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WASHINGTON STATE
SUPREME COURT

Supreme Court No.: 94635-3 CR
Court of Appeals No.: 74030-0-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RONALD PARKER,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND THE DECISION BELOW

Petitioner Ronald Parker, appellant below, requests this Court grant review of the decision of the Court of Appeals in *State v. Parker*, No. 74030-0-I, filed May 15, 2017. *See* RAP 13.4(b). A copy of the opinion is attached as an Appendix.

B. ISSUES PRESENTED FOR REVIEW

1. Whether the Court should grant review to provide direction for future trials and to correct the constitutional violation here where the Court of Appeals declined to find prosecutorial misconduct, including for statements calling the complaining witness "cute as a button"—a fact not in evidence—and misstating the burden of proof by explaining the jury's reasonable doubts could only relate to elements of the crime? RAP 13.4(b)(1), (3), (4).

2. Whether the Court should grant review and hold, in line with Ninth Circuit authority, that Mr. Parker was denied a fair trial by an impartial jury when two prospective jurors broadcast to the venire their expert-like opinions that children do not lie about sexual misconduct and that Mr. Parker was guilty. RAP 13.4(b)(3), (4).

3. Where several witnesses, including the complaining witness, testified about her disclosure of the alleged sexual abuse, did the trial court abuse its discretion by also allowing the State to show the jury the entire

video of the Skagit County "child interviewer" interviewing the complaining witness in a "child-friendly environment" while not subject to cross-examination? RAP 13.4(b)(4).

4. Whether these errors standing alone or combined with additional trial errors denied Mr. Parker a fair trial, compelling reversal and remand for a new trial by this Court? RAP 13.4(b)(3), (4).

C. STATEMENT OF THE CASE

Shannon Parker and three of her five children moved from Sedro-Woolley into her boyfriend, Ronald Parker's, home in Rockport. RP (8/11/15) 63-64, 71, 143-45; RP (8/12/15) 41-47.[1] The children's relationship with Mr. Parker was volatile. *E.g.*, RP (8/12/15) 49-50, 61-62. The complaining witness, A.R.M., initially did not mind Mr. Parker, but that changed when he started yelling at them if they did not do their chores. RP (8/11/15) 68-70. Her older sister, R.M., also did not like Mr. Parker. RP (8/12/15) 75; RP (8/13/15) 125-29; RP (8/13/15) 195-97; *see* RP (8/13/15) 211-12 (Shannon told Ron that R.M. did not like him and Shannon was thinking of moving out). R.M. disliked that Mr. Parker disciplined her and she disliked living in Rockport with Mr. Parker because all her friends were in Sedro-Woolley. RP (8/11/15) 103, 148-49,

[1] The verbatim report of proceedings is set forth in separately-paginated volumes referred to by the date of the first hearing transcribed.

164-65, 182-83. A.R.M. also preferred her school in Sedro-Woolley. RP (8/11/15) 120, 122. The children told their mother they did not like Ronald Parker, who Shannon eventually married. RP (8/11/15) 99-100.

R.M. also wrote in her journal a five-point plan mapping ways she could rid the family of Mr. Parker, including telling lies in order to make the parents break up. RP (8/11/15) 131-32, 162-69 ("I do not like Ron, I hate him, he's so stupid, mom has made the biggest mistake"); Exhibit 5.

On the night before the last day of school in June 2013, R.M. says she was playing "the secrets game" with A.R.M., then seven-years-old when A.R.M. told R.M. their step-dad touched A.R.M. during family movie nights. RP (8/11/15) 157-59; *see* RP (8/11/15) 96-97, 101-02 (the complaining witness's testimony). On R.M.'s urging, A.R.M. told their mother and brother, J.M., the following day. RP (8/11/15) 96-97; RP (8/12/15) 64-65.

Older sister R.M. received her wish; Ms. Parker immediately moved the family back to Sedro-Woolley from Rockport. RP (8/11/15) 66, 97-98, 160; RP (8/12/15) 65-66.

J.M. later testified that, when A.R.M. told him the allegations, she made a face like when she exaggerates. RP (8/11/15) 203-04.

After Ms. Parker called the police a couple days later, the Skagit County Prosecuting Attorney's Office arranged for its "child interviewer,"

Deborah Ridgeway, to conduct investigative interviews of the complaining witness, her older sister, and her brother J.M. RP (4/1/15) 26-27, 28, 31-32, 44, 47; RP (8/12/15) 67, 122, 130-32, 134, 139-40, 143-44; Exhibits 6 & 7. Ms. Ridgeway repeatedly referred to "Dan" instead of "Ron," and A.R.M. did not ask for clarification until after having responded to several of the questions about Dan. Exhibit 6 (file 2) at 9:09:15, 9:15:13, 9:30, 9:39:40; RP (8/13/15) 66. A.R.M. also indicated her mother had talked to her about the accusations. Exhibit 6 at 8:55, 8:59:30, 9:16, 9:38:10. J.M. later testified that his mother encouraged him to lie to the police about Mr. Parker during this investigation. RP (8/13/15) 117-20, 141-42, 145-46.

The State charged Mr. Parker with four counts of rape of a child in the first degree and four counts of child molestation in the first degree. CP 7-11 (amended information (citing RCW 9A.44.073; RCW 9A.44.083); *see* CP 77-78 (information alleging single count of rape of a child).

