

NO. 49126-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

ELLIOTT RUDOLPH,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable David Gregerson, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The state failed to prove beyond a reasonable doubt that Mr. Rudolph had non-consensual intercourse with Ms. Sandoval.
2. The sentencing court erred by imposing a non-crime related condition of sentencing.
3. The trial court abused its discretion by denying the defense motion for a new trial based on prosecutorial misconduct.
4. The trial court erred by imposing LFO's without inquiring into Mr. Rudolph's ability to pay.
5. The trial court's instructions to the jury denied Mr. Rudolph his right to a fair trial.
6. Defense counsel was ineffective for failing to object to the trial court's imposition of LFO's without making an inquiry into Mr. Rudolph's ability to pay.
7. This Court should deny appellate costs because Mr. Rudolph is indigent.

Issue Presented on Appeal

1. Was the state able to prove beyond a reasonable doubt that Mr. Rudolph had non-consensual intercourse with Ms. Sandoval, where Ms. Sandoval testified that she was too drunk to remember the identity of the perpetrator, too drunk to remember what happened the night of the incident, she told the doctor and her mother she did not see the perpetrator and only later identified Mr. Rudolph?
2. Did the state err by imposing the non-crime related condition of sentencing requiring Ms. Rudolph to engage in domestic violence treatment when he and Ms. Sandoval were just friends?
3. Should this court deny appellate costs where Mr. Rudolph is indigent?
4. Was counsel ineffective to the prejudice of Mr. Rudolph for failing to object to the imposition of LFO's without an inquiry into Mr. Rudolph's ability to pay?
5. Did the trial court err in imposing discretionary LFO's

without inquiring into Mr. Rudolph's ability to pay?

B. STATEMENT OF THE CASE

Alexandria Sandoval and Elliott Rudolph were high school friends that hung out and drank together frequently. RP 77-81. Ms. Sandoval completed in patient alcohol treatment and was not supposed to drink. RP 79, 84-87, 175. The night of the incident, she planned to meet up with Mr. Rudolph to party and get drunk. RP 87, 167. Ms. Sandoval lied to her mother and told her she was staying with her friend Imani Renfro. RP 83. Instead she met Mr. Rudolph at the mall with other friends and proceeded to get drunk to the point where she passed out and could not remember parts of the night. RP 87-88, 91, 153, 160, 387. Ms. Sandoval and Mr. Rudolph texted each other frequently and often texted to each other "love you". RP 121-22.

Mr. Rudolph lives with his mother and sister. RP 163, 673, 83-84. Mr. Rudolph's sister's bedroom is next to Mr. Rudolph and her Chihuahua barks whenever someone comes into the house. RP 681, 695, 697, 705. Two large dogs in the back of the house bark as well. RP 681, 695. To avoid the dogs, it is necessary to

scale a six foot fence. RP 699, 701, 709-10. Mr. Rudolph's sister and mother testified that the dogs did not bark and they did not hear noises the night of the alleged incident. RP 685-86, 708.

Ms. Sandoval slept in Mr. Rudolph's bed the night of the incident but she does not remember how she got there. RP 91. Ms. Sandoval is a lesbian and is not generally interested in men. RP 94-95, 226. Mr. Rudolph knew this but nonetheless on occasion tried to kiss her. RP 93-94. Earlier in the night, when Mr. Rudolph kissed Ms. Sandoval, she responded but then told Mr. Rudolph to stop. RP 90, 93. Ms. Sandoval told Mr. Rudolph she was not romantically interested in him. RP 95, 223.

Ms. Sandoval did not remember anything about the second party she attended, she did not remember walking to walking to Mr. Rudolph's house, but she remembered going to bed with Mr. Rudolph with her clothes on. RP 88. When Ms. Sandoval woke in Mr. Rudolph's house, Mr. Rudolph tried to kiss her, but after responding positively, she said "stop". RP 90, 93. Thereafter, Ms. Sandoval fell asleep. RP 90. A few days after the alleged incident, out of habit, Ms. Sandoval texted Mr. Rudolph and responded to a

text from his stating "I love you" with "I love you too". RP 121-22. Ms. Sandoval also told Mr. Rudolph that everything was ok. RP 122.

Ms. Sandoval testified that she was in and out of consciousness when she woke up with Mr. Rudolph having sex with her. RP 90, 95-96, 100. Ms. Sandoval did not scream or move because she was too drunk. RP 90. Ms. Sandoval told the police and her doctors that she did not know who raped her. RP115-116. Later she identified Mr. Rudolph as the person who had unwanted sex with her. RP 117. Ms. Sandoval did not see the man's face and told the doctor who later examined her that she did not know the man's identity because she was too drunk, and could not really remember much of the incident. RP 100, 376.

Ten days later when the police investigated the incident, Ms. Sandoval could not remember which underwear she wore on the night in question but since she does not do her laundry frequently, she retrieved two pairs of dirty underwear from her laundry basket and gave those two pairs to the police. RP 118, 120, 235.

