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NO. 49357-8-II

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

STATE OF WASHINGTON, Respondent

v.

PAUL LUKE TETERS, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.14-1-01325-6

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. **The Court properly allowed amendment of the information and Teters received effective assistance of counsel.**
- II. **Double Jeopardy was not violated.**
- III. **The prosecutor did not commit misconduct.**
- IV. **Teters had the opportunity to fully and fairly present his defense.**
- V. **The community custody condition prohibiting Teters from frequenting locations where minors congregate was appropriately imposed; the other complained-of conditions are not crime-related and should be stricken.**

STATEMENT OF THE CASE

The State agrees with Teters' statement of the case. Where appropriate, the State included additional facts or procedural history within the argument section below.

ARGUMENT

- I. **The trial court properly allowed the State to amend the information mid-trial.**

Teters argues the trial court erred in allowing the State to amend the Information to add an Attempted Rape of a Child as a stand-alone count when the completed offense of Rape of a Child was already included in the Information, and to remove language showing Child

Molestation as an alternative to the Rape charge. The trial court did not abuse its discretion in allowing amendment of the Information as such amendment was authorized by court rule and the amendment did not prejudice the defendant in his ability to obtain a fair trial. Teters' claim should be denied.

A trial court's decision to allow the State to amend its Information is reviewed for an abuse of discretion. *State v. Haner*, 95 Wn.2d 858, 864, 631 P.2d 381 (1981). A defendant must be informed of the charges against him and cannot be tried for uncharged offenses. *State v. Carr*, 97 Wn.2d 436, 439, 645 P.2d 1098 (1982); *State v. Lutman*, 26 Wn.App. 766, 767, 614 P.2d 224 (1980). Superior Court Criminal Rule (CrR) 2.1(d) allows for amendment of the Information at any time before the verdict as long as such amendment does not prejudice the "substantial rights of the defendant." CrR 2.1(d).

Over the years our appellate courts have limited CrR 2.1(d)'s application in balancing its provisions with a defendant's constitutional right to be informed of the charges against him. In *State v. Pelkey*, 109 Wn.2d 484, 745 P.2d 854 (1987), our Supreme Court limited the ability of the State to amend an Information after resting its case in chief, holding that the State could only amend after resting if it was to a lesser degree of the same charge or to a lesser included offense of one originally charged.

Id. at 491. Thereafter if an Information was amended after the State rested its case to a crime that was not a lesser degree or lesser included offense, it constituted per se error and the defendant had no burden to show prejudice resulted from the amendment. *State v. Markle*, 118 Wn.2d 424, 437, 823 P.2d 1101 (1992). Time and time again, however, our appellate courts have declined to extend the *Pelkey* rule to prohibit amendment of an Information made during the State's presentation of its case in chief. *State v. Schaffer*, 120 Wn.2d 616, 845 P.2d 281 (1993); *State v. Vangerpen*, 125 Wn.2d 782, 888 P.2d 1177 (1995); *State v. Phillips*, 98 Wn.App. 936, 991 P.2d 1195 (2000); *State v. Murbach*, 68 Wn.App. 509, 843 P.2d 551 (1993); *State v. Wilson*, 56 Wn.App. 63, 782 P.2d 224 (1989); *State v. Brown*, 55 Wn.App. 738, 780 P.2d 880 (1989); *State v. Ziegler*, 138 Wn.App. 804, 158 P.3d 647 (2007). Therefore, when an Information is amended prior to the State resting its case, in order to prevail on appeal, a defendant must show prejudice resulted from the amendment. *Ziegler*, 138 Wn.App. at 809 (citing *State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988) and *State v. Hakimi*, 124 Wn.App. 15, 26-27, 98 P.3d 809 (2004)).

