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NO. 51254-8-II

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JAMES GORMAN-LYKKEN,

Appellant.

RESPONDENT'S BRIEF

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I. ISSUES

1. Did the trial court abuse its discretion by denying defense a continuance to interview a witness as well as pursue an expert in a speculative theory in an area that was not studied, not proven, and ultimately inadmissible?
2. Did the “to convict” instruction accurately reflect the law as it pertained to the defendant though it contained a single, additional word?
3. Did the trial court abuse its discretion by permitting the single jailer, who was present next to the defendant during the entirety of trial, to stand behind the defendant as he testified?
4. Did the prosecutor commit misconduct by showing the evidence that the defendant lied about the events, or by arguing the evidence to rebut claims made by defense counsel’s closing argument?
5. Must the trial court reconsider the defendant’s ability to pay certain mandatory fees because the legislature created an exception to the imposition of those fees after his conviction?

II. BRIEF ANSWERS

1. No. Defense counsel was able to interview the witness prior to trial, and the testimony of the expert witness would not have met a Frye standard.
2. Yes. The defendant was not prejudiced by the additional word, and was still able to argue his theory of the case.
3. No. The trial court considered the reasons for and against the jailer’s presence, and felt the jury, like most juries, are inured to the presence of jail staff during trial and that her presence would not prejudice the defendant.
4. No. The prosecutor’s arguments were anchored in the facts, not personal belief, and were in response to defense counsel’s argument.
5. No. The fees were mandatory at the time of his sentencing and the statute did not create a clause, permitting a court to adjust prior convictions.

III. STATEMENT OF THE CASE

I. Facts

On September 15, 2017, the defendant, James Gorman-Lykken was convicted by a jury of Rape in the Second Degree, committed against his girlfriend, Nicole Kunkle. RP 450. At the time of the rape, Kunkle and the defendant were in a long-term relationship. On the Fourth of July, 2017, they lived in Kelso, Washington, and were working towards having a good life together. RP 173-74. The defendant loved the Fourth of July and fireworks, and expected to celebrate the holiday with Ms. Kunkle. They shared a Four Loco while walking to Lake Sacajawea in Longview, Washington, to enjoy the annual firework display. RP 175; 178; 212; 214.

While walking, the defendant repeatedly told Kunkle he wanted to have double penetrative sex—simultaneous anal and vaginal intercourse—she refused. RP 183-87; 218. She recently was involved in a car collision, and suffered three broken ribs and a broken jaw. RP 177. She was in pain, and taking pain medications—Oxycodone and Gabapentin—and did not want to have sex. RP 175, 177; 218.

After the fireworks, and after drinking the Four Loco, she took her medications. RP 177; 212; 214. A compounding effect would have

occurred, which would cause any person to fall asleep or become unconscious. RP 290-98.

Before she went to sleep, she told the defendant not to have sex with her while she slept. RP 181. Ms. Kunkle suffers sleep issues, which cause her to sleep deeply and prevent her from consenting to sexual intercourse. RP 176-78, 190-91; 203-04; 221. Too often in the past, the defendant had sex with her while she was asleep and Kunkle was no longer willing to suffer the abuse. RP 181-82, 190. The defendant became angry and they argued. RP 175; 210. Still, Ms. Kunkle told him not to touch her, they were not going to have sex. RP 176. He did not take “no” for an answer. RP 176.

Randy Kunkle witnessed this argument. RP 226-240. He described it as an argument like every other argument the couple had—the defendant demanding sex from Ms. Kunkle and Ms. Kunkle telling him no. RP 227-231; 232; 386. He lived with both Kunkel and the defendant for several months before the Fourth of July. RP 226. Randy witnessed his sister crying as she told the defendant she did not want to have sex and that she just wanted to sleep on the couch. RP 232-33; 236; 385. Randy said his sister was very clear. RP 385. Eventually, he interrupted the argument, because he needed to go to work in the morning and the couple were preventing his sleep. RP 178-79.

Kunkle awoke the morning of July 5th, 2017, to the defendant performing unwanted oral sex. RP 179; 220. She was upset to find the defendant between her legs; it hurt her and made her feel dirty. RP 179. She told him to get off of her. RP 180. He got mad and they argued.

Eventually, she took a shower with the defendant to placate his anger and hopefully make the day better. RP 180. When water hit her anus she felt a stinging pain. RP 180; 236. Immediately, she knew the defendant had sexual intercourse with her while she was asleep. She yelled at him, asking if he had sex with her while she was asleep. The defendant said yes. RP 180. Ms. Kunkle did not remember anything after she fell asleep, especially having anal sex with the defendant. RP 179; 200-03. Memory loss is symptomatic of being unconscious, which means Ms. Kunkle could not consent to sexual intercourse and that she was physically helpless. RP 221; 290.

In fact, when she is on her medications, she forgets where she leaves her car, or whether or not she turned off the stove, or where she may have fallen asleep. And the defendant was aware of this. For years, Randy Kunkle observed his sister's ongoing sleep issues—as long as he has known her, it has been difficult to arouse her from her sleep. RP 233-35. She may have even been “stupid drunk.” RP 328.

Oddly, even though Ms. Kunkle had informed the defendant on multiple occasions not to have sex with her while she was sleeping, and had not consented to this particular sexual act, she was still uncertain about whether or not she was raped. She called the police. RP 181. Still, she questioned whether to report him for rape. She loved him. RP 182. She even asked Kelso Police Officer, Nick Drakos if she was raped. In fact, she did not want to get the defendant in trouble. RP 190; 206-08; 219.

When she spoke with Officer Drakos, she was hysterical and required several moments to regroup. RP 314-17. Ms. Kunkle informed Officer Drakos that she was in a dating relationship with the defendant, that she was on medications due to injuries sustained in collision, and that she has difficulty waking up after taking those medications. RP 317. She described to him how she confronted the defendant after feeling a burning sensation in her anus, and that the defendant admitted to having sex with her while she was asleep. RP 317.

The defendant claimed the sex was consensual. However, when the couple had consensual anal sex, they used a messy lubricant—vegetable oil—to assist with entry, along with other relaxation techniques, such as biting Ms. Kunkle’s neck and shoulder. RP 187-88. Ms. Kunkle did not observe any oil on the sheets, her body, anywhere, when she awoke. RP 179-80, 188-89. Lubrication would have prevented the sort of contusions

on her anus that were observed during her sexual assault examination. RP 286-87; 289. Kunkle had no observable bite marks on her body. RP 282.

