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DIVISION II

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STATE OF WASHINGTON
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No. 36586-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

JOSEPH FREDRICK LACHANCE JR.

Appellant.

Lewis County Superior Court

CORRECTED

RESPONDENT'S BRIEF

L. MICHAEL GOLDEN
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by:
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STATEMENT OF THE CASE

Appellant's recitation of the facts of the case is adequate for purposes of responding to this appeal.

ARGUMENT

I. THE PROSECUTOR DID NOT COMMIT MISCONDUCT.

LaChance claims that the prosecutor committed misconduct in several different manners. This argument has no merit.

To prove prosecutorial misconduct, the defendant must show that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial; State v. Hughes, 118 Wn.App. 713, 727, 77 P.3d 681 (2003); State v. Gregory, 158 Wn.2d 759, 809, 147 P.3d 1201 (2006), citing State v. Kwan Fai Mak, 105 Wn.2d 692, 726, 718 P.2d 407 (1986). Prosecutorial misconduct is reversible error only when there is "a substantial likelihood that the alleged prosecutorial misconduct affected the verdict." State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 757 (1994). However, if there was no proper objection, a request for a curative instruction, or a motion for a mistrial, the issue of a prosecutor's misconduct cannot be raised on appeal unless the misconduct was so flagrant and ill-intentioned

that no curative instruction could have prevented the resulting prejudice. State v. Swan, 114 Wn.2d 613, 790 P.2d 610 (1990), *cert. denied,* 498 U.S. 1046, 111 S.Ct. 752, 112 L.Ed.2d 772 (1991); State v. Padilla, 69 Wn.App. 295, 846 P.2d 564 (1993). A prosecutor's remarks "must be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), cert. denied 523 U.S. 1007 (1998). Moreover, if the prejudice could have been cured by a jury instruction but the defense did not request one, reversal is not required. State v. Dhaliwal 150 Wn.2d 559, 578, 79 P.3d 432 (2003); State v. Fiallo-Lopez , 78 Wn.App. 717, 726, 899 P.2d 1294 (2995). Additionally, "the absence of a motion for mistrial at the time of the argument strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." State v. Swan, 114 Wn.2d at 661; State v. Negrete, 72 Wn.App. 62, 863 P.2d 137 (2993), rev. denied, 123 Wn.2d 1030, 877 P.2d 695 (1994). Prosecutors may argue inferences from the evidence, and prejudicial error will not be found unless it is "clear and unmistakable" that counsel is expressing a personal opinion. State v. Brett, 126 Wn.2d 136, 175,

892 P.2d 29 (1995), *cert. den.* 516 U.S. 1121, 133 L.Ed.2d 858, 116 S.Ct. 931 (1996), quoting State v. Sargent, 40 Wn.App. 340, 344, 698 P.2d 598 (1985). Indeed, "unless prosecutorial conduct is flagrant and ill-intentioned, and the prejudice resulting there from so marked and enduring that corrective instructions or admonitions could not neutralize its effect, any objection to such conduct is waived by failure to make an adequate timely objection and request a curative instruction." State v. Copeland, 130 Wn.2d 255, 290, 922 P.2d 1304 (1996). " Prosecutorial remarks that may otherwise be improper do not constitute grounds for reversal if they are made in reply to defense arguments, unless a curative instruction would not have cured them." State v. Jones, 71 Wn.App. 798, 806-812, 863 P.2d 85 (1993), citing State v. Swan, 114 Wn.2d at 663. A prosecutor has wide latitude in closing argument to draw and express reasonable inferences from the evidence. State v. Hoffman , 116 Wn.2d 51, 95, 804 P.2d 577 (1991). A prosecutor in closing may freely comment on the credibility of the witnesses based on the evidence. State v. Stenson, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997). "Prejudice is established only if there is a substantial likelihood [that] the instances of misconduct affected the jury's verdict." State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245

(1995) *cert. denied* 518 U.S. 1026 (1996). A prosecutor's remarks are not grounds for reversal if they were invited or provoked by defense counsel or are a pertinent reply to his or her arguments. State v. Carver, 122 Wn.App. 300, 306, 93 P.3d 947 (2004). Claims of prosecutorial misconduct are also subject to a harmless error analysis. A harmless error under the constitutional standard occurs if the reviewing "court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (19896).

