73702-3

NO. 73702-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

---

STATE OF WASHINGTON,

Respondent,

v.

ROBERT CHARLES JACKSON, II,

Appellant.



---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JOHN H. CHUN

---

**BRIEF OF RESPONDENT**

---

DANIEL T. SATTERBERG
King County Prosecuting Attorney

KRISTIN A. RELYEA
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 477-9497

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Table of Cases

Constitutional Provisions

Washington State:



Statutes

Washington State:



Rules and Regulations

Washington State:

Other Authorities

## A. ISSUES

1. Whether Jackson has failed to show that his right to a unanimous jury verdict was violated where the State presented sufficient evidence to convict him of the two alternative means of attempted commercial sexual abuse of a minor that was submitted to a jury.

2. Whether Jackson has failed to demonstrate the court erred by providing the jury with an expert witness instruction.

3. Whether Jackson has failed to show that the prosecutor committed prejudicial misconduct in closing argument.

4. Whether this Court should impose costs against Jackson if the State is the substantially prevailing party on appeal.

## B. STATEMENT OF THE CASE

### 1. PROCEDURAL FACTS

The State charged Robert Charles Jackson, II, with attempted commercial sexual abuse of a minor. CP 7-8. The court instructed the jury on the charged offense, and the lesser-included offense of attempted patronizing a prostitute. CP 48-59. The jury convicted Jackson of attempted commercial sexual abuse of a

minor. CP 32; 4RP 462.[1] The court imposed the low end of the standard sentencing range. CP 87-98; 6RP 21-22.

## 2. SUBSTANTIVE FACTS

On July 10, 2014, King County Sheriff's Vice Detective Michael Garske posted an ad on Craigslist, posing as a juvenile prostitute:

> **Young Hard Body looking for NSA – w4m – 20 (Newcastle)**[2]
>
> Im[3] hella horny. What more can I say, please be for real and come save me. I don't like to do the pic thing because of the "pervs" who just want to play with themselves. I rather be in the room when that happens . . . that it makes it ok. I would help. horny girl needs love.

3RP 217, 245, 247; Ex. 7. Garske posted the ad in the "Personals" section, under "Casual Encounters," a category where prostitution is "prevalent." 3RP 248, 360.

Shortly thereafter, Jackson responded to Garske's post, inquiring "Do you still need that lovin'? I just got off work . . . and

---

[1] The Verbatim Report of Proceedings consists of six volumes designated as follows: 1RP (5/4/15), 2RP (5/5/15), 3RP (5/6/15), 4RP (5/7/15), 5RP (6/26/15), and 6RP (7/5/15).

[2] Garske testified that "NSA" meant "no strings attached," and "w4m" meant "women seeking men." 3RP 233, 248-49. Garske listed "20" as the alleged age because "you have to be 18 years (old) to post." 3RP 249.

[3] All spelling and grammatical errors appear in the original ad, and later email correspondence. Garske purposely misspelled and abbreviated words to maintain his cover as a juvenile. 3RP 256.

could use some loving myself." 3RP 253; Ex. 8. Garske replied, "[B]aby come see me," and Jackson asked where they should meet. 3RP 253; Ex. 8. The following exchange ensued:

> [GARSKE]: im in renton right now
>
> baby I don't like to send pics of myself to anyone last time I did that some dude posted my pick as a anal queen. I have to be careful with that my mom found that ad. **I am almost 16 but I look 25**. I am smoking hot and look like that girl from twilight. I am nice and tan though.
>
> I need you to come see me or come get me so we can meet. I need at least 100. when do you want to meet.
>
> [JACKSON]: I can come to you. Where are you? Do you have a place we can be?
>
> [GARSKE]: yes come see me . . .

3RP 253-54 (emphasis added); Ex. 8.

After arranging to meet in Renton, Garske mistakenly "cut and paste" the same multi-paragraph reply that he had sent Jackson earlier, suggesting, among other things, that he was "almost 16," and needed "at least 100." 3RP 254; Ex. 8. At the time, Garske was corresponding with 80-120 other people.[4]

---

[4] Garske likened posting this type of ad on Craigslist to a "winning slot machine." 3RP 240. In his experience, such ads usually provoked 40-50 replies in the first five minutes, and resulted in email correspondence with 200-300 people per day. Id.