Dr. Ben Rader spoke with Ms. Kunkle prior to the examination to determine the course of care. RP 241-247. He described a tearful and distressed woman. RP 243. She told Dr. Rader that her boyfriend raped her. RP 243. She told Dr. Rader she felt a great amount of pain in her rectal region. RP 244.

Susie Bellar, the Special Assault Nurse Examiner (SANE nurse) who performed the head-to-toe, forensic examination of Ms. Kunkle, observed several bruises and contusions on Ms. Kunkle's anus. RP 250-62, 270-313; 273-74; 279; 281. Ms. Kunkle expressed pain during the examination of her anus. RP 282. These injuries would not have occurred if lubrication was used. RP 286. Bellar testified that moaning is a natural occurrence during sex, consensual or not—they are automatic responses. RP 295. The body also produces responses to pain and medication, whether the person is conscious or not, and one of those things is moaning. RP 294. Ms. Kunkle suffered three broken ribs and a broken jaw just prior to the July 4th and was in significant physical pain. She was sedated and being anally raped with only spit to lubricate, the pain was likely to cause her to moan. Ms. Bellar did not observe any injuries to Ms. Kunkle's vagina. RP 279.

Prior to the sexual assault examination, Ms. Bellar administered half of the prescribed gabapentin to Ms Kunkle. Within minutes, Ms. Kunkle nodded off. RP 291; 296. Because of her condition, Ms. Kunkle could not give consent for specific portions of the SANE examination. RP 255; 260-61; 270-71.

The defendant spoke with Kelso Police Department Sergeant Wiper. RP 324-33. He described the amount of alcohol and medications Ms. Kunkle took the night before. RP 328. He said the medications make her groggy and drowsy. RP 329. He also admitted that when she takes her medications, Ms. Kunkle sometimes forgets having sex. RP 329-30. Despite acknowledging Kunkle is not capable of consenting to sexual intercourse, when on her medications, the defendant claimed he believed she consented because she moaned. RP 331. The defendant gave no other details about her participation in the sexual intercourse. RP 332.

The defendant testified at trial. RP 344-71. He admitted to penetrating Ms. Kunkle's anus with his penis. RP 361. He also stated he simultaneously fisted her vagina and had anal sex with her for 45 minutes. RP 355, 357. He said she was "stupid drunk," "not knowing exactly what you're doing 100 percent." RP 364. He also admitted that when she takes her medications she gets drowsy and sometimes forgets she had sex and that he was on notice she would forget. RP 365-69. He then denied Ms. Kunkle

ever told him not to have sex with her when she was asleep, including the night of the Fourth of July. RP 370-71.

Randy Kunkle rebutted much of what the defendant claimed regarding notification. RP 384-87.

II. Closing Argument

The prosecutor argued the case and the evidence. Noting the evidence did not align with the defendant's testimony. RP 404-17.

The prosecutor asked the jury "why do you think a person would have to say to another person before they go to bed: don't have sex with me while I'm asleep?" RP 405. From there, the prosecutor discussed the interaction of medications with Ms. Kunkle's sleep issues and how the combination would prevent her from understanding the nature and consequences of her actions. RP 405. The prosecutor pointed out that the defendant acknowledged these complications to Sergeant Wiper. RP 405.

And then the prosecutor argued that the defendant knew Ms. Kunkle could not consent. RP 406. He further pointed out that the defendant lied about his knowledge, and then enumerated the reasons why it was a lie. RP 406.

"I mean, he's been around her. He knew. He knew. And yet he got up on the stand and lied. He said he had never been told not to have sex with her when she sleeps, ever. Her brother who did not want to be involved, did not want to come in and testify, her brother who until just last week was not known to anyone, observed much of the

behavior before they went to sleep. He heard her tell the defendant on multiple occasions 'do not mess with me while I'm asleep. Don't do it.'

And yet he said, the defendant said, on cross-examination, 'She never told me that not to have sex with me that night when she's asleep.'

'She never told you that?'

'She never told me that ever, ever, not in the past, not that night, ever.'

That was his response.

And remember, this is a guy who's been convicted of a crime of dishonesty. So he comes in here and tells you a story that doesn't quite fit the evidence. He says they had consensual sex, that it was great, that he lubed her up with his tongue, performed cunnilingus on her, she's ready to go. And so he inserted his penis into her anus and his fist into her vagina and went to town for 45 minutes on her just with his saliva.

You guys heard the evidence, and you heard the testimony of Susie Bellar, someone who's been trained and given a specific set of knowledge about how to investigate sexual assaults. And she knows what sort of injuries to look at and how certain injuries are created." RP 406-7.

Defense did not object. The prosecutor then further discussed Susie Bellar's testimony regarding injuries and drug interaction, observed and expected. He discussed how Saliva would not prevent the stretching and tearing observed on Ms. Kunkle. RP 407. He also pointed out that Susie Bellar did not observe any tearing or injury to Ms. Kunkle's vagina, something that would be expected given the sexual activity described by the

defendant. RP 407. Ms. Kunkle's testimony and her brother's testimony, contrasting that with the defendant's own testimony that admitted every element of the crime. RP 417.

The prosecutor acknowledged it was unable to provide the jury Ms. Kunkle's blood. And explained why it could not provide it to the jury Ms. Kunkle was unable to provide informed consent while under the influence of half her prescribed dosage of Oxycodone. RP 411. Indeed, if she was incapable of consenting to a blood draw after consuming only half her prescribed dosage, she was clearly unable to consent to sexual intercourse. RP 411.

Defense counsel argued that Ms. Kunkle should not be viewed as a victim in the legal sense of the term. RP 418. He described her credibility was uneven, that she exaggerated, was untruthful, even instinctively misrepresented facts. RP 420-21, 433. He argued the fact she remained in a relationship with the defendant suggested she was not truthful: "again, if that were true, then why on earth would she have stayed?...It just doesn't make any sense that would actually happen." RP 421. Indeed, defense counsel spent the majority of his argument attacking Ms. Kunkle's credibility. Then defense counsel contrasted Gorman-Lykken as the only truthful party to testify, including the police officers. RP 422-23.