On the State's motion, a hearing was held to determine whether A.R.M.'s out-of-court statements to her mother and the child interviewer were admissible under the child hearsay statute, RCW 9A.44.120. CP 80-

98; RP (4/1/15) 3-71. Judge Rickert found the testimony admissible. CP 75-76; RP (4/1/15) 66-71.[2]

Judge Needy presided over the trial, which began with the prosecutor describing A.R.M., the complaining witness, as "cute as a button." RP (8/11/15) 46. A.R.M. then testified Mr. Parker touched her on her "boobies" and "crotch" while they were lying together on a living room couch on various occasions while her family and others were present watching television together. RP (8/11/15) 72-74, 77-79, 89-91, 105-06, 118-20, 180; *see* RP (8/12/15) 55-59, 77-78; *see* RP (8/13/15) 101-02, 106, 140 (testimony of J.M. regarding television watching and that he never saw the complaining witness under a blanket with Mr. Parker); RP (8/13/15) 175-77, 185, 190 (testimony of friend R.S. regarding television watching and that he never saw the complaining witness under a blanket with Mr. Parker). A.R.M. also testified that Mr. Parker sometimes tried to have her touch his "wee-wee" but did not state that she actually did touch it. RP (8/11/15) 86-89, 114. No one witnessed any of the alleged acts of sexual misconduct. *E.g.*, RP (8/12/15) 86 (Ms. Parker never saw or became aware of "anything"). Mr. Parker testified in his own defense that

[2] Outside the presence of the jury, but during trial, Judge Needy (who presided over the trial) also found the complaining witness's out-of-court statements to R.M. admissible.

he "did not inappropriately touch [A.R.M.]. . . . at all." RP (8/14/15) 26, 45-46 (allegations are fabrication to get back at him).

Mr. Parker was convicted of counts one through seven and the lesser-included attempted child molestation for count eight relating to touching Mr. Parker's genitals. CP 101-08. He was sentenced to an indeterminate minimum term of 260 months-to-life on counts one through four, with a minimum indeterminate term of 148.5 months on count eight running concurrently. CP 59-74 (counts five, six and seven merged with counts one through four).

The Court of Appeals affirmed in an unpublished opinion. Appendix.

D. ARGUMENT IN SUPPORT OF GRANTING REVIEW

1. The Court should grant review because the lower court refused to find prosecutorial misconduct where the prosecutor bolstered the complainant by calling her 'cute as a button' in opening statement and then, in closing, lessened the burden of proof by limiting the bases for the jurors to have reasonable doubt.

It is beyond dispute that prosecutors must ensure justice is done and the accused receive a fair and impartial trial. *E.g.*, *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935); *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). As this Court has held, every prosecutor is a quasi-judicial officer of the court, charged with

the duty to seek verdicts free from prejudice, and "to act impartially in the interest only of justice." *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984); *accord State v. Echevarria*, 71 Wn. App. 595, 598, 860 P.2d 420 (1993).

Prosecutorial misconduct violates a defendant's right to a fair trial where the prosecutor makes an improper statement that has a prejudicial effect. *E.g.*, *In re Det. of Sease*, 149 Wn. App. 66, 80-81, 201 P.3d 1078 (2009); *State v. Russell*, 125 Wn.2d 24, 882 P.2d 747 (1994); *State v. Lord*, 117 Wn.2d 829, 887, 822 P.2d 177 (1991). The misconduct is prejudicial if there is a substantial likelihood it affected the verdict. *Sease*, 149 Wn. App. at 81.

It is generally improper for a prosecutor to bolster a witness's good character, even if the evidence supports it. *State v. Jones*, 144 Wn. App. 284, 293, 183 P.3d 307 (2008). Nonetheless, at the outset of her opening statement, the prosecutor told the jury that the accusations against Mr. Parker were made by the complaining witness who was "cute as a button." RP (8/11/15) 46.

The Court of Appeals held "without merit" Mr. Parker's argument that this statement—which was not based in any fact ultimately admitted—bolstered A.R.M. and reflects the prosecutor's opinion. Slip Op. at n.2. Yet, as Mr. Parker explained in his briefing to the Court of

Appeal, the prosecutor's opening remark inserted her personal opinion and bolstered the complaining witness by insinuating a child this cute would not lie. *See United States v. Molina*, 934 F.2d 1440, 1444 (9th Cir. 1991) (recognizing vouching is especially problematic in cases where the credibility of the witness is crucial). The argument further bolstered A.R.M.'s credibility of the complaining witness by implying that Mr. Parker was attracted to the complaining witness's "cute as a button" appearance. The statement the complaining witness is "cute as a button" is also improper because it depended on facts not in evidence. *See State v. Pierce*, 169 Wn. App. 533, 553, 280 P.3d 1158 (2012). The prosecutor used a sympathetic description, cuteness, to curry favor for the State's case but was not based in fact.

The prosecutor then misstated the law when she told the jury "if you have a doubt [as to Mr. Parker's guilt], it needs to be based on evidence or lack of evidence per element that I need to prove." RP (8/14/15) 112-13. She further argued that facts that are not relevant to an element cannot create a reasonable doubt. *Id.*; *see State v. Allen*, 182 Wn.2d 364, 373-74, 341 P.3d 268 (2015) (prosecutor commits misconduct by misstating the law). The prosecutor explained, "So, for example, whether or not Shannon Parker wanted to get out of the marriage might be

a fact that you have a reasonable doubt on, but it doesn't matter in terms of evaluating the elements that I need to prove." RP (8/14/15) 112.

