

NO. 49126-5-II

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

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STATE OF WASHINGTON, Respondent

v.

ELLIOTT JOHNNY RUDOLPH, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO.14-1-02005-8

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BRIEF OF RESPONDENT

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## TABLE OF CONTENTS

RESPONSE TO ASSIGNMENTS OF ERROR .....	1
I.    The State presented sufficient evidence to support the conviction for Rape in the Second Degree.....	1
II.   The trial court properly instructed the jury .....	1
III.  The trial court properly denied Rudolph’s motion for a new trial as the prosecutor did not commit misconduct.....	1
IV.  The trial court properly imposed a domestic violence evaluation as part of Rudolph’s sentence and community custody .....	1
V.    The trial court properly imposed legal financial obligations. ...	1
VI.  The State will not seek appellate costs.....	1
STATEMENT OF THE CASE .....	1
ARGUMENT .....	5
I.    The State presented sufficient evidence to support the conviction for Rape in the Second Degree .....	5
II.   The trial court properly instructed the jury .....	11
III.  The trial court properly denied Rudolph’s motion for a new trial as the prosecutor did not commit misconduct.....	13
IV.  The trial court properly imposed a domestic violence evaluation as part of Rudolph’s sentence and community custody .....	20
V.    The trial court properly imposed legal financial obligations. .	22
VI.  The State will not seek appellate costs.....	25
CONCLUSION.....	25

## TABLE OF AUTHORITIES

### Cases

<i>Sofie v. Fibreboard Corp.</i> , 112 Wn.2d 636, 771 P.2d 711 (1989) .....	15
<i>State v. Bennett</i> , 161 Wn.2d 303, 165 P.3d 1241 (2007).....	12, 13
<i>State v. Blazina</i> , 182 Wn.2d 827, 344 P.3d 680 (2015).....	26
<i>State v. Brown</i> , 132 Wn.2d 529, 940 P.2d 546 (1997).....	15, 16, 18
<i>State v. Chapin</i> , 118 Wn.2d 681, 826 P.2d 194 (1992) .....	7, 8
<i>State v. Davenport</i> , 100 Wn.2d 757, 675 P.2d 1213 (1984).....	18, 19
<i>State v. Dhaliwal</i> , 150 Wn.2d 559, 79 P.3d 432 (2003) .....	18
<i>State v. Fisher</i> , 165 Wn.2d 727, 747, 202 P.3d 937 (2009).....	18
<i>State v. Gosby</i> , 85 Wn.2d 758, 539 P.2d 680 (1975).....	7
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	6
<i>State v. Gregory</i> , 158 Wn.2d, 759, 147 P.3d 1201 (2006) .....	18
<i>State v. Hagler</i> , 150 Wn.App. 196, 208 P.3d 32 (2009).....	24
<i>State v. Hopson</i> , 113 Wn.2d 273, 778 P.2d 1014 (1989).....	15
<i>State v. Hughes</i> , 118 Wn. App. 713, 77 P.3d 681 (2003).....	17
<i>State v. Irwin</i> , 191 Wn.App. 644, 364 P.3d 830 (2015).....	24
<i>State v. Kalebaugh</i> , 183 Wn.2d 578, 355 P.3d 253 (2015).....	13
<i>State v. Lizarraga</i> , 191 Wn.App. 530, 364 P.3d 810 (2015), <i>rev. denied</i> , 185 Wn.2d 1022 (2016) .....	13
<i>State v. Llamas-Villa</i> , 67 Wn.App. 448, 836 P.2d 239 (1992) .....	24
<i>State v. Magers</i> , 164 Wn.2d 174, 189 P.3d 126 (2008).....	17
<i>State v. Mak</i> , 105 Wn.2d 692, 718 P.2d 407, <i>cert. denied</i> , <i>Mak v.</i> <i>Washington</i> , 479 U.S. 995, 107 S. Ct. 599, 93 L.Ed.2d 599 (1986)14, 15	14, 15
<i>State v. McKenzie</i> , 157 Wn.2d 44, 134 P.3d 221 (2006) .....	16, 22
<i>State v. O’Cain</i> , 144 Wn.App. 772, 184 P.3d 1262 (2008) .....	24
<i>State v. Parnell</i> , 195 Wn.App. 325, 381 P.3d 128 (2016) .....	13
<i>State v. Partin</i> , 88 Wn.2d 899, 567 P.2d 1136 (1977).....	6
<i>State v. Pirtle</i> , 127 Wn.2d 628, 672, 904 P.2d 245 (1995).....	17
<i>State v. Russell</i> , 125 Wn.2d 24, 86, 882 P.2d 747 (1994).....	17
<i>State v. Russell</i> , 171 Wn.2d 118, 249 P.3d 604 (2011).....	26
<i>State v. Stenson</i> , 132 Wn.2d 668, 940 P.2d 1239 (1997).....	17
<i>State v. Theroff</i> , 25 Wn. App. 590, 608 P.2d 1254, <i>aff’d</i> , 95 Wn.2d 385, 622 P.2d 1240 (1980).....	6
<i>State v. Thorgerson</i> , 172 Wn.2d 438, 258 P.3d 43 (2011) .....	16
<i>State v. Wilson</i> , 71 Wn.2d 895, 431 P.2d 221 (1967).....	15