RCW 10.61.003 provides that the jury may find the defendant guilty of an attempt to commit the offense charged. RCW 10.61.003; *see also State v. Gallegos*, 65 Wn.App. 230, 828 P.2d 37, *rev denied*, 119 Wn.2d 1024, 838 P.2d 690 (1992). Thus by charging Teters with Rape of

a Child in the Second Degree, the jury could have considered Attempted Rape of a Child in the Second Degree by virtue of RCW 10.61.003 and case law. Teters argues that having the included offense of attempted rape in the charging document and thus presented to the jury as a stand-alone offense was inherently prejudicial even though the same offense could have gone to the jury as an included offense because the jury would have been instructed only to consider the attempt if it first found the defendant not guilty of the completed offense or could not agree. Teters' argument in this regard makes little sense as he was not convicted of both the completed and the attempted rape and was only convicted of the attempted rape. He cannot show prejudice by the addition of the attempted rape in the charging document when the result could not have been any more favorable to him if the court had rejected the amendment and instead instructed on the lesser-included of attempted rape pursuant to RCW 10.61.003, which the court would have done upon request. There is no merit to Teters' argument that he was prejudiced by the trial court allowing the state to amend the Information to add Attempted Rape of a Child when the completed offense was already charged.

Teters also argues the amendment was improper because it removed the "in the alternative" language relating to the Child Molestation count. Teters argues this prejudiced him by increasing his exposure to

additional criminal counts. Teters relies on *Ziegler*, 138 Wn.App. 804, 158 P.3d 647 (2008) to support his argument that the trial court erred in allowing the amendment of the Information, but his reliance on *Zielger* is misplaced. In *Ziegler*, the State was allowed to amend the Information mid-trial, but prior to resting, to change one charge from Rape of a Child in the First Degree to Child Molestation in the First Degree, and to add two charges of Rape of a Child. *Ziegler*, 138 Wn.App. at 805. In analyzing whether *Ziegler* could establish prejudice based on the amendment of the Information, this Court relied upon the decision in *State v. Aho*, 89 Wn.App. 842, 849-50, 954 P.2d 911 (1998), *reversed on other grounds*, 137 Wn.2d 736, 975 P.2d 512 (1999). In *Aho*, the Court of Appeals found no prejudice ensued from the amendment of an information mid-trial from Rape of a Child to Child Molestation. *Aho*, 89 Wn.App. at 849-50. The Court stated that as the only real difference between rape and molestation was whether penetration occurred, the defendant's defense was not affected by the amendment and additional discovery or a continuance would not have impacted his rights. *Id.* Relying on this decision, the Court in *Ziegler* likewise found the amendment from Rape of a Child to Child Molestation was not prejudicial and the defendant's defense was not adversely affected. *Ziegler*, 138 Wn.App. at 810. Furthermore, the Court found the defendant's failure to request a continuance based on the

amendment was evidence the amendment was not prejudicial. *Id.* (citing *State v. Murbach*, 68 Wn.App. 509, 512, 843 P.2d 551 (1993)). Teters did not request a continuance when the State's amendment was allowed, nor did he argue he was prejudiced by the amendment or that his defense was adversely affected by the amendment. This shows the amendment was not prejudicial to Teters.

Furthermore, any claim that Teters was not properly informed of the charges against him lacks merit. Teters was always aware that the State alleged his actions on the date in question constituted Rape of a Child and/or Child Molestation as the State originally charged both crimes. CP 5-6. Teters cannot argue he had not been informed of the charges against him, and as such the holdings in *Pelkey* and its progeny have no application here. The State agreed that Teters' convictions for attempted rape and child molestation constituted same criminal conduct and thus they were not scored against each other and the sentences ran concurrently with each other. RP 963, CP 377-88. The attempted rape conviction was a higher seriousness level than the child molestation and thus that controlled the sentence imposed. CP 379. Teters did not receive any additional punishment by virtue of the child molestation conviction. Even if he had, the possibility of a harsher punishment does not, by itself, demonstrate prejudice. *State v. James*, 108 Wn.2d 483, 489-90, 739 P.2d

699 (1987). Prejudice requires a showing of unfair surprise or inability to prepare a defense. *Id.* (citing *State v. Purdom*, 106 Wn.2d 745, 725 P.2d 622 (1986)). Important to this analysis, Teters was always aware of the child molestation charge and the allegations that supported that charge; there was no additional discovery or witnesses presented due to the State's amendment removing the "in the alternative" language from the Information. Teters' broad allegation of prejudice that denied him a fair trial does not demonstrate prejudice in this instance. There was no unfair surprise or inability of Teters to prepare a defense to the charge of child molestation. Teters' claim that the trial court erred in allowing the state to amend the Information fails.

