPLES,

Petitioner.

---

PETITION FOR REVIEW

---

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A. IDENTITY OF PETITIONER

Scot Christopher Cupples, appellant below, seeks review of the Court of Appeals decision designated in Part B.

B. COURT OF APPEALS DECISION

Mr. Cupples appealed his King County Superior Court convictions for two counts of child molestation in the first degree. Two counts of rape of child were dismissed without prejudice, when a jury failed to reach a unanimous verdict following a jury trial. The Court of Appeals affirmed the two molestation convictions in an unpublished decision on October 2, 2017. Appendix. This motion is based upon RAP 13.3(e) and 13.5A.

C. ISSUES PRESENTED FOR REVIEW

1. The federal constitution's guarantees of the right to present a defense and due process, along with similar guarantees of the Washington Constitution, are violated where a trial court bars a defendant from presenting relevant evidence. Washington courts have concluded that a court's refusal to admit relevant evidence violates a defendant's rights unless the State can establish the relevance is outweighed by prejudice to the fairness of the fact-finding process. Where the trial court restricted defense cross-examination of State witnesses, did the court violate Mr. Cupples's rights under the federal and state Constitutions, and

was the Court of Appeals decision therefore in conflict with decisions of this Court, requiring review? RAP 13.4(b)(1)?

2. The State's duty to ensure a fair trial precludes a prosecutor from employing improper argument and tactics during trial. Where the deputy prosecutor engaged in repeated misconduct, and where such conduct was met by proper objection, was there a substantial likelihood that the comments affected the jury verdicts, and was the Court of Appeals decision therefore in conflict with decisions of this Court, requiring review? RAP 13.4(b)(1)?

D. STATEMENT OF THE CASE

Scot Cupples was involved in a romantic relationship with Lakeisha Colvin for over ten years. RP 488-89. Ms. Colvin has been separated, but not legally divorced, from her husband Guadalupe Gonzalez, since approximately 2005. Id. At the time of trial, Ms. Colvin and Mr. Gonzalez informally shared custody of their two children, H.G. and A.G. RP 321-23. At the time of trial, H.G., a girl, was 14 years old; A.G., a boy, is approximately three years younger. Id.

In 2012-03, Mr. Cupples and Ms. Colvin were living together in an Auburn apartment, and the two children would typically stay with them from Wednesday or Thursday through the weekend. RP 327. The

children lived with their father, Mr. Gonzalez, during the rest of the week.

Id.

One afternoon in April 2013, as Mr. Gonzalez was reviewing missing homework and grades with his then 12 year-old daughter, H.G., he asked why her grades had slipped. RP 333-37. H.G. told Mr. Gonzalez that the atmosphere at her mother's apartment was interfering with her ability to study and focus on her schoolwork. RP 337-38. Mr. Gonzalez asked H.G. if anyone was hurting or touching her inappropriately at her mother's home. RP 338-41. Mr. Gonzalez said he regularly engaged in this sort of "inappropriate touching" conversation with his daughter, and he had previously brought up the topic "maybe half a dozen times to ten times" with H.G. Id. at 341. When H.G. asked her father exactly what he meant by inappropriate touching, Mr. Gonzalez became concerned. Id.

H.G. told her father that Mr. Cupples, her mother's boyfriend, had touched her "bottom" and rubbed her, while pointing to the front of her private area. RP 344. H.G. said this conduct occurred on the couch in the living room, where Mr. Cupples generally slept. H.G. said on certain nights, she would go downstairs to sleep there as well, while her mother and younger brother slept upstairs. Id. at 346.

Mr. Gonzalez put H.G. to bed and immediately called Child Protective Services (CPS), as well as 911. RP 349-50. During the



resulting Auburn Police Department and CPS investigation, the children experienced a dramatic reduction in their custody with their mother, Ms. Colvin. RP 352-53.

At trial, H.G. testified that she had never told her mother about these allegations, because she sensed her mother would not be supportive of her. RP 617. H.G. also expanded her original allegations, claiming Mr. Cupples had improperly touched her, not only in the Auburn apartment, but also in Ms. Colvin's subsequent apartment in Kent. RP 623.<sup>1</sup>

Mr. Cupples was charged with two counts of rape of a child in the first degree, as well as two counts of child molestation in the first degree. CP 7-8.

