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STATEMENT OF THE CASE

Appellant's version of the statement of the case is adequate for purposes of this response.

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DECLINED DEFENDANT'S JURY WAIVER.

Mr. Hylton argues that the trial court abused its discretion when it failed to give reasons for why it required Mr. Hylton's case be heard by a jury. This argument is not supported in the record. The record does not reveal that the trial court failed to exercise discretion, but only that the court did not describe its exercise of discretion on the record. Moreover, there is no support for the broader conclusion, that failure to exercise discretion is an abuse of discretion, either. Mr. Hylton cites several cases for this proposition, but these cases do not support his conclusion that failing to exercise discretion is reversible error.

The first case defendant cites, *Kucera v. State Dept. of Transportation*, 140 Wn.2d 200, 995 P.2d 63 (2000) concerned a suit brought by shoreline landowners who sought to prevent the state from running high speed ferries above a certain speed along certain waterways. A trial court imposed an injunction against the

state prompting it to appeal. The Supreme Court ruled that the trial court improperly imposed the injunction because it failed to consider the requisite factors: whether there was an adequate remedy at law, whether the actor caused actual and substantial injury, and whether the public's interest outweighed the relative interests of the parties. Kucera, 140 Wn.2d at 209, 995 P.2d 63. Mr. Hylton has not identified any comparable specific considerations that a trial court must examine prior to rejecting a jury waiver. Thus, there is no basis to contend the trial court's decision here was presumptively invalid.

Mr. Hylton's second case is State v. Pettit, 93 Wn.2d 288, 609 P.2d 1364 (1980). In this litigation, the Supreme Court analyzed the Lewis County prosecutor's mandatory policy of filing habitual criminal informations. The Supreme Court observed that while prosecutors have charging discretion, "the discretion lodged in the office necessarily assumes that the prosecutor will exercise it after an analysis of all available relevant information." Pettit, 93 Wn.2d at 295. The Court then described specific evidence revealing that the Lewis County prosecutor specifically failed to perform this analysis. The prosecutor admitted

that he relied on the record alone in deciding to file the habitual criminal information. He testified that he did not consider any mitigating circumstances in reaching his decision, and that he could imagine no situation which would provide for an exception to the mandatory policy.

Pettit, 93 Wn.2d at 296. Based on this evidence, the Court held that the prosecuting attorney's policy was an abuse of discretion.

No such evidence exists in the record here. Mr. Hylton has not made a similar showing that the trial court specifically failed to exercise its discretion in his case. There is simply not a record of the court exercising its discretion. As a result, *Pettit* does not support his conclusion.

Finally, in Sanwick v. Puget Sound Title Co., 70 Wn.2d 438, 444-45, 423 P.2d 624 (1967) the Supreme Court neither found a failure to exercise discretion or an abuse of discretion. The Court considered a trial court's grant of leave to amend the pleadings. The Court found no error in the trial court's decision to allow the amendment. Sanwick, 70 Wn.2d at 45. The case is completely inapposite.

A similar conclusion can be made of the cited cases State v. Thompson, 88 Wn.2d 13, 558 P.2d 202 (1977), State v. Rupe, 108 Wn.2d 734, 743 P.2d 210 (1987), *cert. denied*, 486 U.S. 1061 (1988), State v. Maloney, 78 Wn.2d 922, 481 P.2d 1 (1971), and

State v. Jones, 70 Wn.2d 591, 424 P.2d 665 (1967). None of these cases hold that a failure to exercise discretion is an abuse of discretion.

These cases do hold that a defendant bears the burden of showing both an abuse of discretion by the trial court - that is, its decision was "clearly untenable or manifestly unreasonable" - and that the defendant was prejudiced by having his case heard by a jury. Rupe 108 Wn.2d at 754, 743 P.2d 210, 222 (citing State v. Jones and State v. Maloney, *Id.*). Mr. Hylton has done neither.

At most, Mr. Hylton offers several proper justifications for a court not to accept a defendant's jury waiver and then argues that each could not be the basis for judge's decision in this case. But ultimately he fails to provide any argument that the trial court actually employed improper reasons in making its decision. The court's reason to impanel a jury may have been as simple as its judgment that juries are more appropriate triers of fact in cases calling for multiple credibility determinations. This is an appropriate reason for the decision.

Whatever reason one hypothesizes for the court's determination, Mr. Hylton has failed to establish that he was prejudiced by the decision. In the end, Mr. Hylton received his

constitutionally mandated right to a trial by jury. There is no companion right to a bench trial. Consequently, this court has no basis for granting Mr. Hylton relief. As the Supreme Court concluded in Maloney, "There being no showing whatsoever that appellant was prejudiced in any manner in having his cause heard before a jury, nor any indication that the trial court manifestly and untenably abused its discretion in denying his request for a nonjury trial," the appellant's argument that the trial court committed reversible error fails. Maloney, 78 Wn.2d at 928, 481 P.2d 1, 5.

II. THE TRIAL COURT PROPERLY EXCLUDED THE DEFENDANT'S OFFERS OF EVIDENCE.

Mr. Hylton challenges several evidentiary rulings by the trial court. By each ruling, the trial court excluded evidence sought to be admitted by Mr. Hylton. Each ruling is adequately supported by the law and should be sustained by this court.

A trial court has broad discretion when making evidentiary rulings. Cox v. Spangler, 141 Wn.2d 431, 439, 5 P.3d 1265, 22 P.3d 791 (2000). A trial court abuses this discretion if its decision to exclude evidence is manifestly unreasonable or based on untenable grounds. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d

615 (1995). With each ruling, Mr. Hylton fails to establish an abuse of discretion.

A. The court properly excluded Ms. Coward's email messages.

Mr. Hylton first asserts that the trial court's refusal to admit certain e-mail messages produced on the day of trial was error. He claims that the trial court improperly excluded to admit 5 email messages on grounds of hearsay and lack of foundation. Appl. Brief at 30. However, the record reveals that the court only denied admission of one message, defense identification 16. 6/03/08 at 387. The court did not rule on the admissibility of the other messages because Mr. Hylton failed to move to admit any of them.

Turning to the one offered message, the trial excluded the message on the basis of hearsay and lack of foundation. Mr. Hylton now states that the message was not hearsay because it was not offered for the truth of its statement, but to show bias. He cites several authorities to support this argument, but none regard the admission of hearsay testimony. Instead, the authorities all concern improper character and impeachment evidence that was admitted because it was offered to show bias. Appl. Brief at 33

n.14. Regardless, the evidence was offered for its truth. As

Tegland observes,

an out-of-court statement is hearsay if it is the *content* of the statement that is relevant in the case at hand... By contrast, if the statement is relevant simply *because it was made*, and without regard to whether the statement is true or false, the statement is not hearsay.

TEGLAND, COURTROOM HANDBOOK OF WASHINGTON EVIDENCE, §801 at 386 (2009 ed.) The significance of the offered email message, as showing bias or otherwise, is contained in its content, not that it was simply sent to Mr. Hylton. Without knowing whether the content of the message is true or false, there cannot be any determination of Ms. Coward's bias. Ms. Coward must have meant what was written in the message for bias to exist. Regardless of the purpose for which the message was offered, it constitutes hearsay. *In re Detention of Law*, 146 Wn.App. 28, 204 .3d 230, 235 (2008); *Tortes v. King County*, 119 Wn.App. 1, 13-14, 84 P.2d 252 (2003).¹

¹ Mr. Hylton cites Tegland, Washington Practice §801.10 at 297 to support his argument. Tegland does state that some verbal acts are "relevant simply because [they] were made," but this statement only regards verbal acts that are part and parcel of a claim. These statements are "statements in issue" that have an independent legal significance, such as statements showing a formation of a contract, proof of loss, statements constituting harassment, and defamatory statements. *Id.* The email messages here are not this type of statement.