The Court of Appeals held this argument "track[ed] the court's reasonable doubt instruction" to the extent the instruction stated "[t]he State is the plaintiff and had the burden of proving each element of a crime beyond a reasonable doubt." Slip Op. at 10. The Court of Appeals opinion fails to acknowledge that the argument lessened the State's burden of proof because it withdrew from the jury acceptable bases upon which to formulate a reasonable doubt. *See In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 713, 286 P.3d 673 (2012). The jury rightfully could have believed the complaining witness's mother was motivated to fabricate, and did fabricate, the allegations thereby providing reasonable doubt as to the State's case against Mr. Parker. If the jury had a reasonable basis to doubt the charge, it did not have to tie that doubt to a particular element.

Because the Court of Appeals denied either statement was misconduct, it found no prejudice. Slip Op. at 10. However, telling the jury the State's key witness is "cute as a button" and misstating the burden of proof were flagrant and ill-intentioned acts of misconduct because they were not curable by an instruction. *State v. Emery*, 174 Wn.2d 741, 763, 278 P.3d 653 (2014); *State v. Alexander*, 64 Wn. App. 147, 155-56, 822 P.2d 1250 (1982). "Cute as a button" is an image that cannot be undone.

It was particularly prejudicial because it likely swayed the jury to be less concerned with the many inconsistencies in A.R.M.'s testimony, as pointed out in Mr. Parker's Statement of Additional Grounds. St. Add'l Grounds at 14-19.

Further, the jury already had an instruction explaining the reasonable doubt standard, but the prosecutor's argument incorrectly described the State's burden and lessened it. Therefore, even though Mr. Parker did not object, these instances of misconduct require reversal of the convictions. The Court should grant review and determine whether these prosecutorial statements constitute misconduct that must not occur at criminal trials. RAP 13.4(b)(1), (3), (4).[3]

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[3] Mr. Parker raises two additional bases for prosecutorial misconduct in his Statement of Additional Grounds that should be examined on review: First, the prosecutor misrepresented A.R.M.'s statements by relying on poor audio recording to argue A.R.M. stated "push down in it" as opposed to "push down and it" or "push down on it" as reflected in transcripts and conflating the area to which A.R.M. gestured. Second, the prosecutor "manitpulate[d] an adverse witness to face away from [Mr. Parker] and then [the prosecutor] use[d] this tactic to draw a derogatory inference." St. of Add'l Grounds at 7-14; Slip Op. at 11-12.

2. The Court should grant review because Mr. Parker was denied his constitutional right to a fair trial by an impartial jury when two prospective jurors broadcast their expert-like opinion in voir dire that Mr. Parker was guilty.

"Voir dire is a significant aspect of trial because it allows parties to secure their article I, section 22 right to a fair and impartial jury through juror questioning." *State v. Momah*, 167 Wn.2d 140, 152, 217 P.3d 321 (2009); Const. art. I, § 22; U.S. Const. amend. VI; *State v. Roberts*, 142 Wn.2d 471, 517, 14 P.3d 713 (2000). "The 'impartial jury' aspect of article I, section 22, focuses on the defendant's right to have unbiased jurors, whose prior knowledge of the case or their prejudice does not taint the entire venire and render the defendant's trial unfair." *Momah*, 167 Wn.2d at 152.

"Due process requires that the defendant be tried by a jury capable and willing to decide the case solely on the evidence before it." *Smith v. Phillips*, 455 U.S. 209, 217, 102 S. Ct. 940, 945-46, 71 L. Ed. 2d 78 (1982); *accord* U.S. Const. amends. VI, XIV; Const. art. I, § 22. The right to a fair trial includes the right to a presumption of innocence. *State v. Finch*, 137 Wn.2d 792, 844, 975 P.2d 967 (1999).

In *Mach v. Stewart*, the Ninth Circuit held the defendant was entitled to a new venire after a prospective juror broadcast biases to the venire. 137 F.3d 630 (9th Cir. 1997). During voir dire, a prospective

juror with a psychology background and who was employed as a social worker stated that, in her three years as a state-employed social worker, every allegation a child made about sexual abuse was true; and she repeated the remarks upon further questioning. *Id.* at 632-33. The trial court struck the juror but denied a motion for a new panel. *Id.* Reversing, the Ninth Circuit reasoned the statements made by the prospective juror were directly connected to guilt, and that "the court should have[, at a minimum,] conducted further voir dire to determine whether the panel had in fact been infected by [the prospective juror's] expert-like statements.'" *Id.* at 633.

This Court should grant review because similar comments in misconduct denied Mr. Parker a fair trial, yet the Court of Appeals declined to review the error. Slip Op. at 4-5. Two panelists broadcast to the other jurors that their experience caused them to be biased against Mr. Parker. First, juror 22 reported that his wife was molested, his brother-in-law is in jail for being a molester, and he works for the Children's Administration arm of the Department of Social and Health Services. RP (8/10/15) 55. This experience caused him to be biased against Mr. Parker. RP (8/10/15) 53-55. He told the jury, "I see it all, every day" so he did not think he could be fair. RP (8/10/15) 55.

Juror 27 then added to this experience-laden presumption of guilt. She told the venire that her work in an elementary school and as a mandatory reporter "for years," has led her to the "feeling kids don't lie in that situation." RP (8/10/15) 55. She elaborated that while a child might lie to their parent about whether they ate a cookie, they do not lie about something as "big" as sexual abuse:

> I still have that feeling that -- that kids might lie if they -- if mom says do you have a -- did you have a cookie, and they say no, but when it's something that big, that just weighs that heavy on a child, I don't know that I could separate them.

