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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

WILLIAM SAMUEL SCHMIDT, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Gretchen Leanderson

No. 15-1-05057-7

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**Brief of Respondent**

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MARK LINDQUIST  
Prosecuting Attorney

By  
John Cummings  
Deputy Prosecuting Attorney  
WSB # 40505

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

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

1. Has the defendant failed to prove that the State committed misconduct in opening statement where that opening statement was based in explicit statements made pretrial and where the trial testimony substantiated those claims?
2. Has the defendant failed to prove that the State committed misconduct in closing argument where the State projected a single slide for a short period of time to engage jurors as rational decision-makers by enlarging portions of an admitted exhibit to enable closer examination of that exhibit, framing sections of the exhibit for reference, and otherwise leaving the exhibit unchanged?
3. Has the defendant failed to prove that the State committed misconduct in closing argument where the State projected a single slide for a short period of time which bore the words "Justice" and "Guilty" where that slide was displayed after lengthy argument attempting to persuade the jurors as rational decision-makers, was accompanied by oral argument which focused exclusively on reason and evidence, and urged jurors to return a verdict of guilty based on rationality rather than passion, prejudice, or shock?

B. STATEMENT OF THE CASE.

1. FACTS

J.M.F. was born August 29, 2007. RP 1103. J.M.F. answers to both her first and middle names. RP 1103. Her mother is Crystal Leilani Fitzgerald, who also answers to both her first and middle names. RP

1102. David Fitzgerald is J.M.F.'s biological father. RP 1103-1104. Ms. Fitzgerald and Mr. Fitzgerald were married in 2003 and divorced in 2008. RP 1104. J.M.F. is Ms. Fitzgerald's and Mr. Fitzgerald's only child. RP 1107-1108.

When J.M.F. was four years old, her mother met and began dating William Schmidt, hereinafter referred to as "the defendant." RP 1113, 1116. The defendant's birthdate is May 31, 1985. RP 1115; Ex. 1. When J.M.F. was five years old, Ms. Fitzgerald and J.M.F. moved into the defendant's two-bedroom apartment in Federal Way, Washington. RP 117-119; 1320. P.S., the son of Ms. Fitzgerald and the defendant, was born six months later. RP 1120. A month after P.S. was born, the four moved to a three-bedroom apartment in University Place, Washington. RP 1118-1120. When J.M.F. was seven years old, the family moved into a home in Tacoma, Washington. RP 1121, 1167. J.S., the daughter of Ms. Fitzgerald and the defendant, was born soon after this move was complete. RP 1122. All five lived in that home in Tacoma, Washington until October 29, 2015. RP 1122.

The defendant began molesting J.M.F. when she was five years old and living in King County, Washington. RP 1135. On this occasion, she felt ill and stayed home from School. RP 1135. The defendant cared for J.M.F. during this time. RP 1135-1136. He also wrestled with her, an

activity that eventually became part of the pattern of sexual abuse he inflicted on J.M.F. RP 1135-1136. While wrestling with J.M.F. during this first incident, the defendant touched her vagina. RP 1135-1136. J.M.F. told the defendant, "You touched my no spot," meaning her vagina. RP 1930-1931. J.M.F. later told her mother about this incident, but the defendant denied intentionally touching J.M.F.'s vagina, and Ms. Fitzgerald believed him. RP 1135-1137.

The defendant resolved not to wrestle with J.M.F. for a week; within eight days, however, he began wrestling with her again. RP 1930-1931, 1946. Many of the wrestling moves he employed required him and J.M.F. to touch each other's intimate body parts. RP 1135, 1324-1325, 1765, 1882-1883, 1923-1926, 1930, 1941. Sometimes the wrestling occurred in the living room, and sometimes it occurred in the defendant's bedroom on the bed. RP 1325. Eventually, Ms. Fitzgerald and her mother Ivy Stromgren began telling the defendant to stop wrestling with J.M.F. RP 1137-1139.

Between the time when J.M.F. was age six and the time when she was age eight, the defendant molested J.M.F. on more than five occasions. RP 1335-1336. On some occasions, he would walk into J.M.F.'s bedroom, start wrestling with her, and use the wrestling as a chance to touch her on the chest, bottom, and vagina. RP 1326-1330, 1338. On

some occasions, the defendant would not begin by wrestling; he would simply walk into her bedroom and begin touching her “where no one’s supposed to touch.” RP 1359. He would use these opportunities to insert his fingers into her vagina and move his fingers around and to insert his fingers into her anus and move her fingers around. Ex. 5 at 15:28:29-15:36:14<sup>1</sup>, 15:45:00-15:53:45, Ex. 6. Each of these types of penetration happened “more than once.” Ex. 5 at 15:32:29-15:33:08, 15:42:51-15:44:01. He would also use the opportunities to place his penis against her clothed vagina and rub his penis on her clothed vagina. Ex. 5 at 15:42:08-15:49:47.

During the time period when the defendant was digitally penetrating J.M.F., J.M.F. would tell Ms. Fitzgerald that her vagina was hurting. RP 1162-1163. J.M.F. typically did this after a shower, when she would wrap herself in a towel, go to her room, and ask her mother to come into the room with her. RP 1162-1163. J.M.F. would then point to her vagina and spread her legs, asking Ms. Fitzgerald to look to see if there was anything wrong. RP 1163. This happened on at least two occasions: once while they lived with the defendant in University Place and once while they lived with him in Tacoma. RP 1163.

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<sup>1</sup> Timestamps referenced in this brief refer to the on-screen timestamps of Exhibit 5, which do not change depending on the software used to play the exhibit.

As the molestation continued, J.M.F.'s behavior changed and became more erratic. Her relationship between her and the defendant began to obviously deteriorate, and family members described their interaction as tense. RP 1134. J.M.F. became defiant to the defendant. RP 1134, 1234-1235. J.M.F. began slamming doors. RP 1132. She began to yell and scream more. RP 1771. Eventually, Ms. Fitzgerald took J.M.F. to a behavioral specialist to try to determine if something was wrong with her. RP 1133. She also asked Ms. Stromgren, to speak to J.M.F. and try to find out if there was anything wrong with J.M.F. RP 1133, 1771.

At some point after the family moved into the Tacoma House, the defendant removed the door from J.M.F.'s room. RP 1131-1132, 1233. The door remained off the hinges for over a month. RP 1233. There were times when the defendant would loiter outside of J.M.F.'s room when either Ms. Fitzgerald or Ms. Stromgren were in her room with her, as if he were listening to see what she was telling them. RP 1194-1195; 1763-1764. Ms. Stromgren noted that during this time, the door to J.M.F.'s room was "off, completely off" because the defendant had removed the door from the hinges. RP 1762, 1764.

On one occasion, Ms. Fitzgerald caught the defendant watching J.M.F. while J.M.F. was in the bathroom. Ex. 5 at 16:03:17. When he

was discovered, the defendant exclaimed, "Hey, I wasn't examining her body!" Ex. 5 at 16:03:17. J.M.F. started refusing to shower in the home. RP 1130-1131.

In the summer of 2015, the defendant threatened to punch J.M.F. because she was not eating her food as she was told. RP 1169. Ms. Fitzgerald told the defendant he was not going to punch J.M.F. in the face. RP 1169. At the age of eight, J.M.F. again began to assert herself in the face of being molested by the defendant. On one occasion when the defendant was touching J.M.F.'s vagina in the Tacoma home, J.M.F. told him to stop. RP 1330-1333. The defendant responded by claiming he was not doing anything, saying, "What are you talking about?" RP 1330-1333.

