

FILED
Court of Appeals
Division II
State of Washington
6/29/2018 3:33 PM
NO. 50287-9

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JASON C. WILKS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Stanley J. Rumbaugh

No. 14-1-04908-2

Brief of Respondent

MARK LINDQUIST
Prosecuting Attorney

By
ROBIN SAND
Deputy Prosecuting Attorney
WSB # 47838

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

1. Whether the trial court properly declined to inquire into whether Juror No. 10 was sleeping when the record reflects that they were awake and there is nothing to indicate the contrary? 1

2. Whether the defendant fails to demonstrate that the trial court violated his right to present a defense where nearly all of the challenged evidence was not only admitted at trial, but also argued thoroughly during closing arguments? 1

3. Whether defendant has failed to show prosecutorial misconduct occurred when none of the prosecutor's comments during closing were improper, let alone flagrant and ill-intentioned? 1

4. Whether the State adduced sufficient evidence for the trier of fact to find the defendant guilty of the crimes of rape of a child, child molestation, unlawful delivery of a controlled substance with sexual motivation and furnishing liquor to a minor with sexual motivation when the defendant provided alcohol and marijuana to five teenage girls in order to rape and/or molest them while they lay intoxicated and unconscious in bed? 1

5. Whether the defendant has failed to show he is entitled to relief under the cumulative error doctrine when he has failed to show any error occurred much less an accumulation of errors?..... 1

B. STATEMENT OF THE CASE..... 1

1. PROCEDURE..... 1

2. FACTS 3

C. ARGUMENT..... 7

1.	THE TRIAL COURT DID NOT ERR WHEN IT DECLINED TO INQUIRE INTO WHETHER JUROR NO. 10 WAS SLEEPING AS THE RECORD REFLECTS ONLY THAT THEY WERE AWAKE AND NOTHING TO THE CONTRARY.	7
2.	THE TRIAL COURT DID NOT DEPRIVE THE DEFENDANT OF HIS RIGHT TO PRESENT A DEFENSE WHERE THE MAJORITY OF THE CHALLENGED EVIDENCE WAS ADMITTED AT TRIAL AND ARGUED DURING CLOSING ARGUMENTS.....	10
3.	DEFENDANT FAILED TO MEET HIS BURDEN OF SHOWING PROSECUTORIAL ERROR OR THAT ANY UNCHALLENGED ARGUMENT WAS FLAGRANT AND ILL-INTENTIONED.	16
4.	THE EVIDENCE WAS SUFFICIENT TO PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT WAS GUILTY OF THE CRIMES CHARGED WHEN THE DEFENDANT REPEATEDLY GAVE FIVE TEENAGED GIRLS ALCOHOL AND MARIJUANA IN ORDER TO TOUCH THEIR VAGINAS WHILE THEY WERE UNCONSCIOUS FROM INTOXICATION.	24
5.	DEFENDANT IS NOT ENTITLED TO RELIEF UNDER THE CUMULATIVE ERROR DOCTRINE WHEN HE HAS FAILED TO SHOW ANY ERROR OCCURRED.	45
D.	CONCLUSION.....	46

Table of Authorities

State Cases

<i>In re Personal Restraint of Lord</i> , 123 Wn.2d 296, 332, 868 P.2d 835 (1994).....	45
<i>State v. Armstrong</i> , 188 Wn. 2d 333, 339, 394 P.3d 373 (2017).....	11
<i>State v. Ashcraft</i> , 71 Wn. App. 444, 859 P.2d 60 (1993).....	7, 8
<i>State v. Atsbeha</i> , 142 Wn.2d 904, 914, 16 P.3d 626 (2001)	11
<i>State v. Barrington</i> , 52 Wn. App. 478, 484, 761 P.2d 632 (1987), review denied, 111 Wn.2d 1033 (1988).....	25
<i>State v. Berg</i> , 181 Wn.2d 857, 867, 337 P.3d 310 (2014).....	25
<i>State v. Binkin</i> , 79 Wn. App. 284, 293-294, 902 P.2d 673 (1995), overruled on other grounds by <i>State v. Kilgore</i> , 147 Wn.2d 288, 53 P.3d 974 (2002).....	17
<i>State v. Brett</i> , 126 Wn.2d 136, 175, 892 P.2d 29 (1995).....	18, 21, 23
<i>State v. Camarillo</i> , 115 Wn.2d 60, 794 P.2d 850 (1990).....	25, 27, 33, 37, 39, 40, 41, 43, 44, 45
<i>State v. Clark</i> , 187 Wn.2d 641, 648-649, 389 P.3d 462 (2017)	11
<i>State v. Coe</i> , 101 Wn.2d 772, 789, 681 P.2d 1281 (1984)	45
<i>State v. Darden</i> , 145 Wn.2d 612, 919, 41 P.3d 1189 (2002)	11
<i>State v. Delmarter</i> , 94 Wn.2d 634, 638, 618 P.2d 99 (1980).....	24
<i>State v. Emery</i> , 174 Wn.2d 741, 761, 278 P.3d 653 (2012).....	19
<i>State v. Evans</i> , 32 Wn.2d 278, 280, 201 P.2d 513 (1949).....	24
<i>State v. Fisher</i> , 165 Wn.2d 727, 746, 202 P.3d 937 (2009).....	16

<i>State v. Gentry</i> , 125 Wn.2d 570, 593-594, 888 P.2d 1105 (1995)	19
<i>State v. Goodman</i> , 150 Wn.2d 774, 781, 83 P.3d 410 (2004).....	25
<i>State v. Holbrook</i> , 66 Wn.2d 278, 401 P.2d 971 (1965)	25
<i>State v. Horn</i> , 415 P.3d 1225, 1228, (2018).....	10, 11
<i>State v. Hughes</i> , 106 Wn.2d 176, 204, 721 P.2d 902 (1986).....	7
<i>State v. Johnson</i> , 90 Wn. App. 54, 72, 950 P.2d 981 (1998).....	8, 45
<i>State v. Jones</i> , 168 Wn.2d 713, 720, 230 P.3d 576 (2010)	10, 11
<i>State v. Jones</i> , 71 Wn. App. 798, 807-08, 863 P.2d 85 (1993).....	18
<i>State v. Lee</i> , 188 Wn.2d 473, 488, 396 P.3d 316 (2017).....	10, 11
<i>State v. Lindsay</i> , 180 Wn.2d 423, 431, 326 P.3d 125 (2014).....	18
<i>State v. Manthie</i> , 39 Wn. App. 815, 820, 696 P.2d 33 (1985).....	16
<i>State v. Monday</i> , 171 Wn.2d 667, 679, 257 P.3d 551 (2011)	19
<i>State v. Partin</i> , 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977).....	25
<i>State v. Russell</i> , 125 Wn.2d 24, 882 P.2d 747 (1994).....	17, 18, 45
<i>State v. Salinas</i> , 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).....	24
<i>State v. Smiley</i> , 195 Wn. App. 185, 195, 379 P.3d 149 (2016).....	19
<i>State v. Stein</i> , 144 Wn.2d 236, 247, 27 P.3d 184 (2001)	17
<i>State v. Stenson</i> , 132 Wn.2d 668, 940 P.2d 1239 (1997). 17, 18, 19, 23, 24	
<i>State v. Strizheus</i> , 163 Wn. App. 820, 262 P.3d 100 (2011).....	11
<i>State v. Swan</i> , 114 Wn.2d 613, 661, 790 P. 2d 610 (1990).....	19
<i>State v. Thorgerson</i> , 172 Wn.2d 438, 443, 258 P.3d 43 (2011).....	16, 19

<i>State v. Turner</i> , 29 Wn. App. 282, 290, 627 P.2d 1323 (1981)	25
<i>State v. Warren</i> , 165 Wn.2d 17, 30, 195 P.3d 940 (2008) <i>cert. denied</i> , 556 U.S. 1192, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009)....	18, 22, 23
<i>State v. Weekly</i> , 41 Wn.2d 727, 252 P.2d 246 (1952).....	16
<i>Welliever v. MacNulty</i> , 50 Wn.2d 224, 310 P.2d 531 (1957).....	25