RP (8/10/15) 56. She further emphasized that her professional experience leads her to this bias. RP (8/10/15) 57. And she repeated to the venire,

> I think that my previous experience would, dealing with kids, that I just have a feeling kids don't lie in that situation. It's too extreme. And it's not that I assume the defendant is guilty; it's that I assume the child is telling the truth.

RP (8/10/15) 55. The violation of Mr. Parker's right to a fair trial by an impartial jury constitutes manifest constitutional error. RAP 2.5(a)(3).

These jurors' statements contravened the principle that no witness may opine on guilt, directly or inferentially, because such opining "invade[s] the fact finder's exclusive province." *State v. Johnson*, 152 Wn. App. 924, 930-31, 219 P.3d 958 (2009). Because the statements

came during voir dire, moreover, Mr. Parker had no opportunity for cross-examination.

Both the source and the content of the broadcasted information were highly prejudicial. *See State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007) ("Impermissible opinion testimony regarding the defendant's guilt may be reversible error because such evidence violates the defendant's constitutional right to a jury trial, which includes the independent determination of the facts by the jury.").

As the Ninth Circuit held, "[e]ven if 'only one juror is unduly biased or prejudiced,' [by the prospective juror's comments] the defendant is denied his constitutional right to an impartial jury." *Mach*, 137 F.3d at 633 (quoting *United States v. Eubanks*, 591 F.2d 513, 517 (9th Cir. 1979)). "Given the nature of [the prospective juror's] statements, the certainty with which they were delivered, the years of experience that led to them, and the number of times that they were repeated, [the Ninth Circuit] presume[d] that at least one juror was tainted and entered into jury deliberations with the conviction that children simply never lie about being sexually abused." *Id.* at 634. Such a "bias violated [the defendant's] right to an impartial jury." *Id.* at 633. The remedy in *Mach* should be the same here—to begin anew with a fresh jury pool.

3. The Court should grant review and hold the cumulative and prejudicial video of the complaining witness's interview with Skagit County's 'child interviewer' should have been excluded.

Evidence is relevant if it has any tendency to make the existence of a fact more or less probable. ER 401. But relevant evidence may still be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." ER 403. Cumulative evidence is simply "additional evidence of the same kind to the same point." *Roe v. Snyder*, 100 Wash. 311, 314, 170 P. 1027 (1918).

Mr. Parker objected to the admission of the entire video-taped interview of the complaining witness by Deborah Ridgeway, the Skagit County prosecutor's office's "resource interview specialist," or "child interviewer." RP (8/12/15) 91-94, 135-42; Exhibit 6; RP (4/1/15) 26-27. The State presented extensive testimony from many witnesses about the complaining witness's disclosures and allegations: Ms. Ridgeway, the complaining witness, the complaining witness's mother, older sister, and older brother. RP (8/11/15) 63-123 (testimony of A.R.M.); RP (8/11/15) 143-90 (testimony of R.M.); RP (8/11/15) 192-204 & RP (8/12/15) 19-40

(testimony of brother J.M.); RP (8/12/15) 40-107 (testimony of mother); RP (8/12/15) 122-61 (testimony of child interviewer, Ridgeway).

The additional admission of the hour-long interview where the complaining witness was in a more relaxed, "child-friendly" setting than the courtroom and Mr. Parker was not present was not only cumulative but unfairly prejudicial. *See* RP (4/1/15) 26-27, 28, 31-32, 44, 47 (describing interview room, interviewer's allegiance to prosecutor's office, and purpose of interview as investigative). Admission of the entire video bolstered the State's witness. For these reasons, the evidence should have been excluded under ER 403. *State v. Bedker*, 74 Wn. App. 87, 93, 871 P 2d 673 (1994).

The trial court through Judge Needy, however, ruled that Judge Rickert had found the evidence admissible at a child hearsay hearing and therefore it would be admitted in its entirety. RP (8/12/15) 91-94, 135-42. The court abused its discretion when it failed to consider the separate bases for excluding the evidence, even if it was admissible child hearsay. *Bedker*, 74 Wn. App. at 93 (admissibility inquiry is not limited to child hearsay statute); *see State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971) (abuse of discretion when decision is manifestly unreasonable or based on untenable grounds).

Additionally, because this additional evidence was of the same kind and to the same point, it was cumulative. As discussed, it was also unfairly prejudicial because it bolstered the complaining witness's testimony on the stand with video of an interview in a more casual setting where the jury saw her playing with a toy, talking casually with the child interviewer about, for example school and swimming, and writing responses she could not articulate. Ex. 6 at *e.g.*, 8:42-44, 8:53-56.

The trial court abused its discretion in admitting this evidence. Mr. Parker's convictions should be reversed and the case remanded for a new trial without the presentation of cumulative evidence.

4. The Court should grant review of additional trial errors and hold that standing alone or in the cumulative the errors denied Mr. Parker a fair trial.

In addition to the above errors, the trial court excluded R.M.'s journal, in which she set forth a five-part plan to get rid of Mr. Parker, and older brother J.M.'s testimony relating to television watching in Mr. Parker's home. Op. Br. at 23-27; Reply Br. at 7.