Jackson replied, "Umm . . . your last message is exactly like an earlier one. What's going on? Why did you tell me your age? Is this a sting?" 3RP 255; Ex. 8. Garske responded, "hell no . . . I am not a cop baby." 3RP 255; Ex. 8. Garske and Jackson continued emailing, with Jackson ultimately agreeing to bring condoms and call Garske's number when he arrived. 3RP 256-58; Ex. 8.

Around 8:45 p.m., Jackson arrived at the arranged location and called Garske's number. 3RP 305. An undercover female police officer answered, and told Jackson to drive around to the back of the hotel so that she could confirm that Jackson was not a cop. 3RP 306. Jackson complied, parked his car, and headed to the hotel room as directed by the officer. 3RP 307-08. Jackson knocked on the hotel room door, and was arrested moments later. 3RP 318-19, 357. Upon hearing that he was under arrest, Jackson quickly turned around, looked startled, and said, "Oh, shit." 3RP 319. In the process, Jackson inadvertently hit the side of the wall, and the lubricant that he was carrying opened and spilled all over his pants. 3RP 319, 322.

In a search incident to arrest, police located the lubricant, $100 in cash, a cell phone, a small piece of paper with the undercover officer's phone number on it, and a wallet with

additional cash. 3RP 320. A later search of Jackson's phone revealed that it had been used to call the undercover officer's number. 2RP 198-99.

At trial, Jackson admitted to attempting to patronize a prostitute, but denied knowing that she was a juvenile. 3RP 332-33. Jackson testified that initially he did not see the prostitute's age because he was "skimming" the paragraph to find the prostitute's price and place. 3RP 338-39. The second time that he received the email specifying the prostitute's age as "almost 16," Jackson misread the number and thought it said "46" because of the way the number "1" appeared in the ad. 3RP 340-41.

On cross-examination, Jackson admitted that he correctly identified the number "1" in every other instance – for example, by bringing $100, writing down and calling the alleged prostitute's number, which twice contained the number "1," and responding to the alleged prostitute's message seeking to meet in "10" or "15" minutes. 3RP 371-73. Additionally, Jackson admitted to twice seeing the word "Young" in the posting, when he first saw the ad and then clicked on it, to seeing the reference to the alleged prostitute's "mom," and to knowing that the "girl from Twilight" is a teenager. 3RP 361-66.

During the jury instruction conference, Jackson objected to the State's proposed expert witness instruction, which provided:

> A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts.
>
> You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.[5]

4RP 412-13; Supp CP __ (sub 21). Jackson argued that the instruction was unnecessary because the State had not offered any expert testimony. 4RP 412-13. The State disagreed, citing Garske's testimony about his training and experience, and both counsels' numerous questions about the "underworld" of juvenile prostitution. 4RP 413.

Although Jackson admitted that he had elicited facts from Garske about his experience, Jackson insisted that he did not understand that Garske "was being offered as an expert," and that he did not have proper notice of the State's intent. 4RP 414. The State responded that Garske's police report contained "a whole

[5] The State's proposed instruction mirrored the pattern jury instruction on expert testimony. WPIC 6.51.

page" describing the undercover operation and his experience, and that Jackson did not object to lack of notice when Garske testified, and in fact, used Garske's expertise "for his own purposes" on cross-examination. 4RP 416. The court overruled Jackson's objection and gave the proposed expert witness instruction. 4RP 416; CP 48.

Regarding the charged crime, the court instructed the jury as follows:

> A person commits the crime of Commercial Sexual Abuse of a Minor when he (a) pays or agrees to pay a fee to a minor pursuant to an understanding that in return the minor will engage in sexual conduct with him; or (b) solicits, offers, or requests to engage in sexual conduct with a minor in return for a fee.[6]

CP 51. The court's to-convict instruction provided that to convict Jackson, the jury must find that he took a "substantial step" toward committing commercial sexual abuse of a minor. CP 55. The jury was not instructed that it had to be unanimous as to the means by which Jackson committed the crime.

---

[6] The court's definitional instruction tracked the pattern jury instruction. WPIC 48.20.

## C. ARGUMENT

### 1. SUFFICIENT EVIDENCE SUPPORTS JACKSON'S CONVICTION FOR ATTEMPTED COMMERCIAL SEXUAL ABUSE OF A MINOR.

Jackson argues that his conviction should be reversed because the State failed to present sufficient evidence on the alternative means that he attempted to offer to engage in sexual conduct with a minor in return for a fee. Viewing the evidence in the light most favorable to the State, Jackson's claim fails. There was sufficient evidence from which a rational trier of fact could reasonably conclude that Jackson took a substantial step toward soliciting Garske, who was posing as a juvenile prostitute, to have sex for $100.