This court's decision in State v. Spencer, 111 Wn.App. 401, 45 P.3d 209 (2002) *review denied*, 148 Wn.2d 1009, 62 P.3d 889 (2003) does not change this conclusion. In *Spencer*, the defendant sought to introduce hearsay testimony that a state's witness, McMullen, believed she was intimidated and coerced by the police in to giving them a statement. The witness told another woman, Schmidt, that she was afraid the police and CPS would take her child away and that she was angry at the defendant for having a second girlfriend. *Spencer*, 111 Wn.App. at 405-06. The defendant offered Schmidt's testimony as a statement of McMullen's state of mind. The trial court excluded the testimony as hearsay and this court overturned that ruling. This court held that the testimony was exempt from the hearsay rule since it was offered to establish the witness' state of mind:

Regardless of whether the police actually threatened McMullen with CPS taking her child away, Schmidt would have testified to McMullen's state of mind regarding her statement to the police. As such, Schmidt's testimony would not have been hearsay...

Spencer, 111 Wn.App. at 409.

The offered e-mail message here did not directly establish Ms. Coward's state of mind. The message does not state that she is angry at Mr. Hylton, despises him, or any other feeling, similar to

Ms. Schmidt's statements in *Spencer*. A person reading the message could make these conclusions, but only if that person finds the content to be true. In this respect, this case is more similar to *In re Detention Law* than *Spencer*. See *In re Detention Law*, 146 Wn.App. at 235 (distinguishing the *Spencer* holding).

Moreover, the error was harmless. The witness testified to the content of the email message during Mr. Hylton's cross examination. 6/03/08 RP 387-90. Thus, the jury heard the sine qua non of the evidence. The fact that the message was not admitted is of little consequence.

Turning to the other messages, there can be no error concerning the admissibility of those messages as Mr. Hylton did not attempt to admit them into evidence. *Herring v. Department of Social and Health Services*, 81 Wn.App. 1, 20-21, 914 P.2d 67 (1996). It is likely that he did not do so because the trial court limited his use of the messages to impeachment evidence. However, Mr. Hylton cannot now challenge this ruling. Upon introducing the email messages, Mr. Hylton stated his purpose for offering the messages was for impeachment. 6/03/08 RP at 355. Later, when the court asked him if impeachment was truly the purpose, Mr. Hylton expressly agreed. 6/04/08 RP at 397. Thus,

he has waived any argument that the court erred by denying him use of the messages for other purposes. By not moving to admit the messages into evidence, Mr. Hylton denied the trial court the opportunity to rule on their admissibility. His claim, consequently, was not preserved for appeal.

Even if the trial court did commit error by limiting the use of these other e-mail messages, the error was harmless. Mr. Hylton was able to enter evidence of Ms. Coward's bias into evidence. As already noted, Ms. Coward testified that she made threats in an email message sent Mr. Hylton near the date of the crime. Later in the trial, Ms. Coward recounted making other statements to Mr. Hylton after their break-up that revealed her anger at him and her threats. See 6/4/08 RP at 411, 414, & 437. Mr. Hylton's case then did not suffer for lack of evidence of Ms. Coward's possible bias against him.

Nor has Mr. Hylton shown any significance to these messages beyond establishing generally that bias evidence is always material. But certainly not all evidence of bias of every witness is crucial to a defense or pivotal to the constitutional right of cross-examination. Mr. Hylton cites *Davis v. Alaska*, 415 U.S. 308, 316, 94 S.Ct. 1105, 39 L.Ed2d. 347 (1973), to establish that a

defendant's ability to attack a witness' credibility is an important component of a defendant's Sixth Amendment right. But the case did not involve the introduction of hearsay, or otherwise inadmissible testimony. Where the Court has confronted the conflict between a defendant's assertion of its Sixth Amendment right and the admission of improper evidence the Court has ruled that a criminal defendant has no constitutional right to have inadmissible evidence admitted in his or her defense. Taylor v. Illinois, 484 U.S. 400, 410 108 S.Ct. 646 (1988).

Even if admissible, the bias evidence here was not crucial. Ms. Coward's testimony was not central to proving the state's case. Where the credibility evidence in *Davis* related to a "crucial witness for the prosecution," Ms. Coward is not the state's chief prosecution witness. Davis, 415 U.S. at 310. Ms. Coward did not provide any direct evidence of the rape.

At the same time, the content of the messages were also not crucial. They were not, of course, not the only source of evidence of her feelings toward Mr. Hylton. Mr. Hylton was free to examine Ms. Coward and other witnesses regarding these feelings. The topic was not shut off to him. He was able to pursue his theory of her bias through direct and cross-examination. In that respect, this

case is not the same as State v. Roberts, 25 Wn.App. 830, 611 P.2d 1297 (1980) and State v. Wilder, 4 Wn.App. 850, 486 P.2d 319, *review denied*, 79 Wn.2d 1008 (1971), which are cited by Mr. Hylton. In those cases, trial courts foreclosed defendants from eliciting testimony on certain topics that related to a witness' bias. Here, Mr. Hylton was able to pursue his theory of bias. As a result the jury was aware that Ms Coward and Mr. Hylton had been in a long-term romantic relationship that had failed. Any juror knows that such circumstances often results in ill feelings and may lead to one party or the other seeking revenge. The admission of the email messages would not have greatly increased this apparent fact in the case.

Finally, Mr. Hylton disregards the second reason that the trial court gave for its unwillingness to admit the email messages into evidence, lack of foundation. While Mr. Hylton is correct that e-mail messages are not subject to the special authentication requirements that apply to data compilations, they are subject to other authentication requirements. E-mail messages must comply with the same rules that govern the admission of other types of correspondence. The general rule for authentication of

correspondence was stated in Sinnott v. Sinnott, 27 Wn.2d 520, 532, 179 P.2d 305, 312 (1947):

In order to render a letter or telegram or a copy thereof admissible against the addressee, it must be shown that it was received by him, or duly sent or delivered for transmission to him through the mails so as to raise the presumption... that it was received by him, or that it came to his attention. Similarly a letter addressed to one other than the party sought to be charged with knowledge of its contents cannot be admitted without sufficient proof that the contents were communicated to him.

The e-mail messages offered by Mr. Hylton do not meet this rule.

The messages were unsigned, lacked Ms. Coward's electronic signature, and Ms. Coward testified she didn't recall sending them.

Mr. Hylton did not provide any evidence supporting the authenticity of the messages. He did not meet his burden of laying a prima

facie foundation that the documents are what they purport to be.

ER 901. Thus, they were inadmissible. Wagers v. Goodwin, 92

Wn.App. 876, 882, 964 P.2d 1214, 1217 (1998) (an unsigned,

undated excerpt of a letter discussing the parties' finances, was not authenticated and ruled inadmissible.)