A. The Prosecutor Did Not State his Personal Opinion of Defendant's "Credibility."

LaChance mischaracterizes one of the prosecutor's statements as being a comment on LaChance's "credibility." The prosecutor did not comment on LaChance's "credibility" per se. LaChance claims that the following words amounted to the prosecutor's stating a personal opinion as to the "credibility" of LaChance: "What kind of things did Mr. LaChance say, in my opinion [sic] is just asinine, the whole idea of, gee, they brought their own meth, we did it together, I didn't give them any. Where are these girls going to get this stuff [?]." 4RP 41. LaChance's

argument is misplaced when we view the prosecutor's statement in the context of the total argument and issues in this case. State v. Brown, 132 Wn.2d at 561. First of all, the remark was not objected to. 4RP 41. Furthermore, the remark that LaChance's testimony was "asinine" is not a comment on "credibility." "Asinine" means "1.) foolish, unintelligent, or silly; stupid. . ." Webster's Unabridged Dictionary at 122, Random House, 2d Ed. (1998). Accordingly, the prosecutor's saying, in effect, that LaChance's testimony was foolish is not the same as saying that LaChance was lying, and therefore was not improper. See e.g., State v. Brown, 132 Wn.2d 529, 566, 940 P.2d 546 (1997), cert. denied 523 U.S. 1007 (1998). (1997) (prosecutor referring to defense arguments as "ludicrous" is not misconduct). Finally, the prosecutor's stating that LaChance's testimony was foolish was not so flagrant or ill-intentioned that no curative instruction could have erased any alleged prejudice caused by the remark. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). No curative instruction was requested. Moreover, it is difficult to see how such a minor remark would have affected the jury's verdict in any appreciable way. Id. at 508. Because this remark by the prosecutor was not improper, LaChance's argument to the contrary has no merit.

B. The Prosecutor Did Not "Vouch for the Victim's Credibility" Nor Did He Argue Evidence Not in the Record.

LaChance claims that the prosecutor vouched for the victim's credibility when he used the phrase "they looked to me to be scared to death. They looked to me to not want to be here on some kind of redemptive quest. . ." 4RP 42. Again LaChance's argument is misplaced. All that the prosecutor was doing here was arguing reasonable inferences from the record and, furthermore, the prosecutor's remarks were provoked by defense counsel, who claimed that "M.M. and M.D. want some kind of redemption, this is a way to redeem themselves." 4RP 30-31. A prosecutor's remarks are not grounds for reversal if they were invited or provoked by defense counsel or are a pertinent reply to his arguments. State v. Carver, 122 Wn.App. at 306. Because the prosecutor's remarks were provoked by defense counsel, the prosecutor's responses were not improper.

C. The Prosecutor Did Not Appeal to the Jury to Convict on The Basis of " Emotion."

LaChance also claims that some remarks by the prosecutor invited the jury to convict "based upon emotion." This is not correct. LaChance argues that the prosecutor's statement that

"[i]t's difficult for me to handle some of the items in evidence and as difficult as it was, however, it is not going to be difficult for you to decide on each of the charges in this case" (4RP 2) and "the hardest thing for me to explain [re: sexual motivation] just in terms of the way I feel about it. . . . " (4 RP 18,19) amounted to the prosecutor's asking the jury to convict based upon "emotion." Brief of Appellant 15-18. This is not correct. There was no objection to these remarks, nor was a curative instruction requested. 4RP 2, 18, 19. Perhaps the reason there was no objection to these remarks is because defense counsel knew the remarks were not objectionable. In fact, the failure to make a proper objection, move for a mistrial, or request a curative instruction strongly suggests that the questions did not appear prejudicial to LaChance. State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990). Indeed, these remarks by the prosecutor in this case were not improper but were simply remarks based upon common sense and reason, upon the evidence presented in the case, and upon inferences from the evidence: the prosecutor had to handle a dildo (belonging to LaChance) with a gloved hand in order to show it to the jury, and the prosecutor needed to bring to the jury's attention the suggestive titles of several pornographic DVDs belonging to the defendant.

2RP 28, 29, 37, 38, 42. This evidence went to the prosecution's theory of the case. Furthermore, these items were all "properly admitted evidence" and the prosecutor's arguing inferences from these facts and evidence was proper. Moreover, the prosecutor referred to testimony by M.M. and M.D. and to the physical evidence of the dildo and the pornographic videos when he stated that LaChance "had his toys and he had sex with these girls." 4RP 19.

