

No. 49289-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

KAMERON ROSENGREN

Appellant.

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

The Honorable Mary Sue Wilson

Cause No. 15-1-00915-3

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. If Rosengren's defense counsel introduced evidence portraying his client in a negative light, was he required to request an accompanying limiting instruction? If so, did the failure to do so constitute ineffective assistance?
2. Did defense counsel provide ineffective assistance of counsel by failing to subpoena a witness able to authenticate a series of Facebook posts?
3. After the trial had begun, Rosengren sought to designate his father as a witness, but was denied by the trial court. Did this exclusion of testimony constitute an abuse of discretion?
4. Rosengren raised allegations of juror misconduct, but after an investigation, the trial court found the allegations to be unfounded. Did the trial court nevertheless, abuse its discretion by failing to order a new trial?
5. Rosengren requests that appellate costs not be imposed. The State does not contest.

B. STATEMENT OF THE CASE

On February 25, 2015, thirteen year old J.F.-P. was at school when counselors pulled her out of class, informing her that her four year old brother, B.C., had been taken to the hospital, covered in bruises. RP Vol. I at 137-40. J.F.-P. was told that the Appellant, Kameron Rosengren, was among those listed as suspects.¹ RP Vol. I at 137-38. Nineteen year old Rosengren was a family friend who frequently babysat J.F.-P., and at the time she considered him to be her best friend. RP Vol. I at 134-35, 171. Upon hearing the news, J.F.-P. initially denied that Rosengren would be capable of abusing her brother. RP Vol. I at 114.

¹ Rosengren pled guilty to gross misdemeanor assault. RP Vol. I at 25.

However, a few days later, J.F.-P. requested to speak with Detective Kolb of the Tumwater P.D. RP 141. In her interview with Det. Kolb, J.F.-P. explained that her mother was dating Rosengren's older brother. RP Vol. II at 319. Her family would frequently share a motel room with Rosengren and his brother, with J.F.-P. and Kameron sharing one bed, while her mother and Rosengren's brother shared the other. RP Vol. I at 145. J.F.-P. went on to tell Det. Kolb that on two occasions, Rosengren touched her inappropriately, groping her breasts and touching her vagina over her clothes. RP Vol. I at 149-67. J.F.-P. also told Det. Kolb that the assault of B.C. was what led her to come forward with her own allegations. RP Vol. I at 174-75.

Rosengren was subsequently charged with molestation. At trial, the defense sought to portray Rosengren as a victim, alleging that L.F.-P. had fabricated her story to punish Rosengren for assaulting her little brother. RP Vol. I at 27-28. Over the State's objections, details of B.C.'s abuse was presented to the jury. RP Vol. I at 27-33. The State expressed concerns that if these details were admitted, then Rosengren may later claim he was prejudiced and appeal, nevertheless, defense counsel successfully argued that the evidence was essential to the defense. RP Vol. I at 27. After a three day trial, Rosengren was convicted of child molestation in the

second degree, and sentenced to forty months imprisonment. RP Vol. II at 435; CP 106-18. He now appeals that conviction.

C. ARGUMENT

1. Rosengren Concedes That Defense Counsel's Strategy Was "Correct" And "Logical," Yet Without Legal Support, He Claims That Defense Counsel Was Required To Request A Limiting Instruction For Evidence Introduced By The Defense. This Argument Is Baseless, And Regardless, It Does Not Render Defense Counsel's Entire Performance Ineffective.

In his first point of error, Rosengren claims that defense counsel provided ineffective assistance when he introduced evidence of B.C.'s assault without an accompanying limiting instruction. Appellant's Brief at 14. Notably, Rosengren does not claim that the evidence should not have been introduced. In fact, Rosengren concedes that this legal strategy was the correct course of action. Appellant's Brief at 15. Instead, he argues that if defense counsel instructed the jury not to consider B.C.'s assault as evidence of his propensity for bad acts, then he may have escaped conviction. Appellant's Brief at 19.