Federal and Other Jurisdictions

<i>Commonwealth v. Tedford</i> , 598 Pa. 639, 960 A.2d 1, 28-29 (Pa. 2008).	16
<i>State v. Fauci</i> , 282 Conn. 23, 917 A.2d 978, 982 n. 2 (2007).....	16
<i>State v. Leutschaft</i> , 759 N.W.2d 414, 418 (Minn. App. 2009), <i>review denied</i> , 2009 Minn. LEXIS 196 (Minn., Mar. 17, 2009).....	16

Constitutional Provisions

Sixth Amendment	10
-----------------------	----

Statutes

RCW 2.36.110	7
--------------------	---

Rules and Regulations

CrR 6.5	7, 8
ER 401	10
ER 404(a)(3)	13
ER 607	13
ER 608	13, 14
ER 608(b).....	13, 15

ER 609	13
GR 4.1	10
 Other Authorities	
American Bar Association Resolution 100B (Adopted Aug. 9-10, 2010), http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/100b.authcheckdam.pdf (last visited June 28, 2016)	16
 <i>Merriam Webster's Third New International Dictionary</i> (2002).....	21
National District Attorneys Association, Resolution Urging Courts to Use “Error” Instead of “Prosecutorial Misconduct” (Approved April 10, 2010). http://www.ndaa.org/pdf/prosecutorial_misconduct_final.pdf (last visited June 28 2016)	16

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

1. Whether the trial court properly declined to inquire into whether Juror No. 10 was sleeping when the record reflects that they were awake and there is nothing to indicate the contrary?
2. Whether the defendant fails to demonstrate that the trial court violated his right to present a defense where nearly all of the challenged evidence was not only admitted at trial, but also argued thoroughly during closing arguments?
3. Whether defendant has failed to show prosecutorial misconduct occurred when none of the prosecutor's comments during closing were improper, let alone flagrant and ill-intentioned?
4. Whether the State adduced sufficient evidence for the trier of fact to find the defendant guilty of the crimes of rape of a child, child molestation, unlawful delivery of a controlled substance with sexual motivation and furnishing liquor to a minor with sexual motivation when the defendant provided alcohol and marijuana to five teenage girls in order to rape and/or molest them while they lay intoxicated and unconscious in bed?
5. Whether the defendant has failed to show he is entitled to relief under the cumulative error doctrine when he has failed to show any error occurred much less an accumulation of errors?

B. STATEMENT OF THE CASE.

1. PROCEDURE

On December 9, 2014, the State charged Jason Wilks, hereinafter referred to as "the defendant", with one count of rape of a child in the second degree (count I), one count of child molestation in the second

degree (count II), two counts of rape of a child in the third degree (counts III and VII), two counts of child molestation in the third degree (counts IV and X), two counts of unlawful delivery of a controlled substance to a minor (counts V and VIII) and three counts of furnishing liquor to a minor (counts VI, IX, XI). CP 1-5.

On August 26, 2016, the State filed an amended information adding the following charges: one count of rape of a child in the third degree (count XII), one count of unlawful delivery of a controlled substance to a minor (count XIII) and two counts of furnishing liquor to a minor (counts XIV and XVI). CP 225-231.

Jury trial began on September 9, 2016 and was held before the honorable Judge Stanley Rumbaugh. 9/22/16 RP 138.¹ On October 13, 2016, the State filed a second amended information amending count I to rape of a child in the third degree and counts VII and XII to child molestation in the third degree. CP 257-263.

The jury found the defendant guilty beyond a reasonable doubt of one count of child molestation in the second degree (count II), one count of rape of a child in the third degree (count III), five counts of child molestation in the third degree (counts IV, VII, X, XII and XV), three

¹ The verbatim report of proceedings consists of 32 volumes which will be referred to in the same way as appellant's opening brief for purposes of clarity. They are referred to by date and page number of that corresponding date.

counts of unlawful delivery of a controlled substance to a minor (count (V, VIII, XIII), and five counts of furnishing liquor to a minor (counts VI, IX, XI, XIV and XVI). CP 347-369. The jury found the defendant not guilty of count I. CP 327. The jury also found that the defendant committed the following crimes with sexual motivation: unlawful delivery of a controlled substance to a minor (counts V, VIII and XIII) and furnishing liquor to a minor (count XVI). CP 343-346.

Sentencing was held on January 27, 2017. 1/27/17 RP 33-37. The Court sentenced the defendant to a total of 280 months in custody, to have no contact with the victims and the mandatory financial obligations.

1/27/17 RP 33-37. CP 343-346, 370-379.

The defendant filed a Notice of Appeal on March 13, 2017. CP 390.

2. FACTS

The defendant raped and/or molested five teenaged girls over the span of two years by getting them drunk and high at his home. 9/28/16 RP 116-117, 9/28/16 RP 128, 10/10/16 RP 144, 10/6/16 RP 75, 79-80, 10/4/16 RP 129-132, 9/27/16 RP 56. The victims were friends of his teenage daughter Samantha Wilks. 9/27/16 RP 34-35, 9/28/16 RP 41, 9/28/16 RP 107, 10/4/16 RP 121, 10/6/16 RP 54. The defendant grew marijuana in his bedroom and gave it to the victims to smoke. 9/28/16 RP

109-110, 9/27/16 40-39. He gained the girls' trust by giving them rides, buying them gifts, taking them on vacation, letting them stay and party at his house and providing marijuana and alcohol. 9/27/16 RP 39-40, 9/28/16 RP 109-110, 86, 10/5/16 RP 31-32, 10/6/16 RP 99. He complimented their looks and messaged them on social media. 10/6/16 RP 65-67.

The victims were all around the age of 15 at the time of the incidents: BS² (dob 3/24/99), RR (dob 12/16/99), AB (dob 11/25/98), MR (dob 10/1/98) and LM (dob 6/4/99). 9/27/16 RP 31, 9/28/16 104.

The defendant told BS that he'd had a crush on her since the 6th grade when she first started coming over to his house. 9/28/16 RP 120. BS recalled being molested by the defendant for the first time in 7th grade. 9/28/16 RP 116-117. After a typical night of partying and drinking at his house, BS woke up to the defendant touching her buttocks, breasts and rubbing her vagina. 9/28/16 RP 116-117. The defendant raped BS when she was in 8th grade. 9/28/16 RP 128. Similar to when he molested her, BS woke up to the defendant touching her vagina, only this time he inserted his finger inside of her. 9/28/16 RP 128. The defendant also tried to push his erect penis into her from behind. 9/28/16 RP 126-128. On multiple occasions, BS woke with her pants down, despite being fully dressed

² Because the victims were minors at the time of the incident, that State will refer to them by their initials. The State means no disrespect.

when she fell asleep, after a night of drinking and smoking too much at the defendant's house. 9/28/16 RP 131.

RR frequently spent the night at the defendant's house where she, the defendant, his wife Katie Wilks and Samantha would drink alcohol, smoke marijuana and have bon fires. 10/10/16 RP 123. Several other girls attended these parties and spend the night. 10/10/16 RP 124, 129-130. The defendant molested RR in the summer of 2014. 10/10/16 RP 131, 144. The defendant gave RR rum and followed her onto Samantha's bed where she'd passed out from drinking. 10/10/16 RP 142-144. The defendant touched RR's vagina as she lay in bed. 10/10/16 RP 144. RR experienced panic attacks and nightmares as a result of being molested by the defendant. 10/10/16 RP 146.

AB first met the defendant at Samantha Wilks' 15th birthday party. 10/6/16 RP 53. Thereafter, she regularly spent time at the defendant's house where he provided her with alcohol and marijuana. 10/6/16 RP 54-55. The defendant made her a part of the family and took her on vacation. 10/6/16 RP 99. He told her he liked her because she was more mature than the other girls and bought her painting. 10/6/16 RP 66-67. He told her she was beautiful on social media. 10/6/16 RP 65. The defendant molested her in the summer of 2014. 10/6/16 RP 75, 79-80. On one occasion, AB was intoxicated after playing a drinking game called "Kings Cup" and smoking

marijuana given to her by the defendant. 10/6/16 RP 77-78. She woke up in the defendant's bed to him touching her vagina. 10/6/16 RP 80. The defendant told her, "Just pretend I'm Devon. it's okay." 10/6/16 RP 79-80. Devon was a boy AB was seeing at the time. 10/6/16 RP 80. AB was so intoxicated that she couldn't stop the defendant as he molested her. 10/6/16 RP 81.