The Washington State Crime Lab forensic scientists

analyzed the black and pink underwear and detected 2 sperm cells on the black underwear. RP 475-78, 494. David Stritzke, a forensic scientist testified that when a man ejaculates he emits millions of sperm. RP 652. He also testified that when clothing comes in contact with other clothing DNA can be transferred between the article of clothing. RP 639, 641. The two semen cells revealed two separate male contributors: one for Mr. Rudolph and another from an unidentified male. RP 660-61.

Ms. Sandoval did not tell her mother about the incident until several days later when she complained of pelvic pain which was later confirmed to be a urinary tract infection. RP 114, 383.

Ms. Sandoval went to Kaiser with Imani's mother four days after the night after having sex. RP 111, 344. Ms. Sandoval asked for a test for STD's and asked for a pregnancy test, but did not indicate the name of the person she had sex with. RP 111, 199. Ms. Sandoval told Dr. Wilmington that she did not see the person she had sex with. RP 376. Dr. Wilmington testified at length that it is common for women to contract a UTI after their first sexual experience. RP 353-54.

Ten days after the incident on October 27, 2013, Ms. Sandoval went to a different doctor, Dr. Auerbach at Legacy Emanuel Hospital. RP 378-381. MS. Sandoval told Dr. Auerbach she did not know the identity of the person she had sex with. RP 382, 387. Ms. Sandoval admitted that she lied to two different doctors after this incident. RP 204-05. Dr. Wilmington testified at length that it is common for women to contract a UTI after their first sexual experience. RP 353-54.

a. Orders in Limine

The court reserved ruling on the state's motion to suppress any reference to Ms. Sandoval's sexual history, but explained that there would need to be an exception to the rape shield statute, and generally agreed with the state that such evidence was inadmissible. RP 49-51.

b. Closing.

During closing argument, the defense discussed the fact that Ms. Sandoval asked for STD testing and a pregnancy test to make sure that she was not pregnant and had not contracted a STD. RP 812, 856. The prosecutor argued she wanted those tests because

she was raped. RP 856. The prosecutor also argued that her encounter with Mr. Rudolph was her first sexual encounter. RP 797.

She got a urinary tract infection, and it's true, there's more than one way that can be caused, but we heard from Dr. Wilmington that it is very common after a first sexual experience, penile-vaginal sex that is, that girls will develop a UTI, and that she started having that pain and started telling others about it almost immediately right afterwards, after that night. That again corroborates that she had sex that night.

RP 797.

b. Post-Sentencing Motion For New Trial.

The defense presented information that the state's closing argument was an intentional violation of the motion in limine to prohibit reference to Ms. Sandoval's prior sexual activity. 1RP 3-8. During the state's closing, the prosecutor argued that Ms. Sandoval was a virgin prior to this incident. 1RP 7. The prosecutor and defense however knew that the encounter was not Ms. Sandoval first sexual encounter. 1RP 1-7.

The state nonetheless, in its closing argument, argued facts not in evidence and contrary to the trial court's orders in limine by arguing that Ms. Sandoval's UTI was likely due to this being her first sexual encounter. 1RP 7. The defense argued that this was

overly prejudicial because it allowed the jury to find Mr. Rudolph guilty based on facts not in evidence. 1RP 8. The facts provided that Ms. Sandoval told one doctor that she had never had sex before the encounter with Mr. Rudolph, but ten days later told a second doctor that she had had sex before. 1RP 9-11. DNA revealed the presence of another male's semen on Ms. Sandoval's underwear. RP 660-61.

The defense argued that Mr. Rudolph was denied his right to a fair trial based on the state's arguing highly prejudicial facts not in evidence in violation of the orders in limine. 1RP 9-11. The state argued that the transcript of the state's closing was inaccurate but not completely inaccurate. 1RP 11-12. The state contended that it did not commit misconduct under CrR 7.5(a). 1RP 12. The state argued that a doctor testified that it was typical for a woman to contract a UTI after her first sexual encounter or after any sexual encounter. 1RP 12-13. The prosecutor admitted to arguing:

I did make mention of some of his prior testimony, the part about it's typical for the first time, that was mentioned to give an example of the fact that sex can cause a UTI. I never said that the victim had never had prior penile-vaginal sex, so the State contends it didn't misrepresent evidence in closing argument.

1RP 13.

Citing to “*State v. Avendano-Lopez*, 79 Wn. App. 706, at 721”, the prosecutor argued there was no evidence that he made this argument in “bad faith” and the defense did not establish prejudice because the presence of Mr. Rudolph’s semen established that he and Ms. Sandoval had sex. 1RP 13-14. The state also argued that the defense did not object and request a curative instruction. 1RP 14. The prosecutor also argued that Ms. Sandoval testified that previously, she never had sex with a male not that she never had prior sex. 1RP 16.

