

NO. 44815-7

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

SHERMAN CLAY ROBERTS, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Jerry Costello

No. 92-1-02296-8

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**BRIEF OF RESPONDENT**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did defendant waive the right to appeal the trial court's denial of his meritless motion to dismiss for alleged prosecutorial misconduct during redirect examination when he inexcusably declined a curative instruction and adamantly opposed a mistrial?
2. Has defendant failed to prove it was manifest abuse of discretion for the trial court to deny a motion to dismiss his charges for raping and molesting his stepdaughter when dismissal was not a permitted remedy for the error alleged?
3. Was defendant's motion to dismiss also properly denied because the prosecutor's good faith attempt to complete the record of a conversation defendant introduced during cross examination was not flagrant and ill-intentioned misconduct?<sup>1</sup>
4. Did the trial court have authority to order the forfeiture of property defendant never claimed despite having notice and an ongoing opportunity to do so pursuant to CrR 2.3(e).

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<sup>1</sup> Defendant waived any direct claim of prosecutorial misconduct as a basis for a new trial when he refused a curative instruction and mistrial, as well as by failing to assign error to a contention of prosecutorial misconduct on appeal. *See* RAP 10.3(a)(4); *State v. Lord*, 161 Wn.2d 276, 291, 165 P.3d 1251 (2007). The absence of prosecutorial misconduct is only separately addressed herein to more clearly explain why the trial court did not abuse its discretion when it denied defendant's motion to dismiss.

B. STATEMENT OF THE CASE.

1. Procedure

Appellant, Sherman Roberts ("defendant") was charged by second corrected information with two counts of third degree child rape (Counts I and III) and molestation (Count II) for the recurrent sexual exploitation of his teenage stepdaughter (A.B.)<sup>2</sup> between 1991 and 1992. CP 1-5, 38-39. The original information was filed on May 29, 1992. CP 1-3. Defendant was already serving a SSOSA<sup>3</sup> sentence for the second degree child rape and molestation he committed against A.B. when she was younger. CP 4-5. Defendant absconded when A.B. reported the continuation of that sexual abuse in 1992. IRP 41-44; 2RP 132, 146, 163, 193; 3RP 278; CP 6-7, 47. He was apprehended in Texas twenty years later. *Id.*

Defendant's case was called on March 18, 2013. IRP 4. The Honorable Gerald T. Costello presided over the trial. IRP 4. Preliminary motions were addressed outside the jury's presence. IRP 18-53, 58-109. Among them was the State's ER 404(b)<sup>4</sup> motion on the admissibility of

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<sup>2</sup> A.B. was formally known as A.R., but subsequently changed her last name. The State will refer to her by her new initials ("A.B.") throughout its response out of respect for her decision and to protect her privacy. 2RP 121.

<sup>3</sup> Special Sex Offender Sentencing Alternative. *See* RCW 9.94A.670.

<sup>4</sup> ER 404(b) "Evidence of other crimes, wrongs, or acts is not admissible to prove character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." "Lustful disposition" toward the victim is another recognized exception under ER 404(b). *State v. Ray*, 116 Wn.2d 531, 547, 806 P.2d 1220 (1991).

defendant's prior sexual misconduct with A.B. to prove his lustful disposition toward her as well as to establish his common scheme of using her for sex. 1RP 59-70. The prior abuse was ruled admissible to prove lustful disposition. 1RP 91-97. A stipulation summarizing defendant's admission to that abuse was admitted as evidence. 1RP 91-97; CP 43-46.

The trial court sustained defendant's objection to a question the prosecutor posed during redirect on the basis that it exceeded the scope of cross-examination. 2RP 212. The witness was not permitted to answer. *Id.* Defendant then moved for dismissal claiming the question amounted to prosecutorial misconduct. 2RP 212, 214. The court determined dismissal was inappropriate as the prosecutor's question was grounded in a good faith belief defendant opened the door to the challenged inquiry. 2RP 219-20. The court was satisfied the jury would disregard the unanswered question pursuant to its instructions. 2RP 220-21. Defendant declined a curative instruction and refused to refashion his motion as one for mistrial because he did not want that relief. 2RP 216, 219.

Defendant rested without calling witnesses. 3RP 311. In summation he argued A.B. falsely accused him of ongoing sexual abuse because she missed the attention he gave her before law enforcement interrupted the earlier abuse. 3RP 328-30. The jury decided defendant was guilty as charged. CP 107-109. Sentence was imposed on April 25, 2013. CP 114. Defendant had an offender score of 9+ for each offense. CP 117.

The court imposed a 60 month concurrent sentence in accordance with the law in effect when the offenses occurred. CP 117; 3RP 369, 382.

Paragraph 4.4 of the judgment notified defendant of his right to submit a claim for property held in conjunction with the case. CP 119; 3RP 373-74, 387. "Forfeit any items seized by law enforcement" was written under the advisement without reference to particular property. CP 119; 3RP 373-74, 387. Defendant did not object to that term when given an opportunity to do so and he has never asserted an interest in property claimed to be related to the case. 3RP 374-75, 377-82, 385; App.Br. 9-15. Notice of defendant's appeal was timely filed on April 25, 2013. CP 130.