Following trial, the jury found Mr. Cupples guilty of two counts of child molestation in the first degree. CP 62-63. The jury could not reach a unanimous verdict as to the two counts of rape of a child, and a mistrial was declared. CP 60-61; RP 907. These counts were dismissed without prejudice. 4/15/16 RP 15.

Mr. Cupples's motion to arrest judgment and for a new trial pursuant to CrR 7.4 and 7.5 was denied. CP 69-78; CP 124-25.

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<sup>1</sup> H.G.'s first allegation was made on April 2, 2013, during a discussion with her father. RP 333. The Kent apartment lease began in April 2013, and the mother moved there on April 3rd. RP 519-21. Even H.G.'s father agreed the children had never slept at the Kent apartment. RP 330, 376-77.

Mr. Cupples appealed, assigning error to the issues raised herein. On October 2, 2017, the Court of Appeals affirmed Mr. Cupples's convictions and sentence. Appendix.

Mr. Cupples seeks review in this Court. RAP 13.4(b)(1).

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

THIS COURT SHOULD GRANT REVIEW, AS THE COURT OF APPEALS DECISION IS IN CONFLICT WITH DECISIONS OF THIS COURT. RAP 13.4(b)(1).

**1. The trial court denied Mr. Cupples's federal and state constitutional right to present a defense.**

- a. The Sixth Amendment guarantees an individual the right to present a defense.

The Sixth Amendment guarantees a defendant the right to present a defense. Davis v. Alaska, 415 U.S. 308, 318, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). A defendant must receive the opportunity to present his version of the facts to the jury so that it may decide "where the truth lies." Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); Chambers v. Mississippi, 410 U.S. 284, 294-95, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). "[A]t a minimum . . . criminal defendants have . . . the right to put before the jury evidence that might influence the determination of guilt." Pennsylvania v. Ritchie, 480 U.S. 39, 56, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987).

So long as evidence is minimally relevant,

“. . . the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial.” The State's interest in excluding prejudicial evidence must also “be balanced against the defendant's need for the information sought,” and relevant information can be withheld only “if the State's interest outweighs the defendant's need.”

Jones, 168 Wn.2d at 720 (quoting State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002)) (internal citations omitted).

- b. The trial court may not arbitrarily abridge a criminal defendant's constitutional right to cross-examine a witness with relevant evidence.

A criminal defendant's right to confront the witnesses against him is guaranteed by both the United States and the Washington Constitutions.<sup>3</sup> In addition, the right to confront witnesses has long been recognized as essential to due process.<sup>4</sup> Chambers, 410 U.S. at 294.

The main and essential purpose of confrontation is to secure the opportunity for meaningful cross-examination of adverse witnesses. Davis, 415 U.S. at 315. The purpose of cross-examination is to test the perception, memory and credibility of the witness. Id. at 316.

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<sup>3</sup> Article 1, section 22 of the Washington Constitution guarantees that “[i]n all criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face, [and] to have compulsory process to compel the attendance of witnesses in his own behalf.”

<sup>4</sup> The Fourteenth Amendment provides no state shall “deprive any person of life, liberty, or property, without due process of law.”

Confrontation therefore helps assure the accuracy of the fact-finding process. Chambers, 410 U.S. at 295. Whenever the right to confront is denied, the ultimate integrity of the fact-finding process is called into question. Id.

A defendant's constitutional right to confrontation is violated where he is unreasonably precluded from cross-examining a witness on a subject that is probative of the witness's motive to lie. Olden v. Kentucky, 488 U.S. 227, 231-32, 109 S.Ct. 480, 102 L.Ed.2d 513 (1988). The defendant must be allowed to conduct reasonable cross-examination on a subject relevant to the witness's motive to lie, even if the subject matter is potentially inflammatory to the jury. Id. Such cross-examination is designed to expose a witness's motivation in testifying and thereby "expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness." Id. at 231 (quoting Davis, 415 U.S. at 316-17); Delaware v. Van Arsdall, 475 U.S. 673, 680, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986).

c. The excluded evidence regarding Mr. Gonzalez was relevant and admissible in this case.