Additionally, anyone trying to explain what sexual motivation means may struggle with trying to define it, and commenting that it is difficult to try to explain it does not show that the prosecutor was trying to get the jury to convict based upon emotion rather than reason. Incidentally, LaChance also claims that the prosecutor "repeatedly" told the jury about his personal discomfort [Brief of Appellant 18] yet he only cites *two* alleged incidences of such conduct. Brief of Appellant 16. In this way LaChance is exaggerating the number of allegedly improper remarks of the prosecutor.

In sum, when viewed in the context of the total arguments and evidence in this case, the prosecutor's remarks discussed in

this section were not improper and LaChance's arguments to the contrary are without merit.

D. The Prosecutor's Comment About the Missing Defense Witnesses Was Not Improper.

LaChance also argues that the prosecutor improperly invoked in closing the missing witness doctrine in regards to a couple of witnesses LaChance mentioned in his testimony. Brief of Appellant 18-22. But the prosecutor was only responding to LaChance's testimony on direct when LaChance named other individuals that he "knew" were to blame for providing the methamphetamine to the girls, and that others owned the "blue bag" and the pornographic materials. 3RP 75,76,89,92. LaChance further claims that the prosecutor was not allowed to "wonder aloud" why those individuals did not testify for LaChance because supposedly their remarks would have been self incriminatory. LaChance's argument is once again misplaced. Had LaChance called a couple of these witnesses to testify on his behalf, their testimony would not have necessarily been entirely "incriminating." For example, mere possession of scales is not a crime (LaChance said the scales were his brother's) and neither is possession of *adult* pornography an "incriminating" crime (LaChance said that the

pornography really belonged to Myra Story--that she had "planted" such evidence in his room-- 3RP 94,95). So, not all of these witnesses would have incriminated themselves if they were called as witnesses by LaChance. LaChance mentioned them in his testimony and the prosecutor was not out of line to wonder aloud in his closing just where those witnesses were because not all of their testimony would have been necessarily "incriminating" or "unimportant."

However, even If any of the remarks by the prosecutor were improper, any error should be deemed harmless by this Court because the evidence here was overwhelming. Harmless error occurs when the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Both M.M. and M.D. testified that LaChance gave them methamphetamine. 3RP 4-8,13; 3RP 41-44. Both M.M. and M.D. testified that LaChance had sex with M.M. when she was under 16. 3RP 14,17,18,20; 3RP 40-46. Both girls testified that LaChance used a dildo on them after supplying them with methamphetamine and watching sexually explicit videos. Id. 43, 44,45. Because the evidence of LaChance's guilt was overwhelming, a reasonable jury would have reached the

same result in absence of any alleged misconduct, and LaChance's arguments to the contrary are without merit.

E. The Prosecutor Did Not "Incite the Jury to Convict By Means of Innuendo."

LaChance also argues that the prosecutor committed "flagrant misconduct" by questioning LaChance on cross examination about LaChance's having given his daughter methamphetamine " without producing extrinsic evidence of the prejudicial fact implied in that question." Brief of Appellant 25-28. This assertion is absolutely false. The State did indeed produce evidence on rebuttal that LaChance had admitted to giving his daughter methamphetamine. Thus, LaChance is not only wrong on this issue but he also misleads this Court by falsely claiming that the State failed to put on rebuttal evidence to contradict LaChance's claim that he had never given his daughter methamphetamine.

The truth is that LaChance took the stand and on cross examination the prosecutor asked, "You gave methamphetamine to your daughter, didn't you?" LaChance replied, "No. I sure did not." 3RP 98. LaChance now claims that by asking that question, the prosecutor "insinuated LaChance had in fact given meth to his daughter." Brief of Appellant 23. LaChance further maintains that

"[t]he State presented no extrinsic evidence that LaChance gave meth to his daughter. . . . [w]ithout such extrinsic evidence, the prosecutor's question was a "flagrant attempt to place evidence before the jury that appeared to have been otherwise unavailable." Brief of Appellant 25. LaChance goes on to claim in a footnote that the State "never called [deputy] Shannon as a witness to rebut LaChance's denial at trial." Brief of Appellant 25 note 6. These assertions are all categorically untrue. The truth is that the State did re-call Deputy Shannon on rebuttal and ask her if LaChance had said anything about giving his daughter methamphetamine. Specifically, on rebuttal Deputy Shannon testified:

> I specifically asked Mr. LaChance, have you given your daughter methamphetamine, and he responded, quote, yes, I have, unquote. . . . He also stated, . . . if you're going to do meth, you're going to do it with me. That's specifically what Mr. LaChance said. And he also confessed post Miranda to giving his own daughter methamphetamine a second time.

