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

STATE OF WASHINGTON, RESPONDENT

v.

ANDREW HIEB, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Bryan Chushcoff, Judge

No. 16-1-04248-3

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**Brief of Respondent**

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

1. Whether defendant has failed to show prosecutorial misconduct occurred when none of the prosecutor's comments during closing were improper?

B. STATEMENT OF THE CASE.

1. PROCEDURE

On October 26, 2016, the State charged Andrew Hieb, hereinafter referred to as "defendant" with one count of rape of a child in the first degree (count I) and three counts of child molestation in the first degree (counts II-IV). CP 3-4.

On January 9, 2018, the State filed an amended information adding one count of child molestation in the second degree (count V), one count of child molestation in the first degree (count VI)<sup>1</sup> and amending count III to include the alternative means of attempted rape of a child in the first degree. CP 5-8.

Jury trial was held before the Honorable Judge Bryan E. Chushcoff and began on February 27, 2018. RP 433. After hearing all of the

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<sup>1</sup> D.O. is the victim of counts I-V. D.W. is the victim for count IV. Charges for each victim were severed. RP 375.

evidence, the jury found defendant guilty beyond a reasonable doubt of two counts of rape of a child in the first degree (counts I and IV), one count of child molestation in the first degree (count II), one count of attempted rape of a child in the first degree (count III), and one count of child molestation in the second degree (count V). RP 1099-1100.

Following his convictions after trial, defendant pleaded guilty to one count of first degree child molestation against D.W. (count VI). CP 80-89; RP 1117.

Defendant's sentencing hearing was held on May 11, 2018. RP 1124. The State recommended a high end sentence with 318 months to life for count 1, the longest sentence. RP 1125. Defendant requested a low end sentence of 240 months to life. RP 1132. The Court imposed a sentence within the standard range for a total of 264 months to life, lifetime no-contact order with the victim and \$100 DNA and \$500 crime victim penalty assessment fees. RP 1136-1138; CP 113-129.

Defendant timely filed a Notice of Appeal on May 11, 2018. CP 134.

## 2. FACTS

D.O. knew defendant her entire life. RP 502-503. He was her mother, Carol Orcutt's, childhood best friend and lived up the road from their house. RP 503. She saw defendant five days out of the week. RP 503.

She would often go to his house for dinner or to play when she was younger. RP 504. Defendant does landscaping and helped Ms. Orcutt with her residence. RP 694. D.O. worked with defendant doing landscaping at the Mashburn house, an “old folks home” in her neighborhood. RP 505.

Defendant sexually abused D.O. repeatedly when she was in elementary school. RP 514. Defendant came up from behind D.O. and cupped her breasts. RP 507. Defendant said, “Wow. They have gotten big.” RP 508. She told him to stop. RP 508.

Another instance occurred in defendant’s Saturn. RP 512. Defendant was alone with D.O. driving along a dark road when he pulled over and made D.O. put her mouth on his penis. RP 513.

At D.O.’s mother’s house in the livingroom, defendant lay naked on his back and D.O. was sitting on top of him naked. RP 516. Her vagina was touching his penis. RP 516. Defendant had an erection and was bouncing D.O. up and down on his penis. RP 517.

On another instance when defendant was babysitting D.O., D.O. was naked in the livingroom on the couch. RP 518, 520. She was laying on her back with defendant on top of her. RP 518. Defendant tried to put his penis in her vagina. RP 518. He also flipped her on her stomach and tried to put his penis in her butt. RP 518.

Another time on the couch, defendant touched her breasts and rubbed her vagina. RP 521. Defendant put his fingers in her vagina at least three times. RP 521.

On another occasion, defendant blew up an air mattress and put it in the shed. RP 522. He lied to his girlfriend, Gina, that he was taking D.O. home. RP 522. Instead, defendant took D.O. into his shed. RP 522. In the shed, defendant removed D.O.'s clothes, took his pants off and made her put her mouth on his penis. RP 522. He also rubbed his penis on her vagina. RP 522. Defendant stopped when he heard D.O.'s father come home and asked where D.O. was. RP 523. Defendant told D.O. to be quiet. RP 523. Defendant took D.O. home. RP 524. When D.O.'s father asked where they were, defendant said they took the long way home. RP 524. D.O. felt sick, her stomach hurt and she ran to the bathroom crying. RP 525.