On October 29, 2015, the defendant was out of town on a business trip and J.M.F. disclosed to Ms. Fitzgerald that the defendant had been molesting her. RP 1170-1172, 1342-1346. With the assistance of a stuffed animal, J.M.F. told her mother where and how the defendant had touched her vagina and bottom. RP 1173-1174, 1347-1348, 1350. J.M.F. demonstrated that the defendant had placed his hand on her vagina and moved it around and that he had put his hand on her bottom. RP 1174, 1350. J.M.F. also told her the defendant "put a finger in [her] butt crack." RP 1174.

Ms. Fitzgerald took J.M.F. and her siblings out of the home before the defendant could return, and she brought them to Ms. Stromgren's home in Yelm, Washington. RP 112, 1179-1180, 1350-1351, 1778-1780. Soon thereafter, she made a report to police. RP 1187-1188, 1717-1718. J.M.F. was forensically interviewed on November 5, 2015. RP 1186, 1363, 1536; Ex. 5. During the interview, J.M.F. drew diagrams to assist her in explaining what the defendant had done to her. Ex. 6. The forensic interview was recorded and admitted substantively at trial as Ex. 5. Ex. 5; CP 359-360. Ex. 5 was played for the jury during the State's case-in-chief. RP 1473-1474, 1497. The diagrams J.M.F. drew during the forensic interview were collectively admitted as Ex. 6. RP 1367. The defendant did not object to the admission of any of the diagrams admitted as Ex. 6.

## 2. PROCEDURE

On December 18, 2015, the Pierce County Prosecuting Attorney's Office charged the Defendant by Information with four counts of Rape of a Child in the First Degree. CP 3-5. A Declaration for Determination of Probable Cause was filed at that time. CP 1-2.

On July 8, 2016, defense counsel interviewed J.M.F. at the Prosecuting Attorney's Office in the Pierce County Prosecutor's Office. Pretrial Ex. 6. This interview was transcribed on January 1, 2017. Pretrial

Ex. 6. During this interview, J.M.F. indicated that the defendant touched her clothed vagina with “the part where [the defendant] pees from.”

Pretrial Ex. 6 at 44-45. The defense investigator how J.M.F. knew that it was the defendant’s penis if he had his clothes on. Ex. 6 at 44-45. The following questions and answers followed this question:

JF: Because I could felt -- because I can feel it.

[Defense Investigator]: How do you know you didn't just feel like his leg or his hip?

JF: It was not his leg because I could see. I could see it happen.

[Defense Counsel]: You could see it. What do you mean?

JF: You are taking it the wrong way. I could see what he was doing.

[Defense Counsel]: OK.

[Defense Investigator]: What did it look like? Can you describe it?

JF: Him touching me with that part with his clothes on.

Pretrial Ex. 6 at 44-45.

On October 19, 2017, the State filed an Amended Information amending Counts I-IV to four counts of Child Molestation in the First Degree. CP 132-124. The State noted that, while rape of a child in the first degree was an appropriate charge given the facts of the case, “one of my duties as a prosecutor is to think about what I can most accurately prove to a jury... I... have to recognize the high burden the State faces, and that is why the amendment is made at this time.” RP 39.

Prior to the trial, the court held a Child Hearsay Hearing to determine whether J.M.F.'s disclosures to others and in the Forensic Interview (FI) would be admissible as substantive evidence in accordance with RCW 9A.44.120. RP 229-1002. The transcript of the FI was admitted as evidence for Child Hearsay Hearing. RP 945; Pretrial Ex. 6.

During argument regarding the admissibility of J.M.F.'s statements, the State noted that J.M.F. had alleged digital-vaginal penetration as well as digital-anal penetration. RP 968. The State also noted that the defendant "moved into the home very quickly and began... engaging in activity which created a situation where there would be a delayed disclosure: The threatening to punch her in the face at one point, removing the door from her room...." RP at 974. In rebutting this testimony, defense counsel did not dispute the vaginal penetration, the anal penetration, the removal of the door, or the timing of the door's removal despite addressing other testimony from that hearing. RP 976-987. The court ruled that J.M.F.'s statements in the forensic interview and to other witnesses regarding her abuse at the defendant's hands were admissible. RP 1002.

Opening statements were held on October 30, 2017. RP 1004. During opening statements, the State said,

Sexual acts can be embarrassing for anyone to talk about, but especially for an eight-year-old child who may not know precisely what's happened to them, who may be ashamed or afraid about what will happen when they come forward, who may not even have the words to express the fact that her stepfather had been digitally penetrating her vagina over the course of the last two years and digitally - meaning with his finger -- penetrating her anus numerous times and had taken his penis out and rubbed it outside of the clothed area of her vaginal area.

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Within a few months, [the defendant] had moved in. He quickly moved in with the family. Within two to three months, he had removed the door from the bedroom that belonged to [J.M.F.].

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As time and again he would wrestle and use this as an opportunity to touch her private parts, when he would choose to insert his finger into her vagina in her bedroom or in his bedroom, when he took his penis out and put it on her clothed vaginal area, or he would penetrate her anus with his finger, [J.M.F.], who's a pretty happy, talkative kid, started to get really, really upset.

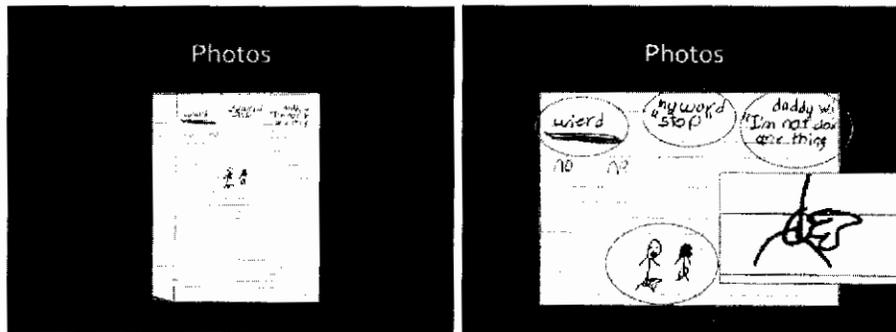
RP 1004-1007. Later in the opening, the State noted that the penetration commentary was contained in the recorded forensic interview. RP 1008.

During the State's opening statement, defense counsel objected to the allegation that the defendant had rubbed his penis on J.M.F.'s clothed vagina, moving for a mistrial. RP 1020. The State noted that the Declaration for Probable Cause filed at the inception of the case contained statements in which it was asserted that the defendant had put his "PP" on J.M.F. when they were both fully clothed. RP 1021; CP 364-365. The

court overruled the objection and denied this mistrial motion. RP 1023. The defendant did not object to the statements regarding allegations of digital-vaginal penetration, digital-anal penetration, or the removal of the door. RP 1004-1054. Nor did defense move for a mistrial on the basis that such a statement had been made in opening. RP 1004-1054.

Prior to closing argument, the State filed a Corrected Amended Information. CP 125-127. On November 15, 2017, the State provided a PowerPoint (PPT) presentation for the trial court's in camera review. RP 1959-1961; Ex. 25; Ex. 26. A copy was provided to defense counsel after closing argument had been presented to the jury. RP 1959-1961; Ex. 25, 26.

Slide 4 of the PPT presentation depicted one of the drawings J.M.F. created during the forensic interview of November 5, 2015. Ex. 5, 6, 25, 26. Slide 4 began as the below left diagram; an automatically triggered animation enlarged the portion of the image containing a diagram while four manual animations added circles and another enlargement of the image, resulting the below right image:



RP 1980, Ex. 25. The State made the following argument as Slide 4 was displayed for the jury:

Also, she talked about how it felt. [J.M.F.] was very clear about how things felt. She talked about how it felt weird when the defendant would do this to her body.