A criminal defendant has a right to a unanimous jury verdict. CONST. art. I, § 21; State v. Owens, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014). Due process does not require jury unanimity as to alternative means of a single crime. State v. Fortune, 128 Wn.2d 464, 475, 909 P.2d 930 (1996). Jury unanimity is not required as to alternative means if there is sufficient evidence to support each of the alternative means of committing the crime that is presented to the jury. Owens, 180 Wn.2d at 95. However, if there is insufficient

evidence of any of the alternative means presented to a jury, then a particularized expression of jury unanimity is required. Id.

A person is guilty of commercial sexual abuse of a minor if he (1) pays a fee to a minor as compensation for having engaged in sexual conduct, (2) pays, or agrees to pay, a fee to a minor with the understanding that the minor will engage in sexual conduct, or (3) solicits, offers, or requests to engage in sexual conduct with a minor for a fee. RCW 9.68A.100(1)(a)-(c). To be found guilty of an attempt to commit a crime, a person must have the intent to commit a specific crime, and take a "substantial step" toward committing that crime. RCW 9A.28.020(1). A "substantial step" is an act that is "strongly corroborative" of the actor's criminal purpose. State v. Johnson, 173 Wn.2d 895, 899, 270 P.3d 591 (2012). "Neither factual nor legal impossibility is a defense to criminal attempt." Id.; RCW 9A.28.020(2).

At trial, the State must prove each element of the charged crime beyond a reasonable doubt. State v. Alvarez, 128 Wn.2d 1, 13, 904 P.2d 754 (1995). Evidence is sufficient to support a conviction if, viewed in a light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201,

829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that reasonably can be drawn therefrom." Id. Circumstantial and direct evidence are equally reliable. State v. Fiser, 99 Wn. App. 714, 718, 995 P.2d 107 (2000).

A reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. Id. at 719. The reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that there is substantial evidence in the record to support the conviction. Id. at 718.

Here, the court's instructions required the State to prove that Jackson took a substantial step toward paying or soliciting a minor to engage in sexual conduct for a fee. CP 51. Although no Washington court has yet addressed whether commercial sexual abuse of a minor is an alternative means crime, it most likely qualifies as one given "how varied the actions are that could constitute the crime." Owens, 180 Wn.2d at 97. Agreeing to pay a minor for sex is a qualitatively different act than soliciting a minor to engage in sex for money.

Jackson argues that the State failed to present sufficient evidence that he attempted to "solicit, offer, or request" to engage in sexual conduct with a minor in return for a fee. Br. of Appellant at 8. He does not challenge the sufficiency of the State's evidence that he attempted to pay a minor to engage in sexual conduct. Jackson's claim fails because there is substantial evidence from which a rational trier of fact could conclude that he attempted to offer to engage in sexual conduct with a 15-year-old girl for $100.

Jackson's attempted solicitation started when he responded to Garske's ad, titled "*Young* Hard Body," by asking, "Do you still need that lovin'?" and "Where do you want to meet?" 3RP 253 (emphasis added); Ex. 8. Jackson and Garske never would have crossed paths but for Jackson searching out and replying to Garske's ad. Jackson repeatedly solicited Garske, asking three times where they should meet, even after Jackson learned that Garske was allegedly "almost 16." See 3RP 254 ("Where are you? Do you have a place we can be?"), 256 ("Where do we meet?") ("You have a place we can go to, right?"); Ex. 8.

Viewing the evidence in the light most favorable to the State, and drawing all reasonable inferences therefrom, a rational trier of fact could reasonably conclude that Jackson took a substantial step

toward offering to engage in sexual conduct with a minor by clicking on and responding to Garske's ad, and repeatedly urging Garske to identify a place that they could meet.

Jackson's claim that insufficient evidence exists based on the prosecutor's closing argument fails. Contrary to Jackson's claims, the prosecutor properly articulated and applied the alternative means of committing the charged offense. For example, the prosecutor summarized the charge as follows:

> [Y]ou commit the crime . . . when you pay or agree to pay a fee to a minor pursuant to an understanding that in return, the minor will engage in sexual conduct. Or you *solicit, offer, or request to engage in sexual conduct* with a minor in return for a fee . . .
>
> [Y]ou only have to attempt to make an agreement with somebody. You only have to *attempt to try to solicit* them. You only have to *attempt to offer.*

4RP 419-20 (emphasis added).