On another instance in D.O.'s mother's bedroom, she was naked on the floor as defendant licked her vagina. RP 525. Defendant also rubbed his penis against her until he ejaculated. RP 526. He put his mouth on her vagina more than five times. RP 527. D.O. never said anything because defendant told her not to and she thought it was her fault. RP 529.

In elementary school, defendant was alone with D.O. in the camper when he put on a pornography show of women with raining dildos. RP 539. Defendant said, “lets try this” and they walked up to the bed, but D.O. doesn’t remember what happened after that. RP 539. Defendant also licked her vagina when she was in the fourth grade. RP 541.

On October 9, 2016, Michelle Reddekopp told Ms. Orcutt about an incident involving D.W., D.O.’s young niece, and defendant. RP 723-724. Ms. Orcutt asked D.O. if defendant touched her after learning what happened to D.W. RP 724. D.O. said defendant had been touching her her entire life. RP 724-725. After school, she and her mother called the police. RP 726. Deputy Greiman came out and the next day they spoke with a child forensic interviewer. RP 726. Defendant was later arrested. RP 778.

C. ARGUMENT.

1. DEFENDANT HAS FAILED TO SHOW THAT ANY PROSECUTORIAL MISCONDUCT OCCURRED WHEN THE PROSECUTOR’S COMMENTS WERE NOT IMPROPER.

To prove that a prosecutor’s actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor’s actions were improper. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing *State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952)). The defendant has the burden of establishing that the alleged misconduct is both improper and prejudicial. *State v. Stenson*, 132 Wn.2d

668, 718, 940 P.2d 1239 (1997). “If the defendant objected at trial, the defendant must show that the prosecutor’s misconduct resulted in prejudice that had a substantial likelihood of affecting the jury’s verdict.” *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012).

If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. *State v. Binkin*, 79 Wn. App. 284, 293-294, 902 P.2d 673 (1995), (*overruled on other grounds by State v. Kilgore*, 147 Wn.2d 288, 53 P.3d 974 (2002)). Failure by the defendant to object to an improper remark constitutes a waiver of that error unless the remark is deemed so “flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *Stenson*, 132 Wn.2d at 719, (*citing State v. Gentry*, 125 Wn.2d 570, 593-594, 888 P.2d 1105 (1995)).

When reviewing an argument that has been challenged as improper, the court should review the context of the whole argument, the issues in the case, the evidence addressed in the argument and the instructions given to the jury. *State v. Russell*, 125 Wn.2d 24, 85-6, 882 P.2d 747 (1994), (*citing State v. Graham*, 59 Wn. App. 418, 428, 798 P.2d 314 (1990)). In closing arguments, attorneys have latitude to argue the facts in evidence and any reasonable inferences therefrom. *State v. Smith*, 104 Wn.2d 497, 510, 707 P.2d 1306 (1985). However, they may not make

statements that are unsupported by the evidence or invite jurors to decide a case based on emotional appeals to their passion or prejudices. *State v. Jones*, 71 Wn. App. 798, 808, P.2d 85 (1993).

A prosecutor enjoys reasonable latitude in arguing inferences from the evidence, including inferences as to witness credibility. *State v. Gregory*, 158 Wn.2d 759, 810, 147 P.3d 1201 (2006). An error only arises if the prosecutor clearly expresses a personal opinion as to the credibility of a witness instead of arguing an inference from the evidence. *State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008) *cert. denied*, 556 U.S. 1192, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009). A prosecutor may not make statements that are unsupported by the evidence or invite jurors to decide a case based on emotional appeals to their passion or prejudices. *State v. Jones*, 71 Wn. App. 798, 808, P.2d 85 (1993). A prosecutor is allowed to argue that the evidence does not support a defense theory. *Russell*, 125 Wn.2d at 87. The prosecutor is entitled to make a fair response to the arguments of defense counsel. *Russell*, 125 Wn.2d at 87.