For Rosengren to prevail on an ineffective assistance of counsel claim, he has the burden of proving (1) deficient performance by counsel and (2) resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To determine if defense counsel's performance was deficient, the question is whether their actions

fell “below an objective standard of reasonableness,” viewed at the time the assault evidence was introduced. *Strickland*, 466 U.S. at 688-89 (“A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.”); *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978). The presumption is that Rosengren’s defense counsel provided effective assistance, unless there is no possible tactical explanation for his actions. *Strickland*, 466 U.S. at 689; *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Finally, to establish prejudice, Rosengren must show that there is a reasonable probability that, but for defense counsel’s failure to request a limiting instruction, he would have been found innocent. *Strickland*, 466 U.S. at 694. For the reasons discussed below, Rosengren’s claim fails both prongs of *Strickland*, and as a result, must be denied.

a. Defense counsel’s actions, viewed in their entirety, were tactical and logical. Rosengren admits as much, therefore counsel’s performance was not ineffective.

The doctrine of ineffective assistance does not require perfection, yet that is the standard by which Rosengren now judges defense counsel’s performance. Rosengren states in his brief, “The defense, by taking the

bold but logical step of requesting admission of damaging evidence without simultaneously requesting a corresponding limiting instruction was to use a sledgehammer where a scalpel was required.” Appellant’s Brief at 18. However, the standard for effective assistance is not scalpel-like precision, it is an objective standard of reasonableness. *Strickland*, 466 U.S. at 688-89. Moreover, rather than viewing defense counsel’s actions as a whole, which again, Rosengren concedes were logical, Rosengren’s argument seeks to focus only on one particular aspect of counsel’s performance. *See State v. Thomas*, 71 Wn.2d 470, 471, 429 P.2d 231 (1967) (noting that ineffective assistance analysis must examine counsel’s actions in the context of the entire record). In the context of the entire case, the failure to request a limiting instruction alone does not drop counsel’s entire strategy below the objective standard of reasonableness. *See* Appellant’s Brief at 15 (“Trial counsel was correct in his unorthodox request for admission of the potentially prejudicial testimony…”).

b. Rosengren has presented no legal authority to support his claim that defense counsel must request limiting instructions for his own evidence. Thus, Rosengren’s argument not only seeks to create a new rule, he seeks to retroactively fault defense counsel for not adhering to his new rule.

Whether defense counsel must request a limiting instruction when introducing evidence that is potentially harmful to his client is a question of first impression. Rosengren fails to cite to a single instance where a

court found error in a defense counsel's failure to request a limiting instruction for evidence introduced by the defense;² instead every case cited in his brief is limited to evidence introduced by the prosecution. ER 105, which governs limited admissibility, by its plain language only authorizes limiting instructions for evidence introduced by the opposing party.³ Thus, in essence, Rosengren is claiming defense counsel's actions fell below an objective standard of reasonableness, because he failed to do something which has never been previously required under Washington law.

Although there could certainly be circumstances where an attorney's approach to a novel issue could constitute ineffective assistance, this is not one of those situations. As Rosengren concedes, defense counsel's overall strategy was correct, *see* Appellant's Brief at 15, and because the defense was the party introducing the evidence, they controlled the context in which the evidence was introduced, minimizing the need for a limiting instruction.

² In fact, Rosengren's brief fails to even cite a single instance where the failure to request a limiting instruction was found to constitute ineffective assistance.

³ "When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." ER 105.

- c. Rosengren's argument seeks to significantly expand the doctrines of ineffective assistance and limited admissibility. Such an expansion would have negative practical implications.

As a policy matter, Rosengren's claim seeks to greatly expand both the ineffective assistance doctrine and the requirements for limiting instructions. Not only would the failure to argue novel claims now constitute ineffective assistance, counsel would also be required to request limiting instructions for any evidence which could be potentially inadmissible on other grounds.

Currently the limiting instruction doctrine seeks to protect defendants from improper prejudice caused by the prosecution's introduction of otherwise inadmissible evidence. *See State v. Gallagher*, 112 Wn. App. 601, 611, 51 P.3d 100 (2002); ER 105. In contrast, Rosengren's argument would expand the doctrine to cover any prejudice potentially introduced by their own evidence, and the failure to request a limiting instruction would now constitute ineffective assistance. The potential for this to complicate criminal law, and increase the grounds for appeal is not insignificant.