Further, the prosecutor highlighted the substantial evidence showing that Jackson had attempted to solicit sexual conduct with a minor, arguing that Jackson admittedly visited a website known for prostitution because he was "looking for sex," and "willing to pay for it." 4RP 425. The prosecutor noted that Jackson selected Garske's ad, responded to it, and worked out the details of the

arrangement, even after learning that Garske was purportedly 15 years old. 4RP 425, 427. The prosecutor ended his argument by stating, "[T]rying to pick up a teenager is the crime. He (Jackson) was looking for sex and he found it and made the deal." 4RP 434.

Jackson's efforts to recruit an allegedly underage prostitute to engage in sex satisfy both potential alternative means. Thus, Jackson's right to unanimous jury verdict was not violated because substantial evidence supported both means of committing the crime.

### 2. THE COURT PROPERLY PROVIDED THE JURY WITH THE EXPERT WITNESS INSTRUCTION.

Jackson argues that the trial court erroneously instructed the jury on expert testimony because the State failed to identify its expert witnesses until after the parties rested. Jackson's argument fails. The State provided Jackson with sufficient advance notice that it intended to rely on Garske's specialized knowledge. Both the State and Jackson elicited extensive testimony from Garske about his unique training and experience investigating juvenile prostitution. Given these circumstances, the trial court properly included the expert witness instruction in its jury instructions. Even if the trial court

erred, Jackson cannot show that he was prejudiced by the court's inclusion of the expert witness instruction.

CrR 4.7 requires the prosecutor to disclose witness names and statements, and "any reports or statements of experts" made in connection with the case. CrR 4.7(a)(1)(i), (iv), (2)(ii). The purpose of these rules is to prevent the defendant from being prejudiced by surprise or governmental misconduct. State v. Cannon, 130 Wn.2d 313, 328, 922 P.2d 1293 (1996). Failure to comply with the discovery rules may lead to a continuance, dismissal, or other order deemed just by the court under the circumstances. CrR 4.7(h)(7); State v. Barry, 184 Wn. App. 790, 796, 339 P.3d 200 (2014).

A trial court's discovery decision will be upheld on appeal absent a manifest abuse of discretion. State v. Blackwell, 120 Wn.2d 822, 826, 845 P.2d 1017 (1993). A court abuses its discretion only when its decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Stated another way, the question is whether "any reasonable judge would rule as the trial judge did." State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

ER 702 governs the admissibility of expert testimony. If "specialized knowledge" would assist the trier of fact in understanding the evidence, or determining a factual issue, then a witness qualified as an expert by "knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." ER 702. Expert testimony is helpful if it concerns matters outside an average person's common knowledge and is not misleading. State v. Groth, 163 Wn. App. 548, 564, 261 P.3d 183 (2011).

If expert testimony is admitted at trial, then the court should provide the expert witness pattern jury instruction upon request. WPIC 6.51, Note on Use. Jury instructions are sufficient if they permit each party to argue their theory of the case, do not mislead the jury, and when read as a whole, properly inform the jury of the applicable law. Bodin v. City of Stanwood, 130 Wn.2d 726, 732, 927 P.2d 240 (1996). A misleading jury instruction does not require reversal unless it is prejudicial. Keller v. City of Spokane, 146 Wn.2d 237, 250, 44 P.3d 845 (2002).

Here, the State's intent to rely on Garske's specialized knowledge was evident at filing. The Certification for Determination of Probable Cause revealed that Garske assisted Renton police "in an undercover operation targeting males soliciting the services of

juvenile prostitutes." CP 4. The certification explained the operation's methods, and detailed Garske's role in conducting the investigation. CP 4-5. As part of pretrial discovery, the State provided Jackson with a copy of Garske's police report, which included a "whole page" describing the operation and Garske's experience. 4RP 416. Further, the State listed Garske as a witness in its trial brief, and proposed at the start of trial that the court provide the jury with the expert witness pattern jury instruction. Supp CP __ (sub 20), CP __ (sub 21).

At trial, the State elicited nearly 30 pages of testimony from Garske about his extensive training and experience as a vice detective specializing in undercover prostitution operations. 3RP 217-45. Garske explained why the juvenile prostitution industry has moved online, how it functions, the language it employs, and law enforcement's efforts to eradicate it. 3RP 228-45. Other than two brief hearsay and relevance objections, Jackson never objected to the basis for Garske's specialized knowledge, or the helpfulness of his testimony. 3RP 242-44. Indeed, Jackson relied on Garske's experience on cross examination to elicit testimony about women on Craigslist who are not prostitutes and legitimately seek casual sex,

the panoply of ways that prostitution is marketed on Craigslist, and the "going rate" for prostitution. 3RP 280-87, 89-90.