She told you how she would say -- told the defendant to stop, and he said, "I'm not doing anything." And on that same page, she drew a hand touching her vaginal area. She also told you about her other emotional feelings when she talked during the disclosure about how it felt awkward. We'll talk about that later.

RP at 1980. Defendant did not object to this slide. RP 1980. At the conclusion of the State's argument, the State displayed Slide 36, which depicted the following:



RP 2009-2010; Ex. 25. While this slide was displayed, the State made the following argument:

Sex can be an embarrassing topic for anyone, but especially for a five to eight year old who is scared about what's happening, doesn't know what's happening to her, doesn't have the words to say. But for the last two years, the person who was her father figure, who she's done fun things with, has been fondling her vagina, penetrating her butt crack, and placing his penis on her clothed vagina.

For the last four years, she's been molested by the defendant who is supposed to care for her and who had a position of trust. And for those **reasons**, the defendant is guilty of four counts of child molestation in the first degree, and I urge you to answer yes to each of the aggravators.

RP 2010 (emphasis added). This statement concluded the State's argument. RP 2010. After the State completed the argument, defendant objected to Slide 36. RP 2010. The court overruled the objection and directed the slide to be turned off. RP 2010.

The jury began deliberations on November 15, 2017. RP 2042. On November 20, 2017, the jury found the defendant guilty of four counts of child molestation in the first degree. RP at 2046; CP 153-156. The jury found that in committing all four instances of child molestation in the first degree, the defendant used his position of trust, confidence, or fiduciary responsibility to facilitate the crime. RP 2046-2048; CP 157-160. The jury was polled. RP at 2048-2049.

On December 1, 2017, the defendant moved for a New Trial; the parties filed numerous briefs regarding this motion. RP 2055; CP 161-315. The motion hearing was held on January 5, 2018. RP at 2055. During the motion, the defendant argued that the State committed misconduct in opening by indicating that the jury would hear evidence (1) that the defendant inserted his finger into J.M.F.'s vagina, (2) that the defendant penetrated her anus, (3) that the defendant took out his penis and rubbed it on J.M.F.'s vaginal area, (4) that the defendant took opportunities to be alone with J.M.F., (5) and that the defendant removed J.M.F.'s door shortly before he moved in with J.M.F.'s mother and it remained off the hinges for years. RP at 2064-2065; CP 161-315. During argument, the State made it clear that, at the time of opening statement, the prosecutor believed that the most credible interpretation of the information provided in discovery and at the pretrial hearing supported his predictions in opening statement. RP at 2084-2091; CP 161-315. The trial court denied the motion, concluding that the State did not commit prosecutorial misconduct in opening statement. RP at 2092; CP 316, 351-355. The court further found that, even if misconduct had occurred as alleged by defense, the misconduct would not have prejudiced the jury. RP at 2092; CP 316, 351-355.

Sentencing was held on January 26, 2018. RP 2095; CP 317-334. The Court sentenced the defendant to 196 months in custody. RP 2123; CP 317-334, 337-340. The defendant filed notice of appeal on January 29, 2018. CP 346. Findings of Fact and Conclusions of Law regarding the denial of the defendant's Motion for New Trial were filed on April 27, 2018. RP at 2150-2171.

C. ARGUMENT.

1. THE STATE'S ALLEGATIONS IN OPENING STATEMENT WERE MADE IN GOOD FAITH, WERE BASED ON EXPLICIT STATEMENTS FROM PRETRIAL DISCOVERY AND TESTIMONY AND WERE SUBSTANTIATED BY EVIDENCE ADMITTED AT TRIAL.

A person commits the crime of Child Molestation in the First Degree where "the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim." RCW 9A.44.083.

The purpose of the prosecutor's opening statement is to outline the material evidence that the State to outline the material evidence the State intends to introduce at trial. *State v. Kroll*, 87 Wn.2d 829, 834. 558 P.2d 173 (1976). Proper opening statement is based upon both the anticipated evidence and the reasonable inferences which can be drawn therefrom. *Id.* at 835.

A prosecuting attorney is a quasi-judicial officer who must “subdue courtroom zeal for the sake of fairness to the defendant.” *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011) (internal citations omitted). 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. *Id.* at 442. “When reviewing a claim that prosecutorial misconduct requires reversal, the court should review the statements in the context of the entire case.” *Id.* at 443. To prevail on a claim that the prosecutor committed misconduct in opening, a defendant must prove that the prosecutor acted in bad faith. *Washington v. Farnsworth*, 185 Wn.2d 768, 786, 374 P.3d 1152 (2016).

Even where defense has properly preserved an objection, “the defense bears the burden of establishing the impropriety of the prosecuting attorney's comments and their prejudicial effect.” *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997); *Thorgerson*, 172 Wn.2d at 442-443. “To establish prejudice, the defense must demonstrate there is a substantial likelihood the misconduct affected the jury’s verdict.” *Brown*, 132 Wn.2d at 561; *Thorgerson*, 172 Wn.2d at 442-443.

Prejudice deriving from opening statement or closing argument can be alleviated by an instruction to the jury that the lawyers’ statements are

not evidence. *Brown*, 132 Wn.2d at 565. Jurors are presumed to follow the court's instructions. *State v. Kroll*, 87 Wn.2d 829, 835, 558 P.2d 173 (1976).

The defendant fails to carry his burden to prove prosecutorial misconduct occurred in opening statement. He waived any objection to most of the statements to which he now assigns error, the statements were based on testimony and evidence available to the State prior to trial, and there can be no prejudice where trial testimony and evidence substantiated the State's opening statement.

- a. The defendant failed to object to the majority of the allegations in the State's opening statement, and those statements do not represent flagrant and ill-intentioned misconduct because they were accurate predictions of the evidence that was subsequently elicited at trial.

The defendant failed to object during opening statements to the allegations that the defendant digitally-vaginally penetrated J.M.F., digitally-anally penetrated J.M.F., and removed her door from the hinges. RP 1005. Where defendant fails to object to an improper remark, he waives that error unless the remark is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. *State v. Kroll*, 87 Wn.2d at 443. The defendant fails to prove that these statements constitute such flagrant

and ill-intentioned misconduct that they resulted in enduring prejudice that could not have been cured by an instruction. Indeed, the testimony at trial substantiated the State's allegations in opening statement.

The statement that the defendant had digitally penetrated J.M.F.'s vagina over the course of the previous two years was an accurate statement that was based in a number of sources available pretrial and which was borne out by the testimony at trial. Pretrial, the State was aware of the Declaration for Determination of Probable Cause, which indicated J.M.F. said the defendant "put his fingers in the crack where she pees...lots of times" from time J.M.F. was age six until the time she was age eight. CP 364-365. During the Forensic Interview, J.M.F. said the defendant "just sticks his finger in the... in the crack" from which she peed. Ex. 5 at 15:51:32-15:51:49; Ex. 13 at 25-26. The diagram accompanying the Forensic Interview substantiated this claim. Ex. 6. J.M.F. told the defense investigator pretrial, "Um, like, he just sticks his fingers in like in the crack." Pretrial Ex. 6 at 26. Ms. Fitzgerald testified in the Child Hearsay Hearing that J.M.F. utilized a stuffed animal and "put her hands in between [the stuffed animal's] legs and kind of moved her hands side to side." RP 230. At trial, the claim was substantiated through the admission of Ex. 5 and Ex. 6. CP 359-360. Witnesses testimony during the State's case-in-chief corroborated J.M.F.'s report of digital-

vaginal penetration. RP 1135-1136, 1326-1330, 1338, 1359 1930-1931. Testimony also established this penetration occurred from the age of six until the age of eight. RP 1335-1336. J.M.F. experienced vaginal pain significant enough to cause her to ask her mother to look at her vagina. RP 1162-1163. Ms. Fitzgerald testified about J.M.F.'s disclosure substantially similarly to the way she testified pretrial, with the exception that during her trial testimony, she specifically indicated that J.M.F. said the defendant "put a finger in [J.M.F.'s] butt crack." RP 1350, 1173-1174. The allegation of digital-vaginal penetration as not misconduct; it was a good faith description of anticipated testimony which was substantiated at trial.