MR also spent a lot of time at the defendant's house where he gave her alcohol and marijuana. 10/4/16 RP 122-124. For her 16th birthday, the defendant bought her a \$190 bracelet. 10/5/16 RP 31-32. The defendant molested her before that birthday. 10/4/16 RP 127, 131. The defendant took her to a liquor store where he bought her alcohol to play a drinking game. 10/4/16 RP 127-128. MR fell asleep in the defendant's bed and woke up to him touching her vagina. 10/4/16 RP 129-132. After MR told Katie Wilks about being molested, the defendant told MR that he confused her with his wife. 10/5/16 RP 33. He also told her not to talk about it or that she wouldn't be allowed over anymore. 10/5/16 RP 33.

LM spent a lot of time at the defendant's house when she was in 7th and 8th grade. 9/27/16 RP 35. The defendant treated her like family, so she considered him a second father. 9/27/16 RP 42. The defendant texted LM "I'm bored. You need to turn 18 already." 9/27/16 RP 43. After a football game, the defendant played a drinking game with her where she

ended up consuming half a gallon of whiskey. 9/27/16 RP 45-47. LM laid down in the defendant's bed because she felt dizzy from drinking. 9/27/16 RP 54. She woke up to the defendant biting her ear, rubbing her buttocks and touching her vagina. 9/27/16 RP 56. LM was in shock. 9/27/16 RP 57. The next morning, LM woke up with her underwear pulled down by her thighs, and pants pulled all of the way up. 9/27/16 RP 57.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ERR WHEN IT DECLINED TO INQUIRE INTO WHETHER JUROR NO. 10 WAS SLEEPING AS THE RECORD REFLECTS ONLY THAT THEY WERE AWAKE AND NOTHING TO THE CONTRARY.

The trial court's decision to excuse a juror is reviewed for an abuse of discretion. *State v. Hughes*, 106 Wn.2d 176, 204, 721 P.2d 902 (1986); *State v. Ashcraft*, 71 Wn. App. 444, 859 P.2d 60 (1993). Under RCW 2.36.110, the judge has a duty to "excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of... inattention... or by reason of conduct or practices incompatible with proper and efficient jury service." (Emphasis added.) CrR 6.5 enables the court to seat alternate jurors when the jury is selected. Further, CrR 6.5 states that: "[i]f at any time before submission of the case to the jury a juror is found unable to perform the duties the court shall order the juror discharged." (Emphasis added.) RCW 2.36.110 and CrR

6.5 place a continuous obligation on the trial court to excuse any juror who is unfit and unable to perform the duties of a juror.

CrR 6.5 does not require a hearing even after the case has been given to the jury. *Ashcraft*, 71 Wn. App. at 462, 859 P.2d 60. While CrR 6.5 contemplates a formal proceeding, which may include brief voir dire before substituting a juror, this statement applies where the case has already gone to the jury and the alternates have been temporarily excused. *State v. Johnson*, 90 Wn. App. 54, 72, 950 P.2d 981 (1998), *see also Ashcraft*, 71 Wn. App. at 462, 859 P.2d 60. The purpose of a “formal proceeding” is two fold. First, it verifies that the juror is unable to serve. *Johnson*, 90 Wn. App. at 73, 950 P.2d 981. Second, it demonstrates that the alternate has remained impartial after being temporarily dismissed. *Ashcraft*, 71 Wn. App. at 462, 859 P.2d 60.

In the instant case, there is nothing in the record to indicate that any juror was sleeping. At trial, the defendant indicated that juror number 10 was apparently sleeping. 11/1/16 RP 47. Although defense counsel put it on the record on behalf of his client, he made no request for an inquiry or motion to strike the juror for inattentiveness. The court declined to take action on the matter given that there was no indication that the juror was sleeping. 11/1/16 RP 47-48. The court stated the following:

So I have been vigilantly watching the jury. I didn't see anyone sleeping. We did get up and stretch. It's a little subjective, but I thought perhaps their attention was starting to fade and so we got up for a stretch break. ***I would observe that yesterday – what I have regarding the sleeping incident is I didn't see it. None of my staff saw it. Neither counsel or any defense or prosecution team saw it or brought it to the court's attention.*** What I have are essentially observations from the gallery. And I don't think that there is cause to inquire of the jurors, you know whether they were sleeping or not, given the fact that nobody that was directly involved with the case either saw it or brought it to the Court's attention.

I will continue to have breaks or do whatever I can to ensure the attentiveness of the jurors, unless something happens and one of them just tips over and starts snoring. If you see anything, please bring it to my attention in a timely way. That's about all I can do.

11/1/16 RP 47-48.

Defense counsel did not object to the court's ruling or request further inquiry. Defendant claims that the trial court abused its discretion by "failing to inquire about a sleeping juror." Brief of Appellant at 52-53. Defendant's claim fails as there is nothing in the record to indicate that juror number 10 was sleeping. Thus, the trial court did not err when it did not inquire in the matter. As such, this Court should dismiss this claim and affirm his convictions.

2. THE TRIAL COURT DID NOT DEPRIVE THE DEFENDANT OF HIS RIGHT TO PRESENT A DEFENSE WHERE THE MAJORITY OF THE CHALLENGED EVIDENCE WAS ADMITTED AT TRIAL AND ARGUED DURING CLOSING ARGUMENTS.

This Court reviews a Sixth Amendment right to present a defense claim under a three-step test. First, the evidence that a defense desires to introduce “must be of at least minimal relevance.” *State v. Horn*³, 415 P.3d 1225, 1228, (2018) citing *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). A defendant only has a right to present evidence that is relevant. *Id.*; ER 401. Second, if relevant, the burden shifts to the State to show that the relevant evidence “is so prejudicial as to disrupt the fairness of the fact-finding process at trial.” *Jones*, 168 Wn.2d at 720, 230 P.3d 576. Third, the State’s interest in excluding prejudicial evidence must also be balanced against the defendant’s need for the information sought, and relevant information can be withheld only if the State’s interest outweighs the defendant’s need. *Id.* The same test is used to review claims that the right to confront witnesses was violated. *State v. Lee*, 188 Wn.2d 473, 488, 396 P.3d 316 (2017).

³ This is an unreported case. However, the State cites to this authority pursuant to GR 14.1 which states that unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities and may be accorded such persuasive value as the court deems appropriate.

Constitutional issues are reviewed de novo. *State v. Armstrong*, 188 Wn. 2d 333, 339, 394 P.3d 373 (2017). On the other hand, evidentiary rulings are reviewed for an abuse of discretion. *State v. Horn*, 415 P.3d at 1229, citing *State v. Strizheus*, 163 Wn. App. 820, 829, 262 P.3d 100 (2011). For example, in *Lee* Wn.2d at 486-488, 396 P.3d 316, our Supreme Court held that we review for an abuse of discretion a trial court's ruling limiting cross-examination of a witness that implicated the defendant's constitutional right of confrontation. In *State v. Darden*, 145 Wn.2d 612, 919, 41 P.3d 1189 (2002), our Supreme Court, in a confrontation clause challenge, also held that a trial court's ruling on the admissibility of evidence is reviewed for an abuse of discretion. In *Clark*, the court held the following:

We review the trial court's evidentiary rulings for abuse of discretion and defer to those rulings unless, "no reasonable person would take the view adopted by the trial court." *State v. Atsbeha*, 142 Wn.2d 904, 914, 16 P.3d 626 (2001). If the court excluded relevant defense evidence, we determine as a matter of law whether the exclusion violated the constitutional right to present a defense. *State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576 (2010).