3RP 99-102. (emphasis added). Thus, LaChance's argument that the prosecutor failed to produce rebuttal evidence that LaChance had given his daughter meth is completely false. LaChance admitted to Deputy Shannon that he not only gave his daughter methamphetamine once but twice. Id. Accordingly, this particular argument by LaChance is based upon a total misrepresentation of

what happened at trial, and none of his argument based upon this misrepresentation should be given any consideration whatsoever.

II. TRIAL COUNSEL WAS NOT INEFFECTIVE IN FAILING TO OBJECT TO ADMISSION OF THE PORNOGRAPHY EVIDENCE OR IN FAILING TO REQUEST A LIMITING INSTRUCTION BECAUSE SUCH EVIDENCE WAS PROPERLY ADMITTED.

LaChance also claims that his trial counsel was ineffective for failing to object to evidence that LaChance possessed pornography and in failing to request a curative instruction regarding such evidence. Brief of Appellant 28-30.

In order to prove ineffective assistance of counsel an appellant must show that (1) trial counsel's performance was deficient and (2) the deficient performance prejudiced him. Strickland v. Washington, 466 U.S. 668, 687-289, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice occurs when, but for the deficient performance by counsel, there is a reasonable probability that the outcome would have been different. In the Matter of the Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). It is the defendant's burden to prove ineffective assistance of counsel. McFarland, 127 Wn.2d at 335. The defendant bears the burden of establishing both prongs before a reviewing court will deem trial

counsel's performance ineffective. Strickland at 687, 104 S.Ct. at 2064. Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 558, 705, 940 P.2d 1239 (1997), cert. den., 523 U.S. 1008, 118 S.Ct. 1193, 140 L.Ed.2d 323 (1998). When reviewing claims of ineffective assistance of counsel, a reviewing court gives great deference to trial counsel's performance and begins the analysis with a strong presumption that counsel was effective. Strickland, 466 U.S. at 689; State v. McFarland, 127 Wn.2d 322, 337, 899 P.2d 1241 (1995). Moreover, a presumption exists that "under the circumstances, the challenged action 'might be considered sound trial strategy.'" Strickland at 689, 104 S.Ct. at 2005.; State v. Hakimi, 124 Wn.App. 15,22,98P.2d 809 (2004)(The defendant must show that there were no legitimate strategic or tactical rationales for his trial counsel's conduct). A reviewing court will determine whether counsel was competent based on the entire trial record. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Mere differences of opinion regarding trial strategy or tactics cannot support an ineffective assistance of counsel claim. State v. Hendrickson, 129 Wn.2d 61, 66-78, 917 P.2d (1996). An

attorney has no duty to argue frivolous or groundless matters before the court. State v. Stockman, 70 Wn.2d 941, 946, 425 P.2d. 898 (1967). Mere differences of opinion regarding trial strategy or tactics cannot support an ineffective assistance of counsel claim. Hendrickson, 129 Wn.2d at 77-78. Exceptional deference must be given when evaluating counsel's strategic decisions. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). Decisions by trial counsel concerning methods of examining witnesses are trial tactics. Hendrickson, 129 Wn.2d at 77, 78. Likewise, decisions by trial counsel as to when or whether to object are trial tactics. Absent egregious circumstances, counsel's failure to object will not constitute ineffectiveness requiring reversal. State v. Madison, 53 Wn.App. 754, 763,770 P.2d 662 (1989)(failure to object will not constitute ineffective assistance of counsel except under egregious circumstances).; State v. Neidigh, 78 Wn.App. 71, 77, 895 P.2d 423 (1995) (failure to object is not ineffective assistance of counsel if it could have been a legitimate trial strategy.)

Counsel in the present case was not ineffective. Notably, trial counsel made numerous pre-trial motions including a motion to dismiss, 3.5/3.6 motion and various motions regarding 404(b) evidence. 1RP 3-81. LaChance's reasons for claiming counsel

was ineffective had to do largely with his counsel's failure to object. But trial counsel's decision as to when or whether to object are trial tactics and cannot be the basis for a claim of ineffective assistance of counsel. State v. Madison, supra. And, for reasons discussed in detail in the following section of this brief, trial counsel here was not "ineffective" for failing to object to admission of evidence that LaChance possessed pornographic materials with titles like "Barely Legal Horny Girls" and "Sweet Young Girls." As explained below, these materials were relevant and properly admitted, so trial counsel was not ineffective for failing to object to materials/evidence that he likely knew were relevant and admissible in this case. In other words trial counsel obviously knew that objecting to the admission of these relevant materials would be futile.