The statement that the defendant had digitally penetrated J.M.F.'s anus numerous times was an accurate statement that was based in a number of sources available pretrial and which was borne out by the testimony at trial. Pretrial, the State was aware of the Declaration for Determination of Probable Cause, which indicated that J.M.F. said the defendant put his fingers in the area where "brown and green poop" comes from. CP 364-365. During the Forensic Interview, J.M.F. indicated something happened to her butt that should not have happened and that it happened many times. Ex. 5 at 15:32:29-15:33:08. She later replied to the statement, "What do his fingers do in the crack on the bottom," with,

“They move around.” Ex. 5 at 15:52:50-15:53:25. The diagrams she drew during the interview corroborate her statements. Ex. 6. During the defense interview of J.M.F., she said, “[Y]ou know how like there is a crack behind there too...? He puts his fingers there.” Pretrial Ex. 6 at 27. Ms. Fitzgerald described in pretrial testimony how J.M.F. utilized a stuffed animal during the disclosure of her abuse and that she did not move her hand, she just rested it on the stuffed animal’s “bum.” RP 231. At trial, the allegation was substantiated by the admission of the Forensic Interview and diagrams. Ex. 5 and 6. It was further substantiated by Ms. Fitzgerald’s trial testimony regarding J.M.F.’s disclosure, which was substantially similar to the way she testified pretrial, with the exception that during her trial testimony, she specifically indicated that J.M.F. said the defendant “put a finger in [J.M.F.’s] butt crack.” RP 1350, 1173-1174.

Where the prosecutor’s opening statements are borne out by the evidence adduced at trial, the jury cannot be said to have been prejudiced by those statements. Jurors are not prejudiced by accurately anticipated evidence which is admitted by the court at trial.

The statement that the defendant had removed the door from J.M.F.’s bedroom within two to three months was made in good faith. Ms. Stromgren testified pretrial that the defendant had removed J.M.F.’s bedroom door. RP 457-458. According to Ms. Stromgren, the door was

left off its hinges “all the way up until [Ms. Fitzgerald and the children] left” the home. RP 458. It was removed “maybe two, three, four months of getting there, moving there.” RP 459. Because the allegation was based in a good faith reliance on the sworn pretrial testimony of Ms. Stromgren, the State did not commit misconduct in predicting that testimony would be borne out in trial.

The trial testimony was substantially consistent with the allegation made in opening statement. At trial, Ms. Stromgren and Ms. Fitzgerald testified that the defendant removed J.M.F.’s bedroom door, that the door was “completely off,” and that it remained off its hinges for over a month. RP 1131-1132, 1233, 1762, 1764. Trial testimony further indicated that, while the defendant’s door was off its hinges, the defendant used this fact to eavesdrop on J.M.F. RP 1194-1195, 1762-1764. Although the trial testimony indicated that the door was not removed immediately when the family moved to the home, but rather “later on,” RP 1233, it did not establish a firm timeframe as to when the door was removed. “Later on” is not inconsistent with “within two to three months.” Thus, the “within two to three months” language of the opening statement, although not borne out verbatim at trial, was not inconsistent with the testimony the jury heard. The opening statement was substantially consistent with the testimony about the door. The State is not required to perfectly predict in

opening statement what the evidence will be; only act in good faith. The *de minimis* discrepancy between opening statement and the trial testimony does not satisfy the defendant's burden of proving bad faith.

This *de minimis* discrepancy also does not establish prejudice in the context of the entire trial. The removal of the door was an ancillary fact of the case, not a significant fact on which the entire case hinged. It certainly did not satisfy a particular element of the crimes charged. Also, the fact that the defendant used the removal of the door to eavesdrop on J.M.F. and ensure she was keeping his secret was a much more significant aspect of the door's removal than the timing of the door's removal. This concern about eavesdropping was substantiated at trial. RP 1194-1195, 1762-1764. Finally, the jury was instructed that opening statement was not evidence, curing any possible prejudice that may have occurred from this uncertainty surrounding the timing of the removal. CP 130-152; RP 1895, 2036. No prejudice resulted from the statement about the door because the opening statement was not inconsistent with the testimony at trial, the removal of the door was not the most significant fact at trial, and the jury is presumed to follow the court's instruction that opening statement is not evidence.

Defendant waives any error assigned to these three statements because he failed to object to them at trial, he fails to prove they were

misstatements made with flagrant ill-intention, and he fails to demonstrate that a discrepancy between these opening statements and the trial testimony would have prejudiced the jury in a way that could not be neutralized by an admonishment to the jury.

- b. The State's allegations that the defendant digitally-vaginally penetrated J.M.F., digitally-anally penetrated J.M.F., and removed the door, would not constitute misconduct even if the objection had been preserved because they accurately predicted the evidence that would be elicited at trial.

Had the defendant properly preserved the error he now assigns to these statements, he would nonetheless fail to meet his burden of proving impropriety. See *Brown*, 132 Wn.2d at 561. Opening statement may properly include statements based upon the anticipated evidence as well as the reasonable inferences which can be drawn therefrom. *Kroll*, 87 Wn.2d at 835. Courts review the context of the entire trial in evaluating claims of prosecutorial misconduct. *Thorgerson*, 172 Wn.2d at 442. He moreover fails to prove prejudice. See *Brown*, 132 Wn.2d at 561; *Thorgerson*, 172 Wn.2d at 442-443. "To establish prejudice, the defense must demonstrate there is a substantial likelihood the misconduct affected the jury's verdict." *Brown*, 132 Wn.2d at 561; *Thorgerson*, 172 Wn.2d at 442-443.

The defendant fails to prove misconduct. As noted in the previous section, the State's opening statements regarding digital-vaginal

penetration, digital-anal penetration, and the removal of J.M.F.'s door were rooted in facts known to the State and defendant prior to opening argument. The penetration allegations were also substantiated at trial, and the testimony about the door was substantiate in relevant part.

The defendant also fails to prejudice. Because evidence of penetration was presented to the jury, it cannot be said that the State somehow caused prejudice by accurately predicting that evidence in opening statement.

The testimony regarding the door was likewise not prejudicial. The only slight discontinuity regarding the removal of the door was between the statement that the door was removed "within two to three months," RP 1004-1007" and the statement that it was not removed immediately when the family moved to the home, but rather "later on," RP 1233. Such a discrepancy is *de minimis* and would have been cured by the court instruction that opening statement is not evidence. CP 130-152. Moreover, the discontinuity did not detract from the ultimate point of the opening statement: that the defendant used the removal of J.M.F.'s door as a way to eavesdrop on her conversations. This evidence *was* elicited during the trial. *See* RP 1194-1195, 1762, 1764. Similarly, evidence was elicited that the defendant made the statement, "Hey, I wasn't examining her body" when he was caught watching J.M.F. in the bathroom. Ex. 5 at

16:03:17. The effect of the defendant's eavesdropping and odd surveillance of the victim as thus substantiated by other evidence independent of the specific timing of the removal of the door.

Defendant fails to "demonstrate there is a substantial likelihood" that any misconduct "affected the jury's verdict." *Brown*, 132 Wn.2d at 561; *Thorgerson*, 172 Wn.2d at 442-443.