State v. Clark, 187 Wn.2d 641, 648-649, 389 P.3d 462 (2017).

- a. Defendant was not deprived of his constitutional right to present a defense where nearly all of the challenged factual allegations were not only admitted at trial, but argued during closing arguments.

Defendant claims that he was deprived of his constitutional right to present a defense. Brief of Appellant at 48-49. This claim fails as all but one of the challenged statements were admitted at trial. Defendant's argument is predicated on the following factual assertions being excluded from trial. Each claim is unsupported by the record as they were all admitted at trial.

- AB brought alcohol to Samantha. 10/27/16 RP 148
- MR was excluded because defendant and his wife found some objectionable and "extremely inappropriate" texts about her on Facebook that were on a backup of Sam's phone. 11/1/16 R 11-14.
- They prohibited Sam from going to MR's house. 11/1/16 15-16.
- LM had stolen. 10/27/16 RP 136.

Defendant argues that "the trial court's exclusion of the reasons for the decision by defendant and his wife to exclude the girls failed to permit the jury to evaluate the defendant's defense." Brief of Appellant at 49. Contrary to his claims, all of these challenged statements were not only admitted at trial, but also argued thoroughly by defense counsel during closing arguments. Defense counsel argued that the victims fabricated

their allegations because he and his wife told them individually that they were no longer welcome at his house. 11/3/16 RP 123, 146. Defense counsel also argued that the victims retaliated against their exclusion by colluding to falsify the sexual abuse claims. 11/3/16 RP 123, 135. He further argued that LM was excluded for smoking marijuana at his house and having “objectionable material” on her cell phone. 11/3/16 RP 135.

- b. The trial court did not abuse its discretion by excluding extrinsic evidence pursuant to ER 608.

Evidence of a witness’s character, trait of character, or other wrongs or acts are “not admissible for the purpose of proving action in conformity therewith on a particular occasion” except as provided in ER 607, 608 and 609. ER 404(a)(3). ER 608 provides that specific instances of a witness’s conduct, introduced for the purpose of attacking his or her credibility, *may not be proved by extrinsic evidence*, but may “in the discretion of the court, if probative of truthfulness, *be inquired into on cross examination* of the witness.. concerning the witness’ character for truthfulness.” ER 608(b)(emphasis added).

Only one of the challenged factual assertions was excluded at trial. Defendant claims that his right to present a defense was violated when the court excluded further testimony regarding why “Sam noted that BS was not allowed in her parents’ bedroom because she had stolen from Katie as

well as Sam.” Brief of Appellant at 49. This claim fails as further testimony was properly excluded pursuant to ER 608.

At trial, Samantha Wilks testified to the following during defense counsel’s direct examination:

DEFENSE: Did your mom and dad – were there certain girls that your mom and dad did not allow in their bedroom?

WITNESS: Yes.

DEFENSE: Who?

WITNESS: Brittany, Michaela and Rhianon
Outside the presence of the jury, the court granted defense counsel’s request to inquire the following from the witness:

DEFENSE: So why weren’t Brittany and Michaela and Rhianon allowed in your parents’ bedroom, if you know?

WITNESS: Brittany was not allowed in my parents’ room because she stole from me and my mom. Michaela was not allowed in my room because of the same thing. She stole from me and my mom. And Lilian – they didn’t like Lilian in my room because she’s been known to lie, and she’s also stole from me and my mom.

10/27/16 RP 135-136

Defense counsel requested that he be allowed to inquire into more regarding this testimony stating the following:

DEFENSE: I guess the defense position would be pursuant to 608 that I would be allowed to inquire with respect to these specific instances. I would acknowledge the witness did not indicate that she had personal knowledge seeing any of these individuals.

THE COURT: Right. So now that would be a hearsay problem.

DEFENSE: Well, I think I would ask that I be allowed to inquire of the witness how she knows.

THE COURT: I would observe that 608 (b), which we're referring to, states in relevant part that specific acts of conduct in the direction of the Court, if probative of truthfulness or untruthfulness, may be inquired into on cross-examination of the witness. This is direct examination, so I just don't see it. I'm not going to allow it.

10/27/16 RP 138-140.

Here, the trial court properly excluded this testimony pursuant to ER 608(b) which specifically prohibits admitting evidence of specific instances of conduct for the purpose of attacking or supporting the witness' credibility. Additionally, the trial court properly excluded this evidence because this type of evidence may only be admitted on cross-examination. ER 608(b). Samantha Wilks testified to the instances of alleged theft on direct examination by defense counsel. Thus, defense counsel could not elicit this examination on cross examination as ER 608(b) requires.

All but one of the challenged factual assertions were not only admitted at trial, but also argued at length during closing arguments. The only challenged factual assertion that was excluded was properly done so pursuant to ER 608(b). Thus, the defendant's constitutional right to

present a defense was not violated and this Court should dismiss his claims and affirm his convictions.

3. DEFENDANT FAILED TO MEET HIS BURDEN OF SHOWING PROSECUTORIAL ERROR⁴ OR THAT ANY UNCHALLENGED ARGUMENT WAS FLAGRANT AND ILL-INTENTIONED.

To prove that a prosecutor's actions constitute error, a defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing *State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952)). A prosecuting attorney represents the people and presumptively acts with impartiality in the interest of justice. *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011) (citing *State v. Fisher*, 165 Wn.2d 727, 746, 202 P.3d 937 (2009)).

⁴ "'Prosecutorial misconduct' is a term of art, but is really a misnomer when applied to mistakes made by the prosecutor during trial." *State v. Fisher*, 165 Wn.2d 727, 740 n. 1, 202 P.3d 937 (2009). Recognizing that words pregnant with meaning carry repercussions beyond the pale of the case at hand can undermine the public's confidence in the criminal justice system, both the National District Attorney's Association (NDAA) and the American Bar Association's Criminal Justice Section (ABA) urge courts to limit the use of the phrase "Prosecutorial misconduct" for intentional acts, rather than mere trial error. See American Bar Association Resolution 100B (Adopted Aug. 9-10, 2010), http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/100b_authcheckdam.pdf (last visited June 28, 2016). National District Attorneys Association, Resolution Urging Courts to Use "Error" Instead of "Prosecutorial Misconduct" (Approved April 10, 2010). http://www.ndaa.org/pdf/prosecutorial_misconduct_final.pdf (last visited June 28 2016). A number of appellate courts agree that the term "prosecutorial misconduct" is an unfair phrase that should be retired. See e.g., *State v. Fauci*, 282 Conn. 23, 917 A.2d 978, 982 n. 2 (2007); *State v. Leutschaft*, 759 N.W.2d 414, 418 (Minn. App. 2009), review denied, 2009 Minn. LEXIS 196 (Minn., Mar. 17, 2009); *Commonwealth v. Tedford*, 598 Pa. 639, 960 A.2d 1, 28-29 (Pa. 2008). In responding to appellant's arguments, the State will use the phrase "prosecutorial error." The State urges this court to use the same phrase in its opinions.

The defendant has the burden of establishing that the alleged error is both improper and prejudicial. *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). Even if the defendant proves that the conduct of the prosecutor was improper, the error does not constitute prejudice unless the appellate court determines there is a substantial likelihood the error affected the jury's verdict. *Id.* at 718-19. If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. *State v. Binkin*, 79 Wn. App. 284, 293-294, 902 P.2d 673 (1995), *overruled on other grounds* by *State v. Kilgore*, 147 Wn.2d 288, 53 P.3d 974 (2002). Juries are presumed to follow the court's instructions. *State v. Stein*, 144 Wn.2d 236, 247, 27 P.3d 184 (2001).

When reviewing an argument that has been challenged as improper, the court should review the context of the whole argument, the issues in the case, the evidence addressed in the argument and the instructions given to the jury. *State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994). "Remarks of the prosecutor, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective." *Russell*, 125 Wn.2d at 86. The

prosecutor is entitled to make a fair response to the arguments of defense counsel. *Id.* at 87.