The prosecutor also misrepresented the defense closing argument by informing the judge that the defense in its closing argument discussed “STD’s” (sexually transmitted diseases) thus arguing that Ms. Sandoval had had prior sex”. 1RP 17. The prosecutor noted that the defense did not ask for a curative instruction and denied that the argument was ill-intentioned. 1RP 18.

The defense argued that the prosecutor’s remarks were

flagrant and highly prejudicial. 1RP 19. Mr. Rudolph and the defense raised the concern that a witness was texting during trial and the witness knew one of the jurors. 1RP 21-22. The court refused to consider this issue.

The court denied the motions for a new trial under CrR 7.4 and CrR 7.5, simply stating the case was not just about credibility, because there was “quite a bit of scientific evidence”. 1RP 22-23.

I think this was a case there was, there was far more than credibility he-said-she-said, there was quite a bit of scientific evidence, and I'm not sure that there was any error, but if there was any error, it's difficult to find a nexus or substantial prejudice or harm to Defendant's rights to a fair trial. So the Court will deny the motion. Do we have an order to that effect?

1RP 22-23.

The court entered findings and conclusions following this hearing. CP 208-209.

c. Jury Instructions.

Jury instruction No. 3 defined “reasonable Doubt” as follows:

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. It,

from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 79

d. LFO's and Improper Sentencing Conditions.

Without any inquiry into Mr. Rudolph's present or future ability to pay legal financial obligations ("LFO's"), the court imposed non-mandatory LFO's: \$200 filing fee; \$250 jury demand fee; \$2,250 court appointed attorney fees; \$2,901.70 defense expert fees; and \$700 in mandatory fees. RP 916; CP 155. Over objection, the court also imposed a domestic violence evaluation even though the crime charged was not a domestic violence crime. RP 902; CP 155.

This timely appeal follows. CP 176.

C. ARGUMENTS

1. THE STATE FAILED TO PROVE THAT MR. RUDOLPH HAD A NON-CONSENSUAL SEXUAL ENCOUNTER WITH MS. SANDOVAL.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Elmi*, 166 Wn.2d 209, 214, 207 P.3d 439 (2009); *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State's evidence and all inferences that can reasonably be drawn therefrom.” *Salinas*, 119 Wn.2d at 201. Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

As charged, to prove rape in the second degree the state was required to establish beyond a reasonable doubt the following elements:

(1) A person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person:

.....

(b) When the victim is incapable of consent by reason of being physically helpless or mentally incapacitated;

RCW 9A.44.050.

In *State v. Chapin*, 118 Wn.2d 681, 685– 86, 826 P.2d 194

(1992), the Court held the evidence of rape in the second degree insufficient where a patient with Alzheimer's disease told his wife, in response to her questions, that a nurse had raped him a day or so earlier. *Chapin*, 118 Wn. 2d at 683-684. First, Chapin asked another aide to trade patients with him; (2) the other aide reported that the victim's behavior towards Chapin suddenly changed from cooperative to extremely hostile; (3) the victim's gait indicated he was in pain when walking; and (4) the victim's rectal area was observed to be "very red and irritated and swollen". *Chapin*, 118 Wn.2d at 692. The Supreme Court noted that the patient had been "calm and had engaged in his usual activities" prior to making his statement to his wife. *Chapin*, 118 Wn.2d at 689. The Supreme Court held the evidence insufficient to establish rape.

Here, Sandoval did not have any injuries, she could not remember what happened, she denied knowing the perpetrator's identity, she was calm and quiet when she went to her friend Imani's house and when she went home to get new clothes, she attended a fundraiser the same day as the incident; she told Imani's mother she needed to see a doctor because of pelvic pain, and did

not disclosing anything about a rape until later. RP 289-92.

The Washington State Patrol lab only found the presence of 2 semen cells, and one was from a male other than Mr. Rudolph. RP 481, 493, 627-29. The crime lab expert testified that the presence of the single semen cell from Mr. Rudolph could have been transferred by clothing contamination. RP 639, 641, 724. Ms. Sandoval spent other nights with Mr. Rudolph, she borrowed a sweatshirt from Mr. Rudolph the morning after the incident, and she kept her dirty clothing in a basket for weeks before washing. RP 193.

Examining this evidence in the light most favorable to the state does not prove beyond a reasonable doubt that a rape occurred. Rather this evidence casts reasonable doubt on the entire case, undermining the state's ability to prove that Mr. Rudolph raped Ms. Sandoval. This evidence like the evidence in *Chapin* was insufficient to establish a rape by Mr. Rudolph.