The significance of Mr. Hylton's failure to establish a foundation for the messages is underscored by the testimony at trial of Detective Brown. She testified that sent emails are subject to alteration by persons other than the sender. 6/04/08 RP at 454.

Since Mr. Hylton provided nothing to indicate that the messages weren't altered, their authenticity could not be established simply by the face of the documents. Thus, the court did not abuse its discretion by limiting the use of the messages to impeachment purposes.

B. The trial court did not abuse its discretion by excluding Mr. Hylton's hearsay testimony of the victim's interaction with another male.

Mr. Hylton next challenges the trial court's exclusion of his testimony that the victim called him after a school dance and reported that, "I snuck out of the dance. And I went out with this boy and we messed around and I got in trouble and blah, blah, blah... I don't want you to come and beat him up." 6/02/08 RP at 122. Mr. Hylton argues that this evidence should have been admitted because it rebuts the state's evidence establishing an element of child rape. But this is not a sufficient reason for admissibility. As already noted, a defendant's right to present evidence in support of a defense is not absolute. "A criminal defendant has no constitutional right to have irrelevant evidence admitted in his or her defense." *State v. Hudlow* 99 Wn.2d 1, 15, 659 P.2d 514, 522 (1983) (citing *Washington v. Texas*, 388 U.S.

14, 16, 87 S.Ct. 1920, 1925, 18 L.Ed.2d 1019 (1967)). A defense must consist of relevant, admissible evidence. State v. Rehak, 67 Wn.App. 157, 162, 834 P.2d 651 (1992).

In the context of a sex offense, the conflict between a criminal defendant's constitutionally protected rights and the judicial interest in "seeing that the evidence is not so prejudicial as to disrupt the fairness of the fact-finding process" was confronted by the Supreme Court in Hudlow. The Supreme Court in Hudlow balanced these concerns by examining whether there is a "compelling state interest" to exclude a defendant's evidence. The Court recognized that one of the relevant interests is whether the evidence violates the rape shield law. The policies behind the law, the Court held, are "compelling enough to permit the trial court to exclude minimally relevant prior sexual history evidence if the introduction of such evidence would prejudice the truth-finding function of the trial." Hudlow, 99 Wn.2d at 15. In contrast, evidence of "high probative value" cannot be shielded by the law. Hudlow, 99 Wn.2d at 15.

Here, Mr. Hylton intended to offer the evidence to rebut the state's physical evidence of the victim's torn hymen. 6/02/08 RP at 121. Since the victim testified that she had not had intercourse

between the two exams, the evidence would also stand against the victim's credibility. But the proffered evidence, according to Mr. Hylton's offer of proof, was a far cry from establishing intercourse by the victim. The evidence only established that the victim had spent some time with an older teenager after a school dance, that they had "messed around." This is hardly probative evidence to refute the victim's testimony that she had not had intercourse between exam dates. But it is evidence that has the potential to influence the jury's view of the victim's sexual mores. The compelling state interests behind the rape shield outweighs this minimally relevant evidence.

Putting aside the rape shield law, the state also has an interest in keeping inadmissible hearsay and irrelevant evidence away from the jury. *Hudlow*, 99 Wn.2d at 17. Washington courts have held that even exculpatory evidence that is barred by the rules of evidence is inadmissible as part of a criminal defendant's defense. *TEGLAND*, §402 at 216. There is no question that Mr. Hylton's proffered testimony was hearsay. At trial and on appeal he offers no hearsay exception that would have permitted the evidence to be admitted under ER 801.

Similarly, the testimony was irrelevant. Relevant evidence is evidence that has the tendency to make a material fact more or less probable. ER 401. Mr. Hylton's testimony does not meet this description. His offer of proof did not establish a sufficient nexus between the victim's statements regarding her one-time interaction with a boy and intercourse that would explain her subsequently torn hymen. See State v. Cosden, 18 Wn.App. 213, 218-19, 568 P.2d 802 (1977); State v. Madison, 53 Wn.App. 754, 770 P.2d 662 (1989); State v. Lord, 161 Wn.2d 276, 294-95, 165 P.3d 1251 (2007) (dog handler's testimony regarding scent trail has no probative value because there wasn't sufficient connection between the scent trail and the day of the murder). A defendant does not have a right to present irrelevant, speculative evidence for any purpose. Even evidence with some minimal relevance may be excluded. State v. Summers, 70 Wn.App. 424, 435-36, 853 P.2d 953, 959 (1993); State v. Thomas, 123 Wn.App. 771, 98 P.3d 1258 (2004). Thus, the trial court did not abuse its discretion to exclude the offered testimony.

Finally, the court's exclusion of the evidence did not prevent Mr. Hylton from pursuing his defense. He still had the option to cross-examine the victim about her interaction with the boy at the

dance, or any other romantic interest she may have had between the two exams. There was no error.

C. The trial court did not abuse its discretion by excluding a journal page.

Mr. Hylton's third evidentiary challenge regards Julie Miller's journal entry for Thanksgiving, 2004. He assigns error to the trial court's exclusion of the journal entry as hearsay and irrelevant. He claims that the journal entry was either a non-verbal act disclosing a feeling, or admissible under ER 801(d)(1)(ii). He is wrong on both accounts.

First, the journal entry is not a nonverbal act. The act of entering the entry into the journal may be a nonverbal act that qualifies as a statement, but that is not at issue here. Mr. Hylton was able to examine Ms. Miller regarding this act. But the actual journal page with the entry written on it is unquestionably not a nonverbal act. It is a statement for purposes of ER 801.

Nor is the journal entry a "verbal act" as described in Tegland, Washington Practice §801.10 at 342. Verbal acts are statements that have legal significance beyond their content. These statements "must be proved to establish a claim or defense."

5B TEGLAND, §801.10 at 342 (5th ed. 2007). The authority cited by Mr. Hylton, State v. Miller, 35 Wn.App. 567, 668 P.2d 606 (1983), does not support his claim. The statements in that case were the "verbal acts" that formed a conspiracy. These are not the same type of statements as the journal entry. Although the journal entry may have supported Mr. Hylton's defense, it did not satisfy an element of a crime or claim. The act of Ms. Miller making the entry did not have independent legal significance.

Nor is the entry offered for something other than the matter asserted. The journal entry was not offered to show a state of mind or emotion. It was offered to prove its content – that Ms. Miller had made a notation regarding Robin Hilton on the journal page for Thanksgiving. As such, it is hearsay and was inadmissible. See State v. Coffey, 8 wn.2d 504, 508, 112 P.2d 989 (1941).

Mr. Hylton separately argues that the journal page is not hearsay because it is a prior consistent statement under ER 801(d)(1). Under this rule, out-of-court statements offered to corroborate testimony are admissible if the opposing party has charged the witness with fabricating the testimony or having an improper motive or bias. ER 801(d)(1)(ii). The out-of-court statement is inadmissible if it simply reinforces or bolsters the

witness' testimony. State v. Purdom, 106 Wn.2d 745, 750, 725 P.2d 622, 624 (1986). The evidence must be in response to an attack on the witness' veracity. The journal entry is not admissible precisely because this condition was not met here. It was not offered after the state attacked the motives or truthfulness of Ms. Miller's testimony that she spent Thanksgiving with Mr. Hylton.