Standing alone or in combination these evidentiary errors and those discussed in prior sections of the petition denied Mr. Parker a fair trial. Under the cumulative error doctrine, even where no single trial error standing alone merits reversal, this Court may nonetheless find that together the errors combined to deny the defendant a fair trial. U.S. Const.

amend. XIV; Const. art. I, § 3; *e.g.*, *Williams v. Taylor*, 529 U.S. 362, 396-98, 120 S. Ct 1479, 146 L. Ed. 2d 435 (2000) (considering the accumulation of trial counsel's errors in determining that defendant was denied a fundamentally fair proceeding); *Taylor v. Kentucky*, 436 U.S. 478, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978) (holding that "the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness"); *Coe*, 175 Wn.2d at 515 (applying same to civil commitment trial). The cumulative error doctrine mandates reversal where the cumulative effect of nonreversible errors materially affected the outcome of the trial. *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *Alexander*, 64 Wn. App. at 150-51.

The errors combined to prejudice Mr. Parker's right to a fair trial because the State's allegations turned on the jury's credibility determinations. No one witnessed Mr. Parker touch the complaining witness in any sexualized manner, even though many people would have been in the living room when the alleged acts occurred. The jury heard about problems between Shannon and Mr. Parker, including Shannon's departure from Mr. Parker's home for several weeks in 2013 and 2014. The jury also knew R.M. had plotted to disparage Mr. Parker so that her mother would move them back to Sedro-Woolley, but could not examine R.M.'s journal. R.M.'s influence over the complaining witness and

consistent bossing around of her younger sister was also of record. R.M. "hated" Mr. Parker and the complaining witness testified she also wanted to leave her school in Concrete. In short, affirmative evidence cast doubt on the State's case.

These shortcomings were overshadowed by the admission of improper evidence, opinion, and argument, and were prejudiced by the exclusion of evidence that supported Mr. Parker's defense. Mr. Parker should have been able to rely on the physical journal R.M. kept in order to provide the jury with a visual example of her motive to lie and dislike for Mr. Parker. The jury also should have heard additional testimony about the context of television watching from Mr. Parker's witness. Instead, the court admitted cumulative and prejudicial testimony favoring the complaining witness and the State. The State also bolstered the credibility of its complaining witness and eliminated bases upon which the jury could acquit. The accumulation of these errors swayed the jury to ignore its doubt and to find Mr. Parker guilty.

The Court should grant review and hold that, cumulatively, these errors denied Mr. Parker the fair trial to which he was entitled. RAP 13.4(b)(3), (4).

E. CONCLUSION

The Court should grant review because a prosecutor's description of the State's complaining witness as "cute as a button" and limiting the bases upon which the jury can have a reasonable doubt is misconduct. Moreover, the jury to which the prosecutor addressed her misconduct had already heard extrajudicial opinions from fellow venire members that complainants like A.R.M. do not lie and Mr. Parker was guilty. On these grounds and the others set forth above, this Court should grant review.

DATED this 6th day of June, 2017.

Respectfully submitted,

s/ Marla L. Zink
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APPENDIX

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

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STATE OF WASHINGTON,	)	No. 74030-0-I
Respondent,	)	DIVISION ONE
v.	)	
RONALD PARKER,	)	UNPUBLISHED OPINION
Appellant.	)	FILED: May 15, 2017

SPEARMAN, J. — Ronald Parker's eight year old stepdaughter accused him of molesting her. A jury convicted Parker of four counts of first degree child rape, three counts of first degree child molestation, and one count of attempted first degree child molestation. On appeal, he claims he was denied an impartial jury, that the trial court erred in its ruling on the admissibility of certain evidence, that the prosecutor engaged in misconduct and that legal financial obligations were improperly imposed at sentencing. Additionally, in a statement of additional grounds, Parker alleges a number of other errors. Because none of the claims have merit, we find no error and affirm.

FACTS

Ronald Parker and Shannon Dearinger lived in Rockport, Washington with four of Dearinger's children: Adam MacCurdy (age 19), R.M. (daughter, age 13), J.M. (son, age 11), and the alleged victim A.M. (daughter, age 8). Dearinger and

her children had moved from nearby Sedro-Wooley to live with Parker in September 2012. The blended family experienced discord. Parker would yell at the children for not doing chores. After he had a physical confrontation with J.M., Dearinger and her children moved out for several weeks in December 2013.

R.M. was particularly unhappy living with Parker. She wrote in her journal that she hated Parker and wanted to move back to Sedro-Wooley. She wrote of ways to induce her mother to leave Parker, such as telling her mother lies that would break them up.

In June 2013, A.M. told R.M. that Parker touched her inappropriately. R.M. and J.M. encouraged A.M. to tell Dearinger. A.M. told her mother that Parker had touched her and tried to press his finger in her. Dearinger and her children gathered their belongings and left the house. Dearinger reported the molestation to police. Soon after, a child interview specialist conducted a video recorded interview with A.M. about her allegations. Parker was charged with four counts of rape of a child in the first degree and four counts of child molestation in the first degree.

At trial A.M. testified that Parker touched her "boobies" and "crotch" under her clothing. Verbatim Report of Proceedings (VRP) (8/11/15) at 72-73. She testified that Parker pushed hard on her crotch with his finger, and that it hurt each time he did this. She also described Parker trying to get her to touch his genitals. She said that Parker touched her while they laid next to each other on the couch watching TV, covered by a blanket. When the incidents occurred, other family members were sitting on couches or the floor. Dearinger, J.M., and R.M.

testified that the family watched TV together at least once a week. They also confirmed that when the family watched TV together, Parker and A.M. laid on the couch together covered by a blanket. A.M.'s testimony was largely consistent with her recorded interview that was admitted and shown to the jury.