2. THE TRIAL COURT'S INSTRUCTIONS DENIED MR. RUDOLPH A HIS RIGHT TO A FAIR TRIAL BY IMPROPERLY DIVERTING THE JURY'S ATTENTION AWAY FROM THE REASONABLENESS OF ANY DOUBT, AND ERRONEOUSLY

FOCUSED IT ON WHETHER JURORS
COULD PROVIDE A REASON FOR
ANY DOUBTS

- a. Jurors need not articulate a reason for doubt in order to acquit.

Due process requires the state to prove each element of a charged offense beyond a reasonable doubt. U.S. Const. Amend. XIV; Wash. Const. art. I, § 3; *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 2082, 124 L.Ed.2d 182 (1993); *State v. Hundley*, 126 Wn.2d 418, 421, 895 P.2d 403 (1995). Jury instructions must clearly communicate this burden to the jury. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). (citing *Victor v. Nebraska*, 511 U.S. 1, 5-6, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994)).

Instructions that relieve the state of its burden violate due process and the Sixth Amendment right to trial by jury. U.S. Const. Amends.VI; XIV; *Sullivan*, 508 U.S.at 278-81; *Bennett*, 161 Wn.2d at 307. An instruction that misdirects the jury as to its duty “vitiates all the jury’s findings.” *Sullivan*, 508 U.S. at 279-281.

Jurors need not articulate a reason for their doubt before they can vote to acquit. *State v. Emery*, 174 Wn.2d 741, 759-60, 278 P.3d 653 (2012) (addressing prosecutorial misconduct).

Language suggesting jurors must be able to articulate a reason for their doubt is “inappropriate” because it “subtly shifts the burden to the defense.” *Emery*, 174 Wn.2d at 759-60. See also *State v. Walker*, 164 Wn. App. 724, 731-32, 265 P.3d 191 (2011); *State v. Johnson*, 158 Wn. App. 677, 684-86, 243 P.3d 936 (2010) *review denied*, 171 Wn.2d 1013, 249 P.3d 1029 (2011) (Johnson I).

Requiring articulation “skews the deliberation process in favor of the state by suggesting that those with doubts must perform certain actions in the jury room—actions that many individuals find difficult or intimidating—before they may vote to acquit...” *Humphrey v. Cain*, 120 F.3d 526, 531 (5th Cir. 1997) *on reh'g en banc*, 138 F.3d 552 (5th Cir. 1998)¹.

An instruction imposing an articulation requirement “creates a lower standard of proof than due process requires.” *Humphrey*, 120 F.3d at 534. In *Humphrey*, the court addressed an instruction containing numerous errors, including an articulation requirement. Specifically, the instruction defined reasonable doubt as

¹The Fifth Circuit decided *Humphrey* before enactment of the AEDPA. Subsequent cases applied the AEDPA’s strict procedural limitations to avoid the issue. See, e.g., *Williams v. Cain*, 229 F.3d 468, 476 (5th Cir. 2000) (superseded on other grounds *Rodriguez v. Cain*, 251 F.3d 157 (2001)).

“a serious doubt, for which you can give a good reason.” *Humphrey*, 120 F.3d at 530.

- b. The trial court erroneously told jurors to convict unless they had a doubt “for which a reason exists”.

The trial court instructed jurors that “A reasonable doubt is one for which a reason exists.” CP 79. This suggested to the jury that it could not acquit unless it could find a doubt “for which a reason exists.” CP 79. This instruction – based on WPIC 4.01 – imposes an articulation requirement that violates the constitution.

A “reasonable doubt” is not the same as a reason to doubt. “Reasonable” means “being in agreement with right thinking or right judgment, not conflicting with reason : not absurd : not ridiculous . . . being or remaining within the bounds of reason... Rational.” *Webster’s Third New Int’l Dictionary* (Merriam-Webster, 1993). A reasonable doubt is thus one that is rational, is not absurd or ridiculous, is within the bounds of reason, and does not conflict with reason. *Accord Jackson v. Virginia*, 443 U.S. 307, 317, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (“A ‘reasonable doubt,’ at a minimum, is one based upon ‘reason.’”); *Johnson v. Louisiana*, 406 U.S. 356,

360, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972) (Johnson II) (collecting cases defining reasonable doubt as one “based on reason which arises from the evidence or lack of evidence” (quoting *United States v. Johnson*, 343 F.2d 5, 6 n.1 (2d Cir. 1965) (Johnson III)).

The “a” before “reason” in Instruction No. 3 inappropriately alters and augments the definition of reasonable doubt. CP 79. “[A] reason” is “an expression or statement offered as an explanation of a belief or assertion or as a justification.” *Webster’s Third New Int’l Dictionary*. The phrase “a reason” indicates that reasonable doubt must be capable of explanation or justification. In other words, WPIC 4.01 requires more than just a reasonable doubt; it requires an explainable, articulable doubt—one for which a reason exists, rather than one that is merely reasonable.

