

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

NO. 42346-4-II

STATE OF WASHINGTON,

Respondent,

vs.

SUSANNAH KENOYER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY
CAUSE NO. 09-1-00361-0

BRIEF OF RESPONDENT

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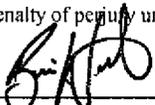
SERVICE	Ms. Jodi Backlund PO Box 6490 Olympia, WA 98507 backlundmistry@gmail.com	This brief was served via U.S. Mail or the recognized system of interoffice communications as follows: original + one copy to Court of Appeals, 950 Broadway, Suite 300, Tacoma, WA 98402, and one copy to counsel listed at left. I CERTIFY (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED: March 7, 2012, at Port Angeles, WA 
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TABLE OF CONTENTS

	<u>Page(s)</u>
TABLE OF AUTHORITIES	ii
I. COUNTERSTATEMENT OF THE ISSUES	1
II. STATEMENT OF THE CASE	1
III. ARGUMENT.....	14
A. THE COURT PROPERLY DENIED THE MOTION FOR A MISTRIAL.....	14
B. THE RECORD DOES NOT SUPPORT A FINDING THAT THE DEFENDANT HAS THE FUTURE ABILITY TO PAY HER LEGAL FINANCIAL OBLIGATIONS.....	19
IV. CONCLUSION	20

TABLE OF AUTHORITIES

<u>Washington Cases:</u>	<u>Page(s)</u>
<i>State v. Baldwin</i> , 63 Wn. App. 303, 818 P.2d 1116 (1991)	19
<i>State v. Bertrand</i> , 165 Wn. App. 393, 267 P.3d 511 (2011)	19-20
<i>State v. Lord</i> , 117 Wn.2d 829, 822 P.2d 177 (1991)	15
<i>State v. McKenzie</i> , 157 Wn.2d 44, 134 P.3d 221 (2006)	15-16
<i>State v. Neslund</i> , 50 Wn. App. 531, 749 P.2d 725 (1988)	15
<i>State v. Smith</i> , 144 Wn.2d 665, 30 P.3d 1245, 39 P.3d 294 (2002)	17
<i>State v. Stenson</i> , 132 Wn.2d 668, 940 P.2d 1239 (1997)	14-15
<i>State v. Thorgerson</i> , 172 Wn.2d 438, 258 P.3d 43 (2011)	15-16
<i>State v. Warren</i> , 165 Wn.2d 17, 195 P.3d 940 (2008)	15-17
<i>State v. Yates</i> , 161 Wn.2d 714, 168 P.3d 359 (2007)	15-16

<u>Statutes:</u>	<u>Page(s)</u>
RCW 9A.56.020(2)	17

I. COUNTER STATEMENT OF THE ISSUES:

1. Did the trial court err when it denied the defendant's motion for a mistrial, which alleged the State committed prosecutorial misconduct in its closing argument, when she failed to articulate or establish any prejudice affecting the outcome at trial?
2. Did the trial court err when it imposed certain legal financial obligations without considering on the record whether the defendant had the present or future ability to pay such costs and fees?

II. STATEMENT OF THE CASE:

In 2007, Susannah Kenoyer (the defendant) and Caron Salzer found themselves in a period of personal and financial upheaval. RP (6/6/2011) at 31-33, 63-64, 75, 89; RP (6/7/2011) at 42-43. As a result, the two friends expressed a desire to live with one another and provide familial and monetary support through the difficult times they envisioned in the future. RP (6/6/2011) at 32-33; RP (6/7/2011) at 69-70.

In July 2007, Kenoyer and her two daughters traveled to California. RP (6/7/2011) at 42. There they helped Salzer load her personal belongings into her motor home. The four then drove Salzer's motor home back to Forks, Washington, where they planned to live as a family. RP (6/6/2011) 31-32, 59.

As the two drove toward Washington, Kenoyer and Salzer discussed their plans for the future. RP (6/6/2011) at 62-63; RP (6/7/2011)

at 46, 59. These plans included a pledge that Salzer would care for Kenoyer's children, while the defendant completed prerequisites for nursing school. RP (6/6/2011) at 33, 63-64, 89; RP (6/7/2011) at 60, 81. The two also discussed their intent to share certain belongings.¹ RP (6/7/2011) at 46, 59.