II. Counsel was not ineffective in his objection to the amendment of the Information.

Teters further argues his attorney was ineffective for failing to argue or be aware of the "relevant law" regarding the State's motion to amend the Information. As discussed above, Teters cannot show the amendment was improper nor can he show he was prejudiced by the amendment and he therefore likewise cannot show he was prejudiced by his attorney's performance in arguing against allowing the State to amend the information.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right of a criminal defendant to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). In *Strickland*, the United States Supreme Court set forth the prevailing standard under the Sixth Amendment for reversal of criminal convictions based on ineffective assistance of counsel. *Id.* Under *Strickland*, ineffective assistance is a two-pronged inquiry:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable.

Thomas, 109 Wn.2d at 225-26 (quoting *Strickland*, 466 U.S. at 687); see also *State v. Cienfuegos*, 144 Wn.2d 222, 226, 25 P.3d 1011 (2011) (stating Washington had adopted the *Strickland* test to determine whether counsel was ineffective).

Under this standard, trial counsel's performance is deficient if it falls "below an objective standard of reasonableness." *Strickland*,

466 U.S. at 688. The threshold for the deficient performance prong is high, given the deference afforded to decisions of defense counsel in the course of representation. To prevail on an ineffective assistance claim, a defendant alleging ineffective assistance must overcome “a strong presumption that counsel's performance was reasonable.” *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Accordingly, the defendant bears the burden of establishing deficient performance. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A defense attorney’s performance is not deficient if his conduct can be characterized as legitimate trial strategy or tactics. *Kylo*, 166 Wn.2d at 863; *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) (holding that it is not ineffective assistance of counsel if the actions complained of go to the theory of the case or trial tactics) (citing *State v. Renfro*, 96 Wn.2d 902, 909, 639 P.2d 737 (1982)).

A defendant can rebut the presumption of reasonable performance of defense counsel by demonstrating that “there is no conceivable legitimate tactic explaining counsel's performance.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999). Not all strategies or tactics on the part of defense counsel are immune from attack. “The relevant question is not whether counsel's choices were strategic, but whether they were

reasonable.” *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable).

To satisfy the second prong of the *Strickland* test, the prejudice prong, the defendant must establish, within reasonable probability, that “but for counsel's deficient performance, the outcome of the proceedings would have been different.” *Kyllo*, 166 Wn.2d at 862. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694; *Thomas*, 109 Wn.2d at 266; *Garrett*, 124 Wn.2d at 519. In determining whether the defendant has been prejudiced, the reviewing court should presume that the judge or jury acted according to the law. *Strickland*, 466 U.S. at 694-95. The reviewing court should also exclude the possibility that the judge or jury acted arbitrarily, with whimsy, caprice or nullified, or anything of the like. *Id.*

Also, in making a determination on whether defense counsel was ineffective, the reviewing court must attempt to eliminate the “distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from the counsel’s perspective at the time.” *Id.* at 689. The reviewing courts should be highly deferential to trial counsel’s decisions. *State v. Michael*, 160 Wn.App. 522, 526, 247 P.3d 842 (2011). A strategic or tactical decision is not a

basis for finding error in counsel's performance *Strickland*, 466 U.S. at 689-91.

Key to a successful ineffective assistance of counsel claim is that the complained-of conduct by counsel actually resulted in prejudice to the defendant. As discussed above, the amendment of the Information did not prejudice Teters. Not only can Teters not show that had his attorney made a more lengthy argument in objection to the amendment than he did that the trial court would have sustained the objection, but Teters cannot show that the amendment itself was improper. Attorneys are not required to make frivolous arguments in order to be effective. Teters' attorney objected to the Information, thus preserving the issue for appeal, and effectively represented Teters in all other respects. Teters' claim of ineffective assistance of counsel fails.