Defense counsel also argued the affirmative defense that the defendant did not reasonably believe Ms. Kunkle was mentally incapacitated and or physically helpless. RP 419. Yet made the argument that Ms. Kunkle stated “to the best of my knowledge, I did not consent to sexual activity at any point,” was not evidence of being physically incapacitated or physically helpless. RP 425.

At some point, defense counsel pivoted to attacking Randy Kunkle. RP 427. He argued:

“Obviously he’s her brother, and so there is that relationship between them that siblings all have. They’re going to stick up for one another. Mr. Randy Kunkle never came forward to law enforcement, whether police officers or anyone on the prosecution team until the day before trial. That’s significant...nobody reached out to him, he didn’t reach out until then.” RP 427-28.

Defense counsel intended on coloring Ms. Kunkle as a drug addict, who, without any other evidence to support the assertion, abused Adderall. He then argued that nothing was stated about the effects of Adderall or amphetamines in combination with depressants would have the opposite effect than drowsiness or catatonia. RP 431-32. And then in an attempt to further tarnish her with the jury, he claimed she was a drug addict, shattering pills and snorting oxycodone and Adderall to get a quick hit. He intimated that because the State did not call her to rebut his client’s salacious remarks means that they were true. RP 434. Defense then went further. Arguing the

lack of evidence bolstered the defendant's credibility, and innocence. RP 436.

The prosecutor then rebutted defense counsel's claims. RP438-43. The prosecutor began with re-instructing the jury that the determination is not guilt or innocence, but guilty or not guilty. RP 438.

The prosecutor then pivoted to rehabilitating Ms. Kunkle, describing the reasons why she now went forward with charges against the defendant. RP 439. She was in a relationship of control, and she wanted to reclaim her body, after telling the defendant that he could not use her the way he wanted to, that he could not have sex with her at night, while she was asleep. RP 439.

After saying that everything Ms. Kunkle did or said or felt was on trial, the prosecutor asked the jury when Ms. Kunkle was permitted to say "you don't get to sleep with me. You don't get to have sex with me. You don't have sex with me when I'm asleep and be believed and be heard." RP 349-40.

The prosecutor then discussed Ms. Kunkle's inability to say no while asleep and on medication. RP 440. The prosecutor then reminded the jury that:

"When a person is unconscious, they don't have control over their body. They don't have control over their actions, and they don't have control enough to say no. And that's why she told him before

she went to sleep: don't have sex with me when I'm asleep." RP 440.

In the course of that argument, the prosecutor addressed the defense counsel's attacks on Randy Kunkle, and did so by framing it as the defendant had notice he was not to have sexual intercourse with Ms. Kunkle. RP 440. While arguing that defense counsel's characterization of when Randy came forward was false and inaccurate, the prosecutor directed the jury to the defendant's own statements that Ms. Kunkle became "drowsy when she takes her medications and doesn't remember having sex." RP 440. Defense counsel did not object to the argument. RP 440.

The prosecutor then returned to the initial issue and primary focus of defense argument: Ms. Kunkle's credibility. RP 441-42. Ms. Kunkle could not quantify the number of times the defendant had nonconsensual sex with her while she was asleep. RP 442. The prosecutor concluded the rebuttal argument focusing on how the administered drugs and her sleep habits comported with her testimony. RP 444.

IV. ARGUMENT

I. It was not error for the trial court to deny defendant's request for continuance.

The decision to grant or deny a motion for continuance rests within the sound discretion of the trial court. *State v. Miles*, 77 Wash.2d 593, 597,

464 P.2d 723 (1970). Refusal to grant a continuance shall be reviewed for abuse of discretion. *State v. Hurd*, 127 Wash.2d 592, 594, 902 P.2d 651 (1995).

Courts will not disturb the trial court's decision unless there is a clear showing the decision was manifestly unreasonable, or exercised on untenable grounds for untenable reasons. *State v. Downing*, 151 Wash.2d 265, 272, 87 P.3d 1169 (2004) citing *State ex rel. Carroll v. Junker*, 79 Wash.2d 12, 26, 482 P.2d 775 (1971).

In exercising its discretion whether to grant or deny a continuance, trial courts may consider many factors, including surprise, diligence, redundancy, due process, materiality, and maintenance of orderly procedure. *State v. Eller*, 84 Wash.2d 90, 95, 524 P.2d 242 (1974). The lack of one factor does not require reversal. *State v. Williams*, 84 Wash.2d 853, 855, 529 P.2d 1088 (1975).

Here, the trial court reviewed defense motion to continue. RP 9. That motion was based on rather speculative research, if it was research at all. The article cited by defense was a proposal for research based on an internet survey, not hard facts or observations regarding drug and alcohol interactions with sleepwalking disorders. RP 9. The Court found this sort of speculative evidence would not satisfy a basic *Daubert/Frye* examination, because there was "absolutely nothing out in the scientific community that

would make this meet any of those criteria,” and delay would not “result in any evidence that could be placed before the jury.” RP 9-10.

Defense then requested a continuance based on the minimal SANE report, and their failure to interview the SANE nurse. RP 11-12. The State recognized the concern, and expressed its own concerns regarding per se ineffective assistance. The court denied the request, and ordered the State to provide the witness for an interview or for deposition. RP 12.

First, defendant misconstrues the nature of the request for a continuance. It was not based on a need for blood results, it was to obtain an expert in somnambulism and to interview the SANE nurse. RP 10-12.

Next, Defendant failed to show he would not have been convicted had the somnambulist expert been permitted to testify. Washington has adopted the *Frye* test for determining if evidence based on novel scientific procedures is admissible. *State v. Baity*, 140 Wash.2d 1, 10, 991 P.2d 1151, (2000) *citing State v. Copeland*, 130 Wash.2d 244, 255, 922 P.2d 1304 (1996). Evidence derived from a scientific theory or principle is admissible *only* if that theory or principle has achieved general acceptance in the relevant scientific community. *State v. Martin*, 101 Wash.2d 713, 719, 684 P.2d 651 (1984).

Here, defense proposed an expert on a topic for which only a proposal for a scientific trial was made. A proposal does not meet the basic

criteria for admissibility—evidence derived from a scientific theory. Therefore, refusing to continue the trial to pursue not only a novel theory, but an unexamined and untested theory, was not an abuse of discretion.