During the drive, Kenoyer was preoccupied with the significant amount of debt she carried. She had received two loans to attend two separate colleges. RP (6/7/2011) at 117, 152. Additionally, she had repeatedly failed to pay her property taxes for several years and was facing a foreclosure sale. RP (6/6/2011) at 50, 75; RP (6/7/2011) at 75-76, 116. As a result, Kenoyer suggested that Salzer pawn her jewelry to help her meet these financial obligations. RP (6/7/2011) at 142. However, Salzer responded: "I would never sell my jewelry." RP (6/7/2011) at 142.

Salzer cherished one piece of jewelry in particular – a custom bracelet that she had commissioned in 1992. RP (6/6/2011) at 38, 51, 95. In 1992, Salzer purchased 19.83 grams of 14-carat gold and 1.5 carats in diamonds, spending approximately \$3500. RP (6/6/2011) at 38-39, 107, 125-26. Once the artist designed the custom bracelet from these materials,

¹ Kenoyer's children testified the two adults agreed to share their property in a "what's mine is yours, and what's yours is mine" manner. See RP (6/7/2011) at 46, 65.

Salzer wore it nearly every day. RP (6/6/2011) at 93; RP (6/7/2011) at 142, 144.

Salzer never promised to share her bracelet with Kenoyer, and she never intended her prized possession to become “community property.” RP (6/6/2011) at 55, 95, 102. *See also* RP (6/7/2011) at 53, 64-65. Salzer was wearing her bracelet when the “family” finally arrived in Forks.² RP (6/7/2011) at 142-144.

In Forks, Salzer lived in her motor home but kept certain personal property inside Kenoyer’s residence.³ RP (6/6/2011) at 34-35, 65; RP (6/7/2011) at 44-45, 57-58, 73-74. Salzer and Kenoyer often pooled their money to purchase necessities for the home. RP (6/6/2011) at 91; RP (6/7/2011) at 47, 59, 74-75, 147, 170. Additionally, Salzer paid most of the \$7300 that Kenoyer owed in back taxes. RP (6/6/2011) at 50, 56-57, 75, 83, 99; RP (6/7/2011) at 50-51, 100. In exchange, Kenoyer promised

² In contrast, Kenoyer testified Salzer removed her bracelet when she was working with the motor home’s power source one night when camping in California. Kenoyer said she placed the bracelet in her purse, where it remained for several months. RP (6/7/2011) at 78-79, 122. On rebuttal, Salzer testified she never gave the bracelet to Kenoyer. RP (6/7/2011) at 143-144.

³ Kenoyer testified she believed she partially owned the property Salzer kept inside the home (furniture, television, dishes, etc). RP (6/7/2011) at 89.

to convey an ownership interest in five of her ten acres to Salzer.⁴ RP (6/6/2011) at 50, 76, 104; RP (6/7/2011) at 86.

Over the next several months, Kenoyer often asked Salzer to pawn her jewelry. RP (6/6/2011) at 55. On one occasion, Salzer suggested that she might pawn one of her rings but decided she could never part with her jewelry.⁵ RP (6/6/2011) at 55. In Salzer's opinion, her jewelry was a "nest egg" that she would only sell when she was ready to build a home on the five acres that Kenoyer had previously promised her. RP (6/7/2011) at 153.

On October 27, 2007, Salzer fell in the restaurant where she was working to supplement the household's income. RP (6/6/2011) at 68. The accident fractured several of Salzer's vertebrae. RP (6/6/2011) at 67. Salzer anticipated she would need several medical appointments, during which she would be unable to wear any jewelry. Thus, she placed her bracelet in a jewelry bag and hid it inside her motor home. RP (6/6/2011) at 39-40, 69-70; RP (6/7/2011) at 155. This was the last time Salzer saw her prized bracelet. RP (6/6/2011) at 39-40, 67; RP (6/7/2011) at 155.

⁴ Neither Salzer, nor Kenoyer prepared any legal document to affirm this conveyance. RP (6/6/2011) at 74-75; RP (6/7/2011) at 86.

⁵ In contrast, Kenoyer testified Salzer offered to sell the bracelet to help pay the property taxes. RP (6/7/2010) at 76-77.