## 2. Facts

A.B.'s mother (Connie Witt) met defendant at Point Defiance Park in the summer of 1977, when A.B. was nine months old. 2RP 180. They lived together as a family for five years before Witt and defendant were married. 2RP 180. A.B. grew up thinking of defendant as her father. 2RP 123-24. The family moved into a large Tacoma home when A.B. was seven. 2RP 122, 135. Defendant began molesting her in the basement of that house before her twelfth birthday. 2RP 125; 3RP 296; CP 43.

The molestation began as a series of "touching" "games" where defendant touched A.B.'s vagina and breasts while having her touch his penis. 2RP 125-26. He also sexually abused her about three times a month in the middle school where he worked as a janitor. 2RP 172-175. She would go there for the purported purpose of helping him clean after hours;

once there, he molested her on the floor of empty classrooms. 2RP 173-175; 3RP 274-75. A.B. was too afraid to ask for help. 2RP 173-74. Defendant eventually confessed to committing felony sex offenses against her between May 1, 1989 and September 15, 1989. CP 43-46; 3RP 278-79. Witt filed for divorce. 2RP 194.

Defendant moved to an apartment several blocks away from the family home. 2RP 153. He was about forty years old at the time. 2RP 138. By 1992 he began contacting A.B. at her friend's house. 2RP 128-129, 134. He would tell A.B. he needed to see her, then ask for sexual favors. 2RP 128. He brought her to his apartment for sex about once a week. 2RP 135. While there defendant touched A.B.'s breasts as well as touched and penetrated her vagina with his fingers. 2RP 135-36. He always made her touch his penis until he had "an orgasm." 2RP 136-37. On at least one occasion he inserted his penis in her vagina. 2RP 129-30, 137.

A.B. disclosed the ongoing sexual abuse to a school nurse sometime between February and April, 1992. 2RP 129-30; 3RP 266-69. Defendant unexpectedly arrived at the school with A.B.'s mother to speak with the nurse. 2RP 130-31, 184-85. A.B. previously refrained from telling her mother the abuse had resumed because she was "afraid for [her] whole family." 2RP 132. She struggled to understand why "someone [she] looked at as [her] father" would sexually abuse her. 2RP 165.

Detective Callaway received a CPS<sup>5</sup> report documenting defendant's crimes on April 28, 1992. 3RP 266. He interviewed A.B. on May 12, 1992. 3RP 266-67. She told him the abuse resumed in the summer of 1991 and last occurred two days before her disclosure. 3RP 268-69. Dr. Duralde examined A.B. on July 2, 1992. 3RP 291. A.B. told her the sexual abuse began as touching when she was about 11 years old. 3RP 296. It became "more aggressive," as defendant recently "put his penis insider of [her]." 3RP 296. A comparison of the medical examination A.B. received in 1990 with the one Dr. Duralde performed in 1992 revealed "a change to [A.B.'s] hymen ... consistent with penetrating trauma." 3RP 297-98.

Defendant disappeared immediately after A.B.'s 1992 disclosure. 2RP 132, 163, 193. He was apprehended in Texas twenty years later. 2012. 2RP 146, 163; 3RP 278; CP 7.

C. ARGUMENT.

1. DEFENDANT WAIVED THE RIGHT TO APPEAL THE DENIAL OF HIS MERITLESS MOTION TO DISMISS WHEN HE REFUSED LESSER REMEDIES CAPABLE OF REDRESSING THE CLAIMED ERROR.

A defendant waives the right to appeal a discretionary ruling on a motion to dismiss based upon a prosecutor's allegedly improper examination of a trial witness when the defendant declines a curative

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<sup>5</sup> Child Protective Services.

instruction and opposes a mistrial. *See State v. Lord*, 161 Wn.2d 276, 291, 165 P.3d 1251 (2007); *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991); *State v. Weber*, 99 Wn.2d 158, 165, 659 P.2d 1102 (1983). That result protects the integrity of judicial proceedings by denying a defendant the opportunity to "[d]ecline to ask for a mistrial or jury instruction, gamble on the outcome, and when convicted, reassert the waived objection." *See Lord*, 161 Wn.2d at 291. "[T]he absence of a motion for mistrial at the time of the [alleged misconduct] [also] strongly suggests to a court ... the ... event in question did not appear critically prejudicial to [a] [defendant] in the context of the trial ...." *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

The trial judge was willing to instruct the jury to disregard the prosecutor's challenged question about whether two children defendant inquired about on cross disclosed seeing defendant expose himself to A.B.. 2RP 213. Defendant withdrew his initial request for that instruction and moved for dismissal upon being reminded the jury had not been exposed to evidence ruled inadmissible since the promptly sustained objection averted the witness's answer. 2RP 213-214. The court inquired whether defendant meant "to fashion [his motion to dismiss] as a motion for mistrial" without intimating how it might rule. 2RP 214. Defendant responded:

"I don't want a mistrial. I don't want a mistrial at this point."

2RP 214. Defendant elaborated on his opposition to a mistrial by stating:

"[I] don't want a mistrial at this point, ... the only motion I have left is ... for dismissal based upon prosecutorial misconduct. I recognize that the Court has already instructed the jury that the remarks of counsel are not evidence, and the Court will also be instructing the jury according to the standard WPIC instructions that ... what the lawyers say, is not evidence and they should disregard it."

2RP 216.

The court again invited defendant to propose a curative instruction.