During both the prosecuting attorney's cross and recross-examination of Ms. Miller, the prosecuting attorney did not ever challenge her truthfulness or motives. 8/4/08 RP 500-4. His questioning of her was brief, consisting of standard questions for an alibi witness. Although Ms. Miller testified on direct that she recorded her meeting with Mr. Hylton in her journal, the prosecuting attorney did not question her about this topic. The vast majority of his questions regarded her ability to recollect her activities on a specific date four years prior. He did not accuse her or imply that she was fabricating her testimony. He did question her regarding her feelings for Mr. Hylton, but once she denied having any romantic feelings for him, he did not pursue the topic. 8/4/08 RP at 502. He also questioned her about the timing of her recent discussions with Mr. Hylton, but again did not pursue the topic after her answer.

Furthermore, this questioning was not accusatory. The prosecuting attorney may have simply been inquiring into whether her recollection was influenced by Mr. Hylton's memory of events, and not into whether the two had gotten "their stories straight" or "hatched a scheme" to present false testimony.

In any event, admission of the journal entry would not rebut an implication of bias based upon her romantic feelings for Mr. Hylton. Indeed, admitting the heart notation entry would only support that implication. ER 801(d)(1)(ii) is inapplicable in this context. The rule only admits evidence that rebuts the specific allegation of fabrication or of motive and bias. *Tome v. U.S.*, 513 U.S. 150, 157-58, 115 S.Ct. 696 (1995). Admission of the journal entry might bolster Ms. Miller's testimony, but it would not disprove her partiality to Mr. Hylton.

Looked at as a whole, this questioning does not trigger the corroboration permitted by ER 801(d)(1). Certainly, the prosecuting attorney's cross examination did not challenge Ms. Miller's testimony to the degree that the counsel for the state challenged the defendant's statements in *State v. Braniff*, 105 Wash. 327, 331-332, 177 P. 801, 803 (1919). In *Braniff*, the state charged Braniff, along with two accomplices, with stealing horses. After giving

confessions, these accomplices testified against Braniff. In response, Braniff's counsel challenged the veracity of their testimony. In his opening statement to the jury, he explained, " we expect to show you that it is a frame-up" by the accomplices. Braniff, 105 Wash. at 333. Later, on cross examination of an accomplice, Braniff's counsel continued this theme: " Is it not a fact, Roy, that you and Sank (the brother) and Bosley ran off the horses, and afterwards made up the scheme to throw the blame onto Tom Braniff?" Braniff, 105 Wash. at 229. In response, the state provided evidence, through testimony of the sheriff, that the accomplices' testimony was consistent with his prior confession although Braniff had not contended that they were different. The trial court allowed the testimony as prior consistent statements. The Supreme Court reversed. It ruled that the implications by Braniff's counsel that the accomplice was lying did not constitute a sufficient challenge to the witness' veracity to warrant admission of a reinforcing out-of-court statement. Braniff, 105 Wash. at 332.

As in Braniff, the prosecutor here did not contend that Ms. Miller had made a prior inconsistent statement. Unlike the Braniff case, he also did not assert that she was lying. The prosecuting attorney merely inquired into her connection to Mr. Hylton. In light

of the Braniff holding, this questioning was not sufficient to trigger admission of prior consistent statements. See also, Benjamin v. Havens, Inc. 60 Wn.2d 196, 202-203, 373 P.2d 109 (1962) (opening statement that defendant's evidence would show that the state's witness was lying and evidence contradicting state's witness was not sufficient to warrant admitting prior consistent statements).

Certainly, the prosecuting attorney's questioning did not rise to the level of contradiction that warranted admission of a prior consistent statement in a federal Eighth Circuit case. In U.S. v. Red Feather, 865 F.2d 169 (8th Cir.1989), the state introduced the victim's diary to corroborate dates of abuse by her father. Her testimony matched all but one date in the diary. The federal appellate court affirmed the district court's admission of the diary because "the defendant had implied on cross-examination that Miranda had been coached by the social services counselors, and that Miranda was prejudiced against her father because of punishment or discipline by him." Red Feather, 865 F.2d at 171. The court further observed that, the trial court found Miranda's statements contained in the diary to be "highly relevant and probative on the issue of her truthfulness." Because of the

“extensive and lengthy cross-examination touching [Miranda's] credibility,” the court admitted the diary.” *Id.*

Neither of the salient facts in *Red Feather* exist here. The statements contained in Ms. Miller's journal are not highly probative of her truthfulness. The heart entry does not refer to or necessarily signify a meeting with Mr. Hylton on that day. Ms. Miller may have drawn it in her open journal on that day while on the phone with Mr. Hylton. Equally, there is no way to tell from the journal whether the entry was written in the journal in 2004, or afterwards.

More significantly, the prosecuting attorney did not subject Ms. Miller to "an extensive and lengthy cross-examination touching on her credibility." Indeed, the cross-examination and re-cross-examination were brief and focused upon her recall ability. This type of probing does not trigger the entry of a ER 801(d)(1)(ii) statement.

Finally, ER 801(d)(1) does not apply for one additional reason: It was impossible for the trial court to determine whether the journal entry was made before or after Ms Miller was aware that the state was investigating Mr. Hylton for child rape. Since ER 801(d)(1)(ii) only applies to prior consistent statements made before the alleged influence, or motive to fabricate, arose, it is not

an available basis for admission of the journal entry. Tome, 513 U.S. at 159; State v. McDaniel, 37 Wn.App. 768, 771, 683 P.2d 231 (1984). To admit the entry, Mr. Hylton needed to show that Ms. Miller's entry of the notation predated him informing her of the investigation; he failed to make this showing.

III. THE STATE DID NOT COMMIT PROSECUTORIAL MISCONDUCT BY VOUCHING FOR THE WITNESSES

Next, Mr. Hylton argues that the state committed prosecutorial misconduct by vouching for the credibility of various witnesses. His contention is unconvincing. To prove prosecutorial misconduct, a defendant bears the burden of proving that the prosecuting attorney's conduct was both improper and prejudicial. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997) (citing State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994)). To prove the conduct was prejudicial, the defendant must prove there is a substantial likelihood the misconduct affected the jury's verdict. State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). Where the defendant did not object or request a curative instruction, the error is considered waived unless the court finds that the remark was "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been

neutralized by an admonition to the jury." State v. McKenzie, 157 Wn.2d 44, 53, 134 P.3d 221 (2006) (quoting State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990))

Generally, vouching for a witness' credibility constitutes misconduct if committed by a prosecuting attorney in closing argument. However, not all vouching is prejudicial. Prosecutors may comment on witnesses' veracity as long as they don't express a personal opinion and as long as their comments are not intended to incite the passion of the jury. State v. Stith, 71 Wn.App. 14, 20-21, 856 P.2d 415 (1993). A prosecutor only commits misconduct when it is "clear and unmistakable" that he is expressing a personal opinion rather than arguing an inference from the evidence. State v. Papadopoulos, 34 Wn.App. 397, 400, 662 P.2d 59 (1983) *review denied*, 100 Wn.2d 1003 (1983). Prosecutors may call the jury's "attention to those facts and circumstances in evidence tending to support the credibility of" a witness. Id.