During closing argument, the prosecutor did not refer to Garske as an expert, or suggest that the jury should convict Jackson based on Garske's expert opinions. 4RP 418-34. Instead, the prosecutor focused on Garske as a fact witness who provided the majority of the evidence about Jackson's arrest. Id. Jackson, on the other hand, explicitly relied on Garske's specialized knowledge, reminding jurors that they had "heard Detective Garske talk about . . . the upsell," and how adult prostitutes, unlike juvenile prostitutes, try to entice buyers into paying for more services when they arrive. 4RP 446-47. Jackson used Garske's expertise to argue that he brought extra cash with him to the hotel because he believed that he was meeting with an adult prostitute. Id.

Based on this record, Jackson's argument that his conviction should be reversed because the State failed to timely disclose its intent to rely on Garske as an expert witness, and that the allegedly late disclosure prejudiced him, fails. The probable cause certification and Garske's police report provided Jackson with ample advance notice of the State's intent to rely on Garske's specialized training and experience as an undercover vice detective. The fact that Jackson

allowed Garske to testify for nearly 30 pages about juvenile and adult prostitution practices with little objection, and that Jackson capitalized on Garske's expertise to introduce additional evidence on the topic, suggests that Jackson was not surprised by, and actually benefited from, Garske's expert testimony.

The trial court reasonably exercised its discretion to overrule Jackson's discovery objection, and provide the jury with the expert witness instruction. Jackson never argued at trial, nor does he argue on appeal, that Garske was unqualified to testify as an expert, or that his testimony was unhelpful to the jury.[7] Garske's knowledge of the online prostitution industry, and experience using it to communicate with and apprehend buyers, qualified him as an expert. His testimony was indisputably helpful to the jury tasked with decoding the acronyms used in the Craigslist posting, and understanding how a "reverse sting" operation is conducted to target and apprehend buyers of juvenile prostitution. 3RP 230-32.

[7] Indeed, courts have frequently allowed police officers to testify as experts based on their training and experience. State v. Francisco, 148 Wn. App. 168, 177, 199 P.3d 478 (2009) (detective allowed to testify as an expert regarding drug users' general practice based on his six years of experience working in the drug unit, several hundred drug arrests, and extensive advanced level training); State v. Campbell, 78 Wn. App. 813, 823, 901 P.2d 1050 (1995) (three police officers allowed to testify as gang experts about gang culture, terminology, and activities).

Nonetheless, even if the trial court erred by providing the jury with the expert witness instruction, Jackson cannot show that he was prejudiced by the instruction, which merely informed the jury that a witness with special training and experience is allowed to express an "opinion," and that the jury is not "required" to accept it. CP 48. Jackson does not claim that the instruction misled the jury, failed to properly inform the jury of the applicable law, or prohibited him from arguing his theory of the case. Because a jury instruction is only improper for one of these reasons, Jackson cannot show that the trial court erred. Bodin, 130 Wn.2d at 732.

Jackson's prejudice argument rests on the mistaken belief that the State sought to qualify all of the officers who testified as experts. See Br. of Appellant at 18 (arguing prejudice based on "the officers"). Jackson misreads the record, and is presumably relying on the prosecutor's isolated statement that "several police officers testified to topics that were based on their training and experience." 4RP 413.

Despite this comment, it is clear from the parties' arguments, and the witnesses' testimony, that the only witness who qualified as an expert was Garske. For example, the prosecutor focused his argument in support of giving the expert witness instruction on Garske, and the "number of questions" that both sides had asked

about "how things work" in the "underworld" of juvenile prostitution. 4RP 413, 416. Jackson similarly tailored his comments, arguing that the defense "didn't understand that *Detective Garske* was being offered as an expert." 4RP 414 (emphasis added). Neither the prosecutor, nor Jackson, contemplated that the expert witness instruction pertained to someone other than Garske.