Parker was convicted of four counts of first degree rape of a child, three counts of first degree child molestation, and one count of attempted child molestation. He appeals the convictions.

DISCUSSION

Juror Statements in Voir Dire

Parker argues that he was denied his constitutional right to a fair and impartial jury. He contends that the jury was biased when two prospective jurors discussed their experience with child sexual assault victims.

During voir dire, juror 22 and Parker's counsel discussed juror impartiality. Juror 22 revealed that "[m]y wife was molested. My brother-in-law is in jail for being a molester, and I work for DSHS children's administration." VRP (8/10/15) at 55. Juror 22 said he could not be a fair juror. Parker's counsel asked if anybody else felt that way. Juror 27 said,

> I work in an elementary school, and have been a mandatory reporter for years. For all the time I've worked with kids, and had a niece about six years ago that went through a very, very similar trial, very similar counts read. . . . But I think that my previous experience would, dealing with kids, that I just have a feeling kids don't lie in that situation. It's too extreme. And it's not that I assume the defendant is guilty; it's that I assume the child is telling the truth.

VRP (8/10/15) at 55. Defense counsel continued to question the juror, who reiterated her perspective. Juror 27 repeated four times that she might be biased.

The State moved to excuse Juror 22 for cause without objection by defense. Defense did not seek to excuse Juror 27, but she was not among the jurors chosen to decide the case.

Generally, we do not consider arguments raised for the first time on appeal. RAP 2.5(a). But a defendant may appeal a manifest error affecting a constitutional right even if the issue was not raised before the trial court. RAP 2.5(a)(3). The defendant must identify a constitutional error and show that it resulted in actual prejudice, which means that it had practical and identifiable consequences in the proceeding. State v. Roberts, 142 Wn.2d 471, 500, 14 P.3d 713 (2000). "'[T]o determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.'" State v. Lamar, 180 Wn.2d 576, 583, 327 P.3d 46 (2014) (quoting State v. O'Hara, 167 Wn.2d 91, 100, 217 P.3d 756 (2009)). "'If the trial court could not have foreseen the potential error or the record on appeal does not contain sufficient facts to review the claim, the alleged error is not manifest.'" Id. at 583 (quoting State v. Davis, 175 Wn.2d 287, 344, 290 P.3d 43 (2012)).

Parker meets the first part of the RAP 2.5(a)(3) analysis because his claimed error implicates the constitutional guarantee to a trial by impartial jury. But he fails to satisfy the second part because the error is not manifest from the record. Jurors 22 and 27 simply expressed a concern that based on their experience, they could not be unbiased jurors. Juror 27's statements had the most potential to influence the venire because of the length of questioning,

repetition of statements, and experienced based opinion on the credibility of child victims. But this was apparently not obvious to Parker's counsel. He questioned this juror at some length as she repeatedly expressed her opinion, and did not move to excuse her for cause. Because the trial court could not have foreseen the alleged error, it is not manifest. We decline to review this issue under RAP 2.5(a)(3).

Admission of Recorded Interview

Parker argues that the trial court erred by admitting A.M.'s recorded interview. He contends that the recording should have been excluded because it was cumulative and unfairly prejudicial.

We review a trial court's decision to admit evidence for abuse of discretion. State v. Magers, 164 Wn.2d 174, 189 P.3d 126 (2008). Child hearsay statements about sexual contact are admissible if the child is available to testify. RCW 9A.44.120. The statements are nonetheless subject to analysis under ER 403, which permits exclusion of evidence if the "probative value is substantially outweighed by the danger of unfair prejudice ... or needless presentation of cumulative evidence." ER 403; State v. Bedker, 74 Wn. App. 87, 93, 871 P.2d 673 (1994). A recorded interview with a child sexual assault victim is not cumulative if it gives new or additional information that is not presented in other evidence, including a view of the victim's demeanor and voice inflections. Bedker, 74 Wn. App at 94; State v. Dunn, 125 Wn. App. 582, 588-89, 105 P.3d 1022 (2005).

Here, the trial court conducted a child hearsay hearing before trial, and found the recording admissible under RCW 9A.44.120. At trial, Parker objected that the interview was cumulative. The trial court did not consider the objection, deferring to the finding at the child hearsay hearing that the recording was admissible. But even if child hearsay statements are admissible under RCW 9A.44.120, the statements are still subject to other rules of evidence. Bedker, 74 Wn. App at 93. Thus, the trial court's refusal to consider the objection was an abuse of discretion. The error was harmless, however, because the objection was not well founded. The recording was not cumulative because during the interview, A.M. showed a range of demeanor and provided new information. It contained more details about distinct incidents of molestation, whereas A.M.'s testimony discussed the molestation more generally.

Parker additionally argues that the recording was unfairly prejudicial because it showed A.M. in a "more relaxed, 'child friendly' setting than the courtroom," which he contends bolstered her testimony. Brief of Appellant at 12. But other than this bald assertion, Parker fails to explain how an interview conducted in such a setting bolstered A.M.'s credibility or unfairly prejudiced him. Accordingly, we reject the argument. The trial court did not err by admitting the recording of A.M.'s interview.