- c. The trial court did not abuse its discretion in denying the defendant's motion for a new trial based on the State's allegations in opening that the defendant placed his penis on J.M.F.'s clothed vagina because the statement was based in pretrial interviews and was an accurate prediction of the evidence admitted at trial.

The trial court did not abuse its discretion when it denied the defendant's motion for mistrial based on the State's opening statement that the defendant "had taken his penis out and rubbed it outside of the clothed area of [J.M.F.'s] vaginal area." RP 1005. The denial of a motion for a mistrial on the basis of prosecutorial misconduct is reviewed for an abuse of discretion. *Brown*, 132 Wn.2d at 562-563. An abuse of discretion occurs when the "trial court's decision is manifestly unreasonable or based upon untenable grounds or reasons." *Brown*, 132 Wn.2d at 572.

The statement that the defendant rubbed his penis on J.M.F.'s clothed vaginal areas was based in evidence available to the State and defendant prior to trial. The Affidavit for Determination of Probable

Cause indicated that during the Forensic Interview, J.M.F. “disclosed that the defendant put his ‘P.P.’ on her ‘P.P.’ when they were both fully clothed.” CP364-35. During the forensic interview, J.M.F. was reluctant to talk about the time the defendant placed his penis on her clothed vagina on multiple occasions. Ex. 5 at 15:42:08 – 15:44:30; Ex. 13 at 22-25. She indicated that when this occurred, she was sometimes wearing pajamas, school clothes, or panties and that his penis touched her vaginal area over her clothes. Ex. 5 at 15:45:00 – 15:48:24; Ex. 13 at 24-25. During the pretrial defense interview on July 8, 2016, J.M.F. clarified that on at least one occasion, when the defendant touched her clothed vaginal area with his penis, he was wearing pants. Pretrial Ex. 6 at 44-45. The defense interviewer challenged her on this point, asking how she knew it was the defendant’s penis, as opposed to his leg or his hip, if he was wearing pants. Pretrial Ex. 6 at 45. J.M.F. responded, “because I could see. I could see it happen.... I could see what he was doing.” Pretrial Ex. 6 at 45. The defense interviewer asked, “What did it look like? Can you describe it?” and she replied, “Him touching me with that part with his clothes on.” Pretrial Ex. 6 at 45. Assessing these facts, the State concluded that it was reasonable to conclude that the defendant was wearing pants, exposed his penis without removing the pants completely, and rubbed his penis on J.M.F.’s clothed vaginal area. Such a conclusion

reconciles the accounts of J.M.F. and is not inconsistent with any of the evidence available to the State prior to opening statement. It was not an improper statement, but one based in the facts and reasonable inferences therefrom. *See Kroll*, 87 Wn.2d at 835.

Even if this statement had been improper, it did not result in prejudice such that “there is a substantial likelihood the misconduct affected the jury's verdict.” *Brown*, 132 Wn.2d at 561; *Thorgerson*, 172 Wn.2d at 442-443. The forensic interview was admitted for substantive purposes at trial, so the jury knew that the defendant had rubbed his penis on J.M.F.’s vaginal area in a manner which made her uncomfortable, a manner about which she did not want to speak, and a manner which caused her to grimace and nod vigorously when she recounted it to the Forensic Interviewer on November 5, 2015. Ex. 5 at 15:42:08-15:42:51; Ex. 13 at 22; CP 359-360; RP 1002.

Moreover, even if the jury had discounted this one count of child molestation in the first degree, the verdict would not have been altered because the State offered evidence of more instances of child molestation than it charged. Although the State presented four counts of child molestation in the first degree to the jury, the trial testimony established that the defendant molested J.M.F. on more than five occasions (i.e., at least six occasions) from the time she was six-years-old until she was

eight-years-old. RP 1335-1336. Thus, even if the court had stricken evidence of the incident in which he had rubbed his penis on J.M.F.'s clothed vagina, the defendant cannot establish that the verdict would have been different. The jury would have had two additional instances on which to base convictions.

The trial court did not abuse its discretion when, after observing the witnesses at trial, it concluded that the State gave a proper opening statement and that the conclusion would not have prejudiced the jury. Defendant fails to meet his burden to show the trial court abused its discretion because the opening statement was proper and nothing in the opening statement was prejudicial.

2. THE DEFENDANT FAILS TO PROVE MISCONDUCT IN CLOSING WHERE THE STATE USED A SLIDE BEARING AN ENLARGEMENT OF ADMITTED EVIDENCE AND A SLIDE WITH THE WORDS "JUSTICE" AND "GUILTY" IN ORDER TO ANALYZE EVIDENCE WITHOUT ALTERING IT, ENGAGE THE JURORS AS RATIONAL DECISION-MAKERS, AND ASK THE JURY TO RETURN A VERDICT OF GUILTY BASED ON A RATIONAL ANALYSIS OF THE EVIDENCE, NOT BASED ON PASSION, PREJUDICE, OR SHOCK.

a. The defendant has waived argument as to Slide 3 because the defendant objected to Slide 3 below, but fails to assign error to this Slide or to develop the objection with argument on appeal.

The defendant assigns error to Slide 4 of the State's PowerPoint presentation and mistakenly asserts that he objected to this slide below. The slide to which the defendant objected, however, was Slide 3. Because the defendant fails to argue on appeal why Slide 3 is in error, the defendant has waived argument to Slide 3.

Generally, arguments unsupported by applicable authority and meaningful analysis should not be considered. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); *State v. Elliott*, 114 Wn.2d 6, 15, 785 P.2d 440 (1990); *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 345, 779 P.2d 249 (1989); *In re Disciplinary Proceeding against Whitney*, 155 Wn.2d 451, 467, 120 P.3d 550 (2005)

(citing *Matter of Estate of Lint*, 135 Wn.2d 518, 532, 957 P.2d 755 (1998) (declining to scour the record to construct arguments for a litigant); RAP 10.3(a).

It is evident that the defendant objected to Slide 3, not Slide 4, during the State's closing argument. The defendant interposed three objections between the appearance of slide three and the appearance of slide 27. RP 1978-1995; Ex. 25, 26. The State made a record of displaying Slide 3 to the jury by stating, "this first picture is from the substantive portion of [J.M.F.'s] interview where she's talking about the abuse;" Slide 3 was the first slide in the State's PowerPoint to bear any images. RP1978; Ex.5, 6. As the first animation sequence was triggered, displaying a clarification of the words on the exhibit, the defendant objected, saying, "I just make an objection to the alteration of the exhibit on the slide." RP 1978. The court overruled the objection. RP1978. The State made a record of its response to the objection and then addressed the jury, saying "[J.M.F.] says, 'Two hands where boy goes pee pee. Two hands to do it. William.'" RP 1978. This statement is a verbatim quote from the first animation of slide 3. Ex. 25 at Slide 3. The State triggered further animations on Slide 3, eventually displaying one that said, "more than o[nce]". Ex. 25 (brackets in original). Defense counsel objected, saying, "again, I would object to the alteration of the exhibit that's adding

–,” and the State replied, “I would note that the ‘more than once,’ Your Honor, is a combination of both what’s displayed here as well as what’s from the forensic interview as well as testimony.” RP 1979. The court overruled this second objection to Slide 3. RP 1979. The defendant did not object to the remainder of Slide 3. RP 1979-1995.

