Supreme Court No. 98572-3
(COA No. 79347-1-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

REGINALD MOORE,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Reginald Moore, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3(a)(2)(b) and RAP 13.4(b).

B. COURT OF APPEALS DECISION

Mr. Moore seeks review of the decision by the Court of Appeals dated April 20, 2020, attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Because an accused person in a criminal case has a right to present a complete defense, a defendant must be allowed to argue that the prosecution has failed to meet its burden of proof, including by commenting on the lack of evidence presented. No missing witness instruction is required for a party to call attention to the lack of evidence, including testimony. The trial court refused to allow Mr. Moore to argue that that prosecution had failed to corroborate its allegations by not offering testimony from people purportedly present during the incident, asking the jury to disregard the defense's argument that the prosecution had failed to corroborate its allegations by

not offering testimony from people who were purportedly present during this incident and prohibiting the defense from arguing about absent witnesses. 8RP 668, 687. The Court of Appeals decision that without a missing witness instruction, Mr. Moore could not argue about the absence of witnesses present during the incident is in contradiction with this Court's decision in *State v. Sundberg*, 185 Wn.2d 147, 370 P.3d 1 (2016). Should review be granted under RAP 13.4(b)?

2. The state and federal constitutions require that an accused person have the opportunity to cross-examine witnesses about all relevant matters, including matters that impact the credibility of that witness. This right extends to a complaining witness's drug use that may have impacted her ability to accurately perceive the events in question. The trial court refused to allow Mr. Moore to ask the complaining witness about how her drug use affected her on the day in question, but the prosecution's closing argument repeatedly insisted that her drug use was relevant to evaluating her credibility. Should this Court review the court's restrictions on Mr. Moore's cross-examination

of the key witness that undermined his right to present a defense?

D. STATEMENT OF THE CASE

Reginald Moore was charged with contacting and threatening his former girlfriend, Lucy Romero, in violation of a no contact order on June 28, 2018. Court of Appeals Opinion at 2.

Ms. Romero gave several conflicting accounts of the events in question. At trial, she testified that at about 6:30 in the morning on June 28, 2018, she drove her truck to a "crash house" to see a friend. 6RP 416, 428-29; 7RP 496. She saw a person she knew who happened to be passing by and asked him to watch her truck while she went into the house. 6RP 438. Her truck's ignition was broken, the engine started with a screwdriver, and the doors did not lock. 6RP 411-12, 439.

While Ms. Romero was in the house, someone told Ms. Romero that Mr. Moore was in her truck. 6RP 417, 437. Ms. Romero said she went outside when she heard her truck's engine start, and Mr. Moore said, "I'll be right back," then drove away. 6RP 418.

After Mr. Moore drove away, Ms. Romero called Angie Garcia, and asked her to help look for Mr. Moore. 6RP 418. Ms. Garcia received this call "early in the morning," possibly at 7 a.m. 7RP 549.

Ms. Romero testified that while in the car with Ms. Garcia, she spotted Mr. Moore in her truck at the "Olson-Myers encampment," so she got into the truck with Mr. Moore, on the passenger side. 6RP 419. Mr. Moore continued driving with Ms. Romero in the truck. *Id*. Ms. Romero claimed that while Mr. Moore drove the truck, he called her names, hit her with a piece of paper, and tried to choke her with one hand. 6RP 423, 425.

She said Mr. Moore stopped the truck, got out, and "walked off with some lady," while a number of other people were present. 6RP 444. Ms. Romero admitted she was jealous that Mr. Moore was now seeing other women and that she still loved him. 6RP 427.

Another version of events stems from a 911 call and follow up interview. While Mr. Moore was driving the truck, Ms. Garcia called 911 and said her friend's truck was stolen. 7RP 542. But while Ms. Garcia was trying to describe their location

to 911, Mr. Moore stopped the truck and returned it to Ms. Romero. 7RP 544. When the 911 operator asked for more information, Ms. Romero got on the phone and said Mr. Moore had left the scene after getting into another person's white Acura. 7RP 546. Ms. Romero then got into her truck and drove away. 7RP 537.