Before examining Mr. Hylton's particular allegations, it is first notable that the court both instructed the jury that they are the sole judges of credibility and that statements by the attorneys are not evidence. 6/4/08 RP at 545-46. The court's delivery of these instructions diminish any threat that the prosecutor's statements

caused prejudice. State v. Sandoval, 137 Wn.App. 532, 541, 154 P.3d 271 (2007). Moreover, the prosecuting attorney himself reminded the jury of their role as the sole evaluator of credibility immediately prior to making the statements that Mr. Hylton now attacks. The prosecuting attorney stated to the jury that "you are the sole judges of the value of the weight to be given to the testimony of each witness..." 6/04/08 RP at 562.

It is additionally notable that at trial Mr. Hylton did not object to the prosecuting attorney's comments. Mr. Hylton's failure to object at trial means he must show on appeal that the prosecuting attorney's comments were so prejudicial that a curative instruction could not have alleviated any error. He fails to do so. In fact, he fails to give this court any specific reason to believe that the comments had any improper influence on the jury. In this respect alone, he fails in his burden.

On appeal, Mr. Hylton merely intimates that he was prejudiced by the prosecuting attorney's comments because witness credibility was a key factor in the case. Appl. Brief at 38. But he never explains how or to what degree the comments improperly improved the credibility of the witnesses. Not all vouching is prejudicial. Furthermore, he ignores the corroborating

physical evidence in the case. Medical evidence from sexual assault exams showed that the victim's hymen was intact in April, 2002, but appeared torn by May 2005, after Mr. Hylton's Thanksgiving 2004 visit to her. 6/2/2008 RP at 129-30, 137-48. The victim testified that no one besides Mr. Hylton penetrated her between those dates. 6/3/08 RP at 217. The state also introduced a wiretap tape of Mr. Hylton making several incriminating statements to the victim. He responded to the victim accusing him of touching her by stating, "I... I just can't talk to you again until you're 18." 6/3/08 RP at 221. Later in the conversation he revealed his knowledge of the rape:

Ms. ARAGON: ... When you touched me, you do not know how horrible and nightmarish it was. It was a nightmare, the biggest nightmare in the world, it mentally fucked with me, and physically there's proof.

Mr. HYLTON: Whatever. I'm just saying blaming me is not –

Ms. ARAGON: So are you saying it's not your fault, that you didn't do anything?

Mr. HYLTON: I'm just saying blaming me is a waste of time.

Ms. ARAGON: You can't just say sorry?

Mr. HYLTON: I did say I'm sorry.

Ms. ARAGON: for what?

Mr. HYLTON: What – what do you want from me? You want me to suffer. You want me to pay. You think I don't think about you every day?...

...Ms. ARAGON: You're just (inaudible) because you're a little fucker. You're going to be the next Michael Jackson in this world.

Mr. HYLTON: I really hope you can find a way to forgive me.

6/3/08 RP at 218-34. In light of this testimony, it is not necessarily the case here that the "jury's verdict turned almost entirely upon the credibility of the complaining witness and the defendant," as it did in State v. Boehning, 127 Wn.App. 511, 523, 111 P.3d 899 (2005).

The opportunity exists that the jury used the above evidence to corroborate the testimony of the witnesses.

Regardless, Mr. Hylton does not establish that a curative instruction would have failed to neutralize whatever prejudice that might have been created by the prosecuting attorney's statements. The type of statements Mr. Hylton attacks actually lend themselves to a curative instruction. The prosecutor did not personally assure the credibility of the witnesses. He did not offer his opinion. As the state will establish, the statements are simply not sufficiently harmful to have made giving an instruction pointless.

Turning to the individual statements, none of the referenced statements present a personal expression by the prosecuting attorney of his belief in the veracity of a witness.

A. The prosecuting attorney's statements regarding April.

Mr. Hylton first challenges the following statement by the prosecuting attorney regarding April:

From April, got up there and gave very compelling, very emotional testimony. You can tell, body language, what she was saying, the whole package, she was telling the truth. All the other evidence supports that." 6/04/08 RP at 563-64.

Later, he states, "...she's telling us a true story." 6/04/08 RP 570.

It is not misconduct to urge the jury to consider a witness' demeanor in judging the witness' veracity. *State v. Green*, 119 Wn.App. 15, 25, 79 P.3d 460, 465 (2003). Nor is it improper for a prosecuting attorney to reference corroborating evidence of a witness' testimony. *Papadopoulos*, 34 Wn.App. at 399, 662 P.2d 59. The prosecuting attorney did not state that he believed that the victim's story was true. He merely drew a conclusion from the supporting evidence of her testimony. The statements regarding April do not represent prosecutorial vouching.

B. The prosecuting attorney's statements regarding Detective Brown's testimony.

Next, Mr. Hylton challenges statements by the prosecuting attorney regarding the testimony of a detective, Detective Brown. The prosecuting attorney stated, "Detective Brown, isn't going to affect her job at all, straight shooter, every credible, very believable." 6/04/08 RP at 564.

Again, the prosecuting attorney did not express his belief as to the witness' truthfulness. He merely referenced testimony by the detective earlier in the trial that she had no professional stake or interest in the outcome of the trial. See 6/04/08 RP at 455. He was not suggesting, as Mr. Hylton would like this court to believe, that the officer would be placing his career in jeopardy if he were to lie under oath. Arguing that an officer has no motivation regarding personal gain or loss in seeing the defendant either convicted or acquitted is acceptable argument. The argument does not set forth a statement of personal belief. The prosecutor is telling the jury why it would want to believe the witness. The opposite concern, a witness' bias and personal interest in the outcome of the case, is properly considered by the jury in credibility determinations. Such argument is not improper vouching for the credibility of a witness.

U.S. v. Wellington, 754 F.2d 1457, 1468 (9th Cir.1985) (statements of the general form: “Why would the witness not tell you the truth?” did not constitute vouching.); U.S. v. Nash, 115 F.3d 1431, 1439 (9th Cir.1997).

Mr. Hylton cites *U.S. v. Weatherspoon* and *U.S. v. Combs* in support of his argument. Appl. Brief at 38. These cases are distinguishable. The prosecuting attorney's statements in those cases are different than the statements made regarding Detective Brown in this case. In *Weatherspoon* and *Combs*, the prosecutor stated that officers who lied while testifying risked losing their jobs. *Weatherspoon*, 410 F.2d at 1146; *Combs*, 379 F.3d at 574-75. This type of statement is equivalent to a guarantee by the prosecutor that the officer is telling the truth. Nothing of this sort occurred in this case. The prosecuting attorney's statements here referred to the witness' lack of motive to lie under oath, not how the lack punishment of the officer indicates she is telling the truth. The prosecuting attorney's statement carries no implication, as there was in *Combs* and *Weatherspoon*, that the prosecutor knows the officer is not lying. In the absence of such an implication, no improper vouching occurred.

C. The prosecuting attorney's statements regarding Ms. Eschbach's testimony.

Finally, Mr. Hylton attacks the prosecuting attorney's closing statements regarding Ms. Eschbach's testimony. He stated:

"She's got no real stake in this trial at all. She's not a family member of anyone. I talked to her. Think there would be any consequences if we found – you know, if it came to light that you were lying, criminal consequences? She said yeah. Defendant's cross-examination was, well, we would never really know if you lied. Well, if evidence came up that a State's witness lied in trial, you can imagine what the State might then do with that information. Leave that to you."
6/04/08 RP at 565.