III. THE TRIAL COURT DID NOT ERR IN ADMITTING PORNOGRAPHY EVIDENCE NOR DID IT ERR IN FAILING TO ISSUE A LIMITING INSTRUCTION REGARDING THOSE MATERIALS.

LaChance claims it was error to admit evidence of LaChance's possession of pornography and that it was error not to issue a limiting instruction as to those materials. Trial counsel did not object to the admission of the pornography evidence, nor did

trial counsel request a limiting instruction as to that evidence. LaChance first claims counsel was ineffective in handling the pornography evidence. The State disagrees and addressed the ineffective of counsel issue above. But LaChance also places blame on the trial court for the way it handled the issue of the pornography evidence, and for failing to issue a limiting instruction as to the pornography evidence. For the following reasons, the State believes LaChance's claims are without merit.

A trial court's decision to admit evidence is reviewed for abuse of discretion. State v. Griswold, 98 Wn.App. 817, 991 P.2d 657 (2000); State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008, 118 S.Ct. 1193, 140 L.Ed.2d 323 (1998). An abuse of discretion exists only if the decision is manifestly unreasonable or based on untenable grounds. Id. Evidence of prior bad acts is generally inadmissible to prove the character of a person and his propensity in conformity therewith, but such evidence may be admissible for other purposes. ER 404(b). For example, evidence of other bad acts may be admitted to show a common scheme or plan. See e.g., State v. Lough, 125 Wn.2d 847, 854-55, 889 P.2d 487 (1995). "Where a defendant is charged with child rape or child molestation, the existence of 'a

design to fulfill sexual compulsions evidenced by a pattern of past behavior is probative of the defendant's guilt." State v. Sexsmith, 138 Wn.App. 497, 504, 157 P.3d 901 (2007) quoting State v. DeVincentis, 150 Wn.2d 11, 17-18, 74 P.3d 119 (2003), State v. Bowen 48 Wash.App. 187, 194, 738 P.2d 316 (1987). "The trial court determines whether evidence is relevant and an appellate court reviews the trial court's ruling for a 'manifest abuse of discretion.'" State v. Brockob, 159 Wn.2d 311, 348-349, 150 P.3d 59 (2006)(quoting State v. Vreen, 143 Wn.2d 923, 932, 26 P.3d 236 (2001)(other citations omitted). "'The threshold to admit relevant evidence is very low. Even minimally relevant evidence is admissible.'" State v. Lord, 161 Wn.2d 276, 301, 165 P.3d 1251 (2007), quoting State v. Darden, 145 Wash.2d 612, 41 P.3d 1189 (2002). "And relevant evidence need provide only 'a piece of the puzzle.'" Lord , 161 Wn.2d at 301, quoting Bell v. State, 147 Wn.2d 166,182, 52 P.3d 503 (2002). But a reviewing court will also affirm the ruling of the trial court if there are other proper grounds to admit the evidence. State v. Rohrich, 149 Wash.2d 647, 654, 71 P.3d 638 (2003). Even relevant evidence may be excluded if its "probative value is substantially outweighed by the danger of unfair prejudice." ER 403. Evidence is unfairly prejudicial if it is likely to cause an

emotional rather than rational decision. State v. Rice, 48 Wn.App. 7, 13, 737 P.2d 726 (1987). The burden of demonstrating unfair prejudice is on the party seeking to exclude the evidence. Erikson v. Kerr, 125 Wn.2d 183, 190, 883 P.2d 313 (1994). "Evidence is not inadmissible under ER 403 simply because it is detrimental or harmful to the interests of the party opposing its admission; it is prejudicial only if it has the capacity to skew the truth-finding process." Wilson v. Olivette North Am.,Inc. 85 Wn.App. 804, 814, 934 P.2d 1231, *review den.* 133 Wn.2d 1017, 948 P.2d 388 (1997).

The evidence of LaChance's possession of pornography in the present case was relevant and did not "skew the truth-finding process." Id. For example, evidence that LaChance possessed pornographic materials with titles indicating the videos depicted sex with young girls, and that LaChance viewed a pornographic video with victim M.M. was relevant to show that LaChance had sex with M.M. to fulfill his sexual desires (desires evidenced in the pornography depicting young girls) and also goes to LaChance's sexual motivation when he supplied M.M. with methamphetamine before having sex. 3RP 3-10, 21,30, 36. The pornographic videos could also have been used by LaChance to entice the victim, M.M--making the pornographic materials instrumentalities in the crime.