On November 28, 2007, Kenoyer pawned three items at the E.Z. Pawnshop in Port Angeles, Washington. RP (6/6/2011) at 90, 107-09, 131; RP (6/7/2011) at 93-95. Among these items was Salzer's bracelet. RP (6/6/2011) at 90. The pawnshop paid \$400 for the bracelet, intending to make a profit when it resold the item for a substantially higher price. RP (6/6/2011) at 127-28, 133. Kenoyer never asked Salzer for permission to pawn the bracelet.^{6,7} RP (6/7/2011) at 109.

In February 2008, Salzer traveled to California to visit friends and family. RP (6/6/2011) at 40-41; RP (6/7/2011) at 113. Salzer left her jewelry behind to reduce the threat of a robbery during her extended travels. RP (6/6/2011) at 40. Salzer told Kenoyer where she hid her jewelry and asked the defendant if she thought it would be safe.⁸ RP (6/6/2011) at 40-41. Kenoyer promised to move the jewelry if she had reason to believe someone might break into the mobile home. RP (6/6/2011) at 41.

⁶ Kenoyer testified she believed Salzer would approve of her pawning the bracelet because (1) they were always trying to find ways to pay taxes, (2) Salzer had allegedly suggested selling the bracelet, and (3) had the taxes not been paid then everyone would have been homeless, including Salzer. RP (6/7/2011) at 96-98, 103-04.

⁷ Kenoyer testified that she did not believe she needed to ask permission because she believed the bracelet was "community property" based upon their agreement and that she had the right to sell such property. RP (6/7/2011) at 110-11.

⁸ Kenoyer testified that she had no recollection of this conversation. RP (6/7/2011) at 113.

In April 2008, Salzer returned to Forks and wanted to show her bracelet to a friend. RP (6/6/2011) at 44. However, Salzer was unable to find the jewelry bag that contained the prized item. RP (6/6/2011) at 44. Salzer asked Kenoyer if she had moved her jewelry.⁹ RP (6/6/2011) at 44. Kenoyer replied she could not remember, but promised to look for the jewelry bag.¹⁰ RP (6/6/2011) at 44.

Without success, Salzer searched the motor home looking for her jewelry. RP (6/6/2011) at 44. Believing someone had stolen the bracelet, Salzer began searching local pawnshops and various internet sites. RP (6/6/2011) at 45.

In 2009, Kenoyer and Salzer started spending less time together. This was because Salzer had found a boyfriend and was spending more time at his residence. RP (6/7/2011) at 148. Additionally, Salzer was becoming less comfortable with the living and financial arrangement she had made with Kenoyer. RP (6/6/2011) at 97-98, 102.

In July or August 2009, Salzer tried to find her own apartment. RP (6/6/2011) at 98. Salzer visited a local realtor and inquired about a property. RP (6/6/2011) at 129, 144. Because Salzer's credit rating was

⁹ Kenoyer testified that Salzer never asked her about the bracelet between 2007 and 2009. RP (6/7/2011) at 102, 113.

¹⁰ Kenoyer had no recollection that she offered to help Salzer find her jewelry bag. RP (6/7/2011) at 133.

too low, the realtor required someone to co-sign the lease. RP (6/7/2011) at 130. Salzer offered to use the ownership interest she had in Kenoyer's property as collateral. RP (6/6/2011) at 74, 76-77; RP (6/7/2011) at 88, 130-31. The realtor reluctantly agreed, provided Kenoyer signed certain forms confirming Salzer's interest in the property. RP (6/7/2011) at 131.

When Kenoyer arrived at the realtor's office, she refused to sign any documents.¹¹ RP (6/6/2011) at 77-78, 97-98; RP (6/7/2011) at 88, 132-33. Salzer was incredibly upset. RP (6/6/2011) at 78, 204; RP (6/7/2011) at 88, 133, 145. However, the two friends reconciled after Kenoyer apologized and recommitted to conveying the five acres to Salzer. RP (6/7/2011) at 149.

A few weeks later, Salzer discovered her bracelet in the Port Angeles pawnshop. RP (6/6/2011) at 41, 46. Salzer informed the manager that the bracelet belonged to her and asked how it came to be in the display case. RP (6/6/2011) at 46. The manager said he would set the bracelet aside and advised her to contact the Clallam County Sheriff's Office. RP (6/6/2011) at 46-47.

¹¹ According to Kenoyer, Salzer lost a possessory interest in the property when she moved away and stopped providing the support that would allow her to attend nursing school. RP (6/7/2011) at 123-25. *See also* RP (6/6/2011) at 97; RP (6/7/2011) at 145.

