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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

No. 42792-3-II

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

STATE OF WASHINGTON,
Respondent,

v.

BRANDON L. DUGGER,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE DAVID L. EDWARDS, JUDGE

BRIEF OF RESPONDENT

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BY: _____
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Procedural History

The defendant was charged by Information on November 30, 2012 with one count of Rape in the Second Degree and one count of Rape of a Child in the Third Degree. (CP 1-3). An Amended Information was filed on March 25, 2011. This added the allegation, pursuant to RCW 9.94A.837, that the victim of count one was under fifteen years of age. (CP 7-8). The defendant was found guilty as charged on September 21, 2011. (CP 25-27). The defendant was given a standard range sentence on November 7, 2011. (CP 39-49).

Factual Background

The State agrees with the Statement of Facts as presented in the Appellant's Brief.

RESPONSE TO ASSIGNMENTS OF ERROR

The prosecutor's comments in closing argument were not improper.

While presenting a criminal case, a prosecutor must seek a verdict free of prejudice and based upon reason, fairness, and the evidence. *State v. Torres*, 16 Wn. App. 254, 263, 554 P.2d 1069 (1976) "Where improper argument is charged, the defense bears the burden of establishing the impropriety of the prosecuting attorney's comments as well as their prejudicial effect." *Id.* "Allegedly improper argument should be reviewed

in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given." *Id.*

The United States Supreme Court addressed "prosecutorial misconduct" in *Namet v. United States*, 373 U.S. 179 (1963). In *Namet*, the Court recognized that some lower courts were of the opinion that error may be based upon a concept of prosecutorial misconduct. Such a claim was said to arise when the government made a conscious and flagrant attempt to build its case out of inferences arising from the use of testimonial privilege. In other words, such a claim did not arise out of mere negligence or out of "simple" trial error.

The issue was first addressed by the Washington Supreme Court in *State v. Nelson,* 72 Wn.2d at 282. In *Nelson*, the prosecutor called a witness whom the prosecutor knew would claim his Fifth Amendment privilege against self-incrimination solely as a means of getting the government's theory of the case before the jury via the questions asked of the witness. The court stated that "the prosecutor called Patrick to the stand, and in the presence of the jury, asked 28 questions of Patrick outlining substantially in its entirety the State's theory of the case." *Id.* at 282. The "conduct of the prosecutor in placing Patrick on the stand, knowing that Patrick intended to claim his privilege against self-incrimination to questions relating to the alleged crime, and seeking to get the details of Patrick's purported confession before the jury by way of impermissible inferences drawn from the witness' refusal to answer the

questions propounded, constituted a denial of Nelson's right to confrontation under the Sixth Amendment." *Id.*

In *State v. Belgarde*, 110 Wn.2d 504, 755 P.2d 174 (1988), the defendant testified that he had some affiliation with the American Indian Movement (AIM). The prosecutor made several references to AIM in his closing argument. The court characterized the prosecutor's closing argument as follows:

> The remarks were flagrant, highly prejudicial and introduced "facts" not in evidence.
>
> A prosecutor cannot be allowed to tell a jury in a murder case that the defendant is "strong in" a group which the prosecutor describes as "a deadly group of madmen," and "butchers that kill indiscriminately." The prosecutor likened the American Indian Movement members to "Kadafi" and "Sean Finn" of the IRA. This court will not allow such *testimony*, in the guise of argument, whether or not defense counsel objected or sought a curative instruction. An objection and an instruction could not have erased the fear and revulsion jurors would have felt if they had believed the prosecutor's description of the Indians involved in AIM. This court cannot assume jurors did not believe the prosecutor's description. We have repeatedly explained that the question to be asked is whether there was a "substantial likelihood" the prosecutor's comments affected the verdict. *State v. Reed*, 102 Wn.2d 140, 147-48, 684 P.2d 699 (1984); *State v. Charlton, supra* at 664. There is a substantial likelihood this egregious departure from the role of a prosecutor did affect the verdict. "If misconduct is so flagrant that no instruction can cure it, there is, in effect, a mistrial and a new trial is the only and the mandatory remedy." 110 Wn.2d at 508-09.