**Statutes**

RCW 9.94A.030(11)..... 21  
RCW 9.94A.505(9)..... 21  
RCW 9.94A.703(3)(c) ..... 21  
RCW 9A.44.010(4) and (5) ..... 7  
RCW 9A.44.020(1)..... 8  
RCW 9A.44.050(1)(b) ..... 6, 10  
RCW 10.01.160(3)..... 23

**Other Authorities**

WPIC 4.01..... 11, 12

**Rules**

CrR 7.5(a) ..... 13  
RAP 2.5(a) ..... 23

## RESPONSE TO ASSIGNMENTS OF ERROR

- I. The State presented sufficient evidence to support the conviction for Rape in the Second Degree.**
- II. The trial court properly instructed the jury.**
- III. The trial court properly denied Rudolph's motion for a new trial as the prosecutor did not commit misconduct.**
- IV. The trial court properly imposed a domestic violence evaluation as part of Rudolph's sentence and community custody.**
- V. The trial court properly imposed legal financial obligations.**
- VI. The State will not seek appellate costs.**

## STATEMENT OF THE CASE

Elliott Rudolph (hereafter 'Rudolph') was charged by Information with Rape in the Second Degree against A.S. CP 1. The State alleged the victim was incapable of consent by reason of mental or physical incapacitation. *Id.*

At trial A.S. testified that she and Rudolph were friends at school; they hung out together a lot and often consumed alcohol together. RP 77-81. The night of the rape, A.S. met up with Rudolph and other friends to drink. RP 79, 84-87. A.S. got very intoxicated and ended up at Rudolph's house in his bedroom. RP 87-90. A.S. did not remember making any plans

to go to Rudolph's house or how it was decided she would go there. RP 89-90.

Once in Rudolph's bedroom, Rudolph tried to kiss A.S. RP 90. She told him to stop. RP 90-91. Specifically, A.S. told Rudolph "I'm saying no. Just stop." RP 93. Rudolph became frustrated, but they rolled over and fell asleep. RP 90-93. The next thing A.S. remembers is waking up to find Rudolph was having sex with her – his penis was inside her vagina. RP 90, 96-97. A.S. felt scared and wanted to leave, but she couldn't move and couldn't scream. RP 98. A.S. testified she did not have the ability to move or say anything while Rudolph was raping her due to her intoxication. RP 98-99. A.S. could control her breathing though, so she tried to hold her breath, hoping Rudolph would notice and stop. RP 98-99. Rudolph did notice at one point, but simply checked her pulse by putting his fingers against her neck, and then flipped A.S. over and continued raping her. RP 99. A.S. continued in and out of consciousness at this point, and doesn't remember how or when Rudolph stopped raping her, but remembers he put her underwear and pants back on. RP 100.