At trial, counsel for Mr. Cupples established that the children's biological father, Mr. Gonzalez, had previously assaulted the mother, Ms. Colvin; however, the court excluded evidence of the couple's physical

conflict. RP 5-8, 394. The court also excluded evidence related to prior CPS referrals made by the father, and the father's own substance abuse history.

The evidence relating to Ms. Colvin and Mr. Gonzalez's "history of violence" and their contentious relationship was relevant to motive, as argued by Mr. Cupples in his motion in limine. RP 5-8. The historical custody battle between the parents here, Ms. Colvin and Mr. Gonzalez, was highly relevant to the accusation of sexual misconduct against Mr. Cupples – which, importantly, was originally made by the father, Mr. Gonzalez. Mr. Gonzalez admitted that he regularly asked H.G., following visits with her mother and live-in boyfriend, whether anyone had touched her inappropriately. RP 339-42. Mr. Gonzalez had led these interrogations with his daughter approximately ten times before H.G. told him what he apparently wanted to hear. RP 342 (calling these sessions of leading questions "check-in's"). Once H.G. made her allegations about Mr. Cupples, the mother essentially lost custody, and only periodically saw the children at the homes of relatives. RP 352-53, 463-64.

Mr. Cupples's ability to inquire about Mr. Gonzales's prior interference in Ms. Colvin's parenting, including his prior unfounded reports to CPS about Ms. Colvin's home, was impermissibly limited by the trial court. RP 5-8, 392-96, 423-24.

The court also limited Mr. Cupples's ability to cross-examine Mr. Gonzalez about his own substance abuse history, limiting the evidence to times the children were in the home. RP 423-24. The prosecution had initially stated Mr. Gonzalez was a recovered drug and alcohol user, whose "alcohol and drug abuse problems ended in 2005 or 2006, well, well in advance of this report." RP 394. Pursuant to this proffer, the court limited Mr. Cupples's cross examination of Mr. Gonzalez. Later in the trial, the prosecutor corrected the record to indicate that Mr. Gonzalez continued to struggle with substance abuse through 2011 – a full five years later. RP 422-23. In light of this new evidence, the court's ruling that limited Mr. Cupples's cross-examination regarding the "competing households" theory, RP 423, was erroneous. Jones, 168 Wn.2d at 720. This new evidence about Mr. Gonzalez created additional conflict between the two homes; to limit Mr. Cupples's ability to cross-examine on this new evidence improperly limited his ability to present a defense.

Lastly, Mr. Cupples was denied the opportunity to cross-examine Mr. Gonzalez concerning another point of conflict between the two homes, a missing Nintendo game system belonging to Mr. Gonzalez. RP 451. This Nintendo device had disappeared during the children's visit to their mother's home, within a month of the rape report made by Mr. Gonzalez. RP 451. Mr. Gonzalez filed a police report concerning the

video game, and then one concerning the rape. Id. The Nintendo was relevant to the history of conflict between the parents, as well as to the ongoing issues over child custody; it was erroneous for the court to preclude cross-examination on this area of recent disagreement between the parents. Jones, 168 Wn.2d at 720. The additional tension caused by the missing property from Mr. Gonzalez's home added to the conflict between the two homes; Mr. Cupples's offer of proof was adequate to meet the minimal relevance bar articulated in Jones. 168 Wn.2d at 720. The court's exclusion of the evidence of the Nintendo, Mr. Gonzalez's drug use, and the prior assaults between H.G.'s biological parents was erroneous, despite the Court of Appeals finding that Mr. Cupples's assertion lacked specificity. Appendix at 5.

The trial court was required to apply the standard set forth in Jones -- specifically, that the evidence regarding the custodial history was admissible, unless it was "so prejudicial as to disrupt the fairness of the fact-finding process at trial." See Jones, 168 Wn.2d at 720. The State did not meet that burden. The State made no showing that admission of this relevant evidence would upset the fairness of the fact-finding proceeding. The trial court's erroneous ruling deprived Mr. Cupples of his right under the Sixth Amendment and Article 1, section 22 to present a defense and his right of confrontation.