After the second objection to Slide 3, the State continued to argue from Slide 3, directly quoting statements from the slide such as “she guessed that...the abuse began when she was five years old,” RP 1979; “she wrote, ‘No, no, no,’” RP 1979; “She’s [n]ot exaggerating,” RP 1980; and “Where boys go pee pee. Where...boys go pee pee over,” RP 1980. These statements correlate directly to the phrases “guss 5 year,” “no no no | no no no,” and “were boy’s go pp over,” which appear on Slide 3 of Ex. 25 and 26.

After this exchange, the State advanced to Slide 4, saying, “Also, she talked about how it felt. [J.M.F.] was very clear about how things felt. She talked about how it felt **weird** when the defendant would do **this** to her body.” RP 1980 (emphasis added). It is significant that this is the first appearance of the word “weird” in either the States closing argument or the State’s PowerPoint Presentation. RP 1962-1980. The State then mentioned that J.M.F. told the defendant to stop and that he denied doing anything, RP 1980, which are statements that appear along the top of Slide

4, Ex. 25, 26. Clearly, by the time the State was displaying these statements on the slide, the closing argument had moved past Slide 3 and on to Slide 4. The defendant did not object to Slide 3, and interposed no objections until the State was discussing Slide Number 27 entitled, “Is J.M.F. making it up on her own?” RP 1979-1995<sup>2</sup>; Ex. 25, 26.

On appeal, the defendant does not assign error to Slide 3, choosing to focus argument on Slide 4. Because the defendant fails to support any objection to Slide 3 with argument on appeal, he waives error as to that Slide.

- b. The defendant waives error regarding Slide 4 because he failed to object to this slide below, and he cannot prove flagrant and ill-intentioned misconduct when Slide 4 merely enlarges and highlights portions of an admitted exhibit for purposes of engaging the jurors as rational decision-makers without altering the exhibit.

A prosecuting attorney has wide latitude in drawing and expressing reasonable inferences from the evidence in closing argument. *Brown*, 132 Wn.2d at 565; *Thorgerson*, 172 Wn.2d at 448. A defendant arguing that prosecutorial misconduct violated his or her right to a fair trial has the

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<sup>2</sup> The objection at RP 1995 clearly applies to Slide 27. Slide 27 contains the phrase “Even the defendant said that, on 10/28/15, he could not think of any other reason for JMF to be upset with him.” Ex. 25 and 26. Immediately after the defendant’s objection as overruled at RP 1995, the State argued, “The defendant testified that on October 28th 2015, he had no idea why these behavioral changes were happening.” RP 1995.

burden of showing the prosecutor's conduct was both improper and prejudicial in the context of the entire trial. *State v. Glasmann*, 175 Wn.2d, 696, 704, 286 P.3d 673 (2012); *State v. Walker* 182 Wn.2d, 829, 477, 286 P.3d 673 (2012). A prosecutor has the duty to secure convictions based only on probative evidence and sound reason. *Glasmann*, 175 Wn.2d at 704. A prosecutor, has a duty to “subdue courtroom zeal,” not add to it, to ensure the defendant receives a fair trial. *Walker*, 182 Wn.2d at 477. In assessing prejudice, courts do not focus on the prosecutor’s subjective intent in committing misconduct, but instead on “whether the defendant received a fair trial in light of the prejudice caused by the violation of existing prosecutorial standards and whether that prejudice could have been cured with a timely objection.” *Walker*, 182 Wn.2d at 478. An improper argument is not necessarily prejudicial. *Kroll*, 87 Wn.2d at 836. The argument must be considered in the context in which it was made. *Kroll*, 87 Wn.2d at 836.

Attorneys are permitted and encouraged to utilize multimedia presentations during closing argument. *Walker*, 182 Wn.2d at 477. “A trial judge must... be careful to avoid letting the visual aids be used more for their shock value than to educate.” *Walker*, 182 Wn.2d at 480. One guideline courts have utilized is to assess whether the PowerPoint slide contains information which the prosecutor could state orally. *Glasmann*,

175 Wn.2d at 708 (“A prosecutor could never shout in closing argument that “Glasmann is guilty, guilty, guilty....”). PowerPoint slides which, when viewed as a whole, include altered exhibits, repeatedly express the prosecutor’s personal opinion on the defendant’s guilt, and evidence efforts to distract the jury from its proper function as a rational decision-maker are improper. *Walker*, 182 Wn.2d at 478-479; *Glasmann* 175 Wn.2d at 710. A “voluminous number of slides depicting statements of the prosecutor’s belief as to defendant’s guilt, shown to the jury just before it was excused for deliberations, is presumptively prejudicial and may in fact be difficult to overcome, even with an instruction.” *Walker*, 182 Wn.2d at 479.

The defendant waived any error regarding Slide 4 because he failed to object to the slide at trial, the slide does not constitute flagrant and ill-intentioned misconduct, and the slide did not create enduring and resulting prejudice which could not have been neutralized by an admonition to the jury. *Kroll*, 87 Wn.2d at 443.

Courts draw a distinction between exhibits with captions, which are permitted, and altered exhibits, which are prohibited. *State v. Rodriguez-Perez*, 1 Wn. App.2d, 448, 465, 406 P.3d 658 (2017). Permissible captions are editorial comments that are “based on the evidence and assist the jury's understanding of it.” *Rodriguez-Perez*, 1

Wn. App.2d at 465. Altered exhibits are those exhibits with added phrases that are either racially inflammatory or calculated to improperly and emotionally influence the jury's assessment of the defendant's guilt and veracity. See *Glasmann*, 175 Wn.2d at 705; see *Walker*, 182 Wn.2d at 478.

The use of Slide 4 is not misconduct falls well within the wide latitude granted prosecutors in closing argument by serving only to enlarge, not alter, the diagram in Ex. 6. Ex. 6 is not inherently problematic; defendant did not object to its admission at trial and does not assign error to the its admission on appeal. CP 359-360. The slide opened with the diagram as it appeared in the original admitted exhibit, making it clear to the jury that the following animations were merely portions of that original. Circles were added to note which text and images were being discussed in the State's oral argument. The larger inset image was positioned so as not to cover any of the images already extant on Slide 4, permitting the jury to view the original images without obfuscation. Enlargements were framed in orange to highlight the fact that they were enlargements and not the original exhibit in its entirety. The imagery and text were derived entirely from the diagram admitted as evidence. Slide 4 added only highlighting color and circles; it did not alter or add any images or text to the exhibit.

Such presentation was clearly intended to engage jurors as rational decision-makers, not to shock them or inflame their passions. *See Walker*, 182 Wn.2d at 480. The slide functioned as an educational tool, assisting the jury in analyzing more closely portions of an admitted piece of evidence. The Slide related information that could have been conveyed even without a multimedia presentation: that J.M.F. had created this diagram and drawn the images it contained. It was the equivalent of placing an image on an overhead projector and zooming in on portions to assist in oral argument. Such a permissible use is not misconduct.

Even if Slide 4 constituted misconduct, defendant fails to prove that such misconduct was flagrant and ill-intentioned. In creating this slide, the State utilized an innocuous heading, a diagram from Ex. 6, four orange circles, and two orange frames. The State did not add any language – inflammatory or otherwise – to the slide. The enlargements were conscientiously placed on the exhibit to avoid obscuring other images. At all times, the jurors could view the original images as they appeared on Ex. 6. Far from flagrant ill-intent, this slide demonstrated a conscientious attempt on the part of the State to enlarge portions of an admitted piece of evidence to facilitate rational argument to the jury while maintaining the substance of the original exhibit.