A.S. woke up again the next morning and left Rudolph's house. RP 102. A friend picked her up and took her to her friend Imani's house. RP 102-03. A.S. eventually told Imani what happened at some point that next day, but did not go into details. RP 106-07. A.S. started having pain in her

vaginal area and wanted to go to a doctor. RP 107-08. A.S. told Imani's mom about the situation so she could take her to urgent care. RP 107-08. A.S. discovered she had a urinary tract infection and needed medication. RP 108. When A.S. first spoke with the doctor at urgent care, she was vague with details and did not want to tell him much about what happened. RP 111. However, the doctor kept pushing her to take birth control, which A.S. indicated was not needed because she is gay. RP 111-12. Eventually A.S. told the doctor that the recent intercourse was a result of a non-consensual incident. RP 111-12. A.S. worried the doctor would make her file a police report and A.S. did not want to file charges or tell anyone else what had happened, especially her mom. RP 112.

A.S. felt compelled to tell her mom what happened when she needed help obtaining a prescription for her urinary tract infection from the pharmacy. RP 114. A.S.'s mother took her to another doctor and then reported the incident to police who started an investigation. RP 115-16. A.S. provided the police with the clothing she wore the night of the rape, and two pairs of underwear – one of which she is sure she wore that night, though she wasn't sure which of the two pairs was the correct one. RP 118. The Washington State Patrol Crime Lab analyzed the underwear A.S. provided and found 2 sperm cells on the black pair of underwear. RP 475-78. The sperm was found to have come from two male contributors, one of

whom was Rudolph. RP 660-61.

A.S. admitted she told both doctors she saw in reference to this event that she did not know who had raped her, even though she did know. RP 378, 382. Dr. Wilmington, who first saw A.S., testified as to the common causes of urinary tract infections in women. RP 352-54. Dr. Wilmington indicated that in women the urethra between the vulva to the bladder is quite small so women can easily obtain urinary tract infections when bacteria goes in to the urethra and up to the bladder. RP 353. He testified that the usual cause is not going to bathroom frequently enough, and is often seen after stimulation to the area or pressure on the vulva. RP 353-54. Urinary tract infections are often seen after a woman first becomes sexually active as she may not know the importance of urinating after sexual intercourse and that sets her up for a urinary tract infection. RP 354.

During closing arguments, the defense argued that A.S. must have been concerned about sexual intercourse she had had at least a month prior to the alleged rape when she asked for a pregnancy test and STD testing at urgent care because it's common knowledge that someone would not be able to find out if they were pregnant only three days after intercourse. RP 857. The State's theory was that A.S. asked for those tests because of the rape. During closing arguments, the State discussed Dr. Wilmington's

testimony and stated,

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 at 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.

The trial court instructed the jury on reasonable doubt pursuant to WPIC 4.01 as requested to do by both the State and Rudolph. RP 738; CP 84. The jury returned a verdict finding Rudolph guilty of second degree rape. RP 885; CP 103. Prior to sentencing, Rudolph filed a motion for a new trial alleging prosecutorial misconduct by alleging the victim was a virgin prior to the rape. 1RP 7. The trial court denied Rudolph's motion for a new trial finding no misconduct, and even if there were misconduct that it did not prejudice or harm Rudolph's rights to a fair trial. 1RP 22-23.

The trial court sentenced Rudolph to a standard range sentence. CP 155-72. This appeal timely follows.

#### ARGUMENT

**I. The State presented sufficient evidence to support the conviction for Rape in the Second Degree.**

Rudolph argues there was insufficient evidence presented at trial to

support his conviction for Rape in the Second Degree. When the evidence is viewed in the light most favorable to the State, it is clear that Rudolph's conviction is supported by sufficient evidence. His conviction should be affirmed.

The test for determining 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. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980). Evidence that is direct or circumstantial may be equally presented to the jury. Circumstantial evidence is no less reliable than direct evidence. *State v. Gosby*, 85 Wn.2d 758, 766-67, 539 P.2d 680 (1975).

A defendant is guilty of second degree rape when he 'engages in sexual intercourse with another person ... [w]hen the victim is incapable of consent by reason of being physically helpless or mentally incapacitated.' RCW 9A.44.050(1)(b). A person is 'physically helpless'

when he or she is unconscious or, for any other reason, is physically unable to communicate unwillingness to an act, including sleep. RCW 9A.44.010(5). ‘Mental incapacity’ is a condition existing at the time of the offense that prevents the victim from understanding the nature or consequence of the act of sexual intercourse whether that condition is produced by illness, defect, the influence of a substance, or some other cause. RCW 9A.44.010(4). Sleep is considered a state in which a person is physically helpless. RCW 9A.44.010(5).