“Trial court rulings based on allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard.” *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). The trial court is in the best position to determine whether misconduct or improper argument prejudiced the defendant. *See Stenson*, 132 Wn.2d at 718.

Defendant in the present case cites to numerous statements by the prosecutor which were made during both her closing and rebuttal argument. Appellant's Opening Brief at 10-20. Defendant fails to show how any of the prosecutor's comments were improper in any way.

- a. The State did not commit prosecutorial misconduct by quoting evidence properly admitted at trial and supported by the record.

At trial, the State began closing arguments by quoting D.O.'s testimony.

COURT: Now, ladies and gentlemen, please give your attention to the closing argument by Ms. Lori Kooiman on behalf of the plaintiff, State of Washington.

STATE: Thank you, Your Honor. "When it happened, I didn't understand what he was doing to me. I didn't understand the gravity –"

DEFENSE COUNSEL: Objection, Your Honor. At this time, counsel is speaking in the first person. She is playing to the prejudice and passions of the jury. This is inappropriate.

COURT: Overruled. You may proceed.

STATE: Thank you. "I didn't understand the gravity of what was happening to me. I trusted him. I didn't want to make my mom mad. I thought it was my fault."

DEFENSE COUNSEL: Objection

COURT: Objection is overruled.

STATE: "He stopped when I told him to stop. He never touched me again." Destiny testified and told you that she held on to what the defendant had done to her, kept it to herself for over eight years of sexual abuse.

RP 995-996.

The State properly argued the evidence elicited at trial. *State v. Smith*, 104 Wn.2d at 510. Defendant claims that the State committed prosecutorial misconduct during closing argument by improper emotional appeal through “impermissibly assuming the role of D.O. and thereby becoming her personal representative.” Brief of Appellant at 11. This claim fails because the quote was evidence properly admitted at trial. D.O. testified that, “I have tried to just block it out and pretend like it never happened...Because I thought it was my fault.... I thought that my mom would get mad at me... Because [defendant] always told me not to tell my mom.” RP 529.

D.O. also testified that she didn’t understand the gravity of what defendant had done to her.

STATE: I know that you understand what he was doing, the acts that he was doing; but at the time that it was occurring, did you understand the gravity of what he was trying to do?

D.O.: No.

STATE: When he would try and do this with you, when he would touch you and touch your vagina, do you know how you reacted toward him?

D.O.: I just – I thought that it was normal.

The evidence was D.O.'S testimony which the State had wide latitude to argue during closing argument. *State v. Smith*, 104 Wn.2d at 510. Contrary to defendant's claims, the State did not improperly appeal to emotion by asking the jury to step into the victim's shoes and becoming the victim's representative. Defendant cites to *State v. Pierce*, 169 Wn. App. 533, 280 P.3d 1158 (2012) in support of his argument that the State impermissibly conveyed that she was D.O.'s personal representative. Brief of Appellant at 11. This claim fails as *Pierce* is clearly distinguishable. In *Pierce*, the prosecutor created an entire conversation between the defendant and his victims just before before he murdered them. *Id.* at. 541. The prosecutor also created a fictitious internal dialogue the defendant had with himself before deciding to rob and murder the victims, which the prosecutor recited in a first person narrative during closing. *Id.* Finally, the prosecutor stated that "never in their wildest dreams" or "wildest nightmares" would the victims have imagined that they would be murdered that day." *Id.* This Court held that these arguments had no basis in the record and improperly asked the jurors to step into both the victim's and defendant's shoes. *Id.* at 555.

Here, the State quoted D.O.'s testimony. The State did not, as in *Pierce*, make arguments in the first person from the defendant's thought

process. The State's arguments were consistent with facts supported by the record.

During closing arguments, the State argued that D.O. was credible.

STATE: Next thing I want to look at is credibility. The judge went through with you instruction no. 1, which covers credibility. No matter what is said, if anything is misstated, I'm not the judge of credibility. The defense is not the judge of credibility. The forensic interviewer is not the judge of credibility. The only person that is the judge of credibility is you, the jury. That's it. you are the sole judges of credibility. You make that determination... I submit to you that when you are determining the credibility of D.O., the State submits, that she was credible. She got up there. She told the truth. She gave you all of the information that she had, all of the information that she could take in. There are two different options here in looking at that. She made it up. She made up these allegations.