This language requires more than just a reasonable doubt to acquit. *Cf. In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). (“[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt.”) Jurors applying Instruction No. 3 could have a reasonable doubt but also have difficulty articulating or explaining

why their doubt is reasonable. See Steve Sheppard, *The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence*, 78 NOTRE DAME L. REV. 1165, 1213-14 (2003).

For example, a case might present such voluminous and contradictory evidence that jurors with reasonable doubts would struggle putting their doubts into words or pointing to a specific, discrete reason for doubt. Despite reasonable doubt, acquittal would not be an option under Instruction No. 3. CP 79.

As a matter of law, the jury is “firmly presumed” to have followed the court’s reasonable doubt instruction. *Diaz v. State*, 175 Wn.2d 457, 474-475, 285 P.3d 873 (2012). Jurors had no choice but to deliberate with the understanding that acquittal required a reason for any doubt. See Sheppard, 78 NOTRE DAME L. REV. at 1213-14.

The instruction “subtly shift[ed] the burden to the defense.” *Emery*, 174 Wn.2d at 759-60. It also “create[d] a lower standard of proof than due process requires...” *Humphrey*, 120 F.3d at 534. By relieving the state of its constitutional burden of proof, the court’s instruction violated Mr. Rudolph’s right to due process and his right

to a jury trial. *Id.*; *Sullivan*, 508 U.S. at 278-81; *Bennett*, 161 Wn.2d at 307. Accordingly, his convictions must be reversed and the case remanded for a new trial with proper instructions. *Sullivan*, 508 U.S. at 278-82.

3. MR. RUDOLPH WAS DENIED HIS RIGHT TO A FAIR TRIAL BY PROSECUTORIAL MISCONDUCT AD THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE DEFENSE MOTION FOR A NEW TRIAL.

“It is error to submit evidence to the jury that has not been admitted at trial.” *In re Pers. Restraint of Glassman*, 175 Wn.2d 695, 705, 286 P.3d 673 (2012); *State v. Pete*, 152 Wn.2d 546, 552-53, 98 P.3d 803 (2004). Arguing facts not in evidence denies a defendant his right to a fair trial when those facts permit the jury to convict the defendant based on evidence not presented at trial.

a. Prosecutorial Misconduct.

To prevail on a claim of prosecutorial misconduct, a defendant must show that “in the context of the record and all of the circumstances of the trial, the prosecutor’s conduct was both improper and prejudicial.” *Glasmann*, 175 Wn.2d at 704. This Court reviews the prosecutor’s conduct and whether prejudice resulted

therefrom “by examining that conduct in the full trial context, including the evidence presented, ‘the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.’” *State v. Monday*, 171 Wn.2d 667, 675, 257 P.3d 551 (2011) (*internal quotation marks omitted*) (*quoting State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006)).

When the defendant fails to object to the challenged portions of the prosecutor’s argument, he is deemed to have waived any error unless the prosecutor’s misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. *Emery*, 174 Wn. App. at 760-61. In making this determination, the reviewing Court “focus[es] less on whether the prosecutor’s misconduct was flagrant or ill-intentioned and more on whether the resulting prejudice could have been cured. *Emery*, 174 Wn. App. at 762.

The defendant must show that (1) no curative instruction would have eliminated the prejudicial effect, and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting

the verdict. *Emery*, 174 Wn. App. at 760-61.

The state's argument that Ms. Sandoval was a virgin in closing argument was a flagrant and ill-intentioned reference to Ms. Sandoval lack of prior sexual activity which when considered with Dr. Wilmington's testimony that many women contract UTI's after their first sexual encounter, prejudiced Mr. Rudolph. RP 49-51, 797, 856; 1RP 3-8. The comment about virginity allowed the jury to be swayed by passion and prejudice rather than based on the evidence. This issue of virginity should not have been raised by the prosecutor.

The evidence in this case was equivocal because it included the presence of semen from another man and an expert testified that semen can transfer from clothing to clothing. RP 639, 641, 660-61.

There was evidence of sexual activity with another man. The argument about virginity prejudicially tipped the scales in favor of the state to such an extent that no curative instruction would have eliminated the prejudicial effect, and the misconduct resulted in prejudice that had a substantial likelihood of affecting the verdict.

Emery, 174 Wn. App. at 760-61.

Citing to “*State v. Avendano-Lopez*, 79 Wn. App. 706, at 721”, the prosecutor argued there was no evidence that he made this argument in “bad faith” and the defense did not establish prejudice because the presence of Mr. Rudolph’s semen established that he and Ms. Sandoval had sex. 1RP 13-14. This is incorrect.

The presence of Mr. Rudolph’s semen and that of another man’s on underwear that Ms. Sandoval may or may not have worn, indicated that Mr. Rudolph’s semen was on her underwear. The evidence does not establish intercourse. The prosecutor also misrepresented the defense closing argument by informing the judge that the defense in its closing argument discussed “STD’s” (sexually transmitted diseases) thus arguing that Ms. Sandoval had had prior sex”. RP 812, 856; 1RP 17. The prosecutor argued Ms. Sandoval requested those tests because she was “raped” not because she had sex. RP 812, 856. No curative instruction could undo the prejudice of hearing that Ms. Sandoval was raped as a virgin.