Rudolph argues that the evidence presented at trial does not prove beyond a reasonable doubt that a rape occurred. *See* Br. of Appellant, p. 15. He likens it to the facts involved in *State v. Chapin*, 118 Wn.2d 681, 826 P.2d 194 (1992). In *Chapin*, the victim was a man with Alzheimer’s disease who was unable to testify at trial as he was incompetent. *Chapin*, 118 Wn.2d at 685. The only direct evidence of a rape occurring was the victim’s excited utterance that the defendant had raped him. *Id.* On review, the Court found the victim’s statement that the defendant had “raped [him]” was not admissible as an excited utterance and thus the evidence was insufficient to establish that a rape occurred beyond a reasonable doubt. *Id.* at 689, 691. With no victim to testify at trial, no excited utterances or any other statements from the victim, the jury in *Chapin* would have been left with only circumstantial evidence that showed the

victim may have been in pain when walked, his anus was red and irritated, his behavior towards the defendant changed, and the defendant asked to be his caregiver. *Id.* at 692. There was no actual evidence of a rape occurring without the statements from the victim. *Id.*

However, the *Chapin* facts are significantly different from the facts in Rudolph's case and it is perplexing Rudolph relies upon it to support his argument that there was not sufficient evidence presented to support his conviction. Unlike in *Chapin*, the woman that Rudolph raped was present at trial, competent, and did testify. RP 75-235. A.S. remembers telling Rudolph, "I'm saying no. Just stop." when he expressed frustration at her stopping him from kissing her. RP 92-93. A.S. then recounts falling asleep and later waking up to Rudolph having sex with her, by putting his penis in her vagina. RP 96-97. A.S. was too intoxicated to move or scream as Rudolph continued having sex with her against her will. RP 98. A.S. did the only thing she could: she held her breath hoping he would notice she wasn't breathing and stop raping her. RP 98. Only Rudolph did notice, enough that he checked her pulse to assure she was still alive, only to flip A.S.'s flaccid body over and reinsert his penis into her vagina to continue his rape. RP 98-99. Without anything further, this was sufficient evidence to establish that Rudolph raped A.S. A victim's testimony need not be corroborated. *See* RCW 9A.44.020(1).

However, this wasn't a case of only the victim's word against the defendant's. The State submitted additional evidence to the jury to corroborate and support A.S.'s allegations; this additional evidence more than sufficiently establishes sufficient evidence to support the conviction for Rape in the Second Degree.

A.S. immediately started having pain in her vagina after the rape. RP 108. She later discovered she had a urinary tract infection. RP 108. A.S. asked her mom's friend to take her to urgent care. RP 110. The doctor at urgent care kept urging A.S. to get on birth control "just in case," and would not accept A.S. telling him it was not needed, so A.S. admitted to him that the sexual contact she had had was not consensual. RP 112. The doctor at the urgent care suggested she go to the hospital for a rape exam. RP 112 (+?). A.S. did not go to the hospital as she did not want her mom or anyone else to know about what happened to her. RP 114. However, A.S. needed to pick up a prescription for her urinary tract infection so she ended up telling her mother. RP 114. A.S.'s mother took her to be seen by a doctor and to have a rape examination performed. RP 115-16. A.S. told the doctor she didn't know who had raped her, but later told her mother on the car ride home. RP 115-17. Her mother called the police and A.S. later met with police. RP 118. She gave the officer clothing she had been wearing when the rape occurred, except that she

could not remember what pair of underwear she had been wearing. RP 118. A.S. had two pairs of underwear in her laundry basket and knew with certainty she was wearing one of those two pairs. RP 118-19. The crime lab later tested the underwear and on one pair they found evidence of sperm that was identified as belonging to Rudolph. RP 475-78, 660-61.

After the rape, Rudolph and A.S. exchanged text messages during which Rudolph vacillated between saying he did not remember what happened and that nothing happened the night of the rape. RP 121-23; Ex. 5. Rudolph also sent a text message saying “I still love you and I recognize that you’re not going to love me after what happened.” Ex. 5.