III. Convictions of Attempted Rape of a Child and Child Molestation do not implicate double jeopardy.

Teters argues his convictions for Attempted Rape of a Child and Child Molestation violate his right to be free from double jeopardy. Teters fails to acknowledge this Court's recent holding in *State v. Wilkins*, 200 Wn.App. 794, 403 P.3d 890 (2017). The holding in *Wilkins* is controlling here.

Our state and federal constitutions prohibit the imposition of multiple punishments for a single offense. *State v. French*, 157 Wn.2d 593, 612, 141 P.3d 54 (2006). A person's right to be free from double jeopardy is violated if he is convicted of multiple offenses that are identical in both law and in fact. *State v. Fuentes*, 179 Wn.2d 808, 824, 318 P.3d 257 (2014) (quoting *State v. Calle*, 125 Wn.2d 769, 777, 888 P.2d 155 (1995)). Offenses are not the same if they have different elements. *Id.* If each offense includes an element not included in the other offense, then we presume the legislature intended to all multiple punishments for the same act that gave rise to both convictions. *Calle*, 125 Wn.2d at 777.

A person commits the crime of Attempted Rape of a Child in the Second Degree if that person has the intent to commit Rape of a Child in the Second Degree, and takes a substantial step towards the commission of that crime. RCW 9A.44.076; RCW 9A.28.020. Rape of a Child in the Second Degree occurs when an individual has sexual intercourse with a child who is at least twelve years old, but less than fourteen years old, not married to the person and when the person is at least thirty-six months older than the child. RCW 9A.44.076. A person commits the crime of Child Molestation in the Second Degree when he has sexual contact with a child who is at least twelve years old but younger than fourteen years old,

not married to the person, and the person is at least thirty-six months older than the child. RCW 9A.44.089. “Sexual contact” occurs by the “touching of the sexual or other intimate parts of a person...for the purpose of gratifying sexual desire of either party.” RCW 9A.44.010(2).

Many courts in our state have found that a single incident may support both rape and molestation convictions without offending the prohibition against double jeopardy. In *State v. Land*, 172 Wn.App. 593, 295 P.3d 782 (2013), Division One of this Court found convictions for rape of a child and child molestation based on events occurring during a single incident of sexual contact did not offend double jeopardy. *Land*, 172 Wn.App. at 600. In *State v. French*, 157 Wn.2d 593, 141 P.3d 54 (2006), our Supreme Court found that convictions for child molestation and rape of a child did not violate double jeopardy even when they occurred during a single incident. *French*, 157 Wn.2d at 611. In *State v. Jones*, 71 Wn.App. 798, 863 P.2d 85 (1993), Division One of this Court again affirmed convictions for rape of a child and child molestation based on a single incident of child abuse. The Court noted the differences in the elements of rape of a child and child molestation stating “[c]hild molestation requires that the offender act for the purpose of sexual gratification, an element not included in first degree rape of a child, and first degree rape of a child requires that penetration or oral/genital contact

occur, an element not required in child molestation.” *Jones*, 71 Wn.App. at 825.

Most recently in *State v. Wilkins*, 200 Wn.App. 794, 403 P.3d 890 (2017), the defendant was convicted of Rape of a Child in the First Degree and Child Molestation in the First Degree for a single incident of child abuse. *Wilkins*, 200 Wn.App. at 894. On appeal, Wilkins argued that the two convictions violated the prohibition against double jeopardy because the convictions constituted the same offense. *Id.* This Court rejected Wilkins’ argument finding that “[t]he molestation occurred when Wilkins had sexual contact with NH for sexual gratification; the rape occurred when there was penetration.” *Id.* at 898.

The same reasoning applies in Teters’ case. The molestation occurred when he touched the victim for sexual gratification, and the attempted rape occurred when he took a substantial step towards having sexual intercourse with her, with the intent to have sexual intercourse. Each of these offenses includes elements not included in the other and the offenses are therefore not the same. As in *Wilkins, supra*, the prohibition against double jeopardy was not violated by Teters’ convictions for both Attempted Rape of a Child and Child Molestation. Teters’ double jeopardy claim fails.

IV. The Prosecutor did not commit misconduct.

Teters argues the prosecutor committed misconduct during closing argument. The prosecutor's statements were not improper and did not prejudice Teters. This claim fails.