- d. This Court should review the Court of Appeals opinion, as it is in conflict with this Court's decisions recognizing the right to present a defense and the right to due process.

A constitutional error requires reversal unless the State can establish beyond a reasonable doubt the error “did not contribute to the verdict obtained.” Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); United States v. Neder, 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). To meet its burden here, the State was required to prove beyond a reasonable doubt that none of the jurors could have entertained a doubt as to Mr. Cupples’s guilt after hearing evidence that Mr. Gonzalez had reason to fabricate these allegations due to other motivations -- specifically, in order to obtain full custody of his children – something that had not been possible, despite his four previous fruitless CPS referrals against the mother.

The State did not meet that standard here. The Court of Appeals decision is in direct conflict with Jones. 168 Wn.2d at 720. Therefore, this Court should grant review under RAP 13.4(b)(1).

**2. This Court should grant review due to prosecutorial misconduct.**

- a. Prosecutors have special duties which limit their advocacy.

A prosecutor’s improper argument may deny a defendant his right to a fair trial, as guaranteed by the Sixth Amendment and by article I,



section 22 of the Washington Constitution. State v. Monday, 171 Wn.2d 667, 676-77, 297 P.3d 551 (2011). A prosecutor, as a quasi-judicial officer, has a duty to act impartially and to seek a verdict free from prejudice and based upon reason. State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993) (citing State v. Kroll, 87 Wn.2d 829, 835, 558 P.2d 173 (1976)). In State v. Huson, the Supreme Court noted the importance of impartiality on the part of the prosecution:

[The prosecutor] represents the state, and in the interest of justice must act impartially. His trial behavior must be worthy of the office, for his misconduct may deprive the defendant of a fair trial. Only a fair trial is a constitutional trial ... We do not condemn vigor, only its misuse ...

73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969) (citation omitted); see also State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984).

To determine whether prosecutorial comments constitute misconduct, the reviewing court must decide first whether such comments were improper, and if so, whether a “substantial likelihood” exists that the comments affected the jury. Reed, 102 Wn.2d at 145. The burden is on the defendant to show that the prosecutorial comments rose to the level of misconduct requiring a new trial. State v. Sith, 71 Wn. App. 14, 19, 856 P.2d 415 (1993).

- b. The prosecutor engaged in misconduct when he urged the jury to consider matters not in evidence, lowered the burden of proof, and vouched for State witnesses.

In rebuttal argument, the deputy prosecutor stated precisely the conclusion that the trial court had forbidden during pre-trial motions: that the forensic nurse, Joyce Mettler had concluded that the physical examination of the child was consistent with the allegations the child described. RP 894; compare RP 49-50 (motion in limine), with RP 731 (testimony of Nurse Mettler).

Specifically, the prosecutor argued the following: “[Defense counsel] said the physical examination is not consistent with what happened here. Ms. Mettler disagrees, respectfully, to [defense counsel]. Ms. Mettler said that this is entirely consistent with what [the child] described.” RP 894. Mr. Cupples’s objection was overruled by the court, which stated, “this is argument.” Id. (also stating “the jury can recall what the testimony was.”).

By his argument, the deputy prosecutor urged the jury to consider evidence outside the record – and in direction violation of the court’s pre-trial ruling. RP 49-50. This misconduct cannot be condoned.

In addition, the deputy prosecutor vouched for the honesty and integrity of the State’s witnesses, arguing that the CPS social worker and “the police officers. They have no personal interest in this.” RP 854. The

court sustained Mr. Cupples's objection to this improper argument and ordered the prosecutor to rephrase. Id. The prosecutor's next words, however, did nothing to dispel the personal endorsement he had just given to the State's witnesses – nor did his argument cure it.