A careful review of the trial testimony as a whole confirms that none of the other four officers who testified provided sufficient testimony to qualify as expert witnesses. For example, the two officers who arrested Jackson provided less than two pages of testimony about their training and experience. 3RP 311-12, 317. The third officer, who answered Jackson's phone call, offered three pages of testimony about her training and experience. 3RP 300-02. The final officer, Bryan Elliott, who collaborated with Garske in organizing the undercover operation, testified that he had only recently begun investigating commercial sexual abuse of a minor cases, and that he needed Garske to serve as his "mentor" in learning how to conduct such operations. 2RP 180, 183.

Thus, it is clear from the record that the prejudice analysis is limited to Garske, and the alleged prejudice that resulted from the State's allegedly late disclosure of Garske as an expert witness. As

previously stated, Jackson capitalized on Garske's specialized knowledge during cross examination and closing argument. Having used Garske's expertise to his own advantage, Jackson cannot show that he was prejudiced by the witness instruction. See Francisco, 148 Wn. App. at 177-78 (holding that the admission of the detective's expert testimony was harmless because the detective provided testimony that "favored" the defendant's case). Jackson's claim fails.

### 3. JACKSON RECEIVED A FAIR TRIAL FREE OF PROSECUTORIAL MISCONDUCT.

Jackson argues that the prosecutor committed reversible misconduct at trial, although he did not object to the comment that he now challenges on appeal. Jackson contends that the prosecutor impugned defense counsel's integrity, and argued facts not in evidence. Jackson's claims fail. The prosecutor properly characterized Jackson's defense strategy of admitting to attempted patronizing a prostitute as "trying to cut his losses." Jackson cannot show that the prosecutor's remark was "so flagrant and ill intentioned" that it created a lasting prejudice that could not be neutralized by a curative instruction to the jury.

To establish prosecutorial misconduct, the defendant must show that the prosecutor's comments were "both improper and

prejudicial in the context of the entire record and the circumstances at trial." State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011) (citations omitted). Comments are prejudicial only if there is a substantial likelihood that the misconduct affected the jury's verdict. Id. at 443.

A prosecutor has "wide latitude" in closing argument to draw and express reasonable inferences from the evidence. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). "[T]he prosecutor, as an advocate is entitled to make a fair response to the arguments of defense counsel." State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995). A prosecutor's remarks, even if improper, are not grounds for reversal if defense counsel invites or provokes them, unless the remarks are not a relevant reply or are so prejudicial that a curative instruction would be ineffective. Id. at 86.

Failing to object to an improper remark at trial and to request a curative instruction constitutes waiver on appeal unless the remark is "so flagrant and ill intentioned" that the resulting prejudice could not be neutralized by a curative instruction. State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610, cert. denied, 498 U.S. 1046 (1991). The absence of a motion for mistrial at the time of the

argument strongly suggests to a court that the argument . . . did not appear critically prejudicial to an appellant in the context of the trial." Id.

Here, Jackson argued in closing that the jury should convict him of the lesser-included offense of attempting to patronize a prostitute. 4RP 444. In response, the prosecutor argued in rebuttal:

> STATE: . . . The defendant knows what he did. He has engaged in the time-honored tradition of trying to cut his losses by asking you to acquit [sic][8] him of that lesser count. Don't be looped into that. If you believe his story, cut him loose. Cut him loose.
>
> DEFENSE: Your Honor, there it is right there. I'm objecting on prosecutorial misconduct. The prosecutor is telling the jurors the only way they can acquit my client is if they believe him. That's exactly what he said.
>
> STATE: I absolutely did not say that. I said if you believe him, cut him loose.
>
> COURT: That's what I have. Overruled.

4RP 458-59.

Based on the record, it is clear that Jackson objected only to the prosecutor's comment, "If you believe his story, cut him loose.

[8] Given Jackson's argument in closing that the jury should convict him of the lesser-included offense, and the prosecutor's characterization of that strategy as Jackson "cut[ting] his losses," it is most likely that the prosecutor intended to say "convict," rather than "acquit."

Cut him loose." 4RP 459. The limited nature of Jackson's objection is revealed by his argument to the court that the prosecutor had committed misconduct by "telling the jurors the only way they can acquit my client is if they believe him." 4RP 459. Jackson objected to the prosecutor allegedly and improperly shifting the burden of proof.

On appeal, however, Jackson appears to argue that he objected to the prosecutor's entire argument by selectively quoting the record in his brief. See Br. of Appellant at 21 (quoting the prosecutor's argument only, and stating "[d]efense counsel objected"). Jackson does not acknowledge that the ground for his objection below, impermissible burden shifting, is different than the grounds he now raises on appeal, impugning defense counsel and relying on facts not in evidence.