Courts in other jurisdictions have held that pornographic materials are admissible to corroborate the testimony of the victim. People v. Sharbnow, 435 U.W.2d 772, 777 (Mich.Ct.App. 1989)(pornography viewed by minor victim was admissible to rebut contention of defendant that the victim was not credible); State v. Sebasky, 547 N.W.2d 93, 98-99 (Minn.Ct.App. 1996)(pornographic pamphlets viewed by victim were relevant to corroborate victim's testimony). Additionally, Courts in other states have ruled that pornography found in the possession of the defendant is relevant because there--as in the present case-- it was an instrumentality of the crime. .See Hoggard v. State, 640 S.W.2d 102, 106 (Ark. 1982)(stating where child was encouraged to look at the pornography and then encouraged to engage in those acts the "value of the evidence as proof of the crime is obvious"); State v. Natzke, 544 P.2d 1121, 11223 (Ariz.Ct.App. 1976)(holding sexually oriented literature found in the defendant's possession was relevant and admissible because the victim testified the defendant had shown her the material and he wished her to perform sexual acts); People v. Mason, 578 N.E.2d 1341, 1355 (Ill.Ct.App. 1991)(stating "[e]vidence indicating the defendant showed [victim] pornography suggests his intent at self-arousal and could be logically interpreted

as a scheme to seduce the child"); State v. Lee, 525 N.W.2d 179, 183 (Neb. 1994)(holding pornography shown to victim to sexually arouse the victim was relevant to defendant's plan or scheme); Commonwealth v. Impellizzeri, 661 A.2d 422, 431 (Pa.Super.Ct.1995)(stating in dicta that had the defendant shown the pornography to the victim, the probative value "would be more obvious").

Courts in other jurisdiction have further addressed the issue of the admission of evidence that a defendant kept a pornography collection, or evidence that he had shown his victim pornography, and these courts have found that such evidence is relevant and admissible evidence:

> Evidence that the defendant had shown the complainant pornographic videotapes or other pornographic material was admissible 'as evidence of a pattern or course of conduct engaged in by the defendant to exploit the complainant's trust, and also as evidence of the defendant's motive or intent to engage the complainant in a sexual relationship.'
> * * *
> Testimony regarding the pornographic material was also admissible to corroborate the child's testimony.

Commonwealth v. Jaundoo, 831 N.E.2d 365, 369-370 (Mass.App.Ct. 2005)(quoting Commonwealth v. Holloway, 691 N.E.2d 985 (1998)(other citations omitted). And, a Georgia Court

has noted, "[t]he testimony of a child victim of sexual molestation that the pornographic material was shown to her by the defendant immediately prior to, or during, the sexual molestation furnished sufficient linkage between the materials and the various sexual crimes for admission. . . ." Greulich v. State, 588 S.E.2d 450, 451-452 (Ga.App. 2003), referencing Beck v. State, 551 S.E.2d 68 (2001).

In the present case, just as explained in the cases from other jurisdictions discussed above, the admission of evidence of LaChance's possession of pornography was relevant to the child rape charge in the first place because LaChance had the victim watch a pornographic video or DVD with him before or during sexual activities. 3RP 20, 44 ("he [LaChance] put in this porno tape and had headphones on his TV that he had us put on, then he brought out some dildos and started kind of . . .") Secondly, watching pornography is often a part of the "grooming" process for those who engage in sexual activity with young victims in order to, for instance, lower the victim's inhibitions: "[P]ornography is used in connection with child molestation, for arousal and fantasy and as a means of lowering the intended victim's inhibitions through peer pressure effects. . . . [F]indings suggest that a reluctant child can

sexual motivation in supplying methamphetamine to her and M.D. so they could all have sex 3RP 6,7,9,10, 21. Said differently, the pornography in this case was used as an instrumentality in LaChance's commission of the crimes--he provided M.M. with methamphetamine, had her watch a pornographic video and then had her play with his sex toys and then he eventually had sex with her. 3RP 9, 10, 11. In these ways, LaChance's possession of pornography is tied directly to the offenses, was part of his "routine" with the girls and is thus relevant as an instrumentality of the crimes. Put yet another way, because LaChance had sexual contact with M.M. either right before, during or after watching the pornographic video, the pornography was admissible as part of the *res gestae* of LaChance's offenses. 3RP 10, 11, 20. Under the *res gestae* rule, evidence of other bad acts is admissible "'[t]o complete the story of the crime on trial by proving its immediate context of happenings near in time and place.'" State v. Lane, 125 Wn.2d 825, 831, 8889 P.2d 929 (1995) (quoting State v. Tharp, 27 Wn.App. 198, 204, 616 P.2d 693 (1980)). Thus, in the present case, evidence of LaChance's pornography collection was admissible to complete the "story of the crime" and was, in M.M.'s words, part of the "routine" used by LaChance to have the girls