- d. As part of his defense, Rosengren used his own bad acts as a sword to attack his accuser's credibility, despite knowing the high risks associated with this approach. He cannot now claim that those bad acts, which he used to attack J.F.-P., entitle him to appellate relief.

Rosengren's trial strategy exemplified high-risk/high-reward. It was dependent upon convincing the jury that he had committed a crime so serious, that it would drive a fourteen year old girl,⁴ who had previously referred to Rosengren as her best friend, to lie under oath, and fabricate allegations of molestation. To accomplish this, defense counsel introduced evidence that Rosengren beat a four year old boy. Both defense counsel and Rosengren almost certainly knew the risks associated with this approach, but even now, Rosengren concedes it was logical under the circumstances. To now allow Rosengren to cite the risks he willingly accepted as the grounds for relief would be contrary to the interests of justice.

Additionally, considering that the goal of Rosengren's defense was to convince the jury that he had committed past bad acts, this current argument for a limiting instruction appears faulty. On one hand, defense counsel would be repeatedly telling the jury that J.F.-P. was looking to punish Rosengren for his bad acts, while on the other hand, the limiting instruction would advise the jury to disregard the bad acts. At best, this conflict would be confusing to the jury. *State v. Barragan*, 102 Wn.App. 754, 762, 9 P.3d 942 (2000) (noting that counsel may strategically decline

⁴ J.F.-P. was thirteen when the molestation occurred, but fourteen when she testified.

to request a limiting instruction in order to affect the instruction could have on the jury).

e. Jury instructions mitigated any potential harm from the lack of limiting instructions.

Finally, while evidence of Rosengren's assault plea wasn't accompanied by a limiting instruction, the jury was nevertheless instructed that they must not base their decision on "sympathy, prejudice, or personal preference;" each element must be proven beyond a reasonable doubt; and Rosengren was presumed innocent. RP Vol II at 383. As juries are presumed to follow the instructions they are given, in the present case, the jury is presumed to have followed instructions by not allowing their sympathy for B.C. to affect their judgment. *Kansas v. Marsh*, 548 U.S. 163, 126 S. Ct. 2516, 2528, 165 L. Ed. 2d 429 (2006) ("We presume that jurors follow the instructions."); *State v. Blake*, 172 Wn. App. 515, 531, 298 P.3d 769 (2012) ("Important to the determination of whether opinion testimony prejudices the defendant is whether the jury was properly instructed... Proper instructions obviate the possibility of prejudice."). Therefore, any potential harm was mitigated by instructions to the jury at the conclusion of the trial.

f. Taken together, these factors establish that defense counsel's actions did not fall below the objective standard of reasonableness required under Strickland. Therefore, the claim must be denied.

In conclusion, Rosengren concedes that defense counsel's strategy was correct and logical, yet claims it fell below an objective standard of reasonableness. The premise of his claim is an issue of first impression with no legal support, yet he claims defense counsel's failure to raise it constitutes ineffective assistance. The practical consequences of Rosengren's argument would vastly expand the ineffective assistance doctrine, and disregards jury instruction which were broadly similar to the requested limiting instructions. In light of all of these facts, it is apparent that defense counsel's performance did not fall below the objective standard of reasonableness, required under *Strickland*. *Strickland*, 466 U.S. at 688-89. Accordingly, Rosengren's first claim must be denied.

2. Defense Counsel's Failure To Subpoena A Witness To Authenticate A Series of Facebook Posts Did Not Constitute Ineffective Assistance, Because There Was No One Available For Counsel To Subpoena.

Rosengren's second claim of error is fundamentally flawed. He claims that defense counsel provided ineffective assistance by failing to subpoena a witness to authenticate a series of Facebook posts, yet Rosengren's brief does not name any witnesses actually capable of authenticating the posts in question. Appellant's Brief at 20. Considering the trial court's ruling on the issue, it would appear that there were no third parties possessing the requisite personal knowledge to authenticate

the posts, therefore it was impossible for defense counsel to have subpoenaed an adequate witness. Thus, whereas in his first point of error, Rosengren faults defense counsel for not providing perfect assistance, here he faults defense counsel for failing to provide impossible assistance.