Prosecutors may not vouch for the credibility of a witness. State v. Coleman, 155 Wn. App. 951, 957, 231 P.3d 212 (2010). Whether a witness has testified truthfully is solely for the jury to decide. State v. Ish, 170 Wn.2d 189, 196, 241 P.3d 389 (2010). A prosecutor vouches when he or she places the government's prestige behind the witness. Id. It was misconduct for the deputy prosecutor to argue from his position of governmental authority that the CPS and police witnesses had “no personal interest” in this case. See id.

Lastly, the prosecutor diluted the burden of proof by equating it with jurors' common sense and personal experience. RP at 842. “When a prosecutor compares the reasonable doubt standard to everyday decision making, it improperly minimizes and trivializes the gravity of the standard and the jury's role.” State v. Lindsay, 180 Wn. 2d 423, 436, 326 P.3d 125 (2014).

Here, the deputy prosecutor argued the following: “So the reasonable inferences that you take from your commonsense and experience is just as good in the eyes of the law as the testimony of the

witnesses.” RP 842.<sup>5</sup> By so misstating the law, the prosecutor confused the jury and diluted the burden of proof. Lindsay, 180 Wn. 2d at 436.

c. Review should be granted.

The cumulative effect of these various instances of prosecutorial misconduct violated Mr. Cupples’s right to a fair trial. State v. Reeder, 46 Wn.2d 888, 893-94, 285 P.2d 884 (1955); State v. Torres, 16 Wn. App. 254, 262-63, 554 P.2d 1069 (1976). Due to the multiple instances of the deputy prosecutor’s misconduct in closing argument, there is a substantial likelihood the cumulative effect of the prejudice affected the jury’s verdict; therefore, this Court should grant review of the Court of Appeals decision, which is in conflict with decisions of this Court. Reed, 102 Wn.2d at 146-47; see also United States v. Holmes, 413 F.3d 770, 778 (8<sup>th</sup> Cir. 2005) (reversing due to misconduct in rebuttal, which permits no opportunity to respond).

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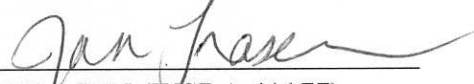
<sup>5</sup> The court overruled Mr. Cupples’s timely objection; thus, endorsing the State’s improper argument. RP 842.

F. CONCLUSION

For the above reasons, the Court of Appeals decision should be reviewed, as it is in conflict with decisions of this Court. RAP 13.4(b)(1).

DATED this 31<sup>st</sup> day of October, 2017.

Respectfully submitted,

  
\_\_\_\_\_  
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APPENDIX

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 75077-1-1
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
SCOT CHRISTOPHER CUPPLES,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: October 2, 2017
	)	

BECKER, J. — Appellant Scot Cupples, convicted of child molestation, contends that the trial court erroneously limited his ability to cross-examine a witness and that the prosecutor engaged in misconduct. Cupples has identified no reversible errors. We affirm.

The alleged victim was the daughter of a woman Cupples lived with. The daughter, 14 at the time of trial, testified that when she was around 11 years old, Cupples molested her on occasions when she was staying at her mother's home. The State also presented testimony from the alleged victim's father, who had reported the abuse to Child Protective Services and to the police. Cupples did not testify. The defense position was that the State lacked sufficient evidence to prove guilt beyond a reasonable doubt. Defense counsel argued the daughter was not a reliable witness. Defense counsel also argued that the father

manipulated the daughter and induced her to fabricate a story about being molested by Cupples.

The jury convicted Cupples on two counts of first degree child molestation. The court imposed a concurrent sentence of 89 months to life on each count. Cupples appeals the judgment and sentence.

Cupples argues that the trial court prevented him from eliciting relevant testimony from the girl's father that would tend to show the father had an ulterior motive to encourage his daughter to accuse Cupples. We will not disturb a trial court ruling that limits the scope of cross-examination unless the ruling reflects a manifest abuse of discretion. State v. Darden, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002).

Criminal defendants are entitled to present testimony and confront adverse witnesses. State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983). The "primary and most important component" of the right to confrontation is the right to conduct meaningful cross-examination of adverse witnesses. Darden, 145 Wn.2d at 620. But these rights are not absolute. Darden, 145 Wn.2d at 621. The evidence sought must be at least minimally relevant. ER 402; Darden, 145 Wn.2d at 621; State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). That is, defendants have no right to question witnesses on irrelevant matters. Washington v. Texas, 388 U.S. 14, 16, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence in determining the action more or less probable than it would be without the evidence. ER 401.