Salzer immediately went to the sheriff's office and completed a police report. RP (6/6/2011) at 47, 70-71. Pursuant to this report, Sergeant John Hollis began investigating the case. RP (6/7/2011) at 5.

On August 21, 2009, Hollis recovered the bracelet from the pawnshop. RP (6/7/2011) at 5. A few days later, Hollis interviewed Salzer at her residence in Forks. RP (6/6/2011) at 47; RP (6/7/2011) at 7. Hollis asked if Salzer would be willing to call Kenoyer and inquire about the bracelet. RP (6/7/2011) at 8. Salzer agreed. RP (6/6/2011) at 48, 80; RP (6/7/2011) at 8.

Salzer phoned Kenoyer, tipping the phone so Hollis could listen to the conversation. RP (6/7/2011) at 8. *See also* RP (6/6/2011) at 14, 21. Salzer then told Kenoyer that she had found her bracelet in Port Angeles. RP (6/6/2011) at 48. Initially, Salzer asked if Kenoyer's son might have pawned her jewelry. RP (6/7/2011) at 154. In response, Kenoyer offered to buy the bracelet to keep her son out of any trouble. RP (6/7/2011) at 154.

When Salzer asked if Kenoyer was the one who had pawned her prized possession, Kenoyer immediately started to cry and stated apologetically: "I'm sorry, please don't put me in jail."^{12, 13} RP (6/6/2011) at 48-49, 81; RP (6/7/2011) at 154. *See also* RP (6/6/2011) at 15.

¹² Because Salzer was so animated during the phone call, Hollis could only hear a female on the other end of the line crying and say "I'm sorry." RP (6/7/2011) at 8, 17. *See also* RP (6/6/2011) at 14-15, 21.

Both Salzer and Kenoyer were very emotional throughout the conversation. RP (6/6/2011) at 80-81; RP (6/7/2011) at 89. Salzer asked Kenoyer to come over and discuss the matter further. RP (6/6/2011) at 49; RP (6/7/2011) at 8, 139. Shortly after the call, Kenoyer arrived at Salzer's residence. RP (6/7/2011) at 9. Hollis identified himself and placed Kenoyer under arrest. RP (6/7/2011) at 9. *See also* RP (6/6/2011) at 16, 22.

After restraining Kenoyer in handcuffs, Hollis escorted the defendant to his unmarked patrol car. RP (6/7/2011) at 9. When Hollis placed Kenoyer in the car, he advised the defendant of her constitutional rights. RP (6/7/2011) at 9. *See also* RP (6/6/2011) at 16, 22. Kenoyer affirmed she understood her rights. RP (6/7/2011) at 10. *See also* RP (6/6/2011) at 17.

As Hollis drove to the county jail, Kenoyer agreed to speak with the officer. RP (6/7/2011) at 9-10. Initially, Kenoyer denied she stole the bracelet. RP (6/7/2011) at 11, 140. *See also* RP (6/6/2011) at 23-24. When Hollis informed her that he had listened to her conversation with Salzer, Kenoyer admitted she (1) took the bracelet, (2) sold the bracelet to the pawnshop, (3) used the money to alleviate her financial distress, and (4)

¹³ Kenoyer testified that she was confused by the call and she never admitted to stealing the bracelet. RP (6/7/2011) at 90.

hoped to purchase the bracelet when she had sufficient resources. RP (6/7/2011) at 11, 18, 93, 101-02. *See also* RP (6/6/2011) at 19, 22-23.

Kenoyer never told Hollis that she owned the bracelet,¹⁴ that she had a right to sell the bracelet, or that Salzer had allowed her to pawn the bracelet. RP (6/7/2011) at 22-23, 139, 141. When Hollis explained that Kenoyer had committed a theft, the defendant replied she understood and it was a “stupid thing to do.” RP (6/7/2011) at 11, 14-16, 18, 23, 26, 27. *See also* RP (6/6/2011) at 19, 22.

The State charged Kenoyer, with first-degree theft. CP 18. The State’s theory was that Kenoyer’s “financial hardship and desperation” led her to commit the crime. RP (6/7/2011) at 194. *See also* RP (6/7/2011) at 197.