These statements do not constitute vouching for Ms. Eschbach's credibility, but rather point out a reason why the jury should believe her. In essence, the prosecuting attorney simply focused the jury's attention on the witness' oath to testify truthfully and the consequences if she perjured herself. The prosecuting attorney did not assure the jury that Ms. Eschbach would not be tried for perjury because her statements were all truthful. He left open the possibility that she may have lied, but noted that she was aware of the grave consequences for her if she did. His statement is a reference to her earlier testimony that she was aware of the consequences. 6/03/08 RP at 330. The statements do not reference information outside the record and are not vouching by

the prosecuting attorney. State v. Korum, 157 Wn.2d 614, 650-651, 141 P.3d 13 (2006); U.S. v. Jackson, 84 F.3d 1154, 1158 (9th Cir. 1996); U.S. v. Kramer, 711 F.2d 789, 795 (7th Cir.1983)(it is not improper for a prosecutor to remind the jury of the deterrent effect the threat of a perjury conviction has upon a government witnesses who might otherwise be inclined to lie to gain immunity.); U.S. v. Necoechea, 986 F.2d 1273, 1279 (9th Cir. 1993) (prosecutor permitted to argue that, if witness were lying, she would have told a more polished story and to state that "I submit to you that [the witness is] telling the truth").

In *Korum*, a defendant challenged both elicited testimony that the State would take away a witness' plea bargain if it was not satisfied with the truthfulness of his statements and the prosecuting attorney's companion statement in closing that the witness promised to tell the truth or else lose the benefit of the plea bargain. Korum, 157 Wn.2d at 650. The Supreme Court concluded that the prosecuting attorney had merely referenced the witness' promise to tell the truth and had not expressed a personal belief about the witness' credibility. Korum, 157 Wn.2d at 650. The prosecuting attorney's statements here are of the same type as these, and certainly are no more improper. As in *Korum*, the prosecuting

attorney referenced testimony that made the witness' testimony more credible due to the consequences for the witness if she testified falsely. Certainly, the statements do not constitute "clear and unmistakable" evidence that the prosecuting attorney was expressing a personal opinion. And, as noted above, there is no basis offered that the statements were "so flagrant and ill-intentioned" to create "an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." Swan, 114 Wn.2d 613, 661. Thus, reversal is unwarranted.

IV. THE TRIAL COURT'S ENTRY OF AN EXCEPTIONAL SENTENCE UNDER RCW 9.94A.535(N) DID NOT VIOLATE THE CONSTITUTIONAL EX POST FACTO CLAUSES

In Mr. Hylton's fourth assignment of error, he claims that the ex post facto doctrine barred the trial court from imposing an exceptional sentence. He argues that because the crime occurred before the effective date of the law adopting the abuse of trust factor, the trial court violated the ex post facto clauses of the state and U.S. constitutions by imposing the exceptional sentence. He fails to accurately apply the ex post facto doctrine.

The U.S. Supreme Court summarized the test for an ex post facto law in Miller v. Florida, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987):

"As was stated in *Weaver*, to fall within the *ex post facto* prohibition, two critical elements must be present: first, the law "must be retrospective, that is, it must apply to events occurring before its enactment"; and second, "it must disadvantage the offender affected by it. Miller, 482 U.S. at 430, 107 S.Ct. at 2451 (*quoting Weaver v. Graham*, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981)).

The law enacting the abuse of trust aggravating factor, Laws of 2005 ch. 68 § 3, does not satisfy the second requirement. In the context of sexual crimes committed against children, the abuse of trust factor has been recognized by courts since at least 1986. See State v. Harp, 43 Wn.App. 340 (1986) and State v. Fisher, 108 Wn.2d 419 (1987). In both *Harp* and *Fisher*, the court imposed an exceptional sentence on a defendant after a jury found him guilty of a sex crime. The courts recognized the factor based upon former RCW 9.94A.390(2)(c)(iv), which stated: "The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense."

From 1986 to 2005, trial courts continually imposed exceptional sentences on this basis. This court too recognized abuse of trust as a valid aggravating factor over this time span.

See State v. Marcum, 61 Wn.App. 611, 811 P.2d 963 (1991); State v. Elza, 87 Wn.App. 336, 341, 941 P.2d 728 (1997); State v. Jennings, 106 Wn.App. 532, 547 24 P.3d 430 (2001). The 2005 ch 68 law merely codifies judicial articulation of abuse of trust as an aggravating factor. The law does not alter the nature or parameters of this factor.² Thus, the adoption of the law did not "substantially disadvantage" Mr. Hylton in his sentence. Miller, 482 U.S. at 430, 107 S.Ct. at 2451. Both prior to and after its adoption, state law made him subject to an exceptional sentence for abusing the trust of a victim of his sex crime. He does not and cannot claim that the new law changed any legal consequences for him. As such, application of the new law did not violate the ex post facto clauses of the U.S. and state constitutions. Dobbert v. Florida, 432 U.S. 282, 294, 97 S.Ct. 2290, 2299, 53 L.Ed.2d 344 (1977) (It is "axiomatic that for a law to be ex post facto it must be more onerous than the prior law.")

The ruling in State v. Chadderton, 119 Wn.2d 390, 832 P.2d 481 (1992) does not change this outcome, as Mr. Hylton argues it does. The holding in Chadderton does not apply to the facts of Mr. Hylton's crime. In Chadderton, the Supreme Court expanded the

² The language of the current RCW 9.94A.535(3)(n) is identical to the language of former 9.94A.390(2)(c)(iv).

abuse of trust aggravating factor to apply to "reckless abuse of trust." *Chadderton*, 119 Wn.2d at 398. By analogy, the Court applied RCW 9.94A.390(2)(c)(iv) to a defendant who recklessly caused the death of a patient in his care. The Court observed that if it applied the law's literal language, the factor would penalize only purposeful misconduct. *Id.*

Because the scope of the 2005 ch. 68 law is narrower than the scope of the common law aggravating factor after *Chadderton*, Mr. Hylton was not disadvantaged by the trial court's application of the factor to him. The trial court's use of the statutory aggravating factor merely reduced the type of conduct that would qualify Mr. Hylton for an exceptional sentence. But since his crime did not regard reckless misconduct, it did not matter.

Moreover, it is not at all clear that the *Chadderton* holding does not equally apply to RCW 9.94A.535 since the language of this section is identical to the former statutory provision. This and other courts may analogize from its language using the same logic as the Supreme Court applied when ruling in *Chadderton*.

Finally, Mr. Hylton's argument assumes that the trial court sentenced him to an exceptional sentence under the authority of RCW 9.94A.535(3)(n). The court may have actually applied the

common law aggravating factor of abuse of trust at sentencing.

The state can find nothing in the record that indicates under what authority the court was acting.

V. IMPOSING AN EXCEPTION SENTENCE AFTER AN AQUITAL WAS NOT VINDICTIVE.

Mr. Hylton's fifth argument is that the imposing of an exceptional sentence after the court vacated his original conviction proves vindictiveness. His argument fails to identify who he claims acted vindictively, the prosecutor or the court, but in either case, the argument fails.