Before trial, the State moved to exclude evidence of an assault committed by the father against the mother in 2005. Defense counsel asked not to be precluded from raising the issue if it became relevant. The court granted the State's motion but told defense counsel "if you feel that somehow it has become relevant, as long as we do it outside the presence of the jury, I will hear your argument at that point."

During the father's testimony, outside the presence of the jury, defense counsel asked to cross-examine the father about his substance abuse history. Counsel asserted that the father "has dealt with alcohol and drug addiction and disputes with the mother that became physical in nature between the two of them." Defense counsel also sought to ask about four instances when the father contacted Child Protective Services about the mother, before the father reported the alleged sexual abuse by Cupples. He argued that all of this evidence was relevant to show that the father contributed to discord between the parents and to rebut the idea that "his home was one of propriety, that is, that there was nothing going on at his home or by his conduct that anyone would be concerned about around the children."

The court prevented inquiry as to "any physical confrontations between the mother and the father" on the basis that such evidence was irrelevant. The court agreed to allow questions about the father's prior contacts with Child Protective Services and his substance abuse history. The court observed, however, that this line of questioning could open the door to testimony potentially unfavorable to the defense, specifically testimony that the father contacted Child

Protective Services out of concern that adults in the mother's home were using drugs and alcohol in front of the children:

I will allow you, if you desire, to go into prior referrals to CPS, or calls by [the father] to CPS.

If you do so, the basic parameters of that I'm satisfied the State could inquire into—the use of alcohol and drugs in the presence of the children. And I will allow you to inquire about his drug and alcohol abuse. [The prosecutor] would thereupon be entitled to go into that he's been sober since whenever, and whether [his experience with addiction] was part of the reasons he calls CPS on [the mother]. So it's entirely up to you about that.

The State later amended its offer of proof as to the father's substance abuse history. While the prosecutor had initially represented that the father struggled with addiction until 2006, the prosecutor corrected this by saying that the father actually had addiction problems until 2011. In response to this amended offer of proof, defense counsel again asserted that the father's addiction history was relevant because the father had, in counsel's view, "painted a picture that I don't believe is accurate in terms of the two households." The court reiterated its earlier ruling:

I am satisfied this isn't about which is the better household for these kids. It's not competing households.

I possibly did not make it clear. My understanding was that the substance abuse might be relevant, but I believe I tied it to the CPS referrals. In fact, I think I indicated that if he, [the father] is a recovering addict that that certainly would give him a perspective and concerns if there are alcohol or substance abuse in [the mother's] household. If [defense counsel] wants to open it up I'm satisfied he's opening that up.

Defense counsel ultimately did not question the father about his addiction history or prior contacts with Child Protective Services.

At another point during cross-examination, defense counsel asked the father whether his son took a video game player to his mother's home sometime in March 2013. The court sustained a relevance objection by the State. Defense counsel explained, outside the jury's presence, that a month before the father reported that Cupples was sexually abusive, the father reported to police "that a Nintendo system belonging to his son had been taken while it was at the mom's residence" and that the father "was upset over the fact that that Nintendo system had been taken." The court ruled, "I'm satisfied that the question was about [the son], and I'm satisfied that's not relevant."

On appeal, Cupples contends it was error to exclude or limit evidence concerning the 2005 assault, the father's prior reports to Child Protective Services, the father's addiction history, and the incident involving the video game player. Cupples further asserts that in light of evidence that the father struggled with substance abuse through 2011, it was error to limit cross-examination on the defense's "competing households" theory.

Cupples has not shown minimal relevance. Cupples makes a blanket assertion that the evidence demonstrated the father's motive to obtain full custody of his children. Cupples fails to articulate with any specificity why the four topics he has identified tended to prove that motive. His brief recites the law at length, but he does not show how the law applies to the facts of this case. At trial, defense counsel was permitted to ask questions pertaining to the nature of the parents' relationship, and the nature of the father's relationship with Cupples, through cross-examination of both the mother and father. We conclude that the

trial court imposed reasonable limitations on Cupples's ability to cross-examine the father.