RP 1000-1002.

Defendant further claims that "the prosecutor's comment impermissibly conveyed that she was D.O.'s personal representative and impermissibly conveyed her personal belief in D.O.'s credibility" because the State "told jurors that D.O. was credible and that "She told the truth." Brief of Appellant at 12. This claim fails because the State did not express a personal opinion on D.O.'s credibility. It is misconduct for a prosecutor to personally vouch for the credibility of a witness. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). But, 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. *State v. Lewis*, 156 Wn. App. 230, 240, 233 P.3d 891 (2010). And, courts review comments made by a prosecutor during closing argument in the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). The context shows that when the State argued that D.O. was telling the truth, she was not personally vouching for her credibility. Defense theory at trial was that D.O. lied about everything. RP 1075. The State did not vouch for the credibility of the victim by arguing that her actions and testimony were consistent. The State argued that D.O. was credible based on the evidence supported by the record. In fact, the State preceeded argument by properly telling the jury that they were the sole judges of credibility and that the State is not the judge of credibility. RP 1000-1002. In addition, the jury was properly instructed by the Court that they were the sole judges of credibility. CP 43 (Jury Instruction No. 1).

- b. The State did not misstate the law when it argued that defendant is protected by the reasonable doubt standard.

At trial, defense counsel argued that there was reasonable doubt, listing reasons to support that argument. RP 1054. Defense counsel also

argued that defendant was on trial for crimes worse than murder and that

D.O. lied about everything to get out of working, stating,

DEFENSE COUNSEL: That's what happened in this case, ladies and gentlemen. It was a simple lie. It was a white lie. It was a lie just to get her mom off of her back about that job. She didn't know where it was going to go. She didn't know what it was going to grow into. She didn't know one day he is going to be sitting in this chair on trial for crimes worse than murder."

RP 1075.

The State responded to defense counsel's argument on rebuttal:

THE STATE: We have to prove it beyond a reasonable doubt, and we can do that if our witness is credible and you find her credible and you find that she has testified to the elements in this packet and that we have proven it beyond a reasonable doubt. That is how we do it. There is nothing that says we need to corroborate.

I would submit to you, as we've discussed earlier, these are crimes of secrecy. You are not going to have corroborating evidence. So what if she had a medical exam? That would have been great. It would have been one more box to check off. Who is to say that torn hymen is from the defendant? There is nothing to say that. There's other ways for those things to happen. It's not going to be –

DEFENSE COUNSEL: Objection, Your Honor. Assumes facts not in evidence.

STATE: There is not going to be DNA evidence from the defendant by the time that she goes in and discloses.

DEFENSE COUNSEL: Objection, Your Honor. Assumes facts not in evidence.

COURT: Overruled.

RP 1079-1080

STATE: Just as defense counsel says – and he makes the comparison to this is worse than murder. I don't know if it is worse than murder. That is for anybody to decide, but that's not what these instructions tell you is before you. What is before you in justice that is due the accused is also due the accuser.

DEFENSE COUNSEL: Objection, Your Honor. That phrase –

COURT: Proceed.

STATE: When you look at that, you look at what does the victim, D.O., experience in this? And you consider everything carefully. You consider what she went through and what she was able to tell you. You consider –

DEFENSE COUNSEL: Again, objection at this time. She is playing to the passions and the prejudice of the jury.

COURT: The jury has been instructed as to what the burden of proof is on the State. I think what counsel is trying to talk about is the credibility of the witness. If counsel is trying to talk about, you should find the defendant guilty because this is difficult for the victim, then that is not correct. That is not what the court's instructions say.

STATE: That is not what the State is trying to tell you at all. What the State is trying to tell you is that you have to – when you make your verdict, you need to be careful with that verdict, and you need to consider everything that is due in the verdict for everyone involved. Is it not just a matter of – we are looking at the credibility, and I'm talking about the defendant sits with beyond a reasonable doubt. He is protected – I'm not – I want to make sure that – well, I will leave it with the court's instruction on that. When you go through beyond a reasonable doubt, a reasonable doubt –

the defense counsel listed off what he considered reasonable doubt. I would submit to you that “reasonable doubt” would be if [D.O.] got up there and said, “Hey, I don’t know if that’s the guy that raped me.” That would be an example of –

DEFENSE COUNSEL: Mischaracterization of the laws –

COURT: I don’t think that she is trying to claim that’s the only way this is possible.