To determine whether the remarks were prejudicial the court must analyze them in context, taking into consideration the total argument, the issues in the case, the relevant evidence, and the jury instructions. *State v. Brown*, 132 Wn.2d

529, 561, 940 P.2d 546 (1997). If the court is satisfied that the outcome of the trial would not have been different had the alleged error not occurred, given all the evidence, then the error is harmless. *Rogers*, 70 Wn. App. at 631.

A prosecutor is afforded wide latitude in drawing and expressing reasonable inferences from the evidence. *State v. Hoffman*, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991).

In this case, trial and appellate counsel for the defendant want the court to infer ill-intention and prejudice due to a half-finished statement. The trial court was in the best position to judge the context and effect of the statement in question. After counsel's objection, the court stated "Well, I didn't hear it all because you stood up and screamed..." RP at 313. The court then reviewed the transcript and found that "There is nothing about that statement that constitutes misconduct. I don't know where it was going to go if there had not been an objection...maybe it would have been objectionable, maybe not. I don't know. I don't care." RP at 314.

Trial counsel also admitted that there was not enough of a statement to establish that is was objectionable or prejudicial. Defense counsel told the court, "...just so the Court understands. I didn't know where that was going and I wanted to stop it before it got like you said and..." RP at 315. In the end, the objection by defense counsel stopped the prosecutor prior to anything objectionable being said. Any speculation about where the statement was going is irrelevant because it was never heard by the jury.

Further, if what the jury heard is found to be improper, it was not prejudicial in this case. The evidence of the defendant's guilt in this case is overwhelming. In addition to the statement of the victim and the corroborating physical evidence, the State presented the defendant's own statement that he had raped S.M.H. The defendant's written statement contains the following:

> I pulled the knife out with my right hand and told [S.M.H.] to be quiet...I had a phone charger chord [sic] in my left had...I put the knife away and told her not to freak out and be quiet. I tied her hands in front of her using the chord [sic].
>
> She was scared, I would have been. I can't believe what I did to that little girl. I can't believe it I ruined her life.
>
> Obviously I forced her to have sex with me. I didn't beat her up or hit her or anything she was just scared.
>
> I didn't tell Detective Cox the whole story [in initial statement] because I was scared.

Exhibit 7. The defendant changed his story at trial and claimed that the sexual acts he committed against S.M.H. were consensual. RP at 270-272. His only explanation for his confession was that the detective "[p]retty much kept nagging me..." RP at 272.

The defendant cannot meet his burden of showing that the prosecutor's statement was improper, nor that it was prejudicial in this case. The trial court's decision to overrule the objection should be affirmed.

The jury instruction were sufficient in this case.

Lastly, the defendant argues that the trial court violated his state and federal due process rights in giving the reasonable doubt instruction because its language lacked one sentence from WPIC 4.01. This contention is incorrect. The

instruction given by the trial court omitted the sentence "The defendant has no burden of proving that a reasonable doubt exists." CP 17-24, Instruction No. 3. However, the court's instruction correctly stated that "The State...has the burden of proving each element of the crimes beyond a reasonable doubt" and "A defendant is presumed innocent." CP 17-24, Instruction Nos. 3 and 4.

Further, the trial court's "to convict" instructions informed the jury that it could only return a verdict of guilty if it found that each element of the crime charged has been proved beyond a reasonable doubt. CP 17-24, Instruction Nos. 6 and 10. These instructions also informed the jury that it must find the defendant not guilty if it had a reasonable doubt as to any one element. CP 17-24, Instruction Nos. 6 and 10. The trial court's instructions did not place an affirmative obligation on the defendant to prove the existence of a reasonable doubt. There is nothing in the record to indicate that either party argued contrary to the instructions or attempted to shift a burden of proof onto the defendant.