During closing argument, the State addressed the defense proffered at trial – *i.e.* that Kenoyer had a good faith claim to the bracelet:

Let’s talk about the defense. Was there a good faith claim of title. As I said this [is] a case of desperation, financial hardship. The defense is all about grabbing at straws. Grabbing at a tuft of weeds at the edge of the cliff, find anything it possibly can to throw at the jury –

RP (6/7/2011) at 197. The defense objected and moved to strike the argument. RP (6/7/2011) at 198. The trial court sustained the objection

¹⁴ Kenoyer testified that she did tell the officer that the bracelet belonged to her too. RP (6/7/2011) at 111.

and immediately instructed the jury to disregard the argument. RP (6/7/2011) at 198.

The State continued without further incident,¹⁵ focusing the jury's attention on the fact Salzer regularly refused Kenoyer's request to pawn her jewelry, Kenoyer surreptitiously pawned the bracelet, and never told Salzer what happened to her prized possession despite knowing she was seeking to reclaim it. RP (6/7/2011) at 198-99, 201-06. The jury found Kenoyer guilty of second-degree theft. RP (6/8/2011) at 3.

The defense moved for a mistrial, alleging the deputy prosecutor committed misconduct during its closing argument. CP 69-70; RP (6/24/2011) at 5-11, 15-16. The defense argued *State v. Monday*, reshaped the legal landscape with respect to prosecutorial misconduct claims. In light of *Monday*, the defense claimed the State had to prove, beyond a reasonable doubt, that the argument did not affect the outcome at trial. RP (6/24/2011) at 10-11. The defense opined the State had flagrantly attacked the credibility of appointed counsel, which was tantamount to using racial epithets to enflame the passion of the jury and violated due process. RP (6/24/2011) at 7-9, 16.

¹⁵ The defense did object to the State's argument that asked the jurors to use their common sense when deciding whether the price of gold and diamonds appreciates. RP (6/7/2011) at 207.

The State responded the defense had the burden to show there was a substantial likelihood the challenged argument affected the verdict. RP (6/24/2011) at 11. The State highlighted the absence of any such showing and maintained that overwhelming evidence supported the conviction. RP (6/24/2011) at 11-12. The State also argued any error was cured by (1) the ruling that sustained the objection and directed the jury to disregard the argument, and (2) the written instruction that advised the jury it must disregard any argument the evidence did not support. RP (6/24/2011) at 12. While the deputy prosecutor stated he only attacked the defense submitted at trial (and not the attorney), the he maintained a new trial was unwarranted because there was no prejudice. RP (6/24/2011) at 14-15.

The trial court denied the motion for a new trial, finding the defense had failed to establish any prejudice:

In this case, frankly the prosecutor made an argument that was improper. It was objected to immediately at the time. The Court informed the jury that the objection was sustained and told them to disregard that particular argument. They were also informed in written instructions to disregard that argument.

In terms of whether or not it can be shown that that was an error which affected the verdict, certainly the testimony which was given to the jury differed in many ways between that provided by Ms. Kenoyer and that provided by the victim in this case.

There were other facts and circumstances from which circumstantial evidence could be drawn. I would note,

for instance, although the bracelet was pawned there was testimony that for example the victim continued to search for her bracelet. She testified that she asked Ms. Kenoyer where it was and was told, gee, I don't know, and it was many months before she found the bracelet in the pawn shop.

Circumstantially it does not make much sense if someone had agreed to Ms. Kenoyer pawning the bracelet that she would search for it so diligently and try to locate it in a pawn shop. So circumstantially that would support her testimony over that of Ms. Kenoyer.

The jury may well have not believed Ms. Kenoyer, that was within their prerogative. They are the sole judges of the credibility of the witnesses.

Under all of those circumstances, and I believe the appropriate test is ... the more traditional [test] which does require the defendant to show that it impacted the trial, I would also note I don't think that this was flagrant or ill intentioned as opposed to simply being an incorrect argument that was stopped pursuant to objection, so under those circumstances I am not going to either declare a mistrial or dismiss the charges.

RP (6/30/2011) at 3-5. The court sentenced Kenoyer to 31 days in jail, converting thirty days into 240 hours of community service work. CP 8-9; RP (6/30/2011) at 19.