The facts in this case are nothing like the facts in the *Chapin* case. Rudolph’s reliance on that case is baffling. To convict Rudolph of second degree rape, the jury had to find beyond a reasonable doubt that he engaged in sexual intercourse with A.S. when she was incapable of consent by reason of being physically helpless or mentally incapacitated. RCW 9A.44.050(1)(b). The evidence showed A.S. was incapacitated due to her high level of intoxication. The evidence further showed that A.S. had previously expressed her unwillingness to engage in sexual activity with Rudolph, and that despite that, he took advantage of her unconscious state, removed her clothes, and put his penis inside her vagina without her consent and while she was unable to consent. When the evidence is

viewed in the light most favorable to the State, it is clear there was more than sufficient evidence to convict Rudolph of second degree rape. Rudolph's sufficiency claim is without merit and his conviction should be affirmed.

**II. The trial court properly instructed the jury.**

Rudolph argues that the trial court improperly instructed the jury when it gave the standard reasonable doubt instruction found in WPIC 4.01 because it relieved the State of the burden of proving every element of the crime beyond a reasonable doubt, specifically, because it directs the jury to articulate a reason for their doubt before they can acquit a defendant. WPIC 4.01 has long been upheld as a proper instruction on the reasonable doubt standard and its use has recently been affirmed by this Court. The trial court properly instructed the jury.

This Court reviews challenged jury instructions de novo, in the context of the instructions as a whole. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). Rudolph challenges the court's instruction on reasonable doubt, which followed the WPIC:

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. If, from such consideration,

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

CP 84; WPIC 4.01. Our trial courts have been *directed* by the Supreme Court to instruct the jury pursuant to WPIC 4.01. *Bennett*, 161 Wn.2d at 317-18. This instruction was deemed “proper” and “correct” once again by the Supreme Court in *State v. Kalebaugh*, 183 Wn.2d 578, 585-86, 355 P.3d 253 (2015). Our appellate courts have recognized this authority to be controlling on this issue. *State v. Lizarraga*, 191 Wn.App. 530, 567, 364 P.3d 810 (2015), *rev. denied*, 185 Wn.2d 1022 (2016).

In *State v. Parnell*, 195 Wn.App. 325, 381 P.3d 128 (2016), this Court addressed the same argument Rudolph makes here. In *Parnell*, this Court held that it was “bound by the Supreme Court’s approval of WPIC 4.01” and held that the trial court properly instructed the jury by using language identical to WPIC 4.01. *Parnell*, 195 Wn.App. at 328-29. The trial court in Rudolph’s case did what it has been directed by the Supreme Court and this Court’s precedent to do: use WPIC 4.01 to instruct the jury on reasonable doubt. The trial court did so appropriately. Rudolph’s contention the reasonable doubt instruction was erroneous is without any legal support. The trial court should be affirmed.

**III. The trial court properly denied Rudolph's motion for a new trial as the prosecutor did not commit misconduct.**

Rudolph contends the trial court erred in denying his motion for a new trial under CrR 7.5(a) because the prosecutor committed reversible misconduct during closing statements. The trial court properly denied Rudolph's motion as the prosecutor did not commit misconduct. Rudolph's conviction should be affirmed.

A trial court's decision to deny a motion for a mistrial is reviewed for abuse of discretion. *State v. Mak*, 105 Wn.2d 692, 701, 719, 718 P.2d 407, cert. denied, *Mak v. Washington*, 479 U.S. 995, 107 S. Ct. 599, 93 L.Ed.2d 599 (1986). "An appellate court finds abuse only 'when no reasonable judge would have reached the same conclusion.'" *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989) (quoting *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 667, 771 P.2d 711 (1989)). A mistrial should only be granted if a defendant has been so prejudiced that nothing short of a mistrial will ensure he receives a fair trial. *Mak*, 105 Wn.2d at 701. Generally, trial judges have seen and heard the entire proceedings and are therefore "in a better position to evaluate and adjudge [a motion for a new trial] than [an appellate court]." *State v. Wilson*, 71 Wn.2d 895, 899, 431 P.2d 221 (1967).