The court erroneously stated this case had “quite a bit of scientific evidence, but that too is incorrect. 1RP 22-23. The only scientific evidence established that a pair of underwear sitting in Ms. Sandoval’s dirty laundry basket for a couple of weeks contained trace amounts of semen from Mr. Rudolph and another man. RP 118, 120,193, 235, 475-78, 494, 660-61.

b. Motion for Mistrial.

When a motion for a new trial under CrR 7.5(a) is based on a claim of prosecutorial misconduct, the defendant “ ‘bears the burden of establishing the impropriety of the prosecuting attorney’s comments and their prejudicial effect.’ ” *McKenzie*, 157 Wn.2d at 52 (quoting *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007 (1998)).

CrR 7.5(a)(2) permits a trial court to grant a new trial on the grounds that the prosecutor committed misconduct. In a criminal proceeding, a new trial is necessary when the “defendant has been so prejudiced that nothing short of a new trial can [e]nsure that the defendant will be treated fairly.” *State v. Bourgeois*, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997); *State v. Chanthabouly*, 164 Wn. App.

104, 140, 262 P.3d 144 (2011), *review denied*, 173 Wn.2d 1018, 272 P.3d 247 (2012).

A trial court's denial of a motion for a mistrial is reviewed for an abuse of discretion. *Emery*, 174 Wn.2d at 765; *State v. Greiff*, 141 Wn.2d 910, 921, 10 P.3d 390 (2000) (citing *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996)). A trial court abuses its discretion when no reasonable person would adopt the trial court's view. *Greiff*, 141 Wn.2d at 921.

The trial court's decision on a motion for mistrial will be overturned if there is a substantial likelihood that the prejudice affected the verdict. *Greiff*, 141 Wn.2d at 921 (quoting *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994)).

This Court recognizes that generally, a curative instruction will suffice against prejudice. *Emery*, 174 Wn.2d at 766. However, our state and federal supreme courts have also recognized that curative instructions do not always cure a taint because jurors do not always disregard the offending argument, and when there is a powerful image in the jurors' minds, it is very difficult to remove the image with a curative instruction. *Bruton v. United States*, 391 U.S.

123,130-31, 135, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968); *Glassman*, 175 Wn.2d at 707.

[A]s was recognized in *Jackson v. Denno*, supra, there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.

Bruton, 391 U.S. at 135 (citing *Jackson v. Denno*, 378 U.S. 368, 388-89, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964)).

The prosecutor's argument that Mr. Rudolph raped a virgin left a powerful image in the jurors' minds that could not be cured with an instruction. *Id.* Under CrR 7.5, Mr. Rudolph was prejudiced and nothing short of a new trial could undo the prejudice. This Court should find that the trial court abused its discretion in denying the motion, and reverse and remand for a new trial.

4. THE TRIAL COURT ERRED BY IMPOSING A DOMESTIC VIOLENCE EVALUATION BECAUSE IT IS NOT CRIME RELATED.

This Court reviews the trial court's imposition of statutorily authorized community custody conditions for abuse of discretion. *State v. Almendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

This Court reviews de novo whether the trial court had statutory authority to impose specific community custody conditions. *Almendariz*, 160 Wn.2d at 110. Because the trial court exceeded its statutory authority by imposing a domestic violence evaluation which is not crime-related, this Court's review is de novo. *In re Postsentence Review of Wandell*, 175 Wn. App. 447, 451, 311 P.3d 28 (2013), *review denied*, 179 Wn.2d 1009 (2014).

Trial courts may only impose conditions of community custody that are authorized by the legislature. *State v. Kolesnik*, 146 Wn. App. 790, 806, 192 P.3d 937 (2008), *review denied*, 165 Wn.2d 1050 (2009). Under RCW 9.94A.508(9), a sentencing court “may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter.” *Id.*

RCW 9.94A.505(9) provides:

(9) As a part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter. “**Crime-related prohibitions**” may include a prohibition on the use or possession of alcohol or controlled substances if the court finds that any chemical dependency or substance abuse contributed to the offense.

(Emphasis added).

Under RCW 9.94A.703(3)(c)-(d), conditions of community custody may include “crime-related treatment or counseling services” or “rehabilitative programs or ... affirmative conduct reasonably related to the circumstances of the offense, the offender’s risk of reoffending, or the safety of the community.” *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). Sentence conditions “are usually upheld if reasonably crime related.” *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008), cert. denied, 566 U.S. 1192 (2009).