The court also imposed a \$500 crime victim's assessment fee; \$500 for attorney fees; \$460 in court costs; \$260 for a Sheriff's serving fee; and a \$100 DNA collection fee. CP 11; RP (6/30/2011) at 19-20. The court placed the defendant on the pay-or-appear program, requiring her to make \$25 payments per month beginning in September 2011. CP 12; RP

(6/30/2011) at 20. While the court noted “[t]he defendant has the ability or likely future ability to pay [her] legal financial obligations” on the judgment and sentence, *see* CP 8, it did not articulate what facts supported this finding on the record. RP (6/30/2011) at 20-22.

Kenoyer appeals.

III. ARGUMENT:

A. THE COURT PROPERLY DENIED THE MOTION FOR A MISTRIAL.

Kenoyer contends the deputy prosecutor committed reversible error during closing argument when he suggested the defense was “grabbing at straws[,]” “[g]rabbing at a tuft of weeds at the edge of the cliff,” and trying to “find anything it possibly can to throw at the jury[.]” *See* Brief of Appellant at 4-6. She argues this isolated event violated her right to a fair trial by disparaging her court appointed counsel. *See* Brief of Appellant at 5-6. However, the State’s argument did not prejudice the defense because it is substantially unlikely the challenged statements affected the jury’s verdict. This Court should affirm.

This Court reviews a trial judge’s ruling on allegations of prosecutorial misconduct under the abuse of discretion standard. *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). Where a defendant objects or moves for a mistrial based on alleged prosecutorial misconduct,

State v. Kenoyer, COA No. 42346-4-II
Brief of Respondent

the appellate courts give deference to the trial judge's ruling on the matter. *Stenson*, 132 Wn.2d at 719. This is because "[t]he trial court is in the best position to most effectively determine if prosecutorial misconduct prejudiced a defendant's right to a fair trial." *Stenson*, 132 Wn.2d at 719 (quoting *State v. Lord*, 117 Wn.2d 829, 887, 822 P.2d 177 (1991)).

A claim of prosecutorial misconduct requires the defendant to establish the challenged conduct was (1) improper, and (2) prejudicial. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011); *State v. Warren*, 165 Wn.2d 17, 26, 195 P.3d 940 (2008); *State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359 (2007); *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006).

It is improper for the prosecutor to disparagingly comment on the defense counsel's role or impugn the defense lawyer's integrity. *Thorgerson*, 172 Wn.2d at 451. This is because comments that permit the jury "to nurture suspicions about defense counsel's integrity" can deny a defendant's right to effective representation. *State v. Neslund*, 50 Wn. App. 531, 562, 749 P.2d 725 (1988).

However, even if the prosecutor's comments were improper, they are only prejudicial if "there is a substantial likelihood the instances of misconduct affected the jury's verdict." *Thorgerson*, 172 Wn.2d at 442-43; *Yates*, 161 Wn.2d at 774; *McKenzie*, 157 Wn.2d at 52. The appellate

courts do not assess the prejudicial effect of a challenged comment by placing the statement in isolation, but by reviewing the remark in the context of the total argument, the issues in the case, the evidence addressed, and the jury instructions. *Thorgerson*, 172 Wn.2d at 443; *Warren*, 165 Wn.2d at 28; *Yates*, 161 Wn.2d at 774; *McKenzie*, 157 Wn.2d at 52.

In the present case, the trial court did not err when it denied the defendant's motion for a mistrial. The State concedes the deputy prosecutor's statements were improper. *See Thorgerson*, 172 Wn.2d at 450-52 (prosecutor engaged in improper argument when it used terms like "sleight of hand," "bogus," and "desperation" to describe the defense). However, these remarks did not affect the outcome at trial.

First, the challenged statements were part of a larger argument suggesting the evidence did not support Kenoyer's defense that she had a good faith claim to the victim's bracelet. The State prefaced its remarks with the phrase: "[w]as there a good faith claim of title[?]" RP (6/7/2011) at 197. The State then focused the jury's attention on the evidence that showed (1) Salzer repeatedly refused Kenoyer's requests to pawn her jewelry, (2) Kenoyer surreptitiously pawned the bracelet in a neighboring town, and (3) Kenoyer never told Salzer what became of her bracelet despite knowing her friend was desperate to find it. RP (6/7/2011) at 198-

99, 201-06. The deputy's intent was to dispel any notion that Kenoyer took and pawned the bracelet "openly and avowedly under a claim of title made in good faith[.]" See RCW 9A.56.020(2). In this context, it is clear the deputy did not intentionally malign appointed counsel's integrity.