2RP 219. Defendant opined a special instruction was "[t]otally unnecessary" due to the anticipated standard instructions. 2RP 219.

Defendant foreclosed any claim to the inordinate relief he requests on appeal by strategically refusing to pursue less extreme remedial measures that would have redressed the purported error before the jury decided his case. He did not perceive the efficacious remedy of a curative instruction to be necessary as he rightly anticipated the jury could fairly decide his guilt once equipped with the court's standard instructions. *See* 2RP 219; CP 85-106. Although plainly unnecessary under the circumstances, the curative instruction defendant declined would have dispelled any prejudice associated with the jury's exposure to a question the witness was never permitted to answer. *See State v. Johnson*, 124 Wn.2d 57, 77, 873 P.2d 514 (1994)(juries are presumed to follow their

instructions). Particularly when one can only speculate as to what Witt's answer may have been. Given her previous responses to questioning it is plausible she would have disclaimed the import of the prosecutor's question or disavowed any memory of the information it elicited.

Albeit completely unwarranted under the circumstances, the mistrial defendant adamantly opposed would have eliminated any trace of the alleged error by enlisting a jury unexposed to the challenged question to consider the case before scarce societal resources were expended to complete his trial. *See State v. Weber*, 99 Wn.2d 158, 165, 659 P.2d 1102 (1998)(mistrial should only be granted when the defendant has been so prejudiced nothing short of a new trial can ensure he will be tried fairly)(quoting *State v. Gilcrist*, 91 Wn.2d 603, 612, 590 P.2d 809 (1979)). Defendant rejected both remedies to "[g]amble on the outcome[.]" *See Lord*, 161 Wn.2d at 291; *Swan*, 141 Wn.2d at 661. In doing so he unmistakably stood on his right<sup>6</sup> to have the empanelled jury decide his guilt, which resoundingly communicated that he believed it would do so fairly, if not also favorably to the defense. The waiver attending those

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<sup>6</sup> *See Oregon v. Kennedy*, 456 U.S. 667, 672, 102 S. Ct. 2083, 72 L.Ed.2d 416 (1982)(a criminal defendant has a "valued right to have his [or her] trial completed by a particular tribunal.").

decisions is rightly an insurmountable bar to appellate consideration of his meritless motion to dismiss. See *Lord*, 161 Wn.2d at 291; *State v. Kjorsvik*, 117 Wn.2d 93, 101-02, 812 P.2d 86 (1991); *State v. Fraser*, 170 Wn.App. 13, 26, 282 P.3d 152 (2012).

2. THE TRIAL COURT APPROPRIATELY DENIED DEFENDANT'S MERITLESS MOTION TO DISMISS BECAUSE IT WOULD HAVE BEEN A MANIFEST ABUSE OF DISCRETION TO GRANT IT.

"[D]ismissal under CrR 8.3 is an extraordinary remedy, one to which a trial court should turn only as a last resort." *State v. Wilson*, 149 Wn.2d 1, 12, 65 P.3d 657 (2003). "The trial court's authority under CrR 8.3(b) to dismiss [is] limited to truly egregious cases of ... misconduct by the prosecutor." *State v. Koerber*, 85 Wn. App. 1, 4, 931 P.2d 904 (1996); *State v. Duggins*, 68 Wn. App. 396, 401, 844 P.2d 441 (1993) (citing *State v. Stephans*, 47 Wn. App. 600, 736 P.2d 302 (1987) *aff'd*, 121 Wn.2d 524, 852 P.2d 294 (1993)).

"A court's decision on a motion to dismiss under the rule is reviewed for manifest abuse of discretion." *State v. Moen*, 150 Wn.2d 221, 226, 76 P.3d 721 (2003) (citing *State v. Michielli*, 132 Wn.2d 229,

240, 937 P.2d 587 (1997)).<sup>7</sup> "The discretion conferred upon the superior court under this rule must be exercised in conformity with the requirement that the record show governmental misconduct ... of the type which [the Supreme Court] has historically found sufficient to support a dismissal of a criminal charge." *State v. Whitney*, 96 Wn.2d 578, 579-80, 637 P.2d 956 (1981).

In addition to misconduct a defendant must show actual prejudice to justify dismissal; "[t]he mere possibility of prejudice is insufficient." *State v. Krenik*, 156 Wn. App. 314, 320, 231 P.2d 252 (2010)(citing *State v. Stein*, 140 Wn. App. 43, 53, 165 P.3d 16 review denied, 163 Wn.2d 1045, 187 P.3d 271 (2008)). This is because "[t]he due process clause does not permit a court to abort [a] criminal prosecution simply because it disagrees with a prosecutor's judgment... The court's role is ... to determine whether the State's conduct violates 'fundamental conceptions of justice which lie at the base of our civil and political institutions.'" *State v. Moen*, 150 Wn.2d 221, 226, 76 P.3d 721 (2003).