Mr. Hylton's citation of *State v. Ameline*, 118 Wn.App. 128, 75 P.3d 589 (2003) and *North Carolina v. Pearce*, 395 U.S. 711 89 S.Ct. 2072, 23 L.Ed.2d 656(1969) in support of his argument, indicates that he is claiming that the trial court acted vindictively when it imposed an exceptional sentence. These cases regard judicial vindictiveness. If that is the case, his claim is misplaced since the trial court did not enter a sentence before vacating the charges. The foundation of the presumption created by Supreme Court in *Pearce* is a trial court's unjustified infliction of a harsher sentence. *United States v. Bay*, 820 F.2d 1511, 1513 (9th Cir. 1987). (If the defendant did not receive a "net increase" in his

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sentence, he is not entitled to the presumption of vindictiveness). Unlike in either *Ameline* or *Pearce*, this court is unable to compare the trial court's sentence before the defendant exercised his constitutional right with a sentence imposed afterwards. In the absence of any evidence that the court increased its penalty after a defendant's actions, there is no way for this court to establish the presumption. The trial court may have in fact imposed an exceptional sentence of the same duration in response to the original conviction if Mr. Hylton had not successfully moved to vacate his convictions. This possibility eliminates any basis for application of the *Pearce* presumption. In essence, Mr. Hylton's argument does not raise the presumption of vindictiveness, but merely speculates that the court felt vindictive. Mere speculation of the trial court's motives is an insufficient basis for reversing the exceptional sentence. *Alabama v. Smith*, 490 U.S. 794, 799-800 (1989) (burden on defendant to prove actual vindictiveness).

Moreover, the trial judge did not find that the aggravating factors existed, the jury performed that role. Thus, the judge had little role in Mr. Hylton suffering an additional penalty after his second sentence. Mr. Hylton has presented no evidence that the jury acted vindictively or knew he was being retried.

If Mr. Hylton's argument is that the *prosecutor* acted vindictively by charging the abuse-of-trust aggravating factor the argument is equally misplaced. The standard for prosecutorial vindictiveness in this state was set out in *State v. Korum*, 157 Wn.2d 614, 141 P.3d 13 (2006):

Constitutional due process principles prohibit prosecutorial vindictiveness. Prosecutorial vindictiveness occurs when "the government acts against a defendant in response to the defendant's prior exercise of constitutional or statutory rights." Thus, "a prosecutorial action is 'vindictive' only if *designed* to penalize a defendant for invoking legally protected rights." There are two kinds of prosecutorial vindictiveness: actual vindictiveness and a presumption of vindictiveness. ... A presumption of vindictiveness arises when a defendant can prove that "all of the circumstances, when taken together, support a realistic likelihood of vindictiveness." The prosecution may then rebut the presumption by presenting "objective evidence justifying the prosecutorial action."

Korum, 157 Wn.2d at 628 (citations omitted).

The defendant bears the burden of proving these circumstances.

State v. Bonisisio, 92 Wn.App. 783, 791, 964 P.2d 1222 (1998).

The US. Supreme Court created the prosecutorial presumption of vindictiveness in *Blackledge v. Perry*, 417 U.S. 21, 27-8, 94 S. Ct. 2098, 2102-3, 40 L. Ed. 2d 628 634-5 (1974). The Court applied the reasoning of *Pearce* and its progeny to actions by prosecutors. The Court concluded that the opportunity for

vindictive action by the prosecutor in a post-conviction setting requires a rule analogous to that of the *Pearce* case. See also *Smith*, 490 U.S. at 800 n.3. In *Perry*, the prosecutor charged the defendant with a felony when he availed himself of review of his initial conviction of a misdemeanor. *Perry*, 417 U.S. at 22-3. The felony charge was for the identical conduct of the defendant that formed the basis for his misdemeanor conviction. The defendant received a five to seven year sentence for the felony in addition to the six-month sentence he had received for the misdemeanor. *Id.* The court concluded that a presumption of vindictiveness arose analogous to that in *Pearce* because the "prosecutor clearly has a considerable stake in discouraging convicted misdemeanants from appealing." *Id.* at 27. However, the court clarified that "the Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only by those that pose a realistic likelihood of vindictiveness." *Id.* Subsequently, in other cases dealing with pretrial prosecutorial decisions to modify the charges against a defendant, the Supreme Court has continued to stress that "a mere opportunity for vindictiveness is insufficient to justify the imposition of a prophylactic rule." *U.S. v. Goodwin*, 457 U.S. 368, 384, 102 S. Ct. 2485, 73 L. Ed. 2d 74 (1982);

Bordenkircher v. Hayes, 434 U.S. 357, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978).

For several reasons, the prosecutor's actions towards Mr. Hylton do not raise the same "likelihood of vindictiveness" that the Supreme Court found in *Perry*. First, the fact that the State here merely amended the information to add an aggravating factor, not a new charge, distinguishes this case from the body of case law surrounding prosecutorial vindictiveness. If proved at trial, an aggravating factor does not guarantee or mandate an increased sentence outside the standard range. When an aggravating factor is averred, both the prosecutor and the judge would need to be acting vindictively in order for a defendant to be punished for exercising his rights.

Second, the nature of the right asserted by Mr. Hylton - vacation of his conviction - and the alleged vindictive action taken by the prosecutor - asserting grounds for an exceptional sentence - do not support a presumption of vindictiveness without additional support. Since vacations of convictions are rare, prosecutors do not generally plan on the possibility that a defendant will move to vacate a conviction. Thus, it is unlikely that a prosecutor would intentionally withhold asserting grounds for an exceptional sentence

on the rare possibility that a defendant might successfully vacate his or her conviction, or take any other procedural action. As the Supreme Court observed in *Goodwin*, prosecutors expect the vast majority of defendants to take certain standard procedural actions:

In addition, a defendant before trial is expected to invoke procedural rights that inevitably impose some “burden” on the prosecutor. Defense counsel routinely file pretrial motions to suppress evidence; to challenge the sufficiency and form of an indictment; to plead an affirmative defense; to request psychiatric services; to obtain access to government files; to be tried by jury. It is unrealistic to assume that a prosecutor’s probable response to such motions is to seek to penalize and to deter.

Goodwin, 457 U.S. at 381.

On the other hand, the state bears a cost for not charging an aggravating factor originally. Such a strategy would place at risk the state obtaining an exceptional at sentencing if there was no retrial. Facing the possibility of losing any opportunity to seek a higher sentence, it is unrealistic to conclude the state intentionally held the option of seeking an exceptional sentence in its back pocket to use if Mr. Hylton successfully overturned his conviction. Thus, the only viable explanation for the state’s failure to initially charge the aggravating factor is the actual one - that the state did not recognize the option until after the first trial was complete. With

the benefit of having all the evidence presented at trial, the state recognized the applicability and appropriateness of the abuse of trust factor and took the opportunity to seek an exceptional sentence for the crime. This decision is not prohibited under *Perry*. *Goodwin*, 457 U.S. at 381, 102 S.Ct. 2485 (Court reasoned that while preparing for trial a prosecutor might uncover additional information that suggests a basis for further prosecution).

The facts of this case are distinguished from those in *Perry* in another respect. The state here did not "pile on the charges" like it did when the *Perry* defendant appealed de novo to superior court. While it may be a slight distinction, the state charged Mr. Hylton with an aggravating factor not an additional crime based on his same conduct. Although the aggravating factor was based upon the same conduct as the crime - his rape of a child - it related to a different aspect of this conduct, the abuse of the victim's trust. The state had an independent basis for charging this factor.