Several weeks after the 911 call, Ms. Garcia arranged an interview with Ms. Romero and a police detective. 7RP 487. Ms. Romero told the detective her truck was taken from the Olson-Myers encampment, and did not mention being at the "crash house". 7RP 495. She also said someone texted her about Mr. Moore taking her truck, but the detective did not check Ms. Romero's phone for any text messages or inquire into who sent that text. 7RP 495-96. Ms. Romero told the detective Ms. Garcia picked her up at the Olson-Myers encampment, not at the house as she testified or at a bakery as Ms. Garcia testified. 7RP 496.

Ms. Romero also told the detective that she first found Mr. Moore in her truck at 14th and Cloverdale, which is the same location where Mr. Moore returned the truck to Ms. Romero. 7RP 497.

The jury found Mr. Moore not guilty of harassment, but guilty of felony violation of a no contact order, domestic violence. CP 74-75. The jury also found the aggravating factor of an aggravated domestic violence offense. CP 78-79. The court imposed the statutory maximum of 60 months as a standard range sentence. CP190, 192. The Court of Appeals affirmed. The facts are further explained in Appellant's Opening Brief, in the relevant factual and argument sections, and are incorporated herein.

E. ARGUMENT

1. The court barred Mr. Moore from giving reasons for the jury to find the State had not met its burden of proof, despite this Court's contrary precedent and undermining his right to present a defense.

The court may not bar an accused person from presenting logical and reasonable inferences from the evidence in closing argument. *State v. Frost*, 160 Wn.2d 765, 772-73, 161 P.3d 361 (2007); U.S. Const. amend VI; Const. art. I, § 22. Defense counsel's closing argument is "a basic element of the adversary factfinding process in a criminal trial." *Herring v. New York*, 442

U.S. 853, 858, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975). Prohibiting defense counsel from making available arguments to the jury impairs the right to effective assistance of counsel. *Frost*, 160 Wn.2d at 772.

An accused person has the right to be free from criminal conviction unless the prosecution has proven all elements of the charged offense beyond a reasonable doubt. *Frost*, 160 Wn.2d at 773. The court infringes on the rights to due process and effective assistance of counsel when it limits the defense from challenging the evidence necessary for a conviction, thus lessening the prosecution's burden of proof. *Id.*

During closing argument, any party may argue reasonable inferences from the evidence. *State v. Sundberg*, 185 Wn.2d 147, 154-55, 370 P.3d 1 (2016). This includes commenting on their adversary's failure to produce testimony from witnesses that could corroborate testimony they presented. *Id.* (citing *State v. Blair*, 117 Wn.2d 479, 491, 816 P.2d 718 (1991)). The court does not need to give the jury a missing witness instruction in order for a party to argue jurors should consider the absence of

testimony from potential witnesses when weighing whether the prosecution met its burden of proof. *Id.*

a. The court restricted Mr. Moore's ability to argue his theory of the case based on available evidence and in direct response to the prosecution.

The court told the jury to disregard Mr. Moore's argument that the prosecution had failed to corroborate its allegations by not offering testimony from people who were purportedly present during this incident. 8RP 668. The court prohibited the defense from arguing about absent witnesses because it believed a missing witness instruction must be given in order for the defense to argue to the jury about the State's failure to call witnesses. 8RP 668, 687. This perception of the law was incorrect, and it infringed upon Mr. Moore's right to due process and ability to present his complete defense to the jury.

The defense's argument arose in response to the prosecution's closing argument, where it discussed why it had not presented testimony from other people who Ms. Romero claimed had witnessed parts of the incident. The prosecution contended that people present during the incident were homeless and "not in a position to call the police" because they

potentially took drugs or had a history of criminal convictions. 8RP 636. It faulted Mr. Moore for acting in front of vulnerable people, knowing these people would not tell the police. 8RP 635-36.

The prosecution also argued that the people who saw the incident were part of Ms. Romero's "community" of homeless people and she did not want to "involve" them in situations they are "not supposed to be involved in," by offering them as witnesses. 8RP 660. It contended "these people" who were present during the incident "may not want to come in contact with law enforcement," which is why Ms. Romero did not identify them in court or to the police. 8RP 661.