A challenged jury instruction is reviewed de novo, in the context of the instructions as a whole. *State v. Castillo*, 150 Wn.App. 466, 469, 208 P.3d 1201 (2009). Instructions must convey to the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). Instructions must also properly inform the jury about the applicable law, not mislead the jury, and permit each party to argue its theory of the case. *Bennett*, 161 Wn.2d at 307. It is reversible error to instruct the jury in a manner relieving the State of its burden to

prove every element of a crime beyond a reasonable doubt. *Bennett*, 161 Wn.2d at 307.

An erroneous jury instruction is "generally subject to a constitutional harmless error analysis." *State v. Lundy*, 162 Wn.App. 865, 871, 256 P.3d 466 (2011). The Court may hold the error harmless if it is satisfied " 'beyond a reasonable doubt that the jury verdict would have been the same absent the error.' " *Lundy*, 162 Wn.App. at 872 (*quoting State v. Bashaw*, 169 Wn .2d 133, 147, 234 P.3d 195 (2010)). Even misleading instructions do not require reversal unless the complaining party can show prejudice. *Lundy*, 162 Wn.App. 872.

The defendant argues that the reasonable doubt jury instruction 3's omission of one sentence from the language of WPIC 4.01 was reversible error under our Supreme Court's *Bennett* decision. *Bennett* "instructed" trial courts "to use the WPIC 4.01 instruction ... until a better instruction is approved." 161 Wn.2d at 318. The *Bennett* court, however, did not decide whether the failure to give the entire WPIC 4.01 was automatically reversible or instead subject to harmless error analysis.

Division One in *Castillo* concluded that such failure was grounds for automatic reversal. *State v. Castillo,* 150 Wn.App. 466, 472. Two years after Division One filed *Castillo,* Division Two reached the opposite conclusion in *Lundy*, disagreeing with *Castillo* and holding that failure to give WPIC 4.01 verbatim was subject to harmless error analysis and that the deviating reasonable doubt instruction in *Lundy* was harmless error. *Lundy*, 162 Wn.App. at 872–73.

The reasonable doubt jury instruction here differed from WPIC 4.01 only in its omission of the following sentence: "The defendant has no burden of proving that a reasonable doubt exists." The defendant contends that this omission was not harmless error. The defendant points out that the reasonable doubt instruction in *Lundy*, which was held to be harmless error, deviated from WPIC 4.01 only in that it reversed the order of the first two paragraphs of WPIC 4.01 and modified the first three sentences of the paragraph on the State's burden of proof.

In *Castillo*, the omission of the "defendant has no burden" sentence was significant because the State's cross-examination and closing argument "suggested Castillo needed to explain why [the victim] might be lying." 150 Wn.App. at 473. Here, in contrast, the State never made any such suggestion. Because the State never attempted to shift its burden of proof here, as it did in Castillo, the reasonable doubt instruction did not prejudice the defendant like it prejudiced Castillo.

Furthermore, the reasonable doubt instruction here did not contain any such potentially misleading or confusing language or alterations. It deviated from WPIC 4.01 only in a single, limited respect, which as explained above, was not harmful because the State never attempted to shift the burden of proof to the defendant. More importantly, instruction 3 included the following language establishing that the State clearly bore the burden of proof beyond a reasonable doubt: "The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt." CP at 17-24.

The defendant fails to demonstrate that the omission of this sentence from the instruction caused him prejudice, especially in light of the fact that the State never attempted to shift the burden of proof to him, the jury was aware that the State bore the burden, and the evidence supporting the convictions was overwhelming. The State asks that the Court find that omission of this sentence from WPIC 4.01 in instruction 3 was harmless error.

Community custody conditions.

Prohibition on contact with minors.