Furthermore, the defendant was still able to argue his theory of the case, without the expert. The denial of a continuance to pursue an unproven theory did not prevent the defendant from asserting his affirmative defense under RCW 9A.44.030(1), because that that defense is argued from the position of what the defendant knew, saw, and reasonably believed at the time of the alleged rape. Relevant to that defense were his impressions of the events and actions, and here the defendant was able to describe those events as he viewed them.

Finally, defendant claims the denial of the continuance due to a need to interview the SANE nurse was error and denied him his due process rights. Where the primary purpose of a continuance is to obtain and review additional discovery, it is not error to deny that motion. *State v. Barnes*, 58 Wash.App. 465, 471-72, 794 P.2d 52, (1990) citing *State v. Anderson*, 23 Wash.App. 445, 449, 597 P.2d 417 (1979). Be that as it may, the remedy was quickly obtained. Defense counsel interviewed Ms. Bellar on September 12, 2017, at 4 P.M., and defense counsel was satisfied with that interview. RP 23.

Even where the denial of a motion for continuance is alleged to have deprived a criminal defendant of his constitutional right to due process, the decision to deny a continuance will be reversed only on a showing that the accused was prejudiced by the denial and or that the result of the trial would likely have been different had the continuance not been denied. *State v. Tatum*, 74 Wash. App. 81, 86, 871 P.2d 1123, *review denied*, 125 Wash.2d 1002, 886 P.2d 1134 (1994). In other words, the critical inquiry is whether the defendant was denied a fair trial because he would not have been convicted had the witness testified. *State v. Lane*, 56 Wsh.App. 286, 296, 786 P.2d 277 (1989).

Defense failed to show any prejudice occurred. He failed to show how speculative testimony based on unexamined theories would have changed his approach to the case. More importantly, he failed to show how this inadmissible testimony would have changed the outcome.

II. **The “to convict” instruction contained all elements of the crime and did not prevent the defendant from arguing his case.**

- a. *The instructional error was not manifest and thus should not be reviewed for defendant’s failure to preserve at trial.*

Defendant should not be permitted to challenge the “to convict” instruction because he failed to preserve the issue at trial. CrR 6.15(c)

requires that timely and well-stated objections be made to instructions given or refused “in order that the trial court may have the opportunity to correct any error.” *State v. Scott*, 110 Wash.2d 682, at 686-87, 757 P.2d 492 (1988)(quoting *Seattle v. Rainwater*, 86 Wash. 2d 567, 571, 546 P.2d 450 (1976)). Courts have refused to review asserted instructional errors to which no meaningful exceptions were taken at trial. *Id.* at 687. Indeed, Courts of Appeal may refuse to review any claim of error which was not raised in the trial court. RAP 2.5(a).

A party may raise a claimed error for the first time only if they can show it was a manifest error affecting a constitutional right. RAP 2.5(a)(3). In order to do so, an appellant must show both that (1) the error implicates a specifically identified constitutional right, and (2) the error is manifest in that it had practical and identifiable consequences in the trial. *State v. Grimes*, 165 Wash.App. 172, 267 P.3d 454 (2011) (citing *State v. O’Hara*, 167 Wash.2d 91, 98, 217 P.3d 756 (2009)).

Here, the defendant has not shown the error to be manifest, because he has not identified a practical and identifiable consequence at trial. *Grimes*, 165 Wash.App. at 190, 267 P.3d 454. Because the defendant has not carried one of his two burdens the Court should not review the non-preserved claim of error. The requirements of due process were met because the jury was informed of all the elements of an offense and instructed that

unless each element was established beyond a reasonable doubt the defendant must be acquitted. *Scott*, 110 Wash.2d at 690.

Moreover, the error at issue is one that was easily rectified if defendant alerted the court to its presence. At the most, if the instruction did create an alternative means, that alternative would become the law of the case. When the State adds an unnecessary element to the “to convict” instruction and the jury convicts the defendant, the unnecessary element must be supported by sufficient evidence. *State v. Hickman*, 135 Wsh.2d 97, 105, 954 P.2d 900 (1998). If that is the case, the alternative would still be the primary elements of Rape in the Second Degree; elements that were properly defined in Instruction 10 and Instruction 6.

b. *The jury instruction sufficiently allowed defendant to argue his case.*

Challenges to jury instructions will be considered in the context of the jury instructions as a whole. *State v. Pirtle*, 127 Wash.2d 628, 656, 904 P.2d 245 (1995). Challenged jury instructions are reviewed de novo. *Pirtle*, 127 Wash.2d at 656. Parties are entitled to instructions that, when taken as a whole, properly instruct the jury on the applicable law, are not misleading, and allow each party the opportunity to argue their theory of the case. *State v. Redmond*, 150 Wash.2d 489, 493, 78 P.3d 1001 (2003); *State v. Mark*, 94 Wash.2d 520, 526, 618 P.2d 73 (1980).

Jury instructions, taken in their entirety, must inform the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt. *Pirtle*, 127 Wash.2d at 656. The “to convict” instruction must contain all of the elements of the crime because it is the yardstick by which the jury measures the evidence to determine guilt or innocence. *State v. Sibert*, 168 Wash.2d 306, 311, 230 P.3d 142 (2010). Courts do not look to other instructions if an element is missing. *State v. Smith*, 131 Wash.2d 258, 262-63, 930 P.2d 917 (1997).

Here, the “to convict” instruction did not lack an essential element. It did, however, contain an error analogous to a scrivener’s error. This error did not misstate the law, nor did it create an alternative means of conviction because it provided no alternative means for which the jury could convict the defendant. The instruction read:

To convict the defendant of the crime of Rape in the Second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about July 5, 2017, the defendant engaged in sexual intercourse with Nicole Kunkel;
- (2) That the sexual intercourse occurred when Nicole Kunkel was incapable of consent by reason of being physically helpless or mentally incapacitated; *and*;
- (3) That the acts occurred in the State of Washington.

If you find from the evidence that either (1), (2), *and* (3), has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

on her anus that were observed during her sexual assault examination. RP 286-87; 289. Kunkle had no observable bite marks on her body. RP 282.

Dr. Ben Rader spoke with Ms. Kunkle prior to the examination to determine the course of care. RP 241-247. He described a tearful and distressed woman. RP 243. She told Dr. Rader that her boyfriend raped her. RP 243. She told Dr. Rader she felt a great amount of pain in her rectal region. RP 244.