In response, the defense started its closing argument by pointing to the "lack of evidence, a lack of witnesses, a lack of anything objective corroborating Ms. Romero's and Ms. Garcia's accusations." 8RP 667. Defense counsel began enumerating the prosecution's lack of evidence, and said, "First, there are missing witnesses." 8RP 668. The prosecution objected, without stating the basis for the objection, and the court said, "Sustained . . . Jury will disregard." *Id*.

Defense counsel next said that if Mr. Moore acted as the prosecution claimed "and at least a dozen people saw him, where are they?" *Id*. The prosecutor said, "Again, objection, Your Honor, based on failing to establish the missing witness instruction." *Id*.

Defense counsel replied that she was "arguing the lack of evidence," but the court said, "I'll sustain. The jury will disregard." *Id*.

At the end of closing arguments, defense counsel complained the judge unfairly prohibited her from responding to the prosecution's argument about the absence of testimony from witnesses who could have corroborated the allegations. 8RP 686-87. The prosecution insisted that without a missing witness instruction, the defense is not allowed to argue the State should have produced testimony from other witnesses. 8RP 687. The court agreed with the prosecution and explained the defense was only allowed to make general arguments about the lack of evidence, not that the State should have brought other witnesses to testify, unless there was a missing witness instruction. *Id*.

By instructing the jury it must disregard Mr. Moore's argument that the State's failure to bring forward corroborating witnesses was a reason to doubt the allegations, the court unfairly prohibited Mr. Moore from presenting a complete defense.

b. The decision below conflicts with this Court's decision in Sundberg.

The Court of Appeals held that the trial court correctly sustained the prosecution's objection to Mr. Moore's argument, because Mr. Moore used the phrase "missing witness" and had not sought a missing witness instruction. Opinion at 4. This is inconsistent with the Supreme Court's opinion in *Sundberg*, which held that a court does not need to give the jury a missing witness instruction in order for a party to argue jurors should consider the absence of testimony from potential witnesses when weighing whether the prosecution met its burden of proof. 185 Wn.2d at 154-55.

In *Sundberg*, the defendant testified he borrowed overalls from Paul Wood and he was unaware they had drugs in the pocket. *Id.* at 151. In its rebuttal argument, the prosecution

argued "why isn't [Paul Wood] here testifying?" and encouraged the jurors to reject the defense of unwitting possession based on the lack of evidence corroborating Paul Wood's connection to the overalls. *Id*. at 151. The Court of Appeals ruled that without a missing witness instruction, it was improper for the prosecution to argue about the defense's failure to call a witness. *Id*. at 152.

This Court reversed, ruling that the prosecution did not improperly invoke the missing witness doctrine by arguing the jurors can consider the defense's failure to produce a witness relevant to its affirmative defense.

When a party bears the burden of proof, like the defendant did for his affirmative defense of unwitting possession, the other party "may call attention" to its adversary's "failure to offer corroborating evidence." *Id*. at 153. It is not error to attack the lack of evidence supporting a conviction. *Id.* When the court gives a missing witness instruction, it directs the jurors they may infer from a party's failure to produce a certain witness that this witness could have given testimony unfavorable to that party. 11 Wash. Prac. Pattern Jury Inst. Crim. WPIC 5.20 (4th ed.). But the missing

witness doctrine "plays no part" in constraining a party from complaining about the lack of evidence, including the lack of corroborating testimony. *Sundberg*, 185 Wn.2d at 156.

Under *Sundberg*, Mr. Moore did not need a missing witness instruction to argue that without testimony from the individuals allegedly present at the scene, the prosecution failed to meet its burden of proof.

This Court should grant review and reverse the Court of Appeals decision, because it conflicts with this Court's holding in *Sundberg* and denies Mr. Moore his right to a fair trial.