Regardless, Mr. Hylton has not met his burden of showing a likelihood of vindictiveness. Nothing in the record supports Mr. Hylton's allegations regarding the addition of the aggravating factors. He presents no evidence regarding the prosecutor's motives or any incentive to seek the exceptional sentence on

improper grounds. The facts of this case equally support both the conclusion that the state simply did not recognize the possibility of seeking an exceptional sentence until the second trial and the conclusion that the prosecutor acted vindictively. Mr. Hylton's speculation that the prosecutor was motivated by a desire to punish him for successfully vacating his sentence, without more, does not amount to vindictiveness. U.S. v. Wilson, 262 F.3d 305, 319 (4th Cir.,2001); Goodwin, 57 U.S. at 382 n. 15, 102 S.Ct. 2485. Furthermore, as just noted, there are reasons to believe that the prosecutor's actions were not vindictive. Given the absence of evidence supporting the prosecutorial vindictiveness claim, Mr. Raider's argument must fail. Goodwin, 57 U.S. at 382 n. 15, 102 S.Ct. 2485. See also, U.S. v. Peoples, 360 F.3d 892, 896 (2004) (state's decision to seek death penalty on retrial did not support a claim of prosecutorial vindictiveness)

VI. THE ABUSE OF TRUST AGGRAVATING FACTOR IS NOT UNCONSTITUTIONALLY VAGUE

Mr. Hylton contends that after Blakely, the "abuse of trust" aggravating factor instruction is unconstitutionally vague. Specifically, he argues that the trial court needed to instruct the jury on the meaning of the phrase "position of trust or confidence," and

v . . .

describe the nexus between the trust relationship and the crime that must exist. These arguments are made for the first time on appeal.

Mr. Hylton's argument is deficient on two counts. First, whether there are elements of the aggravating factor that are indeed vague, Mr. Hylton did not preserve his argument for appeal. Second, the statute is not vague as applied to Mr. Hylton's conduct.

Mr. Hylton did not object to the jury instructions when presented at trial. He expressly denied having any objections or exceptions to the instructions. 6/04/08 RP at 543. He did not offer alternate instructions. As a result, he has waived any objection he has now to the instructions. "Objections to the failure of the trial court to give an instruction must clearly apprise the trial judge of the points of law involved. Where the objection and the discussion of it does not do so, points of law or issues involved will not be considered on appeal." State v. Fowler, 114 Wn.2d 59, 69, 785 P.2d 808 (1990) (failure to object to the vagueness and overbreadth of terms contained in the assault instruction precluded review of the instruction on appeal), *overruled on other grounds by* State v. Blair, 117 Wn.2d 479, 486-87, 816 P.2d 718 (1991).

Mr. Hylton's challenge also fails on the merits. The party challenging a statute for vagueness bears the burden of proving the statute is unconstitutionally vague beyond a reasonable doubt. State v. Halstien, 122 Wn.2d 109, 118, 857 P.2d 270 (1990). The party must prove that an aggravating circumstance is unconstitutionally vague as applied to him, and not merely in hypothetical situations. City of Spokane v. Douglas, 115 Wn.2d 171, 182-83, 795 P.2d 693 (1990). A statute is vague if it either fails to define the offense with sufficient precision that a person of ordinary intelligence can understand it, or it does not provide standards sufficiently specific to prevent arbitrary enforcement. State v. Eckblad, 152 Wn.2d 515, 518, 98 P.2d 1184 (2004). The abuse of trust aggravating factor is not unconstitutionally vague as applied to Mr. Hylton's conduct.

Mr. Hylton has failed to present any argument that the instruction was vague as applied to the facts of his case. He merely asserts that because the instruction is inherently vague he necessarily did not receive a fair trial. While this might be the case in some trials, application of the abuse of trust factor did not prevent a fair trial in Mr. Hylton's case. Any lack of clarity in the abuse of trust statute did not affect the verdict here. The facts of

this case clearly establish that Mr. Hylton was in a position of trust or confidence relative to the victim and that he used this position to commit the crime. A person of ordinary intelligence having heard the trial testimony could conclude that the statutory elements were met regardless of their vague terms.

The facts establishing a trust relationship are clear. Before the date of the crime, Mr. Hylton had lived with the victim, April, for at least four years. 6/03/08 RP at 331-32. He moved in with the family when April was less than ten years old. 6/02/08 RP at 187. April, her sister, and her mother testified that Mr. Hylton acted like a father and husband to them and the sisters called him "dad." 6/03/08 RP at 292, 333; 6/02/08 RP at 188. They loved, trusted and respected him. 6/03/08 RP 292, 334; 6/02/08 RP at 188-89. April considered him her dad. Id. Mr. Hylton was a "stay at home mom" that cared for the children on a daily basis. Id. Even after Mr. Hylton went to work in California a few months before the date of the crime, he spoke to April once a week and he was still part of the family. 6/03/08 RP at 336; 6/02/08 RP at 191-92; 6/03/08 at 214.

The record also clearly establishes that it was in his role as a father-figure that Mr. Hylton raped April. He committed the crime

while he was lying next to April as they watched TV in the home. The rest of the family was a sleep. 6/02/08 RP at 196-99. He performed the rape during a normal night of watching movies. 6/03/08 RP at 213. Afterwards, April didn't speak about the incident because she was concerned it would hurt her family. 6/02/08 RP at 199; 6/03/08 RP at 216. April was 14 at the time.

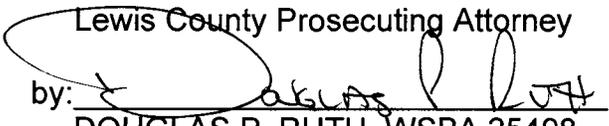
These facts describe an event that falls squarely within the core of the conduct penalized by the law. No definition of terms is needed for a person of ordinary intelligence to conclude that Mr. Hylton's actions fell within the scope of the aggravating circumstance described in RCW 9.94A.535(n) (or by the common law). Thus, any lack of clarity in the statute had no impact on whether Mr. Hylton received either a fair trial or due process.

CONCLUSION

For the foregoing reasons, this court should affirm Mr. Hylton's conviction and exceptional sentence.

RESPECTFULLY submitted this 25 day of June, 2009.

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by: 
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Attorney for Plaintiff

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,)
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vs.)
ROBIN HYLTON,)
Appellant.)
_____)

NO. 38575-9 II

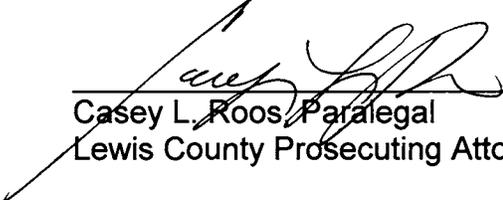
DECLARATION OF
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DIVISION II
SEATTLE, WA

Ms. Casey Roos, paralegal for Douglas Ruth, Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On June 25, 2009, the appellant was served with a copy of the **Respondent's Brief** by depositing same in the United States Mail, postage pre-paid, to the attorney for Appellant at the name and address indicated below:

Sheryl Gordon McCloud
710 Cherry St
Seattle WA 98104-1925

DATED this 25th day of June 2009, at Chehalis, Washington.



Casey L. Roos, Paralegal
Lewis County Prosecuting Attorney Office