smoke methamphetamine, watch a pornographic video and then have sex. 3RP 10, 29,30,32,36,44. As such, the evidence of the pornography was properly admitted as part of the *res gestae* of the crimes. Accordingly, the trial court did not err in allowing admission of LaChance's pornography collection, trial counsel was not ineffective for failing to object to it, and neither trial counsel nor the trial court erred in failing to request or issue a limiting instruction regarding this relevant and admissible evidence. LaChance's arguments to the contrary are without merit.

IV. THERE WAS NO "CUMULATIVE ERROR."

LaChance argues that the cumulative error doctrine requires that his convictions be reversed. LaChance is incorrect.

A reviewing court may reverse for cumulative error when several errors that are not sufficient standing alone may be prejudicial in their cumulative effect. State v. Korum, 157 Wn.2d 614, 652, 141 P.3d 13 (1006); State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). The defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary. In re Personal Restraint of Lord , 123 Wn.2d 296, 332, 868 P.2d 835 (1994). Here, LaChance has not met that burden and has failed to demonstrate any error, so the doctrine of

cumulative error does not apply in this case. State v. Hodges, 118 Wn.App. 668, 673-74, 77 P.3d 375 (2003). LaChance's arguments on this issue fail, and his convictions should be affirmed.

V. ASSESSMENT OF ATTORNEY FEES WAS PROPER.

LaChance also complains that the court's assessment of attorney's fees was improper, inexplicably arguing that "LaChance's counsel breached the duty of loyalty by . . . presenting an order to impose additional punishment on LaChance in the form of attorney fees." Brief of Appellant 48. LaChance is wrong. His argument on this issue is virtually incomprehensible: LaChance cannot cite to any authority for his proposition that appointed counsel's request for attorney fees was "gratuitous," a breaching of "the duty of loyalty," an "abandonment of his duty to advocate," and a "breakdown in the adversarial process." Brief of Appellant 48. The State, frankly, is flabbergasted by this argument.

Washington law allows for the assessment of attorney fees for the services of a court-appointed attorney against a convicted defendant. CrR 3.1(d)(2) states, in pertinent part: "[t]he assignment of a lawyer may be conditioned upon part payment pursuant to an established method of collection." In addition, RCW 10.01.160

permits the court to order a convicted defendant to repay the costs of a lawyer as part of the judgment and sentence. Additionally, RCW 9.94A.030(28) further explains: "Legal financial obligation" means a sum of money that is ordered by a superior court of the state of Washington for legal financial obligations which may include . . . court costs. . . court-appointed attorneys' fees, and costs of defense, fines, and any other financial obligations that is assessed to the offender as a result of a felony conviction." RCW 9.94A.030(28) (emphasis added). Thus, because the costs levied against LaChance for his attorney's fees are allowed under Washington law, and because the judgment and sentence clearly indicated that LaChance would be responsible for such fees "to be determined" ("TBD), LaChance's arguments to the contrary are simply without merit.

LaChance further claims that the Court's amending the judgment and sentence to add costs of attorney fees without LaChance being present "violated LaChance's Due Process right to be present at a critical stage of the proceeding." Brief of Appellant 48. This claim is also without merit. LaChance does not have such a blanket right to be present. LaChance had the right to be present only "when his presence ha[d] a relation, reasonably substantial, to

the fullness of his opportunity to defend against the charge." State v. Ahern, 64 Wn.App. 731, 734-35, 826 P.2d 1086 (1992). LaChance's presence at the proceeding to set the amounts of legal financial obligations would have had no relation to his opportunity to defend against the amounts requested. Accordingly, he had no right to be present for that proceeding and, as explained above, LaChance knew that he would be held responsible for attorney fees in an amount "to be determined" (see Judgment and Sentence)..

LaChance also argues that the "court also had the statutory duty to ascertain LaChance's ability to pay those costs prior to imposing them." Brief of Appellant 50. This argument is also misplaced.