Having failed to timely object, and failed to preserve the grounds that he now raises on appeal, Jackson must show that the prosecutor's comments were so "flagrant and ill-intentioned" that the resulting prejudice could not have been obviated by a curative instruction. Swan, 114 Wn.2d at 661; see also RAP 2.5(a) (permitting the appellate court to refuse to review any claim of error not raised in the trial court); State v. Guloy, 104 Wn.2d 412, 422,

705 P.2d 1182 (1985) (recognizing that a party on appeal is limited to "the specific ground of the evidentiary objection made at trial"). Jackson cannot meet this standard.

A prosecutor may not "disparagingly comment on defense counsel's role or impugn the defense lawyer's integrity." See Thorgerson, 172 Wn.2d at 451-52 (prosecutor improperly referred to the defense presentation of the case as "bogus" and involving "sleight of hand"). Further, a prosecutor may not refer to facts not in evidence. See State v. Pierce, 169 Wn. App. 533, 553-54, 280 P.3d 1158 (2012) (prosecutor improperly attributed "repugnant and amoral thoughts" to the defendant based on the prosecutor's speculation about the defendant's thought process before the crimes).

Here, the prosecutor did not disparage defense counsel or his role. In response to Jackson's argument in closing that the jury should convict him of attempting to patronize a prostitute, the prosecutor argued that "*[t]he defendant*," had "engaged in the time-honored tradition of trying to cut his losses." 4RP 444, 458 (emphasis added). The prosecutor did not attack Jackson or his counsel personally, nor did the prosecutor denigrate counsel's role. Rather, the prosecutor fairly and accurately characterized

Jackson's strategy of admitting to the lesser offense with hopes that the jury would acquit him of the more serious offense.

Although there was no evidence introduced at trial that "cutting your losses" is a "time-honored tradition," the jury is presumed to follow the instruction that counsel's arguments are not evidence. See State v. Warren, 165 Wn.2d 17, 29, 195 P.3d 940 (2008) (presuming that the jury disregarded the prosecutor's improper argument referring to facts not in evidence in light of the court's instruction that counsel's arguments are not evidence).

Jackson relies on State v. Thorgerson to advance his claim, despite its inapposite facts. In Thorgerson, the prosecutor argued that the "defense" was using "sleight of hand" to distract the jury from "pay[ing] attention to the evidence." 172 Wn.2d at 452. The court held that the prosecutor's statement was improper because the dictionary definition of "sleight of hand" "implies wrongful deception or even dishonesty in the context of a court proceeding." Id.

Here, Jackson does not claim, nor could he, that "cutting your losses" implies deception and dishonesty. Indeed, the phrase generally means "to avoid losing any more money than you have already lost." Cambridge Dictionary, http://dictionary.cambridge.

org/us/dictionary/english/cut-your-losses (last visited July 22, 2016). Thus, the phrase suggests a candid accounting of negative financial affairs, rather than a dishonest attempt to hide them. Having been arrested outside the hotel room where he had arranged to have sex with a prostitute, along with the prostitute's phone number, the negotiated $100 amount, and lubricant, Jackson reasonably chose to admit to the lesser offense of attempting to patronize a prostitute.

The prosecutor's remark is a far cry from other statements held to have improperly disparaged defense counsel. Warren, 165 Wn.2d at 29 (prosecutor improperly described defense counsel's argument as a "classic example of taking these facts and completely twisting them to their own benefit, and hoping that you are not smart enough to figure out what in fact they are doing"); State v. Reed, 102 Wn.2d 140, 143, 145-46, 684 P.2d 699 (1984) (prosecutor improperly described the defendant as a "liar," "manipulator," and someone who "couldn't tell the truth under torture," and suggested that "[i]t must be very difficult to represent somebody like [the defendant] when you don't have anything").

Even if Jackson could show that the prosecutor's comment was improper, he cannot show that it was prejudicial. Jackson's

failure to timely object, request a curative instruction, or move for a mistrial, "strongly suggests" that the prosecutor's remark did not appear "critically prejudicial" in context. Swan, 114 Wn.2d at 661. A curative instruction advising the jury to disregard the prosecutor's remark would have remedied the error.

Moreover, the challenged comment represented a small fraction of the prosecutor's overall closing argument. The court properly instructed the jury that the "lawyers' statements are not evidence" and that they should disregard any argument not supported by the evidence. CP 43. The jury is presumed to have followed the court's instructions. Swan, 114 Wn.2d at 662.