The defendant also fails to establish that Slide 4 produced prejudice such that it created enduring and resulting prejudice which could not have been neutralized by an admonition to the jury. The Slide began with an exact copy of the image contained in Ex. 6, giving preference and prominence to the exhibit as it would appear in the deliberation room. Ex. 25. Orange lines marked enlargements of the diagram, delineating for the jury that they were looking at a portion of an enlarged image, not the entirety of the original diagram. Apart from size, none of the images were changed, altered, or manipulated during the animations, so the jury could observe the original evidence as the State discussed it. Enlargement itself is not prejudicial; any juror engaged in deliberation can pick up a piece of physical evidence and look more closely at a particular portion of that evidence. The enlargements here serve the same permissible purpose: allowing the State to properly draw attention to specific portions of Ex. 6 and select these those portions for closer examination.

The use of orange circles was not prejudicial. These circles called attention to various portions of the slide, but the circles did not obscure or change any of the text or images of the original diagram. Orange is not an inherently stigmatic color in the way that red may be. In the context of the entire presentation, it was clear that yellow was a default color and orange was used to highlight or select portions of slides for closer examination.

Ex. 25, 26 at Slide 9, 10, 12, 18, 19, and 33. In one instance, orange was in fact used to remind the jury that that “Defendant does *not* have to propose any doubts – State bears the burden.” Ex. 25, 26 at Slide 9, 10, 12, 18, 19, and 33 (emphasis in original).

Slide 4 was a single instance of enlargement, not part of a pattern of such activity. Slide 4 was one of 36 slides, 34 of which the defendant does not assign error on appeal. It appeared for a relatively short period of time: argument regarding the slide comprised only three paragraphs of text in a closing argument that ran for 49 pages. RP 1962-2011. The relatively short period of time that this single slide appeared before the jury, combined with its insignificance relative to the rest of the presentation, establish that Slide 4 could not have had a significant prejudicial effect on the jury.

Even if jurors were somehow prejudiced by Slide 4, the court instructed the jury that closing argument was not evidence, and they should disregard any statement of an attorney not supported by the evidence. CP 130-152. The State also made a similar statement in objection during the trial before the jury and directly to the jury in rebuttal argument. RP 1895, 2036. These admonishments, combined with the fact that the jury had Ex. 6 to consult during deliberation, prevented Slide 4 from prejudicing the jury in any way.

- c. Even if the defendant had preserved error to Slide 4, this Slide was proper because it enlarged an admitted exhibit to aid in closer examination without altering it and no prejudice resulted from this enlargement.

If the defendant had properly preserved an objection to Slide 4 at trial, he would nonetheless fail to carry his burden of proving that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial.

As noted above, the State's use of the Slide was not misconduct because it fell within the wide latitude afforded counsel in closing argument, it utilized an admitted exhibit to which defendant had not objected, it included frames and enlargements, but no additional text or images were added to the diagram, and its purpose was to enable closer examination of portions of the evidence, an educational purpose that any juror could perform during deliberations by looking closely at the physical exhibit.

It was also not prejudicial because the exhibit was not inherently prejudicial, jurors were reminded on multiple occasions that closing argument was not evidence, the slide was a single slide among 36, the slide was not part of some repetitive pattern of prejudicial slides, the slide was displayed for a very short portion of the State's closing argument, an inflammatory color like red was not used on the slide, and apart from

enlargement, the images were not manipulated or changed from the original exhibit.

- d. Slide 36 properly urged the jury to reach a guilty verdict in light of the rational, evidence-based arguments preceding the slide, the oral argument accompanying the slide which urged the jury to reach a reasoned verdict of guilt, and the fact that prosecutors may properly urge jurors to reach just verdicts of guilt based on the evidence even without the use of multimedia presentations.

The State did not commit misconduct by utilizing Slide 36, the closing slide bearing the words “Justice” and “Guilty.” Courts distinguish between asking the jury to find the defendant guilty, which is permissible, and an impermissible personal opinion as to a defendant’s guilty and veracity. A prosecutor may properly “urg[e] the jury to render a just verdict that is supported by evidence.... Moreover, courts frequently state that a criminal trial’s purpose is a search for truth and justice.” *State v. Curtiss*, 161 Wn. App. 673, 701, 250 P.3d 496 (2011). While it is improper for a prosecuting attorney to express an individual opinion of guilt independent of the testimony in the case, the prosecutor “may nevertheless argue from the testimony that the accused is guilty, and that the testimony convinces [the prosecutor] of that fact.” *State v. McKenzie*, 157 Wn.2d 44, 53, 134 P.3d 221 (2006).

In the context in which it was presented, Slide 36 supported the State's permissible argument that the evidence supported a verdict of guilty, urging the jury to engage in rational decision-making to reach that result. The arguments leading up to this final slide focused entirely on persuading the jury to reach a verdict based on a rational analysis of the evidence of the case, presenting (1) quotes from trial testimony, Ex. 25 at Slide 2, (2) admitted exhibits drawn by the victim, Ex. 25 at Slides 2-7, (3) an analysis of the court's instructions, Ex. 25 at Slides 8-14, (4) assessments of witness testimony, Ex. 25 at Slides 15-21, and (4) an assessment of how the evidence proves the case beyond any reasonable doubt, Ex. 25 at Slides 22-35.

The oral argument accompanying Slide 36 likewise urged the jury to act as a rational decision-maker and return a verdict of guilty. While displaying Slide 36, the State noted that J.M.F. was "five to eight year[s] old," which fulfilled the element of the crimes requiring the State to prove she was under the age of twelve. RP 2011. The State mentioned that she was scared and didn't know what was happening to her, explaining any delay in her disclosure. RP 2011. The State mentioned that the defendant was a father figure to J.M.F. and held a position of trust, evidence supporting the special allegation that the defendant used his position of trust to perpetrate the crime. RP 2011. Stating that the defendant fondled

J.M.F.'s vagina, penetrated her butt crack, and placed his penis on her clothed vagina established the key element of each crime: that he had sexual contact with J.M.F. RP 2011. At the conclusion of this summary of evidence, the State said, "And for those **reasons**, the defendant is guilty of four counts of child molestation in the first degree, and I urge you to answer yes to each of the aggravators." RP 2011 (emphasis added). This focus on evidence and reason made it clear that the State expected the jury to return a just verdict of guilt based on the evidence and testimony proving that guilt. See *Rodriguez-Perez*, 1 Wn. App.2d at 465; *Curtiss*, 161 Wn. App. at 701; *McKenzie*, 157 Wn.2d at 53.

There is nothing inherently prejudicial about the words "justice" and "guilty." Indeed, the trial court properly instructed the jury on multiple occasions using the same or similar words. Instructions 11, 12, 13, 14, and 19 each instructed the jury that there were conditions under which jurors had a duty to return a verdict of guilty. CP 130-152. Several instructions discussed fairness. Instruction 1 directed the jury to act in a manner that ensured the parties had a fair trial; Instruction 2 told them to consider the reasonableness of doubt from the perspective of a reasonable person, "after fully, fairly, and carefully considering all of the evidence;" and Instruction 19 required them to discuss each issue fully and fairly and to consider the special verdict forms with "full and fair" consideration.

CP 130-152. The two words on Slide 36 mirror this focus on fairness and the fact that a fair consideration of the case may result in a duty to return a guilty verdict. Where a trial court instructs a jury that certain conditions impose a duty to return a fair verdict of guilty, it cannot be misconduct for the State to argue that those conditions have been met and the necessary verdict must follow. *See Curtis*, 161 Wn. App. at 701.