2. The court abridged Mr. Moore's right to cross examine the complaining witness, contrary to his rights guaranteed by the Confrontation Clause of the Sixth Amendment

The right to present a defense prevents courts from limiting the defendant's elicitation of relevant evidence about the incident. *State v. Jones*, 168 Wn.2d 713, 721, 230 P.3d 576 (2010). Evidence relevant to a defense theory may only be barred when it undermines the fairness of the trial. *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). The State bears the burden of showing that the evidence is "so prejudicial

as to disrupt the fact-finding process at trial." *Jones*, 168 Wn.2d at 720 (quoting *Darden,* 145 Wn.2d at 622). For evidence of high probative value, "no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. I, § 22." *Id*

Cross-examination is essential to test the accuracy and credibility of a witness while the jury observes the witness's demeanor while testifying under oath. *California v. Green*, 399 U.S. 149, 158, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970). Confronting the prosecution's witnesses about their biases or reasons to give inaccurate testimony is the core guarantee of the Confrontation Clause. *Davis v. Alaska*, 415 U.S. 308, 316-18, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). Limiting a defendant from cross-examining a prosecution witness can only be justified by a compelling state interest that overcomes the defendant's right to produce relevant evidence. *State v. Hudlow*, 99 Wn.2d 1, 16, 659 P.2d 514 (1983).

A witness's drug use is admissible if the witness was under the influence of drugs during the charged incident. *State v. Tigano*, 63 Wn. App. 336, 344, 818 P.2d 1369 (1991). Drug use

may affect a person's ability to perceive or testify accurately about the events in question. *State v. Brown*, 48 Wn. App. 654, 660, 739 P.2d 1199 (1987). When there is a reasonable inference that the witness was under the influence of drugs at the time of the events, or when testifying at trial, their drug use is admissible as impeachment evidence. *Tigano*, 63 Wn. App. at 344.

a. Mr. Moore was not permitted to question how the complaining witness's day of drug use impacted her ability to accurately.

Before trial, the prosecution noted the defense could question Ms. Romero about her drug use to the extent "it goes to what happened on that incident, on that day." 5RP 166. The defense agreed that only "whether or not she was intoxicated on this day is relevant" and it would not question her about drug use on other occasions. 5RP 167. The prosecution approved of this approach. *Id.* But when defense counsel asked Ms. Romero, "Were you using drugs that day?" the court sustained the prosecution's objection. 6RP 430.

Initially, the court said the question was "beyond the scope of direct," then ruled it was impermissible to ask Ms.

Romero about whether she used drugs the day of the incident unless the defense knew she actually used drugs that day. 6RP 431-36.

After an extended discussion for which the jury was excused from the courtroom, the prosecution contended that merely asking this question was so prejudicial that it planted the seed about Ms. Romero's drug use, and Ms. Romero should answer the question. 6RP 434. But the State objected to the defense following up "with any further questions" about her use of drugs. 6RP 434. The defense agreed it would not ask any more questions about drug use based on the court's ruling. *Id*. The court instructed counsel, "I will allow her to answer the question, but that's it. You don't get to explore that issue anymore." 6RP 436.

Before bringing the jury back into the courtroom, the judge told Ms. Romero she would have to answer the question about using drugs. 6RP 437. But once the jury returned, the court ambiguously said to Ms. Romero "you do need to answer the question that was asked of you." *Id*. The court did not repeat the question so the jury would understand the answer. *Id*. Ms.

Romero simply said, "Yes." *Id.* Based on the court's ruling, the defense asked no further questions to Mr. Romero about her drug use or its effect on her perceptions.

By interrupting the defense's question to Ms. Romero about her use of drugs at the time of the incident, the court prohibited Mr. Moore from effectively examining Ms. Romero's ability to perceive and recall the incident, despite his right to explore whether drug use affected her perceptions at the time of the charge and her recollection of it later. This error was not cured by eventually allowing Ms. Romero to answer a single question about her drug use without even repeating the question, making it nearly impossible for the jury to comprehend what Ms. Romero meant when she said "yes" to a question that was posed many minutes earlier.

Puzzlingly, despite insisting Ms. Romero's drug use was woefully prejudicial, the prosecution repeated five times in its closing argument that Ms. Romero told the jury she used drugs that day, and contended this drug use showed she was a reluctant and vulnerable witness who did not give the police information about who she was with. 8RP 636, 639, 659, 661.

Yet the defense was never able to explore whether her drug use affected her actions or perceptions due to the court's ruling, even though it was relevant to the incident.

b. A trial court abuses its discretion when it does not give a party the opportunity to explore whether a witness's drug use affected her testimony.