The Facebook posts in question were written by an individual going by the name of “Strawberry Drizzle.” RP Vol. II at 278. This “Strawberry Drizzle,” is alleged to be a pseudonym for J.F.-P., and defense counsel sought to use the posts to impeach J.F.-P. RP Vol. II at 278. However, the court ruled that personal knowledge was required to verify that the posts had been written by J.F.-P. RP Vol. II at 284.

As a result of the trial court’s ruling, it is clear that none but J.F.-P. herself possessed the personal knowledge required to authenticate. Critically, Rosengren does not argue that the court’s ruling was erroneous, or that defense counsel should have questioned J.F.-P. *State v. Thomas*, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004) (holding that appellate courts do not review arguments that have not been briefed). Instead, Rosengren’s brief simply suggests that a Facebook employee could have been subpoenaed, Appellant’s Brief at 23, but at most, a Facebook employee could testify that the account belonging to “Strawberry Drizzle” was accessed from certain locations, which by itself would not prove that J.F.-P. authored the posts under the trial court’s ruling.

Because defense counsel could not have subpoenaed a witness capable of authenticating the Facebook account, his failure to do the impossible does not amount to deficient performance. *Strickland*, 466 U.S. at 688-89. Similarly, it cannot be said that Rosengren suffered actual prejudice from defense counsel's failure to perform the impossible. *Id.* at 694. Consequently, Rosengren's second claim of ineffective assistance of counsel must be denied.

3. The Trial Court Did Not Abuse Its Discretion When It Did Not Allow Rosengren To Designate A New Witness In The Midst Of Trial, As There Are Facts In The Record Indicating That The Exclusion Was Reasonable And Warranted.

In his third point of error, Rosengren claims that he was denied due process when the trial court precluded his father, Gary Rosengren (hereinafter "Gary"), from testifying on his behalf. Appellant's Brief at 26. The trial court disallowed Gary's testimony for three reasons. RP Vol. I at 84. First, the trial was already into its second day when defense counsel sought to designate Gary as a potential witness. RP Vol. I at 84. Second, on the first day of trial, the court ordered all potential witnesses to leave the courtroom to avoid exposing them to proceedings which could affect their testimony, yet Gary remained, and continued to observe. RP Vol. I at 82-83. Third, this was not the first instance of Rosengren designating witnesses in violation of the rules of discovery: on the first day of trial

defense counsel designated two witnesses who had not been properly disclosed prior to trial. RP Vol. I at 34. Although the State requested their exclusion, the trial court allowed the witnesses, provided the State would get an opportunity to interview them. RP Vol. I at 37. The trial court cited Rosengren's prior late disclosures as one of his reasons for excluding Gary. RP Vol. 1 at 84.

Additionally, beyond the reasons stated by the trial court, Gary's testimony also appears to be cumulative with J.F.-P.'s own testimony. Thus, as discussed in greater detail below, the trial court was within its discretion to preclude Gary's testimony, therefore, it cannot be said that Rosengren's due process rights were unconstitutionally impaired.

a. Based on the record, the trial court was within its discretion to exclude Gary's testimony.

While the preclusion of witness testimony is an extraordinary remedy, it is nevertheless within the sound discretion of the trial court. *State v. Yates*, 111 Wn.2d 793, 797, 765 P.2d 291 (1988). Under *Hutchinson*, there is a four factor analysis to determine whether Gary's testimony was properly excluded; 1) the effectiveness of less severe sanctions; 2) the impact of the exclusion; 3) the degree of surprise to the opposing party; and 4) whether the conduct was willful or in bad faith. *State v. Hutchinson*, 135 Wn.2d 863, 882-83, 959 P.2d 1061 (1998).

Applying these factors to the present facts, it is apparent that the exclusion was reasonable, and within the court's discretion.

To begin, we have direct evidence that lesser sanctions failed to compel Rosengren to comply with the rules of discovery. The day before the court chose to impose lesser sanctions on Rosengren, rather than excluding his two late disclosed witnesses. RP Vol. I at 37. Despite this, defense counsel still waited until the next day to notify the court that Gary had potentially relevant testimony. RP Vol. I at 81-82.