The defendant also fails to prove that Slide 36 prejudiced the jury. As previously noted, the jury was repeatedly informed that closing argument was not evidence, and immediately before they began deliberating, the State actually emphasized this fact, saying in rebuttal, “nothing we [the attorneys] say is evidence.” RP 2036. Slide 36 was one of 36 slides, 34 of which the defendant does not assign error. Ex. 25, 26. This slide was projected for a very short period of time: the span of two paragraphs out of the 49-page closing argument of the State. RP 1962-2011. Immediately after the State concluded its argument, the court directed the prosecutor to turn off the slide. RP 2011. The slide was not inflammatory in any way: it used yellow font, which was the default font color of the text of the presentation, and the words were not overly large or emphasized in any way. Ex. 25, 26. Slide 36 was presented as a conclusion to the closing argument which asked for a just verdict of guilt in light of the evidence presented at trial. There was nothing about the

slide which was shocking, emotional, or otherwise designed to overcome the rational thought process of the jury.

e. The present matter is distinguishable from *Glasmann* and *Walker*.

This case is distinguishable from the two significant cases offered by the defendant: *State v. Glasmann* and *State v. Walker*. In *Glasmann*, the Washington Supreme Court found that a multimedia presentation constituted misconduct where, “[w]hen viewed as a whole, the prosecutor’s repeated assertions of the defendant’s guilt, improperly modified exhibits, and statement that jurors could acquit Glasmann only if they believed him” violated the prosecutor’s duty as a quasi-judicial officer and was substantially likely to have overridden the rational decision-making of the jury. *Glasmann*, 175 Wn.2d at 710, 712. The prosecutor in *Glasmann* presented the jury with copies of a booking photo of the defendant in which he appeared unkempt and bloody. *Id.* at 705. The prosecutor altering the original exhibit by superimposing the words “Guilty, Guilty, Guilty” over the photo in red, a color associated with debt and blood. *Id.* at 706, 708. Other slides contained similarly inflammatory captions which were not admitted into evidence. *Id.* These altered photographs were the equivalent of visually shouting, “Guilty, guilty, guilty!” at the jury, something which a prosecutor would otherwise be

prohibited from doing. *Id.* at 710. The court noted that it was critically important that the crime charged in *Glasmann* carried a *mens rea* of intent. *Id.* at 708. The prosecutor used not just one, but “multiple altered photographs” throughout the presentation. *Id.* at 706. Because the defendant argued for a lesser included offense, the jury was faced with a nuanced determination which was overridden by the repeated and inflammatory presentation of altered exhibits. *Id.* at 710. As a result of this repeated presentation of inappropriate slides, the jury was predisposed to return an artificially harsh verdict based on an emotional, not a rational, response. *Id.* at 705, 709.

In *Walker*, a multimedia presentation constituted prosecutorial misconduct where it contained a voluminous number of slides that “were altered with inflammatory captions and superimposed text; it suggested to the jury that Walker should be convicted because he is a callous and greedy person who spent the robbery proceeds on video games and lobster; it plainly juxtaposed photographs of the victim with photographs of Walker and his family, some altered with racially inflammatory text; and it repeatedly and emphatically expressed a personal opinion on Walker's guilt.” *Walker*, 182 Wn.2d at 478. One slide bore a booking photo of the defendant, and over the photo the words “**GUILTY BEYOND A REASONABLE DOUBT**” had been superimposed in bold

red font, providing a personal opinion of guilt. *Id.* at 468. Another slide bore a picture of the defendant's family over which had been superimposed a quote from trial testimony containing a racial slur. *Id.* at 472, 478. The presentation consisted of 250 slide, over 100 of which bore the heading, "**DEFENDANT WALKER GUILTY OF PREMEDITATED MURDER,**" which constituted a "repeated and emphatic" expression of the prosecutor's personal opinion of the defendant's guilt. *Id.* at 468, 478. Still another slide bore the heading "**DEFENDANT'S GREED AND CALLOUS DISREGARD FOR HUMAN LIFE.**" *Id.* at 474. The facts of the case were complicated, and the multimedia presentation "obfuscated the complicated facts presented to the jury here at least as much as the presentation in *Glasmann* did." *Id.* at 479. The Washington Supreme Court concluded that the clear purpose of the slides was to persuade the jury to convict the defendant because he was callous and greedy, distracting the jury from its duty to act as a rational decision-maker. *Id.* at 478-479.

The State's use of Slides 4 and 36 in the present case is distinguishable from both *Glasmann* and *Walker*. Here, the State presented admitted evidence without changing or manipulating that evidence, engaged the jury as a rational decision-maker in an analysis of admitted evidence, did not use any inflammatory or shocking imagery,

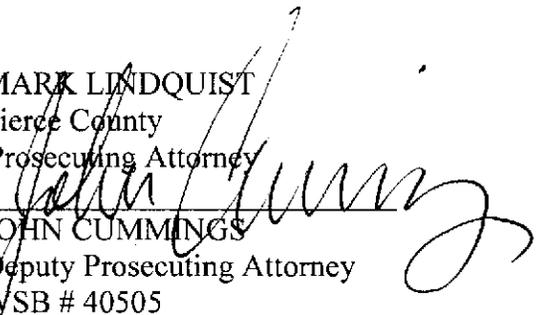
colors, or fonts, and urged the jury to return a verdict of guilty based on the evidence, not the personal opinion of the prosecutor. At no point during the multimedia presentation did the State present a photograph of the defendant. Ex. 25, 26. Neither Slide 4 nor Slide 36 contained text superimposed over an exhibit. Ex. 25, 26. The text used in Slide 36 was yellow, the default color of text for the presentation, and the words “Justice” and “Guilty” appeared on an otherwise blank slide in a standard font size. Ex. 25, 26. Slide 4 contained no text apart from that admitted on Ex. 6. Ex. 25, 26. Slide 36 contained words that the State would have been permitted to say with or without a multimedia presentation. On Slide 36, the word “Guilty” appeared a single time, was preceded by evidence-based rational argument, and was paired with argument that clearly urged the jury to reach its decision based on rational decision-making, not passion, prejudice, or shock. Ex. 25, 26, RP 2011. The use of “guilty” in this single instance represented a request from the State to return a verdict of guilt based on the evidence, not an expression of the State’s personal belief that the defendant was guilty. The word “Justice” was placed in the heading of Slide 36, but it was not referenced in the State’s argument, deemphasizing that word even where the State would have been permitted to ask the jury to return a just verdict based on the evidence. See *Curtiss*, 161 Wn. App at 701. The factual scenario in this case was not

complicated, and the legal theories were neither nuanced nor novel; rather, the defense was general denial and the jury's job was predominantly to determine whether the State had proved molestation and, if so, whether the aggravating circumstance had been proved. Unlike *Glasmann* and *Walker*, which contained voluminous, emphatic, and repetitive instances of altered slides and personal opinions on guilt, the defendant here complains of only two slides, each of which is unique from the other and each of which appeared before the jury for less than three paragraphs of text in a 49 page closing argument. RP 1962-2011. Viewing these two slides in the context of the entirety of the trial in this case, it is clear that they do not contain altered exhibits, that they were presented in an attempt to convince the jury to return a rationally decided verdict of guilt, and that they had no prejudicial effect on the jury.

D. CONCLUSION.

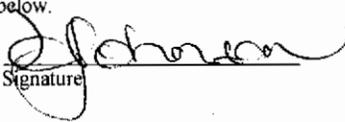
For the foregoing reasons, the State respectfully requests that this Court affirm the defendant's convictions and reject the defendant's claim.

DATED: October 11, 2018

MARK LINDQUIST  
Pierce County  
Prosecuting Attorney  
  
JOHN CUMMINGS  
Deputy Prosecuting Attorney  
WSB # 40505

Certificate of Service:

The undersigned certifies that on this day she delivered by <sup>EFH</sup>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.

10/11/18   
Date Signature

**PIERCE COUNTY PROSECUTING ATTORNEY**

**October 11, 2018 - 1:16 PM**

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