When a defendant alleges prosecutorial misconduct warrants a new trial he has the “burden of establishing the impropriety of the prosecuting attorney’s comments and their prejudicial effect.” *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). A comment is only deemed prejudicial if there is a “substantial likelihood the misconduct affected the jury’s verdict.” *Id.* As in considering a claim of prosecutorial misconduct on appeal, in this posture, the prosecutor’s comments are also viewed “in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.” *Id.* And when a defendant fails to object to the alleged improper comment, the error is considered waived unless it is “so flagrant and ill-intentioned that it cause[d] an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.” *Id.* The standard used by this Court to evaluate whether the trial court properly denied the defendant’s motion for a new trial based on prosecutorial misconduct and to evaluate whether the prosecutor did commit reversible misconduct is one and the same. *State v. McKenzie*, 157 Wn.2d 44, 56, 134 P.3d 221 (2006).

A defendant has a significant burden when arguing that prosecutorial misconduct requires reversal of his convictions. *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011). To prevail on a

claim of prosecutorial misconduct, a defendant must establish that the prosecutor's complained of conduct was "both improper and prejudicial in the context of the entire record and the circumstances at trial." *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008) (quoting *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003) (citing *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997))). To prove prejudice, the defendant must show that there was a substantial likelihood that the misconduct affected the verdict. *Magers*, 164 Wn.2d 191 (quoting *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). A defendant must object at the time of the alleged improper remarks or conduct. A defendant who fails to object waives the error unless the remark is "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). When reviewing a claim of prosecutorial misconduct, the court should review the statements in the context of the entire case. *Id.*

In the context of closing arguments, a prosecuting attorney has "wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence." *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (citing *State v. Gregory*, 158 Wn.2d, 759, 860, 147 P.3d 1201 (2006)). The purported improper

comments should be reviewed in the context of the entire argument. *Id.* The court should review a prosecutor's comments during closing in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003); *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998). Contextual consideration of the prosecutor's statements is important. *Burton*, 165 Wn. App. at 885.

Improper argument does not require reversal unless the error was prejudicial to the defendant. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). The court in *Davenport* stated:

Only those errors [that] may have affected the outcome of the trial are prejudicial. Errors that deny a defendant a fair trial are per se prejudicial. To determine whether the trial was fair, the court should look to the trial irregularity and determine whether it may have influenced the jury. In doing so, the court should consider whether the irregularity could be cured by instructing the jury to disregard the remark. Therefore, in examining the entire record, the question to be resolved is whether there is a substantial likelihood that the prosecutor's misconduct affected the jury verdict, thereby denying the defendant a fair trial.

*Davenport*, 100 Wn.2d at 762-63.

Rudolph alleges the prosecutor committed misconduct by stating that the victim was a virgin in closing argument. *See Br. of Appellant*, p. 23. However, the prosecutor never utters the word "virgin" in his entire

closing argument. RP 790-803, 872-81. Rudolph appears to allege the prosecutor inferred the victim had no prior sexual partners and contracted a UTI after the rape because it was her first sexual experience. *See id.* However, Rudolph misrepresents the prosecutor's statements. The prosecutor did no more than repeat the evidence admitted at the trial through the medical witnesses. In his closing, the prosecutor stated:

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. Rudolph did not object to this argument.

At trial, Dr. Wilmington testified as to the causes of urinary tract infections in females. RP 352-53. Rudolph did not object to this testimony.

He stated,

Not going to the bathroom frequently can cause that. Any type of stimulation area, pressure to the vulva, so that's why first intercourse is a real common reason for a young teen or a teenager to suddenly have their first UTI. So if you basically – Women are different. The urethra between from the vulva to the bladder is actually quite small, and so it's why frequent urination helps to keep the urethra really clean, so I have girls that just basically due to not peeing frequently enough can kind of set themselves up as a UTI. “

...  
Yeah, so obviously, then, intercourse, it's... Vaginal penetration is, is literally the urethra is within millimeters

of the vaginal opening, so movement and stimulation and just structural mechanics of it put that area being stimulated right at the opening of the urethra, and then that can put the bacteria into the urethra that can then go up into the bladder and start causing the infection.