Next, the exclusion had a minimal impact on the proceedings due to the cumulative nature of Gary's testimony. Although the record does not indicate precisely what Gary would have testified about, defense counsel indicated that it was intended to impeach J.F.-P. by drawing attention to the timing between J.F.-P.'s allegations and B.C.'s abuse. RP Vol. I at 81. Because J.F.-P. admitted to the jury that B.C.'s abuse is what motivated her to come forward with her own allegations of molestation, RP Vol. I at 174-75, it is unclear how Gary's testimony would have done any more than repeat testimony already offered.

As to the third *Hutchinson* factor, here, the surprise to the State was significant. The State had already been denied the opportunity to interview two of Rosengren's witnesses until after the trial was already underway. RP Vol. I at 34. Then on the second day of trial, Rosengren

sprang Gary on the prosecution. Surprise is cumulative, as each new witness takes further time away from other tasks required in the course of trial, and while the surprise from one late disclosed witness may not warrant Gary's exclusion, the surprise from three late disclosed witnesses might.

Finally, even if Rosengren did not willingly fail to disclose Gary as a potential witness, he cannot be said to have acted in good faith. Gary was not some distant third party who only came to the defense's attention on the eve of trial. Rather, he was Rosengren's father, who at the very least was involved enough in the proceedings to sit through a day of jury selection, voir dire and motions. RP Vol. I at 81. If he possessed information critical to his son's defense, he had ample opportunity to inform counsel prior to trial. Then, even once defense counsel was informed that Gary could have useful testimony, he waited until the next day to notify the court. To act in good faith requires the exercise of due diligence,⁵ and that simply was not done here.

⁵ Good faith and due diligence are often used in conjunction, as if they were part of the same standard. *See State v. Greenwood*, 120 Wn.2d 585, 602, 845 P.2d 971 (1993) ("We agree the good faith and due diligence standard does not impose the burden of locating defendants who have failed to provide the prosecution with accurate information of their whereabouts."); *see also State v. Stewart*, 130 Wn.2d 351, 364, 922 P.2d 1356 (1996) ("[T]his Court held the State is required to act in good faith and with due diligence to bring a defendant to trial..."); *see also City of*

Taken together, these factors could lead a reasonable person to conclude that the exclusion of Gary's testimony was warranted. *State v. Stenson*, 132 Wn.2d 668, 757, 940 P.2d 1239 (1997) (holding that an exercise of discretion will not be overturned unless no reasonable person would take the position adopted by the trial court).

b. *Because Gary remained in the courtroom after the court had ordered the exclusion of potential witnesses; the trial court had the discretion to preclude his testimony.*

Prior to beginning proceedings on April, 11, 2016, the trial court ordered any potential witnesses to leave the courtroom. RP Vol. I at 44. This order was aimed at ensuring witness testimony was not contaminated or tailored to fit things seen, heard and observed during trial. *See State v. Njonge*, 181 Wn.2d 546, 559-60, 334 P.3d 1068 (2014). Despite the order, Gary remained in the courtroom, observing the proceedings. RP Vol. I at 82. Defense counsel stated that once he was notified that Gary could be a potential witness, he told Gary to leave the courtroom, but the record doesn't indicate precisely when this occurred. RP Vol. I at 82.

Because Gary's presence in the courtroom violated the exclusion order, the court had the discretion to preclude him from testifying. *State v. Skuza*, 156 Wn.App. 886, 895-97, 235 P.3d 842 (2010) (discussing ER

Seattle v. Guay, 150 Wn.2d 288, 291, 76 P.3d 231 (2003) ("We hold that CrRLJ 3.3(g)(5) does not contain a due diligence or good faith requirement...").

615, which allows the exclusion of witnesses so that they may not hear the testimony of others). Absent an indication that the court's discretion was "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons," the court's decision to preclude will not be overturned. *Id.* (citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

c. Any potential error caused by the exclusion of Gary's testimony was harmless due to the cumulative nature of his testimony.