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<sup>7</sup> Discretion is abused if the trial court's decision is manifestly unreasonable or is based on untenable grounds. *Stein*, 140 Wn.App. at 53 (citing *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)). A decision is manifestly unreasonable if the trial court "adopts a view that no reasonable person would take" despite applying the correct legal standard to the supported facts. *State v. Martinez*, 121 Wn. App. 21, 29, 86 P.3d 1210 (2004)(citing *Rohrich*, 149 Wn.2d at 654 (quoting *State v. Lewis*, 115 Wn.2d 294, 298-99, 797 P.2d 1141 (1990)). "A decision is based on untenable grounds if it rests on facts unsupported in the record or was reached by applying the wrong legal standard." *Id.*

The State called A.B.'s mother (Connie Witt) as a witness. 2RP 178. During cross-examination defendant asked about a 1989 meeting where A.B. disclosed defendant's sexual abuse to Witt in the presence of A.B.'s friends "Kim" and "Sarah" as well as Sarah's mother. 2RP 199-200. The State had not inquired about that meeting. 2RP 178-196. Defendant asked Witt whether she first "heard about what had been happening" at the meeting, referring to defendant's sexual abuse of A.B.. 2RP 200. On redirect the prosecutor recalled Witt to that line of questioning before asking whether Kim and Sarah disclosed witnessing defendant expose himself to A.B.. 2RP 211-12. Defendant objected, claiming the question exceeded the scope of cross-examination. 2RP 212. The objection was promptly sustained on that basis before the question was answered. 2RP 212, 220.

The court denied defendant's companion motion to dismiss for prosecutorial misconduct because the prosecutor asked the question with a "good faith" belief the door had been opened to the anticipated answer by defendant's introduction of the conversation in a way that implicitly attacked the victim's credibility. 2RP 219-20. The court was satisfied the jury would properly disregard the unanswered question according to its instructions. 2RP 219-20.

The trial court did not manifestly abuse its discretion in denying defendant's motion to dismiss since dismissal is an inappropriate remedy

for the error alleged. Dismissal is a remedy of last resort reserved for "truly egregious" instances of misconduct that could not be cured by a new trial because an irredeemable violation of a defendant's constitutional rights would persist. *See e.g., Koerber*, 85 Wn. App. at 4-5; *Krenik*, 156 Wn. App. at 320 (defendant forced to choose between the right to a speedy trial and the right to prepare an adequate defense)(citing *State v. Sherman*, 59 Wn. App. 763, 770-71, 801 P.2d 274 (1990)). Dismissal is not an authorized remedy where, as here, the court is confronted with a reasonable extemporaneous response to a debatable evidentiary issue within the trial court's broad discretion to decide on a highly particularized case by case basis.

The trial court would have abused its discretion if it granted defendant's motion as such a ruling would have necessarily entailed blatant disregard for the court's obligation to utilize suitably tailored remedial measures like the curative instruction defendant refused. *See State v. Koerber*, 85 Wn. App. 1, 4, 931 P.2d 904 (1996); *Wilson*, 149 Wn.2d at 12. A properly fashioned instruction is the preferred method of dealing with an attorney's impertinent question. *See Johnson*, 124 Wn.2d at 77; *State v. Beasley*, 126 Wn. App. 670, 688-89, 109 P.3d 849 (2005). And mistrial—not dismissal—is the extraordinary remedy reserved for improper questions so flagrant and ill-intentioned they overwhelm any

realistic capacity of a curative instruction to adequately ameliorate the attending harm. See *State v. Avendano-Lopez*, 79 Wn. App. 706, 721-722, 904 P.2d 324 (1995); *State v. Condon*, 72 Wn. App. 638, 647-48, 865 P.2d 521 (1994)(citing *State v. Escalona*, 49 Wn. App. 251, 254, 742 P.2d 190 (1987)). When inadequately addressed error of that magnitude taints a conviction, the appropriate appellate remedy is reversal and retrial, *not dismissal*. See *Id.*; 2RP 214, 216, 219; App.Br. 7-10. Dismissal of defendant's criminal charges therefore could not have been sustained even if the error he claims was proved. See *Moen*, 150 Wn.2d at 226; *Whitney*, 96 Wn.2d at 579-80; *Wilson*, 149 Wn.2d at 12; *Koerber*, 85 Wn. App. at 4. His motion to dismiss was properly denied.

3. DEFENDANT'S MOTION WAS ALSO CORRECTLY DENIED BECAUSE THE PROSECUTOR'S GOOD FAITH ATTEMPT TO COMPLETE THE RECORD OF A CONVERSATION DEFENDANT INTRODUCED ON CROSS-EXAMINATION WAS NOT FLAGRANT AND ILL-INTENTIONED MISCONDUCT.

"Absent a proper objection *and a request for a curative instruction*," a defendant cannot prevail on a claim of prosecutorial misconduct unless he or she proves the prosecutor's conduct was so flagrant and ill-intentioned that an instruction could not have cured a demonstrated prejudice. *State v. Corbett*, 158 Wn. App. 576, 594, 242 P.3d 52 (2010)(citing *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747

(1994), *cert. denied*, 514 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 105 (1995) (emphasis added); *State v. Edvalds*, 157 Wn. App. 517, 237 P.3d 368 (2010)(citing *State v. Belgrade*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988)). *State v. McChristian*, 158 Wn. App. 392, 400, 241 P.3d 468 (2010) (citing *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied.*, 523 U.S. 1007, 118 S. Ct. 1192, 140 L. Ed. 2d 322 (1998); *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984)).

- a. The challenged question was a proper response invited by defendant's cross-examination.