Inquiry into the defendant's ability to pay is necessary only when the State enforces collection under the judgment, or imposes sanctions for nonpayment. Thus, a defendant's indigent status at the time of sentencing does not bar an award of costs. State v. Mahone, 98 Wn.App. 342, 348, 989 P.2d 583 (1999); State v. Blank, 131 Wn.2d 230, 242, 252-53, 930 P.2d 1213 (1997); State v. Curry, 62 Wn.App. 676, 681, 814 P.2d 1252 (1991), *aff'd.* 118 Wn.2d 911, 829 P.2d 166 (1992) (the meaningful time to examine the defendant's ability to pay is when the government seeks to

collect the obligation). Put another way, "[c]onstitutional principles will be implicated . . . only if the government seeks to enforce collection of the [costs] at a time when [the defendant is] unable, through no fault of his or her own, to comply." Curry, 62 Wn.App. at 681 (quoting United States v. Pagan, 785 F.3d 378, 381 (2nd Cir. 1986 (internal quotes omitted). So, it is at the point of enforced collection . . . where an indigent may be faced with the alternatives of payment or imprisonment, that he 'may assert a constitutional objection on the ground of his indigency.'" Id. quoting Pagan, 785 F.3d at 382 (emphasis added). As another court explained, "the inquiry at sentencing as to *future* ability to pay is somewhat speculative. . . .Accordingly, we hold that formal findings of fact are not required for imposition of recoupment of attorney fees at sentencing." State v. Baldwin, 63 Wn.App. 303, 310-312, 818 P.2d 1116 (1991) ("[w]hether a defendant has the ability to pay should be determined when the State seeks to collect the obligation due it"). Regardless of this rule, it appears that the trial court *did* give some consideration at sentencing to LaChance's indigency because the court reduced the chapter 69.50 drug fine from $2,000 to $1,000. *See* Judgment and Sentence, page 4.

Because LaChance is still incarcerated, the State has not sought to "enforce collection" of his financial obligations (which include the attorney fees). Accordingly, at this point LaChance's protestation about the court's failing to ascertain his ability to pay before imposing costs is simply premature. LaChance's arguments to the contrary are without merit.

VI. LACHANCE'S 143 DAYS CREDIT FOR TIME SERVED WERE PROPERLY CALCULATED AND CERTIFIED TO THE DEPARTMENT OF CORRECTIONS BY THE LEWIS COUNTY JAIL.

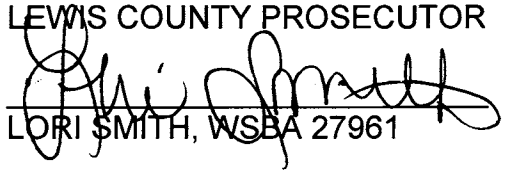
LaChance claims that "the court wrongly ordered the Department of Corrections to give LaChance less credit for time served than was actually due." Brief of Appellant 51. While it is true that the warrant of commitment document for cause number 07-1-00136-5 is wrong because it incorrectly listed credit for time served as "'two days", the Judgment and Sentence listed the time served on this case as 139 days, with time served for case number 07-1-00089-0 listed as two days. As far as the State is aware, the jail uses the Judgment and Sentence as the controlling document for certifying the number of days served to the Department of Corrections.

CONCLUSION

There was no prosecutorial misconduct in this case, nor was trial counsel ineffective. Admission of evidence that LaChance possessed pornography and showed a pornographic video to the victim was relevant, and probative of LaChance's guilt because part of LaChance's "routine" was providing methamphetamine to the victim, watching pornographic videos, and then having sex with the underaged victim. Because it is the State's position that there was no prosecutorial misconduct and no ineffective assistance of counsel shown here, there can be no "cumulative error." Furthermore, assessing attorney fees against LaChance was proper under Washington law. Finally, despite the errors in the warrant of commitment, the correct number of days LaChance spent in the Lewis County jail was properly stated in the Judgment and Sentence, which should be the controlling document here. Accordingly, none of LaChance's arguments on appeal have merit, and his convictions should be affirmed in all respects.

DATED THIS 16th day of September, 2008.

L. MICHAEL GOLDEN
LEWIS COUNTY PROSECUTOR

by: 
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CERTIFICATE OF SERVICE BY MAIL

The undersigned declares under penalty of perjury under the laws of the State of Washington that on 9/16/08, a copy of this Corrected Respondent's Brief was served upon the Appellant by placing said document in the United States mail, postage prepaid, addressed to Appellant's attorney as follows:

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DATED THIS 16 day of September, 2008.