Although the record does not indicate the specific content of Gary's potential testimony, defense counsel indicated that he would be called to impeach J.F.-P.'s statements. RP Vol. I at 81. However, on the witness stand, J.F.-P. conceded that her statements contained numerous inconsistencies, and that her anger over Rosengren's abuse of B.C. contributed significantly to her decision to inform authorities of her molestation. RP Vol. I at 174; Vol. II at 249, 258-65. With J.F.-P. already effectively impeaching herself, it is unclear how Gary's testimony would be anything other than cumulative.

Consequently, because Gary's testimony merely repeated admissions offered by J.F.-P., it is apparent beyond a reasonable doubt that the exclusion did not affect the outcome of the trial. *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) (holding

that certain constitutional errors may be deemed harmless); *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986) (“The harmless error rule preserves an accused's right to a fair trial without sacrificing judicial economy in the inevitable presence of immaterial error.”); *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (quoting *Neder v. United States*, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)) (“the ... test for determining whether a constitutional error is harmless: Whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.’). Therefore the alleged error fell squarely within the realm of harmless error, and Rosengren’s claim must be denied.

4. Once It Had Determined That No Juror Misconduct Had Occurred, The Trial Court Was Within Its Discretion Not to Order a New Trial.

In his fourth point of error, Rosengren argues that the trial court abused its discretion by not ordering a new trial following allegations of juror misconduct. Appellant’s Brief at 33. At issue was an allegation by one juror that extrinsic evidence had been improperly introduced into the jury’s deliberations. However, the trial court found that no misconduct occurred, RP June 2 at 50, and as a result, the trial court was within its discretion to deny Rosengren’s motion for a new trial. *State v. Dawkins*, 71 Wn. App. 902, 863 P.2d 124 (1993) (“The decision to grant or deny a

new trial will not be disturbed unless it constitutes a manifest abuse of discretion.’); CrR 7.5.

In finding that no juror misconduct had occurred, trial court relied on the following facts: 1) the juror accused of misconduct swore under oath that she did not obtain information from an outside source; 2) the accused juror did not have a cell phone to access the internet; 3) the accused juror provided an alternate explanation for the allegations, specifically that another member of the jury had looked up whether a date in question was a four-day weekend; 4) the allegations of misconduct were broad, and did not allege specific extrinsic evidence;⁶ and 5) the trial court granted an extension to allow counsel to contact other jurors, but none who were contacted corroborated the allegations of misconduct. RP July 29 at 4-6; June 2 at 15-19. Based upon this information, the trial court ruled that the juror alleging misconduct was mistaken,⁷ and as the finder of facts, the trial court’s ruling will not be overturned unless not supported by substantial evidence. *State v. Allen*, 138 Wn.App. 463, 468, 157 P.3d 893 (2007).

⁶ It must also be noted that even if the jury did use the internet, it is unclear what facts the jury could have found which were not presented at trial. The juror making allegations of misconduct did not specify what information was supposedly discovered either.

⁷ The court stated “I think with the evidence I have, that the more likely scenario is that [the juror alleging misconduct] misunderstood what occurred.” RP June 2 at 50.

With a finding that no improper extrinsic evidence had been introduced, the trial court was not required to consider whether the alleged conduct had prejudiced Rosengren, nor whether a new trial was necessary. Accordingly, the trial court was within its discretion to deny Rosengren's motion for a new trial, and Rosengren's third point of error must be denied.

5. Rosengren Requests That This Court Decline To Impose Appellate Costs. The State Does Not Contest.

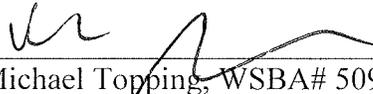
Finally, Rosengren argues that appellate costs should not be imposed because he was found indigent at the trial court level. Appellant's Brief at 41. The State does not contest.

D. CONCLUSION

For these reasons, the State asks the court to affirm Rosengren's conviction.

Respectfully submitted this 16th day of June, 2017.

JON TUNHEIM
Prosecuting Attorney



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Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent on the date below as follows:

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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 16th day of June, 2017, at Olympia,

Washington.


CYNTHIA WRIGHT, PARALEGAL

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

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