STATE: The State – I’m using that as an example, Your Honor. Defense counsel went through several examples.

DEFENSE COUNSEL: Applied to this case.

COURT: Proceed.

STATE: Thank you. What it comes down to is, do we have enough? Do you have enough to overcome that presumption of innocence? I submit to you that you do. You have enough on every count. You have enough on every count because of the details that [D.O.] provided to you, because of the veracity of her statements, because of the credibility of her statements.

The defendant isn’t here just because [D.O.] says this happened. I submit to you that he is facing these charges because [D.O.] is credible in going through all of the accounts of what happened to her.

The defense is right; there are several counts and allegations for you to consider. She went through more than what we have charged, and we leave that to you. That is your job. That is your job to sit through the evidence, and I submit to you that she doesn’t recall all of the details.

This isn’t like a school assignment where she gets to sit there and take it all in and jot it down. This is traumatic. It’s not making casual observations and explaining that to

the jury. Her testimony is reasonable given the circumstances and what she experienced.

Defense counsel also said that she made this up to avoid working for the defendant. She didn't have an understanding of the consequences of this. I submit to you that she had a full understanding of the consequences of this. She has experienced it every day since that disclosure. She didn't make this up to avoid working for the defendant. She has worked for him, and it was hard work, but she didn't complain about it. If that was the purpose, why not turn around and make the disclosure right then so she wouldn't have to work for him again.

When her mom asked her to work for him, she says no. She doesn't say "no" because he did this to me. She says no and she means it. She expects it never to be addressed again until her mom comes to her about a week later.

Defense counsel make the comments about the shortcomings of the law enforcement investigation. I submit to you that those shortcomings don't change what happened to [D.O.]. [D.O.] has been blamed for the defendant's actions by telling her that it is her fault. She is the one in trouble.

DEFENSE COUNSEL:       Objection, Your Honor. There is no testimony to support that. Assuming facts not in evidence.

COURT:                The jury will determine what the facts are. They have been advised previously that the lawyer's remarks, statements, and arguments are not evidence. They determine what the evidence was.

THE STATE: The defendant tells her that she is the one that will be in trouble. She takes that shame. She takes it on. She takes that blame. In shifting the spotlight to law enforcement and the potential shortcomings, the defense is essentially asking you to blame her again for what law enforcement –

DEFENSE COUNSEL:       Objection, Your Honor.

COURT: Sustained. Jury should disregard.

THE STATE: Defense counsel is shining the spotlight on law enforcement's shortcomings or potential shortcomings. [D.O.] shouldn't pay for law enforcement's potential shortcomings. She told you what happened. She was credible. She told you the truth of what occurred. You are always going to want more. There is no question about that.

The question is, if you find the defendant guilty – and I submit to you that the State has proven beyond a reasonable doubt that he is guilty – do you have enough to be confident in that decision? If you have enough to be confident in that decision, then we have proven it beyond a reasonable doubt.

DEFENSE COUNSEL: Objection, Your Honor. That is not the standard.

COURT: I'm sorry. I didn't hear the last remark. It didn't sound like it was inappropriate to me.

THE STATE: if you have enough to be confident in that decision –

COURT: The jury has been instructed as to what the burden of proof is in Instruction No. 2. They should follow that instruction as to the law.

THE STATE: We ask you to sit through the evidence carefully, discuss it with your fellow jurors, and return verdicts of guilty on all counts. Thank you.

RP 1082-1088.

Defendant claims that the State committed misconduct by appealing to the emotions of the jury and misstating the law by “telling the jury that it needed to balance the [defendant's] rights with the rights of the

victim. Brief of Appellant at 14. This claim fails where the record clearly reflects that the State was referring to the appropriate standard of reasonable doubt. When read in whole, the State clarifies exactly that she meant the jury needed to carefully consider the burden of reasonable doubt stating,

COURT: The jury has been instructed as to what the burden of proof is on the State. I think what counsel is trying to talk about is the credibility of the witness. If counsel is trying to talk about, you should find the defendant guilty because this is difficult for the victim, then that is not correct. That is not what the court's instructions say.