"[A] party's introduction of evidence that would be inadmissible if offered by the opposing party 'opens the door' to explanation or contradiction of that evidence." *State v. Ortega*, 134 Wn. App. 617, 626, 142 P.3d 175 (2006)(citing *State v. Avendano-Lopez*, 79 Wn. App. 706, 714, 904 P.2d 324 (1995)); *see also State v. Young*, 158 Wn. App. 707, 719, 243 P.3d 172 (2011)(even constitutionally protected evidence can become admissible if defendant opens the door to its use)(citing 5 Karl B. Tegland, Wash.Prac.: Evidence Law and Practice § 103.14 (5th ed. 2007)); *State v. Gefeller*, 76 Wn.2d 449, 454-55, 458 P.2d 17 (1969); *State v. Hartzell*, 156 Wn. App. 918, 934-35, 237 P.3d 928 (2010); *State v. Jones*, 114 Wn. App. 284, 298, 183 P.3d 307 (2008).

"To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths. Thus, it is a sound general rule that, when a party opens up a subject of inquiry on ... cross-examination, he [or she] contemplates that the rules will permit ... redirect examination ... within the scope of the examination in which the subject matter was first introduced." *Gefeller*, 76 Wn.2d at 455; *see also State v. Gallagher*, 112 Wn. App. 601, 609-10, 51 P.3d 100 (2002)). The appropriateness of a prosecutor's response to a door opened by the defense is reviewed in the context of the entire record and the circumstances at trial. *See State v. Ruiz*, 176 Wn. App. 623, 641, 309 P.3d 700 (2013).

Defendant first introduced the conversation that invited the challenged question when he cross-examined the victim:

[Defendant] "Do you remember being with Sarah and another friend, Kim, and the three of you talking?"  
[A.B.] "I don't remember."  
[Defendant] "All right. You don't remember was Sarah talking to your mom?"  
[A.B.] "I don't remember."  
[Defendant] "Could that have happened?"  
[A.B.] "Possibly."...  
[Defendant] "[S]arah knew about what had happened in the past, didn't she?"  
[A.B.] "I don't remember."  
[Defendant] "You are saying you don't remember having any of these conversations with Sarah?"

[A.B.] "I don't recall."  
[Defendant] "And your mother in - -"  
[A.B.] "I don't recall."....

2RP 156-58(emphasis added). Defendant resumed that line of inquiry during his cross-examination of A.B.'s mother even though the prosecutor refrained from pursuing the matter. *See e.g.* 2RP 128-29, 163-67,178-196. The door opening cross-examination about the conversation continued as follows:

[Defendant] "Do you recall a girl by the name of Sarah...?"  
[Witt] "Yes."  
[Defendant] "She was Amy's best friend, right?"  
[Witt] "Right." ...  
[Defendant] "[D]o you remember a time when Sarah and Amy sat down with you in your home?"  
[Witt] "Yes."  
[Defendant] "And that's when you heard about what had been happening,that's in 1989, the fall of 1989; is that correct?"  
[Witt] "Yes."  
[Defendant] "And Sarah and Amy told you about stuff, right?"  
[Witt] "Yes. And I was shocked."  
[Defendant] "Was it just you?"  
[Witt] "We had her - - Sarah's mom there."  
[Defendant] "Okay. Remember anybody else?"  
[Witt] "There was another girl."  
[Defendant] "Okay. Kim?"  
[Witt] "Kim."  
[Defendant] "Anybody else?"  
[Witt] "No." ...  
[Defendant] "Do you recall telling Sherman about this meeting ...?"  
[Witt] "I don't recall."  
[Defendant] "Okay. Do you think there was a meeting that you sat down with Sherman and told him what the girls were saying or not?"  
[Witt] "Yes. There probably was, but I just - - it's not coming to me right now."

2RP 199-01(emphasis added).

Confronted with defendant's inquiry into the conversation for the second time, the prosecutor attempted to complete the record of what was said during her redirect examination:

- [Prosecutor] "Now, defense counsel asked you in 1989 when you found out about what was going on, you had a meeting with Sarah and Kim and your daughter and their parents, right?"
- [Witt] "Right."
- [Prosecutor] "And you found out that there was an allegation that something happened in view of Sarah and Kim; is that right?"
- [Witt] "Yeah."
- [Prosecutor] "And you found out the defendant may have exposed himself to them; is that correct?"
- [Defendant] "Objection. Beyond the scope."
- [Court] "Sustained."
- [Prosecutor] "Your honor, I would like to address this with the Court."

2RP 211-12.

The court did not affirm its ruling on the objection without acknowledging it was defendant who brought out the discussion about his sexual misconduct in a way that attacked the victim's credibility. 2RP 219-20. The court correctly concluded the prosecutor had a "good faith" belief "the door had been opened to a discussion about what exactly was said in [a] meeting ... the defense had brought to the jury's attention." 2RP 219-20.

Defendant's objection should not have been sustained. The prosecutor's question fairly elicited details about the conversation defendant opened to further inquiry by asking self-serving questions about what other witnesses heard and said. Defendant ultimately commercialized on his ability to adduce an incomplete account of the meeting in summation by arguing inferences favorable to his case from the resulting absence of information about what was said:

"Let's begin with [the State's] first argument ... [that] [w]hen [A.B.] was 15, [defendant] would not leave her alone. I submit to you that it's exactly the opposite, and that was the problem with [A.B.]. When she was 15, he was leaving her alone, totally alone, and that hurt. No explanation. She's with her best friend Sarah -- and we are talking 1989 ... She and Sarah, Sarah's mom, go over to Connie's house, Sherman was still living there, still a family ... and they have this really awful, disgusting stuff. Inexcusable stuff is happening between my client, Sherman Roberts, and Amy. And that's in the fall of 1989. So Sarah's there, Sarah's mom is there, and nobody calls the police. Apparently nothing's been done...."