The Court of Appeals held that the trial court did not abuse its discretion because Mr. Moore did not have evidence that Ms. Romero had used drugs that day, citing *State v. Thomas*, 150 Wn.2d 821, 863, 83 P.3d 970 (2004). Opinion at 5.

But *Thomas* is far different. In *Thomas*, this Court ruled a witness's regular drug use at the time of events was correctly excluded. 150 Wn.2d. at 863. But Mr. Thomas did not seek to introduce evidence of the witness's drug use at trial. *Id.*

Here, Mr. Moore and the prosecution agreed pretrial that Mr. Moore would be allowed to question Ms. Romero's day of drug use. Mr. Moore only sought to introduce evidence of drug use at the time of the incident, not general evidence that Ms. Romero used drugs. Ms. Romero's testimony about her drug use on the day of the event is relevant. Unlike the defendant in *Thomas*, Mr. Moore was not given an opportunity to obtain more

evidence about the witness's drug use, and was not allowed to pursue the topic even after Ms. Romero confirmed that she had, in fact, used drugs on the day of the events. After Ms. Romero testified she used drugs that day, Mr. Moore had the right to ask follow up questions about how that drug use impacted her ability as a witness. *See Tigano*, 63 Wn. App. at 344.

The importance of this rule is illustrated by the case at hand: the prosecution argued day-of drug use made Ms. Romero especially vulnerable, yet Mr. Moore was not allowed to examine its impact on the accuracy of Ms. Romero's testimony.

Because cross-examination is fundamental to Mr. Moore's right to a jury trial, and because it is reasonable to assume that Ms. Romero's day of drug use impacted her ability to perceive events, it was an abuse of discretion for the trial court to limit Mr. Moore's questioning and denied Mr. Moore an ability to pursue a key aspect of his defense. This Court should therefore grant review and reverse the Court of Appeals.

F. CONCLUSION

Petitioner Reginald Moore respectfully requests that review be granted pursuant to RAP 13.4(b).

DATED this 19th day of May 2020.

Respectfully submitted,

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APPENDIX

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

STATE OF WASHINGTON, Respondent, v. REGINALD LAMONT MOORE, JR. Appellant.	)	No. 79347-1-I UNPUBLISHED OPINION

VERELLEN, J. — Reginald Moore appeals his conviction of domestic violence felony violation of a court order. He claims the trial court impaired his ability to present his defense theory to the jury, interfered with his right to cross-examine a key witness, and impermissibly commented on the evidence. We disagree and affirm.

FACTS

Moore and L.R. are former romantic partners. As of June 2018, Moore had twice violated a court order that prohibited him from coming within 500 feet of L.R. and from having any contact with her. He again contacted and threatened L.R. on June 28, 2018.

The State charged Moore by amended information with one count of felony harassment and one count of felony violation of a court order. The State also alleged Moore committed these offenses against a family or household member and as part of an ongoing pattern of domestic violence.

Only three witnesses testified at trial: L.R., L.R.'s acquaintance Anjelica Garcia, and Seattle Police Detective Kailey McEvilly. Moore neither testified nor presented any defense witnesses. The jury acquitted Moore of the harassment charge but convicted him of the felony violation of a no-contact order charge with both aggravators. Moore appeals.

DISCUSSION

Moore asserts four claims on appeal. We address them in the order presented in his briefing.

I. Presentation of Defense Theory

Moore first contends the trial court denied his right to present a complete defense when, during closing argument, it instructed the jury to disregard his statement about the State's "missing witnesses."[1] He argues the court's instruction impaired his theory that the State failed to bring forward corroborating witnesses and implied that the State was not obligated to investigate potential witnesses. Moore's argument is not persuasive because it is not supported by the record.

[1] Report of Proceedings (RP) (Dec. 3, 2018) at 668 ("First, there were missing witnesses.")