STATE: That is not what the State is trying to tell you at all. What the State is trying to tell you is that you have to – **when you make your verdict, you need to be careful with that verdict, and you need to consider everything that is due in the verdict for everyone involved. Is it not just a matter of – we are looking at the credibility, and I'm talking about the defendant sits with beyond a reasonable doubt. He is protected – I'm not – I want to make sure that – well, I will leave it with the court's instruction on that. When you go through beyond a reasonable doubt, a reasonable doubt – the defense counsel listed off what he considered reasonable doubt.** I would submit to you that “reasonable doubt” would be if [D.O.] got up there and said, “Hey, I don't know if that's the guy that raped me.” That would be an example of –

The record reflects that the State referred to the proper standard of law and did not as defendant claims, misstate the burden of proof.

- c. The doctrine of invited error precludes defendant from claiming that the State misstated the burden of proof when he specifically requested that the Court not instruct the jury on the “abiding belief” language.

The doctrine of invited error “prohibits a party from setting up an error at trial and then complaining of it on appeal.” *In re Breedlove*, 138 Wn.2d 298, 312, 979 P.2d 417 (1999)(citing *State v. Wakefield*, 130 Wn.2d 464, 475, 925 P.2d 183 (1996)). Where it applies, the invited error doctrine precludes judicial review even where the alleged error raise constitutional issues. *State v. Henderson*, 114 Wn.2d, 867, 871, 792 P.2d 514 (1990).

Defendant further claims that the State misstated the law by minimizing the burden of proof. Brief of Appellant at 13. Defendant argues that “the State acts improperly when it mischaracterizes the standard [burden of proof] as requiring anything less than an abiding belief that the evidence presented establishes the defendant’s guilty beyond a reasonable doubt.” Brief of Appellant at 13. This claim fails pursuant to the doctrine of invited error as defendant requested that the “abiding belief” language not be used at trial.

During trial, the State proposed the standard WPIC 4.01 regarding reasonable doubt which includes the abiding belief language. CP 142-177 (Plaintiff’s proposed jury instructions). Defendant’s proposed a jury

instruction explicitly omitting the “abiding belief” language. CP 178-186 (Defendant’s proposed jury instruction No. 2). Defendant’s instruction stated the following:

WPIC 4.01 (modified, as permitted by comments to WPIC 4.01 the last sentence **regarding abiding belief has been deleted**. The bracketed material [as to these elements] at the end of the first paragraph has also been deleted. *State v. Cervantes*, 87 Wn. App. 440, 943 P.2d 382 (1997) citing with approval language contained in the third paragraph [which refers to reasonable doubt].

Supplemental CP 179 (Defendant’s proposed jury instruction No. 2, emphasis added). The Court accepted defendant’s proposed instruction omitting the “abiding belief” to which the State took exception. RP 976. The State argued, “my understanding is that the court is not allowing the State to use the words “abiding belief,” which I would argue to the court that “abiding belief” is an accurate statement of the law. The State should be allowed to argue that even if that court is going to give the defense proposed instruction of “beyond a reasonable doubt.” RP 976. To which that court responded, “Well, if I was going to give “abiding belief,” then it would be perfectly fine to argue that. Since I’m not, you can’t. You have to argue the law based on the instructions of the court.” RP 976. The State made its reasonable doubt argument based on the court’s instruction and ruling on rebuttal. RP 1087. Where defendant specifically proposed a jury

instruction omitting the “abiding belief” language, the doctrine of invited error precludes him from claiming error for not using it.

- d. The State did not misstate the evidence where State’s arguments were made in response to defense counsel’s argument and supported by the record.

During closing arguments, defense counsel argued that there was reasonable doubt where law enforcement did not conduct additional investigation than what had already been done. RP 1052.