Finally, given the overwhelming weight of evidence against Jackson, there is not a substantial likelihood that the alleged misconduct affected the jury's verdict. Viewing the prosecutor's comment in the context of the entire argument, the issues presented, the evidence addressed, and the court's instructions, Jackson's claim fails.

Jackson admitted to attempting to patronize a prostitute, the only disputed issue was whether Jackson knew that the prostitute was a minor. During closing, the State properly and persuasively argued that Jackson knew the prostitute's age based on (1) the first

word in the ad's title ("Young"), (2) the fictitious prostitute's email where said she was "almost 16," looked "like the girl in Twilight," and referred to her mom, (3) the repetition of that email, (4) Jackson's response asking, "Why did you tell me your age? Is this a sting?" and (5) the fact that Jackson continued communicating and ultimately showed up at the hotel. 4RP 429. Based on the weight of this evidence, there is not a substantial likelihood that the prosecutor's brief, singular statement in rebuttal affected the jury's verdict.

### 4. APPELLATE COSTS SHOULD BE IMPOSED IF THE STATE PREVAILS IN THIS APPEAL.

This Court should not foreclose the State's option to seek appellate costs in this case, should it prevail, because the record is insufficient to make such a determination at this stage. As in most cases, this defendant's ability to pay was not litigated in the trial court because it was not relevant to the issues at trial. The State has no right to discovery about the defendant's finances in the run-of-the mill case. Thus, the record contains only snippets of information about the defendant's financial status.

Nonetheless, it is clear from the limited record that Jackson was employed at the time of this offense, that he was able to post a

$25,000 bond following his conviction, and that he requested work release at sentencing. 3RP 333; 4RP 471-72; 5RP 20-21. Further, based on Jackson's recent motion for extension of time to file a statement of additional grounds, it is evident that Jackson has completed his prison sentence.

An order authorizing appointment of appellate counsel addresses only an appellant's present financial circumstances and ability to pay appellate costs up front. It does not address an appellant's future ability to pay, or the appellant's ability to pay over time. It is the appellant's future ability to pay, rather than the appellant's current ability to pay, that is most relevant in determining whether the imposition of financial obligations is appropriate. See State v. Blank, 131 Wn.2d 230, 241, 930 P.2d 1213 (1997) (indigence is a constitutional bar to the collection of monetary assessments only if the defendant is unable to pay at the time the government seeks to enforce collection of the assessments); State v. Shelton, Cause No. 72848-2-I, 2016 WL 3461164, at *7 (Wash. Ct. App. June 20, 2016) (challenge to DNA fee not ripe until State seeks to collect, and appellant has not shown future inability to pay); State v. Stoddard, 192 Wn. App. 222, 228-29, 366 P.3d 474 (2016) (constitutional challenges to DNA fee

fail because they "assume his poverty" while "the record contains no information, other than Stoddard's statutory indigence for purposes of hiring an attorney," that he will not be able to pay the fee). Terminating the appellant's obligation to reimburse the public for some portion of the costs of appeal defeats the clear legislative mandate that people who can pay should be required to do so.

A better approach to assessing appellate costs was recently adopted by general order of Division Three of the Court of Appeals. See IN RE THE MATTER OF COURT ADMINISTRATION ORDER RE: REQUEST TO DENY COST AWARD, http://www.courts.wa.gov/appellate_trial_courts/?fa=atc.genorders_orddisp&ordnumber=021&div=III (last visited July 22, 2016). Although there is likely to be very little information in the record regarding the appellant's present ability to pay, the procedure at least requires some showing by the appellant, signed under penalty of perjury, that he does not have the future ability to pay. Respectfully, this requirement is more true to the legislative mandate than the approach adopted in State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612 (2016). The State urges this Court to utilize the procedure adopted in Division Three.

For these reasons, the State opposes Jackson's request to terminate his payment obligations before it can be meaningfully determined what, or if, he can pay.

## D. CONCLUSION

For the foregoing reasons, the Court should affirm Jackson's conviction.

DATED this 26th day of July, 2016.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

#35042

By: Jennifer P. Joseph for
KRISTIN A. RELYEA, WSBA #34286
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Kathleen Shea, the attorney for the appellant, at kate@washapp.org, containing a copy of the Brief of Respondent in State v. Robert Charles Jackson, II, Cause No. 73702-3, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 26th day of July, 2016.

Name:
Done in Seattle, Washington