Exclusion of R.M.'s Journal

Parker argues that the trial court erroneously excluded R.M.'s journal, in which she outlined a plan to convince her mother to leave Parker. The trial court refused to admit the journal in its entirety, but permitted Parker to cross examine

R.M. about the journal and to display portions of it to the jury. Parker contends that because the entire journal showed the states of mind of R.M. and A.M., it was admissible under ER 803(a)(3). He contends the entire journal shows that R.M. and A.M. each had a motive to fabricate the allegations. We disagree.

To the extent certain entries reflected R.M.'s state of mind, Parker was able to cross examine her about those entries and show them to the jury during closing argument. But Parker makes no showing that any entry in the journal was relevant to A.M.'s state of mind. He points to nothing in the journal suggesting that A.M. had a motive to fabricate the allegations or that her disclosure of sexual molestation was influenced by the journal or by R.M.

Additionally, Parker offered the journal in its entirety. But as the trial court observed, "I don't know if the entire journal is relevant or what information is in it" because "[n]obody has read it word for word . . . ." VRP (8/14/15) at 70. It may be that had Parker offered specific entries from the journal that they may have been admissible as to R.M.'s state of mind. But because he did not, the trial court did not err in refusing to admit the journal in its entirety.[1] There was no abuse of discretion.

[1] Parker also argues that the trial court erred when it excluded testimony from A.M.'s brother, Adam, about watching football on Sundays. But the trial court correctly found the testimony irrelevant because it was undisputed that A.M. did not watch football with the family but instead stayed in her room. Thus, that some members of the family watched football on Sunday was of no consequence to whether Parker molested A.M.

Prosecutorial Misconduct

Parker argues that the prosecutor engaged in misconduct during her closing argument.[2] He contends that the prosecutor misstated the law and lessened the State's burden of proof when she summarized the court's reasonable doubt instruction.

In her closing remarks, the prosecutor described the court's reasonable doubt instruction as follows:[3]

> The next instruction that I want to talk about is instruction No. 2, and it tells you what my burden of proof is. All instructions in this packet is important, but this one is particularly important, because in this country, the state, the government, I need to prove a defendant guilty beyond a reasonable doubt. It's more than he probably did it. It's more than I really think he did it, but I'm not quite sure. But it's the highest standard of proof in the law, which is beyond every

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[2] Parker also argues that the prosecutor committed misconduct in her opening remarks when she described A.M. as "cute as a button." VRP (8/11/15) at 46. He contends the comment represented the prosecutor's personal opinion on A.M.'s credibility and bolstered A.M.'s credibility by implying that Parker was attracted to her appearance. The arguments are without merit. Parker does not explain how the remark reflects an opinion on the credibility of the witness. Nor does he cite to anywhere in the record that the State implied or suggested that A.M.'s appearance was Parker's motive for committing the crimes.

[3] The court's reasonable doubt instruction stated as follows:

> The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.
>
> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.
>
> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

Clerk's Papers (CP) at 16.

> reasonable doubt. Now, if you have a doubt, it needs to be based on evidence or lack of evidence per element that I need to prove.
>
> Now, this instruction tell us [sic] you in the first paragraph that the state is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. I point that out because often in a case, and in this one as well, this is no exception, there are proof of facts, a lot of facts, but they may not be facts which need to be proved beyond a reasonable doubt. They may not be entirely relevant to an element, for example.
>
> So, for example, whether or not Shannon [Dearinger] wanted to get out of the marriage might be a fact that you have a reasonable doubt on, but it doesn't matter in terms of evaluating the elements that I need to prove. I need to prove the elements of the charged crimes beyond a reasonable doubt. VRP (8/17/15) at 112-113.

Parker did not object to this argument.

To prevail on a claim of prosecutorial misconduct, the defendant must show that the prosecuting attorney's conduct was both improper and prejudicial. State v. Weber, 159 Wn.2d 252, 270, 149 P.3d 646 (2006) (citing State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)). We determine if the defendant was prejudiced under one of two standards of review. State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). If the defendant objected at trial, the defendant must show that the prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict. Id. If the defendant did not object at trial, the issue is waived unless the "prosecutor's misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice." Id. at 760-61 (citing State v. Stenson, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997)). Under this heightened standard, the defendant must show that (1) "'no curative instruction would have obviated any prejudicial effect on the jury'"

and (2) the misconduct resulted in prejudice that "'had a substantial likelihood of affecting the jury verdict.'" Id. at 761 (quoting State v. Thorgerson, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)).

Parker contends the prosecutor's argument that facts not relevant to a specific element of the crime cannot create a reasonable doubt misstated the law. He contends the argument lessened the State's burden of proof because it withdrew from the jury acceptable bases upon which to formulate a reasonable doubt. He points to the example given by the prosecutor about whether Dearinger wanted to get out of her marriage. He argues that while the issue may not have gone to an element of the charged crime, it may nonetheless have been relevant to her motivation to fabricate allegations against him, and thus whether a crime was committed at all.

The argument fails for two reasons. First, the prosecutor's argument tracks the court's reasonable doubt instruction which states that "[t]he State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt." CP at 16. The prosecutor thus sought to focus the jury's attention on the elements she needed to prove and the evidence that, in her view, supported each element. This was not improper.

Second, because Parker did not object at trial, even if the argument was improper, his claim is waived unless he shows that no curative instruction would have obviated any prejudicial effect on the jury and that there is a substantial likelihood the comment affected the jury's verdict. He fails to do so. Parker makes only a general argument that the comment was prejudicial because it

misstated the State's burden of proof. But he makes no argument about how the comment may have affected the jury's verdict in this case or explain why a proper instruction would not have cured any possible prejudice. We reject Parker's claim of prosecutorial misconduct.