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).

In arguing the law, a prosecutor is confined to correctly characterizing the law stated in the court’s instructions. *State v. Burton*, 165 Wn.App. 866, 885, 269 P.3d 337 (2012) (citing *State v. Estill*, 80 Wn.2d 196, 199-200, 492 P.2d 1037 (1972)). It can be misconduct for a prosecutor to misstate the court’s instruction on the law, to tell a jury to acquit you must find the State’s witnesses are lying, or that they must have a reason not to convict, or to equate proof beyond a reasonable doubt to everyday decision-making. *Id.* (citing to *State v. Davenport*, 100 Wn.2d 757, 675 P.2d 1213 (1984), *State v. Fleming*, 83 Wn.App. 209, 921 P.2d 1076 (1996), *State v. Anderson*, 153 Wn.App. 417, 220 P.3d 1273 (2009),

and *State v. Warren*, 165 Wn.2d 17, 195 P.3d 940 (2008)). 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.

A defendant's failure to object to potential misconduct at trial waives his challenge to the misconduct unless no curative instruction would have obviated the prejudicial effect on the jury and the misconduct caused prejudice that had a substantial likelihood of affecting the verdict. *State v. Emery*, 174 Wn.2d 741, 761, 278 P.3d 653 (2012). The main focus of this Court's analysis on a prosecutorial misconduct claim when the defendant did not object at trial is whether the potential prejudice could have been cured by an instruction. *Id.* at 762.

In Teters' case, the prosecutor did not commit misconduct, and any potential misstatement by the prosecutor did not affect the verdict and did not deny Teters a fair trial. Specifically, Teters argues the prosecutor committed misconduct by arguing to the jury that the defendant relied so heavily on evidence of his PTSD and war service history to distract them from the "real issue, which is whether or not he touched [the victim]...." RP 905. Teters argues the prosecutor "denigrate[d]" defense counsel in making this argument and argued defense counsel's role was to deceive the jury. A prosecutor may argue what evidence is and is not relevant and what evidence was more credible and urge the jury to believe certain evidence and come to a certain conclusion. The prosecutor did not denigrate defense counsel in her argument, but rather she appropriately argued that a significant amount of evidence they heard was not relevant to the issue of whether the defendant was guilty of the crimes charged. This was not misconduct. But even if it was improper, there is not a substantial likelihood the statements affected the jury's verdict. In *State v. Negrete*, 72 Wn.App. 62, 863 P.2d 137 (1993), the Court of Appeals found a prosecutor's statement that the defense attorney was being paid to twist the words of the witnesses was not "irreparably prejudicial" and found the court's general instructions to the jury that counsels' arguments were not evidence minimized any potential prejudice from the prosecutor's

misstatement. *Negrete*, 72 Wn.App. at 67, n. 4. The court gave the same instruction to the jury in Teters' case, thus we can conclude that instruction minimized any potential prejudice from the prosecutor's argument.

Teters also argues the prosecutor improperly suggested the jury had to find the victim was lying in order to acquit. It is improper for a prosecutor to argue that in order to acquit the jury must find the victim is lying. *State v. Casteneda-Perez*, 61 Wn.App. 354, 362-63, 810 P.2d 74, *rev. denied*, 118 Wn.2d 1007, 822 P.2d 287 (1991). However, the prosecutor in Teters' case made no such argument. The prosecutor urged the jury to consider the evidence and the motives of the parties involved, including asking the jury to assess the victim's credibility and in doing so look to what she would gain from making this accusation up, and what benefit she would receive from lying about the incident. This is a far cry from the prohibited arguments of telling the jury they must find a reason to acquit the defendant. Teters simply cannot show the prosecutor's discussion with the jury about why the victim was credible amounted to misconduct, nor can he show an instruction would not have cured any potential prejudice.

Teters next argues the prosecutor misstated the law in arguing that it did not have to prove why Teters committed the crime. During this

portion of closing argument the prosecutor was clearly discussing motive for the criminal acts and not the elements of the crime of child molestation, which the state discussed at another point, making clear it had to show Teters touched the victim for the purpose of sexual gratification. Taken in the context of the entire closing argument, it is clear that the prosecutor did not misstate the law and that any potential confusion that could have resulted from her argument could have been cured by an instruction, and was cured by her discussion of the elements of the crimes charged.