Any conditions not expressly authorized by statute must be crime-related. RCW 9.94A.508(9). Conditions that do not reasonably relate to the crime’s circumstances, the risk of reoffending, or public safety are unlawful *unless* explicitly permitted by statute. See *State v. Jones*, 118 Wn. App. 199, 207-08, 76 P.3d 258 (2003).

For example, in *State v. Vasquez*, 95 Wn. App. 12, 972 P.2d 109 (1998), the appellate court abused its discretion in imposing Moral Reconciliation Therapy (“MRT”) because there was nothing in the record connecting Vasquez’s crime the therapy. *Vasquez*, 95

Wn. App. at 16-17. Citing RCW 9.94A.120(9)(c)(iii), the Court specifically held that the trial court could not impose a non-crime related treatment. *Vasquez*, 95 Wn. App. at 16-17.

Domestic violence is defined in RCW 10.99.020(5) as: “..... any of the following crimes when committed by one family or household member against another. *Id.* RCW 26.50.010(3) also defines domestic violence as:

(3) “Domestic violence” means: (a) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members; (b) sexual assault of one family or household member by another; or (c) stalking as defined in RCW 9A.46.010 of one family or household member by another family or household member.

RCW 26.50.010.

“Family or household members” means spouses, domestic partners, former spouses, former domestic partners, persons who have a child in common regardless of whether they have been married or have lived together at any time, adult persons related by blood or marriage, adult persons who are presently residing together or who have resided together in the past, persons sixteen years of age or older who are presently residing together or who have resided together in the past and who have or have had a dating relationship, persons sixteen years of age or older with whom a person sixteen years of age or older has or has had a dating

relationship, and persons who have a biological or legal parent-child relationship, including stepparents and stepchildren and grandparents and grandchildren.

Ms. Sandoval testified that she and Mr. Rudolph were just friends and never dated. RP 77-81, 94-95. Accordingly, their relationship does not fit the criteria for family or household member necessary for a domestic violence crime.

Here as in *Vasquez*, because there is no relationship connecting Mr. Rudolph's alleged crime to a domestic violence crime, the trial court erred by imposing a non-crime related condition of sentencing. Also, the crime at issue was not charged as a domestic violence crime therefore the court exceeded its authority by imposing domestic violence treatment. CP 155.

5. THE TRIAL COURT ERRED BY IMPOSING LEGAL FINANCIAL OBLIGATIONS WITHOUT INQUIRING INTO MR. RUDOLPH'S ABILITY TO PAY.

Without any inquiry into Mr. Rudolph's present or future ability to pay legal financial obligations ("LFO's"), the court imposed non-mandatory LFO's: \$200 filing fee; \$250 jury demand fee;

\$2,250 court appointed attorney fees; \$2,901.70 defense expert fees; and \$700 in mandatory fees. RP 916; CP 155.

RCW 10.01.160 allows courts to require defendants to pay costs, including fees for court appointed counsel). Use of the term “may” in RCW 10.01.160(1) means that the trial court has discretion whether to impose costs under that statute. See *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992) (holding that the imposition of costs is within the sentencing court's discretion).

Citing, *Blazina*, the state Supreme Court in *State v. Marks*, 185 Wn.2d 143, 145-46, 368 P.3d 485 (2016), held that when the trial court does not make an individualized inquiry into a defendant's ability to pay, the reviewing court should exercise its discretion to consider the issue on its merits, even when trial counsel fails to object. *Marks*, 185 Wn.2d at 145-46; *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

RCW 10.01.160(3) states that the sentencing court “shall not order a defendant to pay costs unless the defendant is or will be able to pay them.” In *Blazina*, 182 Wn.2d at 838, the Supreme Court held that RCW 10.01.160(3) requires the sentencing court to

make an individualized inquiry into a defendant's current and future ability to pay before imposing discretionary LFOs. The court emphasized that in order to comply with RCW 10.01.160(3), the sentencing court must do more than “sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry.” *Id.*

a. Ability to Pay.

In addition to the ability to pay inquiry, the Court in *Blazina* recommended reliance on GR 34 for guidance in determining when to waive fees. For example, if a person meets the indigency requirements under CR 34 “courts should seriously question that person's ability to pay LFOs.” *Blazina*, 182 Wn.2d at 838-39.

Here, the trial court and the court of appeals determined that the defendant was indigent, but the trial court did not make any inquiry into the defendant’s ability to pay LFO’s. Rather the trial court issued the same boiler plate language rejected by the Court in *Blazina* which summarily determined that the defendant could pay his/her LFO’s.

2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS The court has considered the total amount owing, the defend[ant]'s past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

CP 155; *Blazina*, 182 Wn.2d at 831-32.

This court must vacate the cost bill order because the trial court's failure to inquire into the defendant's ability to pay LFO's violated the mandatory language in RCW 10 01.1670(3) and *Blazina*.