RP 352-53. The prosecutor then asked about UTIs being common in first experiences, and Dr. Wilmington testified without objection to the following:

It is. And, in fact, that's called honeymoon cystitis when you're in medical school, so your first infection commonly will occur after having intercourse. And a lot of it is not knowing to go pee afterward frequently, so a woman will be a little more set up for an infection just because she hasn't necessarily been taught about how to prevent UTIs when they're sexually active.

RP 354.

When comparing the prosecutor's statements during closing argument to Dr. Wilmington's testimony at trial, it is clear the prosecutor did no more than accurately restate what the testimony the jury heard was. The prosecutor did not misstate the testimony the jury heard, nor did the prosecutor argue any improper inferences from that testimony. Rudolph claims the prosecutor told the jury the victim was a virgin and that the emotional shock of a jury hearing that a virgin was raped undoubtedly lead to Rudolph's conviction is without merit. The prosecutor never said the word virgin during his closing or rebuttal arguments. He repeated what the doctor's testimony was and argued the presence of A.S.'s UTI is

corroboration that she had sex when she claims Rudolph raped her. The existence of a UTI only showed that some kind of sexual intercourse occurred, and the prosecutor never argued it was more indicative of non-consensual intercourse than it was of consensual intercourse, nor did he argue it was solid proof that intercourse occurred. The prosecutor properly argued the evidence, giving it the weight it deserved by briefly mentioning it in his closing argument. No misconduct occurred.

Even if this Court finds the prosecutor's closing argument was improper in its reference to Dr. Wilmington's testimony, it was not so flagrant and ill-intentioned that a curative instruction could not have cured the prejudice. In *McKenzie, supra*, the defendant alleged the prosecutor committed misconduct by referencing the victim's "innocence" and chastity and improperly inflamed the passions of the jury during closing argument. *McKenzie*, 157 Wn.2d at 60. Although the Court decided the prosecutor's references to the victim's lost innocence as a sexually inexperienced child were improper, the Court held they were not so flagrant and ill-intentioned that their prejudicial effect could not have been cured by the trial court's instruction to the jury. *Id.* The same is true here. Even if the prosecutor's statements during closing argument were improper and did infer that A.S. was a virgin, Rudolph did not object and did not give the trial court an opportunity to correct the error. Because

Rudolph did not so object, he is only entitled to relief if that objection would not have cured the issue – so only if the court could not have instructed the jury to disregard the prosecutor’s statements. Juries are presumed to follow the court’s instructions, and the prosecutor’s brief, two sentence reference to this subject, was not so prejudicial and inflammatory that the jury could not have disregarded it had they been instructed to do so.

Rudolph has not met his burden to prove prosecutorial misconduct and he has not shown the trial court abused its discretion in failing to grant him a new trial based on prosecutorial misconduct. His conviction should be affirmed.

**IV. The trial court properly imposed a domestic violence evaluation as part of Rudolph’s sentence and community custody.**

Rudolph argues that the trial court improperly imposed domestic violence evaluation as part of his community custody conditions because he and the victim were not members of the same family or household. That jury finding is not a pre-requisite to the imposition of domestic violence treatment as a condition of community custody, and the trial court properly imposed the condition.

As part of a defendant’s term of community custody, the court may require the defendant to abide by any crime-related prohibitions or

complete affirmative conditions. RCW 9.94A.505(9). The court also may order an offender to “participate in crime-related treatment or counseling services.” RCW 9.94A.703(3)(c). A condition is crime related if it directly relates to the circumstances of the crime. RCW 9.94A.030(11); *State v. Llamas-Villa*, 67 Wn.App. 448, 456, 836 P.2d 239 (1992). “Directly related” also includes conditions that are reasonably related to the crime. *State v. Irwin*, 191 Wn.App. 644, 364 P.3d 830 (2015). This Court reviews the trial court’s imposition of crime-related conditions for an abuse of discretion. *Id.*

Generally, a discretionary condition should be supported by evidence in the record that the condition is crime-related. *State v. O’Cain*, 144 Wn.App. 772, 775, 184 P.3d 1262 (2008). The absence of a domestic violence designation by the jury does not preclude the trial court from properly imposing domestic violence treatment as a community custody condition. *See State v. Hagler*, 150 Wn.App. 196, 201, 208 P.3d 32 (2009). There must only be evidence from which the trial court could have concluded that a domestic violence evaluation was reasonably crime-related in Rudolph’s case in order for this condition to have been properly imposed.