Teters also argues that the prosecutor commented on his right to remain silent when she mentioned to the jury that the victim was interviewed prior to trial by the defense attorney and that she came to court and testified before them. This argument is nonsensical. The prosecutor never mentioned the defendant's right to remain silent or his exercise of his constitutional rights. The prosecutor properly drew the jury's attention to facts it heard at trial: that the victim had previously had to speak to a doctor, her parents, police, and the defense attorney about this case prior to trial. This was in no way a comment on the defendant's right to remain silent. Teters' argument in this respect fails.

Teters further argues the prosecutor vouched for the victim's credibility by arguing to the jury that the victim "told you all what

happened,” and that by saying the victim said what happened to her the prosecutor was giving her personal opinion that the victim was telling the jury what had happened. Teters cannot show that the prosecutor’s statements constituted misconduct which denied him a fair trial. Teters argues that the prosecutor improperly bolstered the victim’s credibility by arguing that the victim told the jury what happened, thus somehow communicating the prosecutor’s opinion the victim was raped and molested. A prosecutor has wide latitude to argue reasonable inferences from the evidence. *State v. Thorgerson*, 172 Wn.2d 438, 448, 258 P.3d 43 (2011) (citing *State v. Hoffman*, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991) and *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009)). A prosecutor also has wide latitude to comment on witness credibility based on the evidence presented at trial. *State v. Lewis*, 156 Wn.App. 230, 240, 233 P.3d 891 (2010). The prosecutor’s arguments here amount to permissible and appropriate argument on the credibility of a witness and argued reasonable inferences from the evidence presented at trial.

Furthermore, the prosecutor’s statements in no way communicated an opinion by the State regarding the victim’s credibility, nor did the statements in any way convey the prosecutor’s personal opinion on the victim’s credibility or the defendant’s guilt. Prosecutors are free to argue inferences from the evidence and prejudicial error only occurs if it is

“clear and unmistakable” that the prosecutor is expressing a personal opinion. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). Given that a prosecutor has “wide latitude” to argue reasonable inferences from the evidence and comment on witness credibility, it is clear that the State’s arguments here were proper. Instead of focusing on snippets of argument taken out of context, this Court looks to the entire argument to determine whether the prosecutor’s argument was improper or vouched for a witness’s credibility. *State v. Jackson*, 150 Wn.App. 877, 884, 209 P.3d 553 (2009). In *Jackson*, the prosecutor argued a police officer’s “testimony was accurate and true” during his closing argument. *Id.* This Court found the prosecutor did not vouch for the officer’s credibility, but rather argued that the “evidence (and reasonable inferences from the evidence) could support the jury’s conclusion that the officers were credible....” *Id.* at 884-85.

At trial here, the prosecutor discussed the evidence presented at trial, discussed why certain witnesses were or were not credible, and why the evidence presented by the State was persuasive. As in *Jackson, supra*, the prosecutor did not vouch for the victim’s credibility, nor did she express a personal opinion on her credibility. *See Jackson*, 150 Wn.App. at 885 (citing to *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995)). The prosecutor properly argued that the victim told the jury what

happened to her. It would have been improper for the prosecutor to tell the jury “I believe the victim, I believe her.” *See State v. Sargent*, 40 Wn.App. 340, 343-44, 698 P.2d 598 (1985) (finding a prosecutor’s statement that “I believe Jerry Lee Brown, I believe him,” was improper). However, the prosecutor’s statements that the victim told the jury what happened was in no way a comment on the prosecutor’s opinion of the victim’s credibility. Any objection at trial would not have been sustained, nor would the fact of objecting or an instruction to disregard have changed the outcome of the trial.

Even if this Court finds the prosecutor’s statements were improper, 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.