Both the federal and our state constitution guarantee criminal defendants a right to present a defense.[2] This right, however, does not extend to irrelevant or inadmissible evidence.[3] We review a trial court's evidentiary rulings for abuse of discretion.[4] "A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons."[5]

At closing, Moore argued there were "seven to 10" possible eyewitnesses to this incident but that "[t]hey're absent" from the trial.[6] He also argued, "There's missing evidence,"[7] and

> [t]he issue for you is whether this happened at all. All you have is two contradictory witnesses and a complete lack of follow-up investigation. You have no objective corroborating evidence. You have witnesses who are vastly inconsistent regarding the details.
>
> . . . .
>
> Does the testimony you've heard leave you satisfied that you know the truth about what happened without a doubt? Each bit of lacking evidence that would have corroborated this story, each bit, every inconsistency creates a doubt. And you only need one to be obligated to find Reggie Moore not guilty.
>
> . . . .

[2] U.S. CONST. amends. V, VI, XIV; WASH. CONST. art I, §§ 3, 22; Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 298 (1973).

[3] State v. Blair, 3 Wn. App. 2d 343, 349, 415 P.3d 1232 (2018).

[4] State v. McDonald, 138 Wn.2d 680, 693, 981 P.2d 443 (1999).

[5] State v. Lord, 161 Wn.2d 276, 283-84, 165 P.3d 1251 (2007).

[6] RP (Dec. 3, 2018) at 669.

[7] Id. at 670.

> Reggie Moore was arrested . . . without anyone bothering to try to speak to him first . . . [or] asking where he actually was between 6:00 and 10:00 a.m. on June 28th. Without any objective evidence of guilt.[8]

Based on this record, Moore argued the lack of follow-up investigation and the absence of corroborating evidence. We conclude the court's ruling did not prevent Moore from arguing his defense theory to the jury.

We also conclude the trial court correctly sustained the State's objection to Moore's use of the term "missing witnesses." When a party fails to call a witness that it would naturally call if the witness's testimony would be favorable, the missing witness doctrine allows the jury to infer that the uncalled witness's testimony would have been unfavorable.[9] However, Moore never sought a missing witness instruction and, therefore, failed to establish a basis for such an inference.

II. Cross Examination

Next, Moore contends the trial court violated his right to cross-examine L.R. when it sustained an objection to a question about her "using drugs" on the day of the incident.[10] He argues the court prohibited him from pursuing L.R.'s ability to perceive and recall the incident. Because he failed to lay an appropriate foundation for questioning L.R. on this topic, we disagree.

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[8] Id. at 676, 677, 679 (emphasis added).

[9] State v. Blair, 117 Wn.2d 479, 485-86, 816 P.2d 718 (1991) (quoting State v. Davis, 73 Wn.2d 271, 276, 438 P.2d 185 (1968)).

[10] RP (Nov. 28, 2018) at 430.

Criminal defendants have the right to cross-examine witnesses guaranteed by both the federal and state constitutions.[11] However, this right is not absolute, as it is well settled that "evidence of drug use is admissible to impeach the credibility of a witness if there is a showing that the witness was using or was influenced by the drugs at the time of the occurrence which is the subject of the testimony."[12] Because the scope of such cross-examination is left to the sound discretion of the trial court, we review for abuse of that discretion.[13]

Here, outside the presence of the jury, Moore acknowledged that, despite having an opportunity to interview L.R. about using drugs, he did not have any evidence that she had used drugs on the date of the incident. Nor was there any evidence that L.R. was under the influence of drugs while testifying at trial. The court properly sustained the State's objection to Moore's drug use inquiry.[14] There was no abuse of discretion here.

[11] U.S. CONST. amend. VI; WASH. CONST. art. I, § 22; State v. Smith, 148 Wn.2d 122, 131, 59 P.3d 74 (2002).

[12] State v. Russell, 125 Wn.2d 24, 83, 882 P.2d 747 (1994).

[13] Id. at 92.

[14] See State v. Thomas, 150 Wn.2d 821, 863, 83 P.3d 970 (2004) (no abuse of discretion when trial court precluded questions of defendant who had "'[n]othing concrete' in the way of evidence showing [the witness] was under the influence of drugs" on the date at issue). Here, however, because the issue was already before the jury, the court allowed L.R. to answer whether she had used drugs on June 28 but forbade Moore from exploring that issue any further.

III. Comment on the Evidence

Moore also contends the trial court impermissibly commented on the evidence on three occasions. Again, we disagree.

"Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law."[15] This provision "forbids only those words or actions which have the effect of conveying to the jury a personal opinion of the trial judge regarding the credibility, weight, or sufficiency of some evidence introduced at the trial."[16] A judge's statements or actions constitute comments on the evidence if the jury can reasonably infer the court's attitude toward the merits of the case.[17] We review the facts and circumstances of the case to determine whether the trial court's actions or words amount to a comment on the evidence.[18]

First, Moore argues that "the court conveyed its opinion on the ease with which the jury should resolve the allegations"[19] when it stated:

> Once the case has been presented, then it will be sent to the jury to deliberate. And the amount of time that the deliberation will take will be entirely up to the jury. I cannot give you any estimate as to how long that could take. It could take a matter of hours; it could take a couple of days. I think it's unlikely that it will take that long. But again, that's completely within your control.[20]

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[15] WASH. CONST. art. IV, § 16.

[16] State v. Jacobsen, 78 Wn.2d 491, 495, 477 P.2d 1 (1970).

[17] State v. Elmore, 139 Wn.2d 250, 276, 985 P.2d 289 (1999).

[18] Jacobsen, 78 Wn.2d at 495.

[19] Appellant's Br. at 23.

[20] RP (Nov. 27, 2018) at 180.

At that point, jury selection had not yet started, and the court was addressing all of the potential jurors prior to inquiring about their hardships to serve. Though the court noted some possible lengths of deliberations, it expressly said such length was within the jury's control. Taken in context, the court's statement did not convey any personal opinion about the strength of the evidence on either side or about the merits of the case.

Next, Moore claims the court conveyed its opinion about the simplicity of the claims when, after the jury's guilty verdict, it prepared the jury to hear evidence pertaining to the aggravator and stated,

> Because there—because [you did] render a guilty verdict as to count two, there are some additional issues that the law is going to require you to address. The State has alleged an aggravating circumstance.
>
> Because it is—it will be relatively—the amount of time that this next phase will not be long as the first part took, I can assure you of that. But because we are now in the lunch hour, and I understand that one of you has a commitment at 1:00, my—what I'd like to do is have you go back to the jury room, figure out what time would be appropriate for you to come back this afternoon, and then, at that point, I will instruct you on the aggravating circumstance and how to proceed, and then give that to you for your deliberations today.
>
> I think we should be able to resolve this issue by 4:00 or 4:30 at the latest today, okay?[21]

The court and parties then selected a time, based on the resolution of a juror's scheduling conflict, to reconvene trial that afternoon. The court's statement to

[21] RP (Dec. 4, 2018) at 717.

the jury, in context, addresses when they would receive the issue for deliberation, not when they would decide the issue. The statement was not a comment on the evidence.

Finally, Moore contends the court commented on the evidence during the following portion of closing arguments:

> [PROSECUTOR]: Angie did testify—[L.R.] did testify that the defendant wanted her to tell Angie to stop her communication with 911.
>
> [DEFENSE COUNSEL]: Objection, facts not in evidence.
>
> [PROSECUTOR]: And Your Honor, I believe [L.R.] did, in fact, testify to that.
>
> THE COURT: I do recall that, so I'm going to overrule.[22]

Although Moore takes issue with it, the emphasized remark did not comment on the evidence. Courts have the right to give reasons for their rulings on objections, and such reasons will not be treated as comments on the evidence so long as they do not reveal the court's attitude toward the evidence.[23] Here, the court merely conveyed its memory of L.R.'s testimony. The statement neither expressed nor implied an opinion about L.R.'s credibility or her testimony.

[22] RP (Dec. 3, 2018) at 640 (emphasis added).

[23] See State v. Cerny, 78 Wn.2d 845, 855-56, 480 P.2d 199 (1971); State v. Pastrana, 94 Wn. App. 463, 480, 972 P.2d 557 (1999).

IV. Cumulative Error

Given our conclusion that Moore has not established error, his claim of cumulative error also fails.

We affirm.

WE CONCUR:

DECLARATION OF FILING AND MAILING OR DELIVERY

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☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant Date: May 19, 2020
Washington Appellate Project

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