Susie Bellar, the Special Assault Nurse Examiner (SANE nurse) who performed the head-to-toe, forensic examination of Ms. Kunkle, observed several bruises and contusions on Ms. Kunkle's anus. RP 250-62, 270-313; 273-74; 279; 281. Ms. Kunkle expressed pain during the examination of her anus. RP 282. These injuries would not have occurred if lubrication was used. RP 286. Bellar testified that moaning is a natural occurrence during sex, consensual or not—they are automatic responses. RP 295. The body also produces responses to pain and medication, whether the person is conscious or not, and one of those things is moaning. RP 294. Ms. Kunkle suffered three broken ribs and a broken jaw just prior to the July 4th and was in significant physical pain. She was sedated and being anally raped with only spit to lubricate, the pain was likely to cause her to moan. Ms. Bellar did not observe any injuries to Ms. Kunkle's vagina. RP 279.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty. Jury Instruction 10 (emphasis added).

While in most instances, the word “either” might create an alternative means of proof, if other options are provided, here it did not. In fact, the instruction did not provide any answer to what would be the alternative means if (1), (2), and (3) had not been proven. Instead, before the word “either” was mistakenly placed in the instruction, it stated that “each of the following elements must be proved beyond a reasonable doubt:

- (1) That on or about July 5, 2017, the defendant engaged in sexual intercourse with Nicole Kunkel;
- (2) That the sexual intercourse occurred when Nicole Kunkel was incapable of consent by reason of being physically helpless or mentally incapacitated; *and*;
- (3) That the acts occurred in the State of Washington.

The instruction then again followed the “either” with “and,” an inclusive conjunctive that requires all elements to be proved in order for the jury to convict. No alternative to that requirement existed.

On its own, Instruction 10 informed the jury that it had to find all elements in order to convict the defendant. Because the “to convict” instruction contained all essential elements, this court can review the other jury instructions in combination with the “to convict” instruction. *Smith*, 131 Wash.2d at 263, 930 P.2d 917. Reading Instruction 10 with Instruction

6, it is clear the Jury was properly advised that a person committed Rape in the second degree when “that person engages in sexual intercourse with another when the other person is incapable of consent by reason of being physically helpless or mentally incapacitated.” Jury Instruction 6.

c. *If there is any error the error is harmless.*

This error was harmless. An instructional error is presumed to have been prejudicial unless it affirmatively appears harmless. *State v. Wanrow*, 88 Wash.2d 221, 237, 559 P.2d 548 (1977). An error is harmless if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result despite the error. *State v. Aumick*, 126 Wash.2d 422, 430-31, 894 P.2d 1325 (1995). A harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case. *Wanrow*, 88 Wash. 2d at 237, 559 P.2d 548 (quoting *State v. Golladay*, 78 Wash.2d 121, 139, 470 P.2d 191 (1970)). It is the State’s burden to show the error was harmless. *State v. Burri*, 87 Wash.2d 175, 182, 550 P.2d 507 (1976).

Here, the error did not prejudice any right of the defendant. As a whole, Instruction 10 properly stated the law and the State’s burden. The addition of a word did not change that burden, nor did it change the elements necessary to prove guilt.

Moreover, the defendant was able to argue his theory of the case. An instruction is sufficient if it permits a defendant to argue his theory of the case, not limit it. *Wanrow*, 88 Wash. 2d at 237. Instruction 10 did not limit the defendant's ability to argue his theory, which was the victim was an alert and willing participant to the sexual intercourse. If a defendant feels the prosecution's case is weak on one of the elements, or all of the elements, he can argue that to the jury. The defendant did just that.

However, the evidence also showed that the sexual intercourse was not consensual; that the victim told the defendant earlier that night and on several occasions before not to have sex with her while she was asleep; that even when unaided by medication and alcohol the victim was a deep sleeper; that when she did take half of her prescribed medication in the presence of medical staff she became observably intoxicated; that her injuries reflected only anal sex, not anal sex and vaginal fisting; and that the victim had no recollection of the sexual intercourse, only becoming aware of it when she showered and felt the sting of water on her anus. Faced with this evidence, and weighing it against the defendant's own testimony, which was not corroborated by the physical evidence, the jury found the State proved beyond a reasonable doubt the defendant committed Rape in the Second Degree. Consequently, defendant's argument fails.

III. The security measures permitted by the trial court were not inherently prejudicial

A defendant has a fundamental right to a fair trial. Wash. Const, art I, § 22. The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial in the criminal justice system. *State v. Finch*, 137 Wash.2d 792, 844, 975 P.2d 967 (1999).

When courtroom arrangements inherently prejudice the fact-finding process, it violates due process unless arrangements are required by an essential state interest. An arrangement is inherently prejudicial if it creates an unacceptable risk of impermissible factors influencing the jury's verdict. Courts evaluate the likely effects of a particular procedure based on reason, principle, and common human experience. *Holbrook v. Flynn*, 475 U.S. 560, 568-70, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986); *See In re Pers. Restraint of Woods*, 154 Wash.2d 400, 417, 114 P.3d 607 (2005)

In *Holbrook*, The Supreme Court held the presence of four armed State Troopers in the courtroom was not inherently prejudicial. 475 U.S. at 568-69. In rendering its opinion, the Court took pains to clarify that “not every practice tending to single out a defendant from everyone else in the courtroom must be struck down.” *Id.* at 567. So long as both defense counsel and the trial court work to impress upon the jury the need to presume the defendant's innocence, they trust that a fair result was obtained. *Id.* at 568.

Similar to the calculus used by the trial court in the present case, the Supreme Court considered the various inferences a jury could make from the presence of armed, uniformed officers inside a courtroom, ultimately reasoning that society has become inured to the presence of armed guards in most public places and that society has now taken their presence for granted. *Id.* at 569.

Here, the defendant was not unnecessarily marked. The defendant was in-custody, under the care of a single, jail officer. RP 342. He was not free to leave. Be that as it may, he was not in shackles or jail scrubs, otherwise defense counsel would have rightfully objected on those grounds at the outset of trial.

Prior to the defendant's testimony, the court considered defense counsel's objection to the proximity of the jail officer, as he testified. RP 341-43. Defense counsel requested that the jail officer be seated behind the defendant, rather than standing behind him. RP 341-42. The trial court weighed the concerns that the defendant might appear dangerous or that he might appear likely to run against the concern for control of an in-custody defendant and the fact the jail officer was present throughout the trial. RP 342-43. The trial court validated defense counsel's concerns, however, it was not convinced by them. The trial court was comfortable with allowing the jail officer remain where she was while the defendant testified. RP 343.