Prior to sentencing, the trial court ordered the Department of Corrections conduct a pre-sentence investigation. CP 119. As part of that

investigation, DOC prepared a report and recommended a certain sentence and sentencing conditions to the court. CP 123-31. DOC recommended that Rudolph undergo a domestic violence evaluation and treatment. CP 126. This condition makes sense: the evidence at trial showed Rudolph and A.S. were close friends, Rudolph routinely told A.S. he loved her, they spent a significant period of time together, they slept in the same bed on numerous occasions, and were very close. They had a relationship of significant character and duration. Rudolph also had prior domestic violence convictions at the time of sentencing. Given the facts of this case – that Rudolph used his close relationship with the victim to manipulate her and take advantage of her, his violent act against someone he was very close with, and his domestic violence history, it is clear the trial court had substantial evidence upon which to base its imposition of domestic violence evaluation. The trial court did not abuse its discretion and Rudolph’s argument that simply because there was no domestic violence designation on his crime prevents imposition of domestic violence treatment is without legal support. The trial court should be affirmed.

**V. The trial court properly imposed legal financial obligations.**

Rudolph argues the trial court improperly imposed legal financial obligations without considering his ability to pay. However, the trial court

did properly consider Rudolph's ability to pay and reasonably found that Rudolph had a likely future ability to pay and thus chose to impose legal financial obligations. The trial court properly considered Rudolph's situation and his individual ability to pay and its judgment should be affirmed.

Rudolph did not raise the issue of LFOs at the trial court. This Court has the discretionary authority to decline to hear arguments on this issue for the first time on appeal. RAP 2.5(a); *State v. Russell*, 171 Wn.2d 118, 122, 249 P.3d 604 (2011). "[E]ach appellate court must make its own decision to accept discretionary review." *State v. Blazina*, 182 Wn.2d 827, 835, 344 P.3d 680 (2015). Rudolph has not made any showing of why this court should accept review of this issue when he did not give the trial court adequate opportunity to examine the issue and perfect the record. This Court should decline to review this issue raised for the first time on appeal.

However, even if this Court does reach the merits of this issue, the trial court sufficiently made an individualized determination of Rudolph's ability to pay prior to imposing LFOs. RCW 10.01.160(3) requires a trial court take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose prior to imposing

discretionary LFOs. The trial court sufficiently reviewed Rudolph's ability to pay prior to imposing any costs.

The trial court ordered a pre-sentence investigation on Rudolph prior to sentencing. CP 119. In this report, the writer examines and describes in detail Rudolph's life, including his education and employment. Rudolph told the pre-sentence investigator that he always has a job and knows how to manage his money. CP 128. Rudolph indicated he pays his bills and puts money away for his daughter. CP 128. At the sentencing hearing, the trial court indicated it had "reviewed the materials carefully," including the pre-sentence investigation report prior to imposing the sentence on Rudolph. RP 913. The court then found that Rudolph was "presently indigent, but with possible future ability to pay the legal financial obligations." RP 916.

It is clear from Rudolph's own description of his abilities, that he is likely to have a future ability to pay. The trial court properly made this finding based upon sufficient evidence. The trial court made the proper individualized determination in to Rudolph's ability to pay as required. The trial court's imposition of LFOs should be affirmed.

**VI. The State will not seek appellate costs.**

The State does not intend to seek a cost bill in this case and therefore Rudolph's argument that this court should prohibit the imposition of appellate costs is moot.

**CONCLUSION**

Rudolph was properly convicted of Rape in the Second Degree and the trial court imposed appropriate crime-related prohibitions as part of its sentence. The trial court should be affirmed in all respects.

DATED this 25th day of April 2017.

Respectfully submitted:

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**CLARK COUNTY PROSECUTOR**  
**April 25, 2017 - 2:21 PM**  
**Transmittal Letter**

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