Cupples challenges comments made by the prosecutor during closing argument. He must show that the prosecutor's conduct was both improper and prejudicial. State v. Carver, 122 Wn. App. 300, 306, 93 P.3d 947 (2004).

The prosecutor told the jury "between direct and circumstantial evidence there is no difference in the eyes of the law. So the reasonable inferences that you take from your commonsense and experience is just as good in the eyes of the law as the testimony of the witnesses." The court overruled a defense objection to this remark.

Cupples argues on appeal that the prosecutor diluted the State's burden of proof by equating it with jurors' common sense and personal experience. When a prosecutor compares the reasonable doubt standard to everyday decision making, it improperly minimizes and trivializes the gravity of the standard and the jury's role. State v. Lindsay, 180 Wn.2d 423, 436, 326 P.3d 125 (2014). It is improper, for example, for a prosecutor to explain the standard by using a narrative about approaching a crosswalk and having confidence "beyond a reasonable doubt" that it is safe to cross. Lindsay, 180 Wn.2d at 436. The prosecutor's remark here is not analogous. Prosecutors may properly ask jurors to invoke their common sense. State v. Barrow, 60 Wn. App. 869, 873-74, 809 P.2d 209, review denied, 118 Wn.2d 1007 (1991). The prosecutor's remark mirrored the standard jury instruction defining circumstantial evidence as "evidence from which, based on your common sense and experience, you may

reasonably infer something that is at issue in this case.” 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 5.01, at 181 (4th ed. 2016). Cupples does not assign error to this instruction.

Cupples challenges the prosecutor’s characterization of testimony given by a nurse who examined the victim. The nurse testified that her examination did not reveal signs of abuse, but that in cases of reported abuse, she normally did not find “indication of any kind of penetration or any kind of trauma.” During closing argument, defense counsel asserted there was a “lack of evidence, physical or medical evidence” supporting the allegations against Cupples. During rebuttal, the prosecutor argued that while defense counsel “said the physical examination is not consistent with what happened here,” the nurse “said that this is entirely consistent” with what was alleged. The court overruled a defense objection that the prosecutor was arguing facts not in evidence, reasoning “the jury can recall what the testimony was.” The prosecutor went on to clarify his assertion to be “that any injuries are by far the exception in connection with what was described to [the nurse] amongst her many, many, many years of physical examinations.” Cupples fails to show that the prosecutor misrepresented the evidence. In context, the argument was an appropriate characterization of the nurse’s testimony.

Cupples objected when the prosecutor said of two witnesses, a police officer and a social worker, that “they have no personal interest in this.” After the trial court sustained the objection, the prosecutor rephrased his argument by stating “Between the witnesses identified, all right, there’s no evidence presented

of any interest or bias.” Cupples challenges the “no personal interest” comment as improper, and the State concedes that it was. Prosecutors may not vouch for the credibility of a witness. State v. Coleman, 155 Wn. App. 951, 957, 231 P.3d 212 (2010), review denied, 170 Wn.2d 1016 (2011). Given that the court sustained an objection to the remark and the prosecutor then rephrased his argument, any potential prejudice was not so significant as to warrant reversal.

Cupples raises three issues in a statement of additional grounds. He first alleges that defense counsel “did not fight” for him. He also asserts that he was never offered a plea bargain and “No one knows what my character is.” These allegations do not provide sufficient information to allow for review. Although reference to the record and citation to authorities are not necessary or required, an appellate court will not consider an appellant’s statement of additional grounds if it does not inform the court of the nature and occurrence of alleged errors. RAP 10.10(c).

Affirmed.

Becker, J.

WE CONCUR:

Mans, J.

Appelwhite

## DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 75077-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Washington Appellate Project

Date: October 31, 2017

# WASHINGTON APPELLATE PROJECT

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**Superior Court Case Number:** 13-1-02478-7

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