A prosecutor enjoys reasonable latitude in arguing inferences from the evidence, including inferences as to witness credibility. *State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008) *cert. denied*, 556 U.S. 1192, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009); *Stenson*, 132 Wn.2d at 727. An error only arises if the prosecutor clearly expresses a personal opinion as to the credibility of a witness instead of arguing an inference from the evidence. *Warren*, 165 Wn.2d at 30. A prosecutor may not make statements that are unsupported by the evidence or invite jurors to decide a case based on emotional appeals to their passion or prejudices. *State v. Jones*, 71 Wn. App. 798, 807-08, 863 P.2d 85 (1993).

A prosecutor is, however, allowed to argue that the evidence does not support a defense theory. *Russell*, 125 Wn.2d at 87; *State v. Lindsay*, 180 Wn.2d 423, 431, 326 P.3d 125 (2014). The prosecutor is entitled to make a fair response to the arguments of defense counsel. *Russell*, 125 Wn.2d at 87. And, a prosecutor may also argue credibility of witnesses. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995) (a prosecutor may draw an inference from the evidence as to why the jury would want to believe a witness).

Failure by the defendant to object to an improper remark constitutes a waiver of that error unless the remark is deemed so “flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *Stenson*, 132 Wn.2d at 719 (citing *State v. Gentry*, 125 Wn.2d 570, 593-594, 888 P.2d 1105 (1995)). “Under this heightened standard, the defendant must show that (1) ‘no curative instruction would have obviated any prejudicial effect on the jury’ and (2) the [error] resulted in prejudice that ‘had a substantial likelihood of affecting the jury verdict.’” *State v. Emery*, 174 Wn.2d 741, 761, 278 P.3d 653 (2012) (quoting *Thorgerson*, 172 Wn.2d at 455).

Failure to object or move for mistrial at the time of the argument “strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.” *State v. Swan*, 114 Wn.2d 613, 661, 790 P. 2d 610 (1990); see also *State v. Monday*, 171 Wn.2d 667, 679, 257 P.3d 551 (2011). “Accordingly, reviewing courts focus less on whether the prosecutor’s [error] was flagrant or ill-intentioned and more on whether the resulting prejudice could have been cured by an instruction.” *State v. Smiley*, 195 Wn. App. 185, 195, 379 P.3d 149 (2016).

In this case, defendant claims the State committed reversible error during closing arguments by stating “misstatements of the evidence, statements referring to evidence that was never adduced at trial, impermissible vouching for the credibility of the State’s witnesses and other acts of misconduct”. Brief of Appellant at 57. Defendant failed to object to any of the alleged error during trial.

For the reasons set forth below, defendant fails to demonstrate that the prosecutor’s actions were improper, prejudicial, or flagrant and ill-intentioned. Defendant’s claim of prosecutorial error accordingly fails.

Defendant assigns error to the following statements:

- While they were unconscious he would move their bodies, touch their bodies, put his hands in their pants, penetrate their vagina. He would rape them. He would molest them. 11/3/16 RP 43. Brief of Appellant at 58.

Defendant claims that this was prosecutorial error because the State was essentially arguing that the defendant had raped every one of the five girls. Brief of Appellant at 58. This claim fails as the prosecutor’s statements were supported by the evidence that BS and LM were raped. BS testified that the defendant put his finger in her vagina. 9/28/16 RP 128. LM testified that when she woke up, it felt as if her vagina had been stimulated. 9/27/16 RP 61. The prosecutor never said that the defendant raped *all* five of the victims.

- The deputy prosecutor misstated the evidence when he asserted that the alleged victims were unconscious. Brief of Appellant at 58.

This claim fails as several of the victims testified that they were passed out or “blacked out” from alcohol when the defendant molested them. 9/27/16 RP 54-55, 10/6/16 RP 81, 10/10/16 RP 142.

Unconscious is defined as “not knowing or perceiving: not aware”.

Merriam Webster’s Third New International Dictionary (2002).

Accordingly, the State properly argued that the victims were unconscious when the defendant raped and/or molested them.

- The deputy “prosecutor repeatedly argued that the defendant purchased the “expensive” bracelet for LM”. 11/3/16 RP 60-61, 102.

This argument was proper given that it was supported by the record. 10/5/16 RP 30-32. Michaela Roll testified that the defendant bought her a nearly \$190 bracelet for her 16th birthday. 10/5/16 RP 30-32.

- The deputy prosecutor vouched for the credibility of his witnesses by arguing that “the only conclusion that supported by the evidence is that LM BS MR AB and RR are telling the truth”. Brief of Appellant at 59.

This claim fails as a prosecutor may argue the credibility of witnesses. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995) (a prosecutor may draw an inference from the evidence as to why the jury would want to believe a witness). An error only arises if the prosecutor

clearly expresses a personal opinion as to the credibility of a witness instead of arguing an inference from the evidence. *Warren*, 165 Wn.2d at 30. The State did not express any personal opinion or improperly vouch for the credibility of the witnesses. As such, the argument was proper.

- The deputy prosecutor misstated the evidence presented by Daniel Herzfeldt by stating that there were “piles of girls” on the defendant’s bed. Brief of Appellant at 59.

Specifically, defendant claims that Herzfeldt “said no such thing in his testimony.” Brief of Appellant at 59. This claim fails as Herzfeldt did in fact testify to this. 10/20/16 RP 107-108. The record reflects the following:

STATE: When we chatted last week, you mentioned that sometimes you would look in and they would all be kind of piled up on the bed?

WITNESS: correct, sir.

10/20/16 RP 107-108.

- The deputy prosecutor misstated Nathan Wilks’ testimony that he saw “the defendant and girls drinking in his room on homecoming.” Brief of Appellant at 59.

This claim fails because this statement was also supported by the record. Nathan Wilks testified that the defendant kept alcohol in his room

and that Samantha and the victims would watch movies in his bedroom.

10/24/16 RP 141-145.

- The deputy prosecutor stated when the victim came forward, the defendant would take steps to silence them, “threatening to call state officials on their parents.” Brief of Appellant at 60.

This claim fails because this statement was also supported by the record. LM testified that the defendant threatened to call CPS on her family if she reported the defendant for sexually abusing her. 9/27/16 RP 93.

- The deputy prosecutor urged the jury to convict based on matters outside the evidence by referring to LM’s body language in accessing her credibility. Brief of Appellant at 60.

This claim also fails as the State is allowed to argue the credibility of witnesses. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995) (a prosecutor may draw an inference from the evidence as to why the jury would want to believe a witness). A prosecutor enjoys reasonable latitude in arguing inferences from the evidence, including inferences as to witness credibility. *State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008) *cert. denied*, 556 U.S. 1192, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009); *Stenson*, 132 Wn.2d at 727.

- The deputy prosecutor forgot his obligation to seek a fair trial for the defendant when he put in his Power Point presentation that the crimes were committed, that the defendant did it, and that Justice Guilty. Brief of Appellant at 61.

This claim fails as defendant is unable to articulate how this argument is even improper. Defendant fails to meet his burden of establishing that the alleged error is improper and prejudicial. *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). Contrary to the defendant's claims, all of the prosecutor's statements during closing arguments were supported by the evidence and proper. Thus, defendant fails to demonstrate prosecutorial error and this Court should dismiss his claims and affirm his convictions.

4. THE EVIDENCE WAS SUFFICIENT TO PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT WAS GUILTY OF THE CRIMES CHARGED WHEN THE DEFENDANT REPEATEDLY GAVE FIVE TEENAGED GIRLS ALCOHOL AND MARIJUANA IN ORDER TO TOUCH THEIR VAGINAS WHILE THEY WERE UNCONSCIOUS FROM INTOXICATION.

The sufficiency of the evidence is determined by whether any rational trier of fact could find the defendant guilty beyond a reasonable doubt after viewing the evidence in the light most favorable to the State. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

"In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence." *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Verdicts "in either criminal or civil cases may be based entirely upon circumstantial evidence." *State v. Evans*, 32 Wn.2d 278, 280, 201 P.2d 513 (1949).

“Credibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Conflicting evidence is judged solely by the jury. *Welliever v. MacNulty*, 50 Wn.2d 224, 310 P.2d 531 (1957). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the jury should be upheld. *Camarillo*, 115 Wn.2d at 71.

A challenge to the sufficiency of the evidence admits the truth of the State’s evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (*citing State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). “All reasonable inferences must be drawn in favor of the State and interpreted most strongly against the defendant” when the sufficiency of the evidence is challenged. *Camarillo*, 115 Wn.2d at 71. (*citing State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). Criminal intent may be inferred from conduct where “it is plainly indicated as a matter of logical probability.” *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). The weight of the evidence is determined by the fact finder and not the appellate court. *Id.* at 783. Sufficiency of the evidence is reviewed *de novo*. *State v. Berg*, 181 Wn.2d 857, 867, 337 P.3d 310 (2014).

- a. The State adduced sufficient evidence to prove beyond a reasonable doubt that the defendant committed the crime of child molestation in the second degree as charged in Count II.

In order to convict the defendant of the crime of child molestation in the second degree as charged in Count II, the State needed to prove the following elements beyond a reasonable doubt:

- (1) That or about the time period between March 24, 2011, and March 23, 2013, the defendant had sexual contact with BS;
- (2) That BS was at least twelve years old but less than fourteen years old at the time of the sexual contact and was not married to the defendant;
- (3) That BS was at least thirty-six months younger than the defendant; and
- (4) That this act occurred in the State of Washington.

The State proved beyond a reasonable doubt that the defendant committed the crime of child molestation in the second degree. At trial, BS testified that the defendant fondled her breasts, thighs and vagina as she lay intoxicated in bed at his house. 9/28/16 RP 112, 116-117, 121-122. BS testified that it occurred when she was in 7th grade and that her birthdate is March 24, 1999. 9/28/16 RP 104, 114, 111-112. The defendant's birthdate is September 26, 1978, he lives in Pierce County, Washington and was never married to any of the victims. 10/24/16 RP 115, 11/2/16 RP 26.

The defendant claims that the evidence was insufficient because of delayed disclosure and lack of corroborating evidence. Brief of Appellant at 64. These claims fail as they merely attack the credibility of the witness. “Credibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The defendant also claims that BS “did not know when any of these acts occurred.” Brief of Appellant at 64. This claim also fails as BS testified that this occurred when she was in the 7th grade. 9/28/16 114-115, 129.

- b. The State adduced sufficient evidence to prove beyond a reasonable doubt that the defendant committed the crime of rape of a child in the third degree as charged in Count III.

In order to convict the defendant of the crime of rape of a child in the third degree as charged in Count III, the State needed to prove the following elements beyond a reasonable doubt:

- (1) That on or about the time period between August 1, 2012, and September 30, 2014, the defendant had sexual intercourse with BS;
- (2) That BS was at least fourteen years old but was less than sixteen years old at the time of the sexual intercourse and was not married to the defendant;
- (3) That BS was at least forty-eight months younger than the defendant; and
- (4) That this act occurred in the State of Washington.

The State proved beyond a reasonable doubt that the defendant committed the crime of rape of a child in the third degree. BS testified that the defendant penetrated her vagina with his finger. 9/28/16 RP 124. BS testified that it occurred when she was in 8th grade and that her birthdate is March 24, 1999. 9/28/16 RP 104, 128. The defendant's birthdate is September 26, 1978, he lives in Pierce County, Washington and was never married to any of the victims. 10/24/16 RP 115, 11/2/16 RP 26.

The defendant claims that the evidence was insufficient because "BS did not know whether the touching was real or a nightmare". Brief of Appellant at 65. This claim fails as BS testified that she was raped and knew it was not a nightmare. 9/28/16 132-133. As argued *supra*, an attack on the credibility of BS on review is inappropriate. The defendant also claims that BS "had no idea when these acts occurred". This claim also fails because she testified the defendant raped her when she was in the 8th grade. 9/28/16 RP 104, 128.

- c. The State adduced sufficient evidence to prove beyond a reasonable doubt that the defendant committed the crime of child molestation in the third degree as charged in Count IV.

In order to convict the defendant of the crime of child molestation in the third degree as charged in Count IV, the State needed to prove the following elements beyond a reasonable doubt:

- (1) That on or about the time period between August 1, 2011, and September 30, 2014, the defendant had sexual contact with BS;
- (2) That BS was at least fourteen years old but less than sixteen years old at the time of the sexual contact and was not married to the defendant;
- (3) That BS was at least forty-eight months younger than the defendant; and
- (4) That this act occurred in the State of Washington.

The State proved beyond a reasonable doubt that the defendant committed the crime of child molestation in the third degree. At trial, BS testified the defendant touched her butt, breasts, vagina and even tried to push his erect penis in her from behind. 9/28/16 RP 122-128. BS testified that it occurred between the 7th and 9th grade and that her birthdate is March 24, 1999. 9/28/16 RP 104, 128. The defendant's birthdate is September 26, 1978, he lives in Pierce County, Washington and was never married to any of the victims. 10/24/16 RP 115, 11/2/16 RP 26.

The defendant claims that the evidence was insufficient because "the State failed to prove any separate and distinct acts". Brief of Appellant at 65. This claim fails as BS testified that the rape and the molestations occurred on different occasions. 9/28/16 RP 127. In addition, the State argued during closing arguments that each count was based on separate acts. 11/3/16 RP 83. The defendant raises the same credibility

claims as he did for counts II and III. Brief of Appellant at 65. This claim fails as credibility determinations are not to be challenged on review.

- d. The State adduced sufficient evidence to prove beyond a reasonable doubt that the defendant committed the crime of delivery of a controlled substance to a person under the age of eighteen as charged in Count V.

In order to convict the defendant of the crime of unlawful delivery of a controlled substance to a person under the age of eighteen as charged in Count V, the State needed to prove the following elements beyond a reasonable doubt:

- (1) That on or about the time period between June 1, 2012, and September 30, 2014, the defendant delivered marijuana to BS;
- (2) That the defendant knew that the substance delivered was marijuana;
- (3) That the defendant was over the age of eighteen at the time of the delivery;
- (4) That BS was under the age of eighteen and at least three years younger than the defendant; and
- (5) That this act occurred in the State of Washington.

The State proved beyond a reasonable doubt that the defendant committed the crime of delivery of a controlled substance to a person under the age of eighteen. At trial, BS testified that the defendant gave her marijuana to smoke at his house during her 8th grade year. 9/28/16 RP 109-111. BS testified her birthdate was March 24, 1999. 9/28/16 RP 104. The

State proved that the defendant knew what marijuana was because the defendant testified that he grew and smoked marijuana in his house. 11/2/16 RP 65-67. Defendant testified that his birthdate is September 26, 1978 and that he lived in Pierce County, Washington. 11/2/16 RP 26.

The defendant challenges the sufficiency of the evidence because “BS may have testified to a multitude of incidents [regarding the defendant giving her marijuana] yet not to any particular incident”. Brief of Appellant at 66. This claim fails because BS testified that the defendant provided her with marijuana each time he raped or molested her. 9/28/16 RP 109-111, 122.

- e. The State adduced enough evidence to prove beyond a reasonable doubt that the defendant committed the crime of furnishing liquor to a minor as charged in Count VI.

In order to convict the defendant of the crime of furnishing liquor to a minor as charged in Count VI, the State needed to prove the following elements beyond a reasonable doubt:

- (1) That on or about the time period between June 1, 2012, and September 30, 2014, the defendant
 - a. Sold, gave, or otherwise supplied liquor to BS or
 - b. Permitted BS to consume liquor on his premises or premises under his control
- (2) That BS was under the age of twenty-one at the time; and
- (3) That this act occurred in the State of Washington.

The State proved beyond a reasonable doubt that the defendant committed the crime of furnishing liquor to a minor. BS testified that the defendant provided her with alcohol at his house when she was in the 8th grade. 9/28/16 RP 109-111, 131-135. BS testified her birthdate was March 24, 1999. 9/28/16 RP 104. Defendant testified that he lived in Pierce County, Washington. 11/2/16 RP 26.