Second, the challenged remarks were brief and isolated. Once the defense objected to prosecutor's statements, the State refrained from any further argument that characterized Kenoyer's defense as desperate. See RP (6/7/2011) at 198-208; 229-231. Instead, the State concentrated its arguments on the strength of the State's case. See RP (6/7/2011) at 193-208; 229-231.

Third, the trial court's limiting instruction and written instructions cured any potential prejudice. The trial court immediately sustained the defense objection and directed the jury to disregard the improper argument. RP (6/7/2011) at 198. Additionally, the trial court's written instruction obliged the jury to disregard any argument that the evidence did not support. See RP (6/30/2011) at 3. These remedial instructions neutralized any potential prejudice. See *Warren*, 165 Wn.2d at 28 (citing *State v. Smith*, 144 Wn.2d 665, 679, 30 P.3d 1245, 39 P.3d 294 (2002) (some improper prosecutorial remarks may touch upon constitutional rights but are still curable by a proper instruction)).

Finally, overwhelming evidence supported the conviction. The evidence established Kenoyer was in financial distress at the time of the theft. RP (6/6/2011) at 50, 75; (6/7/2011) at 75-76, 116-17, 152. Despite pledging to help Kenoyer financially, Salzer testified she never intended to share or sell her bracelet. RP (6/6/2011) at 55, 95, 102; RP (6/7/2011) at 142, 153. *See also* RP (6/7/2011) at 53, 64-65. Kenoyer neither asked Salzer for permission to pawn the bracelet, nor did she inform Salzer that she sold the bracelet despite knowing her friend was desperate to reclaim her prized possession. RP (6/6/2011) at 44-45; RP (6/7/2011) at 109. When the theft was discovered, Kenoyer begged Salzer not to report the matter to law enforcement. RP (6/6/2011) at 48-49, 81; RP (6/7/2011) at 154. Kenoyer never told Hollis she had a possessory interest in the bracelet. RP (6/7/2011) at 22-23, 139, 141. Finally, Kenoyer admitted that what she did constituted a theft and was a “stupid thing to do.” RP (6/7/2011) at 11, 14-16, 18, 23, 26, 27.

After viewing the challenged statements, in the context of the overall argument, the single issue in dispute, the evidence introduced at trial, and the remedial jury instructions, the improper argument did not prejudice the defense or the outcome at trial. This Court should affirm.

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B. THE RECORD DOES NOT SUPPORT A FINDING THAT THE DEFENDANT HAS THE FUTURE ABILITY TO PAY HER LEGAL FINANCIAL OBLIGATIONS.

Kenoyer argues the sentencing court's finding that she has the present and future ability to pay legal financial obligations is not supported by the record. *See* Brief of Appellant at 6. The State concedes. This Court should vacate the contested finding and remand for a new sentencing hearing.

This Court applies a clearly erroneous standard when reviewing the sentencing court's determination regarding the defendant's ability to pay legal financial obligations. *State v. Bertrand*, 165 Wn. App. 393, 267 P.3d 511, 517 (2011); *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116 (1991). The decision to impose discretionary costs/fees requires the sentencing court to balance the defendant's ability to pay against the burden of his obligation. *Baldwin*, 63 Wn. App. at 312. This determination requires discretion and, thus, is reviewed for an abuse of discretion. *Baldwin*, 63 Wn. App. at 312.

Here, the sentencing court found Kenoyer had "the ability or likely future ability to pay the legal financial obligations." CP 8. However, the record does not show the court took into account Kenoyer's financial resources or the burden her LFO's might present in the future. *See* RP

(6/30/2011) at 19-22. Thus, the sentencing court's written finding that the defendant has the present or future ability to pay LFO's was erroneous. *See Bertrand*, 267 P.3d at 517.

This Court should vacate the challenged finding and remand for a new sentencing hearing, during which the sentencing court should determine, on the record, whether Kenoyer has the ability to pay her LFO's after taking into account her financial resources and any burden the fees/costs may present in the future. *See Bertrand*, 267 P.3d at 517 n. 16.

IV. CONCLUSION:

Based upon the arguments above, the State respectfully asks this Court to affirm Kenoyer's conviction for second-degree theft and remand for a new sentencing hearing.

Respectfully submitted: March ~~7th~~^{7th}, 2012.

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CLALLAM COUNTY PROSECUTOR

March 07, 2012 - 11:10 AM

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