A defendant's failure to object to potential misconduct at trial waives his challenge to the misconduct unless no curative instruction would have obviated the prejudicial effect on the jury and the misconduct caused prejudice that had a substantial likelihood of affecting the verdict. *State v. Emery*, 174 Wn.2d 741, 761, 278 P.3d 653 (2012). The main focus of this Court's analysis on a prosecutorial misconduct claim when the defendant did not object at trial is whether the potential prejudice could have been cured by an instruction. *Id.* at 762. Even if the prosecutor's statement was improper, it was a very small portion of his argument, not heavily argued, and could have been cured by an instruction from the court.

In considering the context of the entire trial, the prosecutor's entire closing argument, and the evidence in the case, as the legal standard directs, it is clear the complained-of statements were not improper, and even if they were they do not undermine this Court's confidence in the outcome of the trial. In determining whether misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict, the question is always, "has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?" *Emery*, 174 Wn.2d at 762 (quoting *Slattery v. City of Seattle*, 169 Wn. 144, 148, 13 P.2d 464 (1932) (alteration in original)). The

prosecutor's remarks were not so flagrant as to have engendered a feeling of prejudice in the minds of the jurors.

Further, in determining whether misconduct prejudiced the defendant, Courts should consider the strength of the evidence against the defendant, along with other trial regularities in determining if the misconduct resulted in prejudice. *Anderson*, 153 Wn.App. at 432, n. 8. The prosecutor's arguments contained no other improper remarks, there was no instructional error, and the trial as a whole contained no other misconduct or irregularities. This Court can and should feel assured that no prosecutorial misconduct resulted in prejudice to Teters' trial rights. Teters' claims of prosecutorial misconduct fail.

- a. This court should review the records the trial court reviewed *in camera*.

Teters argues his rights to present a defense and to confront the witnesses against him were violated when the trial court decided not to disclose the victim's therapy records after the court conducted an *in camera* review of the records. However, Teters admittedly does not know what was contained within the records reviewed by the trial court *in camera* and thus cannot legitimately argue his right to present his defense or to confront the victim were infringed upon. The State has no objection to this Court reviewing the records the trial court reviewed *in camera* and

then determining whether the trial court acted within its vast discretion in choosing not to disclose the confidential medical records of the child victim.

V. The trial court properly entered conditions of community custody.

Teters argues the trial court improperly imposed four conditions of community custody. Specifically he argues the trial court erred in prohibiting him from entering business establishments or locations that cater to minor children, in requiring he submit to urine, breath, or other alcohol monitoring, in prohibiting him from possessing drug paraphernalia, and in prohibiting him from viewing or possessing sexually explicit material. The State agrees the trial court improperly included conditions relating to alcohol and drug paraphernalia in Teters' judgment and sentence and therefore conditions 5, 6, and 7 should be stricken from Teters' conditions of community custody. The trial court did properly impose conditions prohibiting Teters from frequenting locations where minors congregate and from viewing or possessing sexually explicit material.

From the trial court's oral ruling at sentencing, it is clear that inclusion of conditions 5, 6, 7, which prohibit Teters from consuming alcohol, require him to submit to breath and urine monitoring to ensure

compliance with that condition, and prohibit him from possessing drug paraphernalia were mistakenly included in the written judgment and sentence. The trial court stated as it rendered its sentence:

Alcohol – I didn't see that alcohol played a huge role in this case. I know there was some talk about red Solo cups and him being a server or a hostess or a host, whatever was going on at the party. So I'm *not* going to make the alcohol a condition of his probation or parole.

RP 977-78 (emphasis added). The inclusion of the conditions prohibiting use of alcohol, possession of drug paraphernalia, and breath and urine testing to monitor compliance with those conditions, appears to be contrary to the trial court's intent at sentencing. For this reason, those conditions should be stricken.