The defendant challenges the sufficiency of the evidence because “BS may have testified to a multitude of incidents [regarding the defendant giving her liquor] yet not to any particular incident”. Brief of Appellant at 66. This claim fails because BS testified the defendant provided her with alcohol each time he raped or molested her. 9/28/16 RP 111, 122.

- f. The State adduced enough evidence to prove beyond a reasonable doubt that the defendant committed the crime of child molestation in the third degree as charged in Count VII.

In order to convict the defendant of the crime of child molestation in the third degree as charged in Count VII, the State needed to prove the following elements beyond a reasonable doubt:

- (1) That on or about the time period between September 1, 2014, and September 20, 2014, the defendant had sexual contact with MR;

- (2) That MR was at least fourteen years old but less than sixteen years old at the time of the sexual contact and was not married to the defendant;
- (3) That MR was at least forty-eight months younger than the defendant; and
- (4) That this act occurred in the State of Washington.

The State proved beyond a reasonable doubt that the defendant committed the crime of child molestation in the third degree. MR testified that during the week before her 16th birthday, the defendant touched her vagina as she slept at his house. 10/4/16 RP 131-132. She testified that her birthday was October 1st 1998. 10/4/16 RP 114-115. The defendant's birthdate is September 26, 1978, he lives in Pierce County, Washington and was never married to any of the victims. 10/24/16 RP 115, 11/2/16 RP 26.

The defendant challenges the sufficiency of the evidence as to this count because "people were awake in bed and that any such activity would not have gone unnoticed." Brief of Appellant at 68. This claim fails as it merely attacks the credibility of the victim's testimony. "Credibility determinations are for the trier of fact and cannot be reviewed upon appeal." *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

- g. The State adduced enough evidence to prove beyond a reasonable doubt that the defendant committed the crime of delivery of a controlled substance to a person under the age of eighteen as charged in Count VIII.

In order to convict the defendant of the crime of delivery of a controlled substance to a person under the age of eighteen as charged in Count VIII, the State needed to prove the following elements beyond a reasonable doubt:

- (1) That on or about the time period between September 1, 2014, and September 20, 2014, the defendant delivered marijuana to MR;
- (2) That the defendant knew that the substance delivered was marijuana;
- (3) That the defendant was over the age of eighteen at the time of the delivery;
- (4) That MR was under the age of eighteen and at least three years younger than the defendant; and
- (5) That this act occurred in the State of Washington.

The State proved beyond a reasonable doubt that the defendant committed the crime of delivery of a controlled substance to a person under the age of eighteen. MR testified that on the week before her 16th birthday the defendant gave her marijuana before he molested her. 10/4/16 RP 130. She testified that her birthday was October 1st 1998. 10/4/16 RP 114-115. The State proved that the defendant knew what marijuana was

because the defendant testified that he grew and smoked marijuana in his house. 11/2/16 RP 65-67. Defendant testified that his birthdate is September 26, 1978 and that he lived in Pierce County, Washington. 11/2/16 RP 26.

The defendant challenges the sufficiency of the evidence because “the State’s proof may have been outside the charging period”. Brief of Appellant at 69. This claim fails because MR testified that the defendant gave her marijuana on the day that he molested her. 10/4/16 RP 130.

- h. The State adduced enough evidence to prove beyond a reasonable doubt that the defendant committed the crime of furnishing liquor to a minor as charged in Count IX.

In order to convict the defendant of the crime of furnishing liquor to a minor as charged in Count IX, the State needed to prove the following elements beyond a reasonable doubt:

- (1) That on or about the time period between September 1, 2014, and September 20, 2014, the defendant
 - a. Sold, gave, or otherwise supplied liquor to MR, or
 - b. Permitted MR to consume liquor on his premises or premises under his control
- (2) That MR was under the age of twenty-one at the time; and
- (3) That this act occurred in the State of Washington.

The State proved beyond a reasonable doubt that the defendant committed the crime of furnishing liquor to a minor. MR testified that on

the week before her 16th birthday the defendant took her to a liquor store and gave her alcohol at his house. 10/4/16 RP 130. She testified that her birthday was October 1st 1998. 10/4/16 RP 114-115. Defendant testified that he lived in Pierce County, Washington. 11/2/16 RP 26.

The defendant challenges the sufficiency of the evidence because “the State failed to prove a single incident where the defendant provided alcohol to MR and/or permitted MR to consume alcohol on his premises”. Brief of Appellant at 69. This claim fails because as argued above, the record clearly reflected that the defendant took MR to a liquor store and played a drinking game at his house before he molested her. 10/4/16 RP 130. The defendant also challenges the credibility of the evidence because of a lack of corroborating evidence. Brief of Appellant at 69. As argued *supra*, credibility determinations are inappropriate on review.

- i. The State adduced enough evidence to prove beyond a reasonable doubt that the defendant committed the crime of child molestation in the third degree as charged in Count X.

In order to convict the defendant of the crime of child molestation in the third degree as charged in Count X, the State needed to prove the following elements beyond a reasonable doubt:

- (1) That on or about the time period between October 23, 2014, and October 25, 2014, the defendant had sexual contact with LM;

- (2) That LM was at least fourteen years old but less than sixteen years old at the time of the sexual contact and was not married to the defendant;
- (3) That LM was at least forty-eight months younger than the defendant; and
- (4) That this act occurred in the State of Washington.

The State proved beyond a reasonable doubt that the defendant committed the crime of child molestation in the third degree. LM testified that on the evening of October 23rd 2014, the defendant bit her ear, touched her, cuddled her arms, put his hands down her pants and rubbed her butt and vagina while she slept in bed at his house. 9/27/16 RP 43-45, 56-61. LM testified that her birthdate was June 4th 1991. 9/27/16 RP 31. The defendant's birthdate is September 26, 1978, he lives in Pierce County, Washington and was never married to any of the victims. 10/24/16 RP 115, 11/2/16 RP 26.

The defendant challenges the sufficiency of the evidence because LM's testimony was "wildly inconsistent". Brief of Appellant at 70. This claim fails as it applies solely toward her credibility as a witness. "Credibility determinations are for the trier of fact and cannot be reviewed upon appeal." *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

- j. The State adduced enough evidence to prove beyond a reasonable doubt that the defendant committed the crime of furnishing liquor to a minor as charged in Count XI.

In order to convict the defendant of the crime of furnishing liquor to a minor as charged in Count XI, the State needed to prove the following elements beyond a reasonable doubt:

- (1) That on or about the time period between October 23, 2014, and October 25, 2014, the defendant
 - a. Sold, gave, or otherwise supplied liquor to LM, or
 - b. Permitted LM to consume liquor on his premises or premises under his control
- (2) That MR was under the age of twenty-one at the time; and
- (3) That this act occurred in the State of Washington.

The State proved beyond a reasonable doubt that the defendant committed the crime of furnishing liquor to a minor. LM testified that on the evening of October 23rd 2014, the defendant played a drinking game with her, Samantha and Katie Wilks at his house where she consumed half a gallon of whiskey. 9/27/16 RP 43-47. Defendant testified that his birthdate is September 26, 1978 and that he lived in Pierce County, Washington. 11/2/16 RP 26.

The defendant challenges the sufficiency of the evidence based on a lack of corroborating evidence and contradicting testimony by the

defense witnesses. Brief of Appellant at 71. This claim fails, as even the defendant acknowledges in his own argument, that “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

- k. The State adduced sufficient evidence to prove beyond a reasonable doubt that the defendant committed the crime of child molestation in the third degree as charged in Count XII.

In order to convict the defendant of the crime of child molestation in the third degree as charged in Count XII, the State needed to prove the following elements beyond a reasonable doubt:

- (1) That on or about the time period between March 1, 2014, and September 30, 2014, the defendant had sexual contact with AB;
- (2) That AB was at least fourteen years old but less than sixteen years old at the time of the sexual contact and was not married to the defendant;
- (3) That AB was at least forty-eight months younger than the defendant; and
- (4) That this act occurred in the State of Washington.