6. THIS COURT SHOULD NOT IMPOSE APPELLATE COSTS ON APPEAL.

This Court has discretion not to allow an award of appellate costs if the State substantially prevails on appeal. RCW 10.73.160(1); *State v. Sinclair*, 192 Wn.2d 380, 388-89, 367 P.3d 612 (2016); *State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000);. This Court should exercise its discretion and disallow appellate costs should the State substantially prevail.

The defendant's inability to pay appellate costs is an important consideration to take into account in deciding whether to disallow costs. *Sinclair*, 192 Wn.2d 389. Here, the trial court determined that Rudolph is indigent and does not have the ability to pay legal financial obligations. CP 8, 23, 195, 198. The Rules of Appellate Procedure allow the State to request appellate costs if it substantially prevails. RAP 14.2. A "commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, *unless the appellate court directs otherwise in its decision terminating review.*" RAP 14.2 (emphasis added). In interpreting this rule, our Supreme Court held that it allows for the appellate court itself to decide whether costs should be allowed:

Once it is determined that the State is the substantially prevailing party, *RAP 14.2 affords the appellate court latitude in determining if costs should be allowed*; use of the word "will" in the first sentence appears to remove any discretion from the operation of RAP 14.2 with respect to the commissioner or clerk, but *that rule allows for the appellate court to direct otherwise in its decision.*

Nolan, 141 Wn.2d at 626 (emphases added).

Likewise, the controlling statute provides that the appellate

court has discretion to disallow an award of appellate costs. RCW 10.73.160(1) states, “[t]he court of appeals, supreme court, and superior courts *may* require an adult offender convicted of an offense to pay appellate costs.” (emphasis added). In *Sinclair*, this Court recently affirmed that the statute provides the appellate court with discretion to deny appellate costs, which the Court should exercise in appropriate cases. *Sinclair*, 191 Wn.2d at 388-89.

Under *Sinclair*, when the defendant raises an objection to the imposition of LFO’s, appellate courts are obligated to exercise discretion to approve or deny the state’s request for costs. *Sinclair*, 191 Wn.2d at 388. Thus, “it is appropriate for this Court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellate brief.” *Sinclair*, 376 P.3d at 616. Under RAP 14.2, the Court should exercise its discretion in a decision terminating review” *Sinclair*, 376 P.3d at 615.

The Court should deny an award of appellate costs to the state in a criminal case if the defendant is indigent and lacks the ability to pay. *Sinclair*, 376 P.3d at 615-16. The imposition of costs

against indigent defendants raises problems that are well documented, such as increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration. *Sinclair*, 376 P.3d at 617 (citing *Blazina*, 182 Wn.2d 827). “It is entirely appropriate for an appellate court to be mindful of these concerns.” *Sinclair*, 376 P.3d at 617.

In *Sinclair*, the trial court entered an order authorizing Sinclair to appeal in forma pauperis and to have appointment of counsel and preparation of the record at State expense, finding Sinclair was “unable by reason of poverty to pay for any of the expenses of appellate review,” and “the defendant cannot contribute anything toward the costs of appellate review.” *Sinclair*, 376 P.3d at 617. Given Sinclair’s poverty, combined with his advanced age and lengthy prison sentence, there was no realistic possibility he would be able to pay appellate costs. *Sinclair*, 376 P.3d at 618. Accordingly, the Court ordered that appellate costs not be awarded. *Id.*

Similarly here, the trial court determined that Rudolph was indigent for purpose of trial. CP 8, 23, 195, 198. The trial court

again at the end of trial and a matter of months before the filing of the opening brief on appeal, also determined that Rudolph was indigent for purposes of appeal. CP 195, 198.

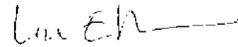
Rudolph is 22 years old and is serving an 88 month sentence. CP 155. The trial court imposed discretionary and mandatory legal financial obligations without inquiring into Mr. Rudolph's ability to pay. CP 155; RP 916. Because Rudolph is indigent and incarcerated, this Court should exercise its discretion to reach a just and equitable result and direct that no appellate costs be allowed should the state substantially prevail. CP 195, 198.

D. CONCLUSION

Mr. Rudolph respectfully requests this Court reverse and remand for dismissal with prejudice based on insufficient evidence and in the alternative requests this Court reverse and remand for a new trial and a new sentencing. Mr. Rudolph also requests this Court deny appellate costs.

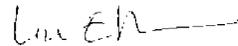
DATED this 20th day of January, 2017.

Respectfully submitted,



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Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Clark County Prosecutor's Office (at prosecutor@clark.wa.gov) and Elliott Rudolph/ c/o Clark County Jail, PO Box 1147, Vancouver, WA 98666 a true copy of the document to which this certificate is affixed on January 20, 2017. Service was made by electronically to the prosecutor and to Elliott Rudolph by depositing in the mails of the United States of America, properly stamped and addressed.



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ELLNER LAW OFFICE

January 20, 2017 - 2:09 PM

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