It was not a long process, but still the trial court properly exercised its discretion. It weighed the concerns brought by defense counsel, but found them unpersuasive enough to change jail protocol for in-custody defendants. The trial court reasoned, as the *Holbrook* Court reasoned, that a jury could speculate the presence of the jail officer was for many reasons, but her presence had been continuous and did not prejudice the defendant. This was an appropriate exercise of the trial court's discretion.

In *State v. Butler*, the Court of Appeals found no violation of an in-custody defendant's right to fair trial, where a second court officer was introduced during the victim's testimony. 198 Wash.App. 484, 494, 394 P.3d 424 (2017). That second officer positioned himself between the defendant and the victim, sat quietly and unobtrusively. *Id.* at 489. In concluding his presence was innocuous, the Court acknowledged the jury would have been aware of the other officer throughout the trial. *Id.* at 494.

Similarly, the trial court saw nothing more prejudicial with the jail officer's presence during the defendant's testimony than there was by her presence during the preceding two days of trial. RP 342-43. The officer then sat quietly and unobtrusively throughout the defendant's testimony.

Defendant contrasts this positioning with the court officer's positioning in *Butler*, arguing the defendant in *Butler* was not in custody. However, the defendant in *Butler* was in custody during trial, just as

Gorman-Lykken was in custody. In *Butler*, one court officer positioned next to the defendant and one court officer positioned between the defendant and the victim. The Court found this was not prejudicial. 198 Wash.App. at 494.

Here, only one court officer was present and positioned next to the defendant throughout trial. The jail did not add an officer to the court arrangements during the defendant's testimony, nor did it exchange the notably small officer with was a sizeable guard. RP 342. Indeed, her presence was less obtrusive than the second officer in *Butler*, who was clearly there to prohibit contact between the defendant and the testifying victim. That officer's presence indicated a concern for the victim's safety, thus suggesting the defendant was dangerous. Such indicia did not exist here. Consequently, the trial court effectively exercised its discretion and no prejudice occurred.

IV. The prosecutor did not commit misconduct.

To prevail on a claim of prosecutorial misconduct the defendant must establish that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial. *State v. Magers*, 164 Wash.2d 174, 191, 189 P.3d 126 (2008). The defendant has the burden of proving there is a substantial likelihood the instances of

misconduct affected the jury's verdict. *Magers*, 164 Wash.2d at 191, 189 P.3d 126 (*quoting Pirtle*, 127 Wash.2d at 672).

However, when, as is the case here, the defendant fails to object to an improper remark that is a waiver of any 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 curative instruction. *State v. Brown*, 132 Wash.2d 529, 561, 940 P.2d 546 (1997); *State v. Russell*, 125 Wash.2d 24, 86, 882 P.2d 747 (1994). Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request. *State v. Hoffman*, 116 Wash.2d 51, 93, 804 P.2d 577 (1991); *State v. York*, 50 Wash.App. 446, 458, 749 P.2d 683 (1987), *review denied*, 110 Wash.2d 1009 (1988).

Alleged improper comments and their prejudicial effect should not be reviewed in isolation but by placing them in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury. *State v. McKenzie*, 157 Wash.2d 44, 52, 134 P.3d 221 (2006) *quoting Brown*, 132 Wash.2d at 561, 940 P.2d 546; *State v. Graham*, 59 Wash.App. 418, 428, 798 P.2d 314 (1990); *State v. Green*, 46 Wash.App. 92, 96, 730 P.2d 1350 (1986).

- a. ***The prosecutor was permitted to claim the defendant lied because the evidence suggested he did in fact lie.***

There is a distinction between the individual opinion of the prosecuting attorney, as an independent fact, and an opinion based upon or deduced from the testimony in the case. *McKenzie*, 157 Wash.2d at 53, 134 P.3d 221, quoting *State v. Armstrong*, 37 Wash. 51, 54-55, 79 P. 490 (1905). To determine if the prosecutor is expressing a personal opinion of the defendant's guilt, independent of the evidence, Court's review the challenged comments in context. *McKenzie*, 157 Wash.2d at 53. Prejudicial error does not occur until it is clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion. *State v. Papadopoulos*, 34 Wash.App. 397, 400, 662 P.2d 59, review denied, 100 Wash.2d 1003 (1983).

Where a prosecutor shows that other evidence contradicts a defendant's testimony, the prosecutor may argue that the defendant is lying. *State v. Copeland*, 130 Wash.2d 244, 291-92, 922 P.2d 1304 (1996); see also *State v. Jefferson*, 11 Wash.App. 566, 524 P.2d 248 (1974)(finding no impropriety in prosecutor's use of word liar where evidence showed the defendant was untruthful); *State v. Luoma*, 88 Wash.2d 28, 40, 558 P.2d 756 (1977) (finding that evidence supported the prosecutor's comments in closing argument that the defendant was a liar).

In *State v. Calvin*, it was not improper argument, when, after reciting a lengthy list of evidence and inconsistencies in testimony, the prosecutor said to the jury that the defendant was “just trying to pull the wool over your eyes.” 176 Wash.App. 1, 19, 316 P.3d 496 (2013). There the court reasoned that prosecutors are entitled to argue inferences from the evidence, and that without a clear and unmistakable expression of personal opinion, there is no prejudicial error for doing so. *Id.*, citing *State v. Brett*, 126 Wash.2d 136, 175, 892 P.2d 29 (1995).

Here, the prosecutor stated only once that the defendant lied on the stand. Before and immediately after that statement, the prosecutor pointedly discussed the evidence that suggested he lied.

First, the defendant testified in direct and cross-examination that the victim never told him that night, or any night, not to have sex with her when she was asleep. This was refuted by Randy Kunkel’s testimony. Randy testified to overhearing the entire conversation and argument between the defendant and the victim. he testified that he heard the victim tell the defendant not to touch her, to leave her alone, to let her go to sleep, and, as she had done multiple times in the past, not to have sex with her while she was asleep. The prosecutor highlighted these discrepancies immediately following the statement “the defendant got up on the stand and lied.”