3RP 328-29 (emphasis added).

Having been refused the opportunity to complete the record of the conversation the prosecutor was left in the unenviable position of being unable to explain why the families behaved as they did. Defendant consequently received the tactical advantage of a one-sided account, which potentially resulted in a half-truth, the "open-door rule" is designed to prevent.

- b. The prosecutor's good faith attempt to complete the record was not flagrant and ill-intentioned misconduct even if the testimony elicited by the prosecutor's question was properly excluded.

"Prosecutors must act impartially and 'with the object in mind that all admissible evidence and all proper argument be made, but that inadmissible evidence and improper argument be avoided." *Avendano-Lopez*, 79 Wn. App. at 722. A prosecutor commits flagrant misconduct during redirect examination when the examination contains a flauntingly or purposely conspicuous error of law. *See State v. Warren*, 165 Wn.2d 17, 28, 195 P.3d 940 (2008); *State v. Emery*, 174 Wn.2d 741, 761, 278 P.3d 653 (2012) (*citing* Webster's Third New International Dictionary 862-63 (2002)). *Avendano-Lopez*, 79 Wn. App. at 718 ("flagrant misconduct" where prosecutor improperly appealed to potential prejudices associated with immigration status and socio-economic class)(*citing State v. Suarez-Bravo*, 72 Wn. App. 359, 367, 864 P.2d 426 (1994); Webster's Third New International Dictionary 1126 (2002)). Whereas an examination can be characterized as "ill-intentioned" when it evinces malicious disregard for a defendant's right to due process. *See generally Warren*, 165 Wn.2d at 29.

Defendant mischaracterizes the prosecutor's question as improperly eliciting information about his uncharged sexual misconduct

with other victims in violation of ER 404(b). The challenged question elicited information about sexual misconduct ruled admissible to show defendant's lustful disposition toward A.B.. The presence of two other teenagers during one of defendant's many sexual overtures to his stepdaughter is simply part of the *res gestae* of an event defendant brought to the jury's attention through his cross-examination. The challenged question did not elicit testimony about an incident unrelated to the charges at issue in his case.

The prosecutor's good faith assessment that the door was opened to the challenged question found support beyond the context the relevant cross-examination as the court had ruled defendant opened the door to other evidence for engaging in similar conduct earlier in the case. 2RP 173-74. Prior to Witt's testimony the prosecutor elicited details from A.B. on redirect about abuse that took place at her middle school in response to defendant's inquiries about it. 2RP 174. When the prosecutor asked whether her mother knew A.B.'s purported purpose for being with defendant at the middle school after hours, defendant objected claiming the inquiry was irrelevant to his cross-examination. 2RP 174. The court overruled that objection, stating: "I think this door has been opened." *Id.* It was not unreasonable for the prosecutor to perceive the same result

would follow her attempt to question Witt about the conversation defendant inquired about during his examinations of A.B. and Witt.

The mere fact defendant's objection to that question was sustained as exceeding the scope of cross examination does not mean the question was improper. See *State v. Rupe*, 101 Wn.2d 664, 692, 683 P.2d 571 (1984); *Gallager*, 112 Wn. App. at 609 (citing *State v. Neal*, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001)); *State v. Ward*, 55 Wn. App. 382, 386-87, 777 P.2d 1066 (1989); see also ER 403,<sup>8</sup> ER 611.<sup>9</sup> The trial court had wide discretion to tailor the scope of the prosecutor's redirect examination by excluding the elicited testimony for reasons unrelated to its admissibility. See *Id.* Improper conduct by the prosecutor was explicitly rejected by the trial court as a basis for its ruling. 2RP 219-21.

Contrary to defendant's suggestion, the challenged question did not violate the pretrial ruling on permissible ER 404(b) evidence. The question was not objected to, or sustained on, that basis with good reason. 2RP 212, 219-21. The pretrial ruling expressly provided for testimonial

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<sup>8</sup> ER 403 "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

<sup>9</sup> ER 611 (A) "The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment."

descriptions of "the crimes ... defendant committed upon [A.B.]" 1RP 97. There is no reason to interpret the ruling as prohibiting A.B. from testifying that one of the many instances of that abuse began in front of her friends. *Id.* Such an account would have been additional evidence of defendant's lustful disposition toward her regardless of who was present to see it. A probative account of sexual misconduct is not made inadmissible by corroboration.

There is nothing in the record to support the contention that the prosecutor committed misconduct by asking the challenged question. Her professional handling of the case is evident in her adversary's recognition that "[i]t [wa]s a pleasure working with someone with ... the kind of ethics that this prosecutor has." 2RP 221. The amorphous line that delimits permissible redirect examination may freely shift within the confines of the individual trial judge's broad discretion to balance the equities of permitting a particular question in a given case. If the prosecutor crossed that often unpredictable line in this case it only reflects a reasonable miscalculation of where the court would find it at the moment the challenged question was asked.