Pursuant to RCW 9.94A.507(5), a person convicted of Attempted Rape of a Child in the Second Degree shall be sentenced to community custody under the supervision of the Department of Corrections for any time he is released from total confinement before expiration of the maximum sentence. RCW 9.94A.507(5). Further, a trial court may impose crime-related prohibitions, affirmative conditions, and statutorily authorized infringements of some constitutional rights as part of an offender's probation. RCW 9.94A.505(9); RCW 9.94A.703(3)(f); *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008); *State v. Riles*, 135 Wn.2d 326, 346-47, 957 P.2d 655 (1998), *abrogated on other grounds by State v.*

Sanchez Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010). A crime-related prohibition must be related to the circumstances of the crime for which the court is imposing a sentence. RCW 9.94A.030(1). Limitations on fundamental rights during community custody are constitutional if they are crime-related and “reasonably necessary to accomplish the essential needs of the state.” *Riles*, 135 Wn.2d at 350. As the imposition of crime-related prohibitions is “necessarily fact-specific and based upon the sentencing judge’s in-person appraisal of the trial and the offender, the appropriate standard of review remains abuse of discretion.” *State v. Rainey*, 168 Wn.2d 367, 374-75, 229 P.3d 686 (2010).

Courts have recognized prevention of harm to children as a compelling state interest justifying limitation of one’s rights. *State v. Letourneau*, 100 Wn.App. 424, 439, 997 P.2d 436 (2000). As Teters was convicted of committing sex crimes against a child, it is clearly a reasonable and compelling state interest to protect other children from Teters. While a condition that orders a defendant not to frequent areas where minor children are known to congregate without specifying the exact off-limits locations is unconstitutionally vague, it is not unconstitutional to prohibit a defendant convicted of crimes against children from being in certain, specified locations where minors congregate. *State v. Irwin*, 191 Wn.App. 644, 655, 364 P.3d 830 (2015);

State v. Nguyen, 2017 WL 3017516 (Div. 1, 2017).¹ In *Nguyen*, the Court of Appeals ruled a trial court can preclude a defendant from entering parks, playgrounds, or schools where children congregate, but that the order must be specific as to the locations in order to survive a vagueness challenge. *Id.*, slip op. at 6. Similarly, in *State v. Starr*, 200 Wn.App. 1070 (Div. 2, October 17, 2017)², this Court upheld the imposition of a community custody condition that was nearly identical to the one Teters now complains of. In *Starr*, the trial court had prohibited the defendant from entering or frequenting business establishments or areas that cater to minor children and gave a list of prohibited locations. *Starr*, slip op. at 2. In analyzing whether the trial court properly imposed this condition in *Starr*, this Court found that the list, though not comprehensive of all prohibited locations, did not render the condition vague. *Id.* at 3. Instead, this Court found this condition “defines the prohibited conduct with sufficient definiteness that ordinary people can understand what conduct is proscribed.” *Id.* (citing *Bahl*, 164 Wn.2d at 752-53. Thus the condition imposed in *Starr* was found to be constitutional and appropriately imposed

¹ GR 14.1(a) allows for citation to unpublished opinions of the courts of Appeals that were filed after March 1, 2013. Such opinions are non-binding and may be accorded such persuasive value as this Court deems appropriate. GR 14.1(a).

² GR 14.1(a) allows for citation to unpublished opinions of the courts of Appeals that were filed after March 1, 2013. Such opinions are non-binding and may be accorded such persuasive value as this Court deems appropriate. GR 14.1(a).

as it provides the defendant with sufficient notice of what he was proscribed from doing.

The same is true in this case. The condition as imposed by the trial court states:

You shall not enter into or frequent business establishments or locations that cater to minor children or locations where minors are known to congregate without prior approval of DOC. Such establishments may include but are not limited to video game parlors, parks, pools, skating rinks, school grounds, malls or any areas routinely used by minors as areas of play/recreation.

CP 391. This condition is nearly identical to the one upheld by this Court in *Starr, supra*. It clearly provides Teters with information about where he may not go, thus giving him sufficient notice and ability to understand what conduct is prohibited. This complies with *Irwin, supra*, and is constitutional.

Finally, Teters argues the community custody condition prohibiting him from using sexually explicit materials is not crime-related and must be stricken. The State agrees there is no evidence that the circumstances of Teters' crimes relate to use or possession of sexually explicit materials and thus this condition is not crime-related and should be stricken.

CONCLUSION

For the reasons discussed above, Teters received a fair trial in all respects. Teters' convictions should be affirmed and the case should be remanded to strike the improper community custody conditions as discussed in the final section.

DATED this 20th day of December, 2017.

Respectfully submitted:

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