Next, the defendant described a consensual act that simply did not fit the evidence. He claimed he had anal sex with the victim, while simultaneously “fisting her vagina for over 45 minutes.” Not overlooking the anatomical impossibility of the defendant’s claim, the State chose to focus on Susie Bellar’s testimony. Susie Bellar performed the SANE examination of the victim and noted abrasions and contusions only around the victim’s anus, not her vagina. The evidence did not fit the defendant’s story and the State was permitted to discuss that inconsistency.

The State then discussed the difference between the defendant’s rendition of his conversation with Kelso Police Sergeant Wiper and Sergeant Wiper’s own recollection. The defendant stated that the conversation lasted nearly 30 minutes, where 20 of those minutes were devoted to a detailed account of the sexual acts. Sergeant Wiper described a five minute conversation that did not include the level of detail described by the defendant.

Finally, the State discussed the victim’s own testimony, which was corroborated by the evidence obtained and presented by Susie Bellar and Randy Kunkel.

Ultimately, the defendant admitted to having sexual intercourse, but claimed it was consensual, anatomically impossible, occurred in orifices not supported by the evidence, and that he was never told no. These statements

were not supported by the evidence and were directly contradicted by several witnesses.

Moreover, the prosecutor did not communicate a personal opinion that the defendant was not credible. The prosecutor pointed to the overwhelming amount of evidence that suggested the defendant lied on the stand. When considered in the context of the closing argument, the issues of the case, nothing the about the prosecutor's statement "the defendant got on the stand and lied" can be considered so flagrant and ill-intentioned to warrant reversal. Consequently, the defendant's argument fails.

b. *Stating the victim is not on trial was proper rebuttal to defense counsel's closing.*

Defense also claims the prosecutor misstated the State's burden of proof by telling the jury what they already knew: the victim was not on trial. This was not an inversion of the State's burden; it was a statement of fact. Common sense dictates here: the jury was informed from the outset that the defendant was charged with rape in the second degree.

The prosecutor neither misstated the law nor did he misrepresent the role of the jury and the burden of proof. The prosecutor's statement did not suggest, or even imply, that if the jury were to acquit the defendant they would have to disbelieve the testimony they heard from the various State's witnesses. *See State v. Fleming*, 83 Wash.App. 209, 921 P.2d 1076 (1996).

That said, the State is permitted to discuss the credibility of witness testimony.

A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and may freely comment on witness credibility based on the evidence. *Gregory*, 158 Wash.2d at 860, 147 P.3d 1201. This is especially so where, as here, the prosecutor is rebutting an issue the defendant raised in his closing argument. *See State v. Jones*, 71 Wash.App. 798, 809, 863 P.2d 85 (1993); *State v. Lewis*, 156 Wash.App. 230, 240, 233 P.3d 891 (2010). A prosecutor is entitled to respond to defense counsel's arguments. *Calvin*, 176 Wash.App. at 16, 316 P.3d P.3d 496.

Defense counsel argued in closing that the victim was both a drug addict and a liar. The argument's imputation was that she was not raped because she was a drug addict. This effectively placed her and her credibility on trial. The prosecutor was permitted to argue that it was not the victim nor her character that was being tried, it was the defendant. That is where the prosecutor left that argument.

In context to that argument, the prosecutor stated that even if she was a drug addict, drug addicts can still be raped. The argument then refuted the claims of drug use and addiction made by the defendant and defense counsel, noting firstly that no testimony presented in its case suggested the

victim was an addict. The prosecutor then described the drugs that were administered to her by medical professionals, and how they affected the victim. Ultimately, the prosecutor argued that the defendant knew about these effects and was on notice not to have sex with the victim when she was asleep.

As in *Calvin*, where the prosecutor argued defense counsel was “blaming the victim,” these arguments were neither flagrant nor ill-intentioned. 176 Wash.App. at 17-18, 316 P.3d 496. The arguments were proper rebuttal to defense closing remarks, in which defense counsel aggressively attacked the victim’s credibility. *See State v. Warren*, 165 Wash.2d 17, 30, 195 P.3d 940 (2008)(prosecutors have wide latitude to argue reasonable inferences from the facts concerning witness credibility). The fact defense counsel did not object at trial strongly suggests the comments did not appear unduly prejudicial in the context of trial. *Id.* at 18.

Finally, given the evidence presented at trial, there is not a substantial likelihood the statement that “the victim is not on trial” affected the outcome. The evidence showed the defendant was told on multiple occasions not to have sex with Ms. Kunkle while she slept; that he admitted to sexual intercourse with Ms. Kunkle; and that the sexual intercourse was non-consensual. Accordingly, the State’s argument was proper and did not affect the outcome.

c. *The prosecutor did not impugn defense counsel.*

A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and may freely comment on witness credibility based on the evidence. *Gregory*, 158 Wash.2d at 860, 147 P.3d 1201. This is especially so where, as here, the prosecutor is rebutting an issue the defendant raised in his closing argument. *See State v. Jones*, 71 Wash.App. 798 809, 863 P.2d 85 (1993); *State v. Lewis*, 156 Wash.App. 230, 240, 233 P.3d 891 (2010). A prosecutor is entitled to respond to defense counsel's arguments. *Calvin*, 176 Wash.App. at 16, 316 P.3d P.3d 496.

Here the prosecutor focused on one interpretation of the evidence, not on defense counsel personally. He argued that defense counsel's presentation of when Mr. Kunkel came forward was inaccurate and false. The prosecutor referred the jury to the evidence as it came out at trial. It may have been imprecise, but it was moored in the belief that "recently" is not "the day before." While it may have been splitting hairs, reasonable minds can disagree and that is the role of the court in instructing the jury on the arguments of counsel. WPIC 1.02.

In context, this was a response to defense counsel's own attempts to impugn the testimony of Mr. Kunkel. Using a specific timeframe to suggest

he should not be believed because he did not promptly come forward as a witness to the case. Defense counsel argued that Mr. Kunkel never came forward, knowing that he and his sister informed the jury that it was the victim who wished not to involve him.

During cross-examination, Randy informed defense counsel that he “recently” spoke with people about the events of July 5, 2017. RP 238. It was then during rebuttal cross-examination that defense inserted his terminology of two days prior to trial, RP 386, which was not testified to at that time. The State objected. Defense then inaccurately argued that “Randy Kunkel never came forward to law enforcement, whether police officers or anyone on the prosecution until the day before trial.” RP 427-28. The original testimony was recently, not the day before trial, and the prosecutor fervently argued from that position.