- c. Any potential for prejudice was eliminated when the jury was properly instructed to decide the case according to the admitted evidence.

"A public prosecutor is a quasi-judicial officer charged with the duty to seek a verdict free of prejudice and based upon reason." *Avendano-Lopez*, 79 Wn. App. at 722. Yet a lamentable failing on the part of a prosecutor does not mandate the great societal cost inherent in reversing a constitutionally obtained conviction. The "final measure of error in a criminal case is not whether a defendant was afforded a perfect trial, but whether he [or she] was afforded a fair trial." *State v. Miles*, 73 Wn.2d 67, 70, 436 P.2d 198 (1968). Proper application of the harmless error doctrine contributes to community safety, conserves scarce judicial resources, and avoids undermining the public's confidence in the criminal justice system by denying windfall relief to guilty defendants. *See generally Avendano-Lopez*, 79 Wn. App. at 722.

According to the harmless error doctrine, proven prosecutorial misconduct does not constitute prejudicial error unless there is a substantial likelihood it affected the verdict. *See State v. Fisher*, 130 Wn. App. 1, 18, 108 P.3d 1262 (2005)(citing *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), *cert.denied*, 516 U.S. 1121, 116 S. Ct. 931, 133 L.Ed.2d 858 (1996)). Appellate courts "give deference to a trial court

ruling on prosecutorial misconduct because it is in the best position to determine if the misconduct prejudiced the defendant's right to a fair trial. *State v. Fisher*, 130 Wn. App. 1, 18, 108 P.3d 1262 (2005)(citing *State v. Luvene*, 127 Wn.2d 690, 701, 903 P.2d 960 (1995)). A trial court's discretionary judgment as to whether a special admonition is necessary, or whether standard instructions are adequate to address a potential error, should be similarly respected by reviewing courts. See *State v. Downs*, 11 Wn. App. 572, 574, 523 P.2d 1196 (1974)(citing *State v. Whetstone*, 30 Wn.2d 301, 191 P.2d 818 (1948)).

The trial court accurately concluded that any potential prejudice attending the prosecutor's unanswered question was so remote that a curative instruction was not necessary despite its willingness to give one if desired by the defense. 2RP 219-21. It was not. *Id.* The court's proper pretrial and concluding instructions were mutually perceived as adequate to ensure the jury would dependably disregard the challenged question. 2RP 219-21; CP 85-106.<sup>10</sup>

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<sup>10</sup> See e.g., Instruction No. 1: "Your decision as jurors must be made solely upon the evidence ... the evidence ... consists of the testimony ...stipulations, and exhibits ... Do not be concerned ... about ... my rulings on the evidence... the lawyers' statements are not evidence ... You must disregard any remark, statement, or argument ... not supported by the evidence...Do not make any assumptions or draw any conclusions based on a lawyer's objections...."

The question was also cumulative in the context of defendant's case. Even if a prejudicial import could be assumed to adhere to the prosecutor's unanswered question, it would have been tragically eclipsed by the appalling account of protracted abuse the jury was forced to evaluate while deciding the case. The admitted evidence established defendant satisfied his prurient desire for his stepdaughter throughout her formative years. Over the State's initial objection the jury also learned that A.B. secretly traveled to visit defendant in Texas as a young adult hoping the man she still viewed as her father had changed, only to have him proposition her for more sexual favors in the home he shared with his new wife. 2RP 145-46, 164-65, 169-70. The unanswered question could not have appreciably affected the jury's relevant assessment of whether defendant acted according to his lustful disposition toward A.B. as charged.

The information elicited by the question was also cumulative in that evidence of the fact Kim and Sarah witnessed defendant's sexual misconduct with A.B. had already been adduced without objection. Witt affirmed the sexual misconduct discussed at the meeting "happened in view of Sarah and Kim[.]" 2RP 212. That answer allowed an inference they witnessed some or all of the prior sexual abuse of A.B. already admitted as evidence—all of which tragically involved an exposure of

defendant's penis at some point during the interaction. Any error identifiable in the challenged question was consequently harmless in the context of defendant's case.

4. THE TRIAL COURT HAD AUTHORITY TO ORDER THE FORFEITURE OF PROPERTY DEFENDANT NEVER CLAIMED DESPITE HAVING NOTICE AND A CONTINUING OPPORTUNITY TO DO SO.

"[A] [defendant] may challenge an illegal or erroneous sentence for the first time on appeal." *State v. McWilliams*, \_\_\_ Wn. App. \_\_\_, 311 P.3d 584, 589 (2013)(citing *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)). Appellate courts "review whether the sentencing court had the statutory authority to impose a sentencing condition *de novo* while the imposition of crime-related prohibitions is reviewed for an abuse of discretion. *Id.* (citing *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007)). A sentencing court abuses its discretion when its conditions are manifestly unreasonable. *State v. Valencia*, 169 W.2d 782, 786, 239 P.3d 1059 (2010). Unreasonableness is "manifest" when it is "obvious, directly observable, overt not obscure ...." *See State v. Taylor*, 83 Wn.2d 594, 598, 521 P.2d 669 (1974).

A court may refuse to return seized property no longer needed for evidence if (1) the defendant is not the rightful owner; (2) the property is contraband; or (3) the property is subject to forfeiture pursuant to statute.