A challenge to a sentencing prohibition is reviewed for an abuse of discretion. *State v. Riley*, 121 Wn.2d 22, 36-37, 846 P.2d 1365 (1993). A trial court abuses its discretion when its decision is "manifestly unreasonable." *State v. Riley*, 121 Wn.2d at 37. Abuse of discretion occurs when a decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *State v. Ancira*, 107 Wash.App. 650, 653, 27 P.3d 1246 (2001).

In the case at bar, the defendant provided drugs to his 14-year-old victim and had forcible oral sex and anal intercourse with her. As part of his conditions of community custody the defendant is prohibited from having contact with juveniles under age eighteen.

This is similar to the restrictions placed upon the defendant in *State v. Riles.* In *Riles*, the defendant was convicted of Rape of a Child in the First Degree, and he was prohibited from having any "contact w/victim or any minor-age children w/o approval of CCO and mental health treatment counselor." *State*

v. Riles, 135 Wash.2d 326, 333, 957 P.2d 655, 658 (1998). The Court concluded that the conditions imposed by the trial court limiting Riles's access to children were appropriate and within its authority. *State v. Riles*, 135 Wash.2d at 349.

Limitations on fundamental rights must be "reasonably necessary to accomplish the essential needs of the state and the public order." *State v. Riles*, 135 Wash.2d 326, 349–50, 957 P.2d 655 (1998) (concluding that a prohibition on a convicted sex offender's contact with minors was not a justified limitation on freedom of association rights where the victim was not a minor) (*citing Riley*, 121 Wash.2d at 37–38, 846 P.2d 1365), abrogated on other grounds by *State v. Valencia*, 169 Wash.2d 782, 239 P.3d 1059 (2010). Sentencing courts can restrict fundamental parenting rights by conditioning a criminal sentence if the condition is reasonably necessary to further the State's compelling interest in preventing harm and protecting children. *Berg*, 147 Wash.App. at 942, 198 P.3d 529; Ancira, 107 Wash.App. at 654, 27 P.3d 1246; *see State v. Letourneau*, 100 Wash.App. 424, 438, 997 P.2d 436 (2000); *see also In re Dependency of C.B.*, 79 Wash.App. 686, 690, 904 P.2d 1171 (1995) (stating prevention of harm to children is a compelling State interest), review denied, 128 Wash.2d 1023, 913 P.2d 816 (1996).

In the case at bar, the defendant was convicted of raping a 14-year-old girl, so the trial court's prohibition on contact with minors is crime-related and appropriate. The trial court did not abuse its discretion.

Prohibition on having a cell phone with capacity to store photographs.

This prohibition was contained within the unsigned appendix F attached to the Department of Correction's pre-sentence investigation. The Judgment and Sentence does state the defendant shall "comply with any other recommendation made by the Dept. of Corrections in the presentence report/investigation." CP 39-49. However, this condition is not contained within the pre-sentence investigation and the State does not believe it was adopted by the Court.

If the Court finds differently, then the State believes that the defendant's case falls under the analysis of *State v. O'Cain*, 144 Wash.App. 772, 184 P.3d 1262 (2008).

The State is not aware of any facts or further case law that would distinguish the case at bar from *O'Cain*. There is no evidence that the defendant's crime was facilitated by or in any way utilized a cell phone camera. So, the prohibition relating to a cell phone camera is not crime-related; therefore, the State concedes that the prohibition should be stricken

CONCLUSION.

For the reasons stated above, the State asks this Court to affirm the decisions of the trial court and the verdict of the jury.

DATED this 4 day of September, 2012.

Respectfully Submitted,

By: _____
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STATE OF WASHINGTON, Respondent, v. BRANDON L. DUGGER, Appellant.	No.: 42792-3-II **DECLARATION OF MAILING**

DECLARATION

I, Barbara Chapman hereby declare as follows:

On the 4th day of September, 2012, I mailed a copy of the Brief of Respondent to Carol A. Elewski, Attorney at Law, P. O. Box 4459, Tumwater, WA 98501 by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 4th day of September, 2012, at Montesano, Washington.

Barbara Chapman

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