Evidence of the presumption of guilt is the failure to investigate, the failure to attempt to contact Michael Hasenger, the failure to attempt to contact Sara, the failure to ask consent from Gina or to obtain a search warrant to look in the trailer, the failure to ask Carol if they can just look at her house to see where these crimes were alleged to have occurred. That is a presumption of guilt. It is the failure to obtain a medical exam when one is suggested by the forensic interviewer.

RP 1052.

In rebuttal, the State responded by stating, “Defense counsel makes the comments about the shortcomings of the law enforcement investigation. I submit to you that those shortcomings don’t change what happened to [D.O.]. [D.O.] has been blamed for the defendant’s actions by telling her that it is her fault. She is the one in trouble.” RP 1086.

Defendant claims that the State committed misconduct by arguing that “if the jury determined the evidence was insufficient to convict [defendant] because police failed to adequately investigate the case, they

(jurors) would be telling D.O. it was her fault that she was sexually abused.” Brief of Appellant at 17. This claim fails because when the statement is viewed in context of the full argument, it is apparent the prosecutor was responding to defense counsel’s argument that there was insufficient evidence to convict because law enforcement failed to conduct a full investigation. The prosecutor never made any sort of comment to the jury that a failure to convict would make this D.O.’s fault. The comment was simply taken out of context.

Defendant further claims that the State committed misconduct in this argument by misstating the evidence, urging jurors to convict in order to protect community values and maligning integrity of defense counsel. Brief of Appellant at 16-18. Defendant claims that the State committed misconduct because there was no evidence [defendant] told D.O. anything was her fault”. Brief of Appellant at 16. During rebuttal, the State argued that “[D.O.] has been blamed for the defendant’s actions by telling her that it is her fault. She is the one in trouble.” RP 1086. Defendant’s claim fails as the State’s arguments are clearly supported by the record. D.O. testified that defendant told her not to tell her mom and that she didn’t tell her mother because she thought it was her fault. RP 529. D.O.’s testimony is evidence that she felt to blame for the sexual abuse by defendant when he specifically instructed her not to tell her mother. RP 529. The evidence

was supported by the record. On the contrary, there is nothing in the record to support defendant's claim that the State urged jurors to protect community values or malign defense counsel. The State argued the evidence admitted at trial. The State never asked the jurors to protect community values by convicting defendant or commented on the integrity of defense counsel.

Defendant claims that the State misstated the evidence by arguing that D.O. suffered a torn hymen. Brief of Appellant at 19. This argument is completely taken out of context and unsupported by the record. In response to defense counsel's argument that there was insufficient evidence because law enforcement failed to conduct additional investigation, the State rebutted with hypothetical evidence to show that there could always be more evidence, but that it is not necessary because there is already enough to convict. RP 1080.

THE STATE: We have to prove it beyond a reasonable doubt, and we can do that if our witness is credible and you find her credible and you find that she has testified to the elements in this packet and that we have proven it beyond a reasonable doubt. That is how we do it. There is nothing that says we need to corroborate.

I would submit to you, as we've discussed earlier, these are crimes of secrecy. You are not going to have corroborating evidence. So what if she had a medical exam? That would have been great. It would have been one more box to check off. Who is to say that torn hymen is from the defendant?

There is nothing to say that. There's other ways for those things to happen. It's not going to be –

RP 1080

None of the comments made by the prosecutor were improper. Defendant is unable to show prosecutorial misconduct occurred in the present case.

- e. Defendant is not entitled to relief under the cumulative error doctrine when he has failed to show any error occurred.

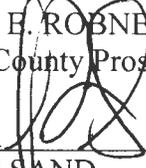
The doctrine of cumulative error recognizes the reality that sometimes numerous errors, each of which standing alone might have been a harmless error, can combine to deny a defendant not only a perfect trial, but also a fair trial. *In re Personal Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835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

D. CONCLUSION.

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

DATED: May 28, 2019.

MARY E. ROBNETT  
Pierce County Prosecuting Attorney

  
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ROBIN SAND  
Deputy Prosecuting Attorney  
WSB # 47838

Certificate of Service:

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

5-28-19 Heaven Ke  
Date Signature

**PIERCE COUNTY PROSECUTING ATTORNEY**

**May 28, 2019 - 2:19 PM**

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