Parker argues in his statement of additional grounds that the prosecutor engaged in misconduct when she mischaracterized testimony, arranged a witness to face away from him, and told the jury they could consider Parker's bias when evaluating his testimony.[4]

Parker contends that the prosecutor characterized A.M.'s statements in the recorded interview as describing penetration even though the verbatim report of proceedings reflects that she said Parker touched "on" her rather than "in" her. In her closing argument, the prosecutor argued that the victim described penetration in the recording. VRP (8/17/15) at 119-20. Right before playing the video, the prosecutor says: "I ask you to pay particular attention about when she's talking about what the defendant does at her hole, does he push on it, in it, or something else." VRP (8/17/15) at 129. When the video stopped, the prosecutor said, "[s]o she's saying he would push down in it and it hurts me." VRP (8/17/15) at 131. Whether A.M. said "in" or "on" was unclear from the recording. VRP (8/13/15) at 82-83. The prosecutor told the jury that it was their decision what exactly A.M. said, then argued that A.M. described penetration. The prosecutor may argue an interpretation of the facts so long as it is based in

[4] For clarity, we address the additional claims of prosecutorial misconduct that Parker raises in his statement of additional grounds at this juncture. The remainder of his statement of additional grounds claims are addressed below.

evidence in the record. State v. Kroll, 87 Wn.2d 829, 846, 558 P.2d 173 (1976). Here, the prosecutor's argument was based on the recording of A.M.'s interview which was admitted into evidence. There was no misconduct.

Similarly, Parker complains that the prosecutor mischaracterized a gesture made by A.M. in the recorded interview by saying in closing arguments that A.M. gestured "toward her bottom." VRP (8/17/15) at 128. Again, because the argument was based on the recording, there was no misconduct

Parker next argues that the prosecutor arranged to have R.M. face away from him during her testimony, then argued at closing that showed R.M.'s fear of Parker. The argument is without merit. The record shows that when R.M. began her testimony, she apparently blocked the microphone because she was touching her face. The prosecutor switched the side of the microphone. The record does not show that this caused R.M. to face away from Parker.

Parker also argues that the prosecutor should not have told the jury that it could consider the effect of Parker's liberty interest on his testimony. The jury was instructed that it judges each witness's credibility, and may consider "any personal interest that the witness might have in the outcome or the issues . . . ." CP at 14. It was not misconduct to explain to the jury its obligation to assess the credibility of all witnesses.

We reject Parker's claims that the prosecutor engaged in misconduct.

Cumulative Error

A defendant may be entitled to a new trial when cumulative errors make a trial fundamentally unfair. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668

(1984). Parker argues that we should reverse his convictions due to the cumulative effect of alleged errors. Because Parker's challenges fail, he is not entitled to a new trial due to cumulative error.

Legal Financial Obligations

Parker argues that the trial court erred when it found that he had an ability to pay legal financial obligations (LFOs). He further contends that the trial court had authority to waive the deoxyribonucleic (DNA) fee, victim's assessment, and filing fee. The State argues that these are all mandatory fees, so the trial court properly imposed them regardless of the inquiry into Parker's ability to pay.

The court stated that "only the mandatory [LFOs] will be imposed given the length of the sentence." VRP (9/17/15) at 210. The DNA fee and victim's assessment are mandatory fees, and a trial court need not consider a defendant's ability to pay when it imposes them. State v. Mathers, 193 Wn. App. 913, 918, 376 P.3d 1163, review denied, 186 Wn.2d 1015, 380 P.3d 482 (2016). The $200 filing fee imposed under RCW 36.18.020 is also a mandatory fee. State v. Lundy, 176 Wn. App. 96, 102, 308 P.3d 755 (2013). Parker urges the panel to abandon Lundy in light of State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015), and hold that the filing fee is discretionary. But Blazina requires an individualized assessment of the ability to pay discretionary costs. It does not change whether a cost is discretionary or mandatory. Under Mathers and Lundy, the trial court imposed only mandatory fees, so it did not err if it failed to make an individualized inquiry into Parker's ability to pay those fees.

Additional Claims in Parker's Statement of Additional Grounds

Parker advances several other arguments in his statement of additional grounds. First, he argues that the trial court erred by not instructing the jury on the hypothesis of innocence. We reject this argument because Washington does not recognize the hypothesis of innocence doctrine. State v. Rangel-Reyes, 119 Wn. App. 494, 499 n.1, 81 P.3d 157 (2003) (citing State v. Zunker, 112 Wn. App. 130, 135, 48 P.3d 344 (2002)).

Second, Parker argues that the police investigation failed to establish that he and A.M. could have watched TV while lying on the couch. We cannot review this claim because it is based on facts or evidence not in the record before us. State v. Alvarado, 164 Wn.2d 556, 569, 192 P.3d 345 (2008). The claim may be properly pursued, if at all, only by means of a personal restraint petition. Id.

Finally, Parker discusses many minor inconsistencies in A.M.'s testimony and argues that the prosecutor had a duty to inform the jury that A.M.'s testimony was unreliable. We defer to the trier of fact on issues of conflicting testimony, witnesses' credibility, and the persuasiveness of the evidence. State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004) (citing State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985)). Here, the jury heard A.M.'s testimony, assessed her credibility, and reached its verdict.

No. 74030-0-I/15

Affirmed.

Spearman, J.

WE CONCUR:

Trickey, ACJ

Dwyer, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 74030-0-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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