*Id.* (citing *City of Walla Walla v. \$401,333.44, 164*, Wn. App. 236, 244, 262 P.3d 1239 (2011)). "CrR 2.3(e)<sup>11</sup> governs motions for the return of illegally seized property; it provides that a person aggrieved by an unlawful search and seizure may move the trial court for the property's return on the ground that the person is lawfully entitled to its possession. A defendant may make a motion for return of property at any time, including after a determination of guilt." *Id.* at 589-90 (citing *State v. Card*, 48 Wn. App. 781, 786, 741 P.2d 65 (1987)(emphasis added). "Our Supreme Court has interpreted the rule to require an evidentiary hearing to determine the right to possession between the State and the defendant." *Id.* at 590 (citing *State v. Marks*, 114 Wn.2d 724, 732, 790 P.2d 138 (1990)).<sup>12</sup>

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<sup>11</sup> CrR 2.3(3) Motion for Return of Property. "A person aggrieved by an unlawful search and seizure may move the court for the return of the property on the ground that the property was illegally seized and that the person is lawfully entitled to possession thereof. If the motion is granted the property shall be returned. If a motion for return of property is made or comes on for hearing after an indictment or information is filed in the court in which the motion is pending, it shall be treated as a motion to suppress."

<sup>12</sup> *Marks* set forth the following guidelines once a motion for the return of seized property has been made: (1) An evidentiary hearing is required under CrR 2.3(e); (2) The purpose of the hearing is to determine the right to possession as between the State and the defendant; (3) The State has the initial burden of proof to show right to possession; (4) Thereafter, the defendant must come forward with sufficient facts to convince the court of his or her right to possession. If such a showing is not made, it is the court's duty to deny the motion. 111 Wn.2d at 734-35.

The challenged provision of defendant's judgment notified him of the process by which he was to pursue any property claims related to his sentence:

Property may have been taken into custody in conjunction with this case. Property may be returned to the rightful owner. Any claim for return of such property must be made within 90 days. After 90 days, if you do not make a claim, property may be disposed of according to law."

CP 119. Defendant nevertheless failed to object to the challenged forfeiture when he had notice and an opportunity to do so, or otherwise move for the return of any seized property pursuant to CrR 2.3(e). 3RP 374-75, 377-82, 385. Defendant similarly refrained from identifying any unlawfully retained property on appeal. App.Br. 10-15.

"Although CrR 2.3(e) provides that a defendant may move for the return of seized property, it does not compel raising such a claim." *McWilliams*, 311 P.3d at 590, fn. 10 (citing *City of Seattle v. Stalsbrotten*, 138 Wn.2d 227, 232, 978 P.2d 1059 (1999)). The right against self-incrimination protects a defendant from asserting a property interest, which would implicate him in a crime." *McWilliams*, 311 P.3d at 590, fn. 10 (citing *City of Seattle v. Stalsbrotten*, 138 Wn.2d 227, 232, 978 P.2d 1059 (1999)). CrR 2.3(e) accommodates that right by putting the onerous on a defendant to move for the return of seized property. See generally *Marks*, 114 Wn.2d at 734-35.

Defendant only challenges the trial court's authority to impose the forfeiture condition in his judgment. App.Br. 15. Unlike the cases he relies on, he has never coupled that challenge with an asserted possessory interest in property allegedly held in conjunction with his case. *See* App.Br. at 11 (*citing State v. Alaway*, 64 Wn. App. 96, 797-99, 828 P.2d 591 (1992); *Expinoza v. City of Evvery*, 87 Wn. App. 857, 862, 943 P.2d 387 (1997)). "The trial court has authority to order the forfeiture of lawfully seized property when the defendant is not the rightful owner." *McWilliams*, 311 P.3d at 590 (*citing Wall Walla*, 164 Wn. App. at 244). By that authority, the trial court lawfully ordered the forfeiture of property defendant never claimed when he had notice and an opportunity to do so. *See Id.* As it stands to reason that if defendant did not claim any case-related property it was either abandoned or belonged to another. Without a record of the property at issue, of a claim for specific property by the defense, it is equally plausible the property was lawfully forfeited contraband.

If defendant is actually aggrieved at the government's retention of some hitherto unidentified property he can pursue the claim by properly filing a motion for the property's return in the trial court pursuant to CrR 2.3(e) as such a motion may be made at any time. *See State v. Card*, 48 Wn. App. 781, 786, 741 P.2d 65 (1987); CrR 2.3(e); CR 55(c)(1).

D. CONCLUSION.

Defendant waived his right to appeal the trial court's denial of his extraordinary motion to dismiss when he refused intermediate remedies capable of curing the error he claimed. His motion was properly denied below because it sought inappropriate relief for proper redirect examination mischaracterized as prosecutorial misconduct. His constitutionally obtained convictions for the third degree rape and molestation of his teenage stepdaughter should be affirmed.

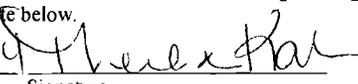
DATED: January 14, 2014.

MARK LINDQUIST  
Pierce County  
Prosecuting Attorney

  
JASON RUYF  
Deputy Prosecuting Attorney  
WSB # 38725

Certificate of Service:

The undersigned certifies that on this day she delivered by US mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

1.14.14   
Date Signature

# PIERCE COUNTY PROSECUTOR

## January 14, 2014 - 4:51 PM

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