The State proved beyond a reasonable doubt that the defendant committed the crime of child molestation in the third degree. AB testified that in the summer of 2014 she woke up to the defendant touching her vagina as she lay intoxicated in bed. 10/6/16 RP 75, 79-80. AB testified that her birthday was November 11, 1998. 10/6/16 RP 49. The defendant’s

birthdate is September 26, 1978, he lives in Pierce County, Washington and was never married to any of the victims. 10/24/16 RP 115, 11/2/16 RP 26.

The defendant challenges the sufficiency of the evidence by raising yet another issue regarding credibility of the victim's testimony. Brief of Appellant at 71. As argued *supra*, these claims fail because "[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal." *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

1. The State adduced sufficient evidence to prove beyond a reasonable doubt that the defendant committed the crime of delivery of a controlled substance to a person under the age of eighteen as charged in Count XIII.

In order to convict the defendant of the crime of delivery of a controlled substance to a person under the age of eighteen as charged in Count XIII, the State needed to prove the following elements beyond a reasonable doubt:

- (1) That on or about the time period between June 1, 2014, and September 30, 2014, the defendant delivered marijuana to AB;
- (2) That the defendant knew that the substance delivered was marijuana;
- (3) That the defendant was over the age of eighteen at the time of the delivery;
- (4) That AB was under the age of eighteen and at least three years younger than the defendant; and

(5) That this act occurred in the State of Washington.

The State proved beyond a reasonable doubt that the defendant committed the crime of delivery of a controlled substance to a person under the age of eighteen. AB testified that in the summer of 2014 the defendant provided her with marijuana at his house before he molested her. 10/6/16 RP 75-78. AB testified that her birthdate was November 25, 1998. 10/6/16 RP 49. The State proved that the defendant knew what marijuana was because the defendant testified that he grew and smoked marijuana in his house. 11/2/16 RP 65-67. Defendant testified that his birthdate is September 26, 1978 and that he lived in Pierce County, Washington. 11/2/16 RP 26.

The defendant challenges the sufficiency of the evidence by raising yet another issue regarding credibility of the victim's testimony. Brief of Appellant at 71. As argued *supra*, these claims fail because "[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal." *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

- m. The State adduced sufficient evidence to prove beyond a reasonable doubt that the defendant committed the crime of furnishing liquor to a minor as charged in Count XIV.

In order to convict the defendant of the crime of furnishing liquor to a minor as charged in Count XIV, the State needed to prove the following elements beyond a reasonable doubt:

- (1) That on or about the time period between June 1, 2014 and September 30, 2014, the defendant
 - c. Sold, gave, or otherwise supplied liquor to AB, or
 - d. Permitted AB to consume liquor on his premises or premises under his control
- (2) That AB was under the age of twenty-one at the time; and
- (3) That this act occurred in the State of Washington.

The State proved beyond a reasonable doubt that the defendant committed the crime of furnishing liquor to a minor. AB testified that in the summer of 2014 the defendant provided her with alcohol at his house before he molested her. 10/6/16 RP 75-79. Specifically, she testified that she and the defendant played a drinking game called "kings cup" which involved them taking shots of alcohol. 10/6/16 RP 75-79. AB testified that her birthdate was November 25, 1998. 10/6/16 RP 49. Defendant testified that he lived in Pierce County, Washington. 11/2/16 RP 26.

The defendant challenges the sufficiency of the evidence by raising yet another issue regarding credibility of the victim's testimony. Brief of Appellant at 71. As argued *supra*, these claims fail because "[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal." *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

- a. The State adduced enough evidence to prove beyond a reasonable doubt that the defendant committed the crime of child molestation in the third degree as charged in Count XV.

In order to convict the defendant of the crime of child molestation in the third degree as charged in Count XV, the State needed to prove the following elements beyond a reasonable doubt:

- (1) That on or about the time period between March 1, 2013, and June 17, 2014, the defendant had sexual contact with RR;
- (2) That RR was at least fourteen years old but less than sixteen years old at the time of the sexual contact and was not married to the defendant;
- (3) That RR was at least forty-eight months younger than the defendant; and
- (4) That this act occurred in the State of Washington.

The State proved beyond a reasonable doubt that the defendant committed the crime of child molestation in the third degree. RR testified that the defendant touched her vagina as she slept at his house during the summer of 2014. 10/10/16 RP 131, 144. RR testified that her birthdate

was December 16, 1998. 10/10/16 RP 122. The defendant's birthdate is September 26, 1978, he lives in Pierce County, Washington and was never married to any of the victims. 10/24/16 RP 115, 11/2/16 RP 26.

The defendant challenges the sufficiency of the evidence because "RR lacks a clear memory" of the defendant molesting her. Brief of Appellant at 73. As argued *supra*, this claim fails because "[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal." *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

b. The State adduced enough evidence to prove beyond a reasonable doubt that the defendant committed the crime of furnishing liquor to a minor as charged in Count XVI.

(1) That on or about the time period between March 1, 2013, and June 17, 2014, the defendant

a. Sold, gave, or otherwise supplied liquor to RR, or

b. Permitted RR to consume liquor on his premises or premises under his control

(2) That RR was under the age of twenty-one at the time; and

(3) That this act occurred in the State of Washington.

The State proved beyond a reasonable doubt that the defendant committed the crime of furnishing liquor to a minor. RR testified that the defendant provided her with rum alcohol before he molested her at his house during the summer of 2014. 10/10/16 RP 131, 142. RR testified that her birthdate was December 16, 1998. 10/10/16 RP 122. Defendant

testified that his birthdate is September 26, 1978 and that he lived in Pierce County, Washington. 11/2/16 RP 26.

The defendant challenges the sufficiency of the evidence because “RR lacks a clear memory” of the defendant molesting her. Brief of Appellant at 73. As argued *supra*, this claim fails because “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

5. DEFENDANT IS NOT ENTITLED TO RELIEF
UNDER THE CUMULATIVE ERROR
DOCTRINE WHEN HE HAS FAILED TO SHOW
ANY ERROR OCCURRED.

The doctrine of cumulative error recognizes the reality that sometimes numerous errors, each of which standing alone might have been a harmless error, can combine to deny a defendant not only a perfect trial, but also a fair trial. *In re Personal Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994); *State v. Coe*, 101 Wn.2d 772, 789, 681 P.2d 1281 (1984); *see also State v. Johnson*, 90 Wn. App. 54, 74, 950 P.2d 981 (1998) (“although none of the errors discussed above alone mandate reversal...”). The analysis is intertwined with the harmless error doctrine, in that the type of error will affect the court’s weighing those errors. *State v. Russell*, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), *cert. denied*, 574 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995).

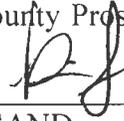
The defendant in the present case has failed to show that any error occurred, much less an accumulation of errors which deprived him of a fair trial. He is not entitled to relief under the cumulative error doctrine.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests that this Court dismiss the defendant's claims and affirm his convictions.

DATED: June 29, 2018.

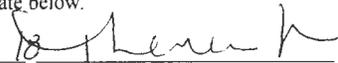
MARK LINDQUIST
Pierce County Prosecuting Attorney



ROBIN SAND
Deputy Prosecuting Attorney
WSB # 47838

Certificate of Service:

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

6.29.18 
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

June 29, 2018 - 3:33 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 50287-9
Appellate Court Case Title: State of Washington, Respondent v Jason C. Wilks, Appellant
Superior Court Case Number: 14-1-04908-2

The following documents have been uploaded:

- 502879_Briefs_20180629153241D2574500_0677.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Wilks Response Brief.pdf

A copy of the uploaded files will be sent to:

- barbara@bcoreylaw.com
- william@bcoreylaw.com

Comments:

Sender Name: Therese Kahn - Email: tnichol@co.pierce.wa.us

Filing on Behalf of: Robin Khou Sand - Email: rsand@co.pierce.wa.us (Alternate Email: PCpatcecf@co.pierce.wa.us)

Address:
930 Tacoma Ave S, Rm 946
Tacoma, WA, 98402
Phone: (253) 798-7400

Note: The Filing Id is 20180629153241D2574500