It was fair for the prosecutor to attack the attribution of a specific date and time. In fact, defense counsel did not object to this argument. Nor did defense counsel object prior to the sentencing hearing, where he felt compelled to request a new trial based on other issues he had with the prosecutor’s closing argument. It was proper for the State to rebut defense counsel’s argument, which meant arguing the claim was false and point the jury to the evidence as the prosecutor viewed it be. *See Warren*, 165 Wash.2d at 30.

Even if the court finds the statement to be improper, any prejudice could have been cured by a limiting instruction. *State v. Charlton*, 90 Wash.2d 657, 661, 585 P.2d 142 (1978). This is especially true given the jury was instructed that the lawyers' remarks are not evidence:

“the lawyers’ remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers’ statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.”

WPIC 1.02 (Emphasis added).

Because the jury is presumed to follow this instruction, *Warren*, 165 Wash.2d at 29, 195 P.3d 940, it was effectively admonished to review the facts and apply them to the law, and that the lawyers' comments are not to be used in their calculus of determination of guilt. While unnecessary, a limiting instruction would have provided an additional prophylactic to any prejudice.

Moreover, the prosecutor's limited comments were not so flagrant and ill-intentioned to justify a reversal.

In *State v. Thorgerson*, the Supreme Court found the prosecutor's comments that defense counsel's presentation of the facts was “just another example of sleight of hand. Look at everything except what matters,” and

his describing the defense case as “bogus” was improper, but that misconduct likely did not alter the outcome of the case. 172 Wash.2d 438, 451-52, 258 P.3d 43 (2011).

Unlike in *Thorgerson*, where the prosecutor attacked the entirety of defense counsel’s theory of the case, and by doing so he attacked defense counsel, here the prosecutor argued about a single fact. The prosecutor argued from the position of “recently,” not “the day before trial.” Though the language was strong it was not ill-intentioned like the argument in *Thorgerson*, where the court found the prosecutor planned in advance the “sleight of hand” commentary about defense theory. Here, the comments were unplanned, were part of rebuttal argument, in response to defense counsel’s own attack on the credibility of the victim and her brother. The prosecutor could not have possibly planned rebuttal for defense counsel’s argument. He might be able to anticipate certain arguments, but he certainly is not clairvoyant.

In *Warren*, where the prosecutor made several comments about defense counsel’s arguments, telling the jury that defense counsel’s mischaracterizations were “an example of what people go through in a criminal justice system when they deal with defense attorneys,” and as “a classic example of taking these facts and completely twisting them to their own benefit, and hoping that you are not smart enough to figure out what in

fact they are doing,” the Supreme Court found the comments were improper comments on defense counsel’s role, but were not so ill-intentioned that no instruction could have cured them. 165 Wash.2d at 29-30, 195 P.3d 940.

Here, the prosecutor’s limited comments were specific to an issue of credibility and did not rise to the level of those described in *Warren*. They were not specifically directed at defense counsel, rather they were against defense counsel’s claims. The prosecutor argued the evidence as he observed it through testimony, stating clearly “that came out in testimony.” RP 440.

Even if this was misconduct, it did not affect the outcome of the case. The evidence was overwhelmingly weighted towards guilt.

V. **The defendant is not entitled to a reduction of a mandatory fee.**

Defendant requests this court to strike the \$200 filing fee imposed, which was mandatory at the time of his conviction.

The legislature in 2018 amended RCW 36.18.020, to include the provision in 36.18.020(2)(h) that prohibits the imposition of the filing fee for those defendants found indigent under RCW 10.101.010(3)(a) and (c). However, being unable to pay the anticipated cost of counsel for the matter before the court because his available funds are insufficient to pay any amount for the retention of counsel is not a reason that triggers the new limitations on imposition of funds. RCW 10.101.010(3)(d).

The defendant was convicted on September 15, 2017, and sentenced on November 5, 2017. At the time of his conviction and sentencing, the filing fee was mandatory. Statutory inquiry into ability to pay was not required. *State v. Lundy*, 176 Wash.App. 96, 102, 308 P.3d 755 (2013)(mandatory fees which include filing fees operate without the court's discretion). Consequently, the trial court was not required to make any findings regarding the imposition of filing fee at the time of the defendant's sentencing. *Id.*

Defendant has provided no authority to justify a departure from what was statutorily permissible at the time at his sentencing. He does refer the Court to *State v. Rose*, 191 Wash.App. 858, 863-864, 365 P.3d 756 (2015), to persuade this Court to review this matter under the state of the current statutory provisions. However, that is not well placed. In *Rose* the Court considered the conviction of a defendant for a crime that had been decriminalized during a deferred sentence, not a change in the mandatory fee structure. The case turned on the legislative intent, where the legislature included "additional language that fairly convey[ed] disapproval or concern for continued prosecution." *Id.* at 871. Because of the legislature made explicit intention, the court followed RCW 10.01.040. *Id.*

Unlike *Rose*, the legislature did not intend for the statutory changes to reach back. RCW 36.18.020, note on Construction 2018 c 269; RCW

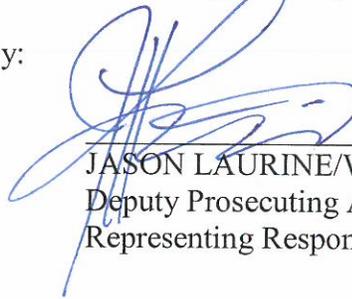
10.82.090 note on Construction “Nothing in this act requires courts to refund or reimburse amounts previously paid towards legal financial obligations or interest on legal financial obligations.” The trial court’s imposition of the \$200 filing fee should remain untouched, as required by RCW 10.01.040, which states that “No offense committed and no penalty or forfeiture incurred previous to the time when any statutory provision shall be repealed, whether such repeal be expressed or implied, shall be affected by such repeal, unless a contrary intention is expressly declared in the repealing act.” Without clear legislative intent to the contrary, this Court should deny defendant’s request.

V. CONCLUSION

For the above reasons, the State respectfully requests this Court deny the defendant's request for reversal. The State did not deny the defendant his due process rights, nor commit prosecutorial misconduct.

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By:



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CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on October 1, 2018.



Michelle Sasser

COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

October 01, 2018 - 11:32 AM

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