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Court of Appeals
Division II
State of Washington
8/7/2020 1:59 PM

NO. 52146-6

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

STATE OF WASHINGTON,

Respondent,

v.

SHAMARR PARKER,

Appellant.

Appeal from the Superior Court of Pierce County
The Honorable Garold Johnson, Judge

No. 08-1-06144-4

BRIEF OF RESPONDENT

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I. INTRODUCTION

The defendant, Shamarr Parker, was a fugitive wanted for the rape and abduction of the teenage victim in this case when police briefly used a cell site simulator pursuant to a judicially-authorized order to verify his presence at his girlfriend's home. Parker suffered no prejudice in his ability to present his case when he was thereafter arrested on two valid warrants in a public place. Parker was convicted of robbery in the first degree and kidnapping in the first degree, both while using a deadly weapon, a knife.

Parker wrongly attempts to exclude his confession to robbing the teenage victim with a knife by applying the exclusionary rule to a witness who spoke to police and testified at trial as part of a voluntary exercise of her free will. He also wrongly asserts any evidence collected after use of the cell site simulator must be excluded no matter how attenuated to that use.

The victim's anguished statements shortly after experiencing rape, robbery, and kidnapping were properly admitted as excited utterances. The statements required to assess and treat her at the hospital were properly admitted as statements for medical purposes. The court allowed Parker to present his version of events but properly denied his attempt to avoid the truth-seeking function of cross-examination by eliciting his own self-

interested hearsay statement from another witness. The court's ruling did not limit Parker's ability to present his theory throughout trial.

The prosecutors properly argued in summation that the victim's emotional state was both relevant to her credibility and circumstantial evidence Parker committed the crimes. That argument was also a fair response to Parker's attacks on the evidence. Additionally, the prosecutors properly argued that Parker's theory of events was unsupported by the evidence and did so without denigrating defense counsel. This Court should affirm Parker's convictions.

II. RESTATEMENT OF THE ISSUES

- A. Did the trial court correctly deny the motion to dismiss where Parker failed to show the impropriety of a judicially-authorized search for his location and even if the search was improper, he was not prejudiced in his ability to present his case?
- B. Did the trial court correctly deny the motion to suppress when the testimony of a witness is not subject to the exclusionary rule and the physical evidence found after Parker's arrest was both attenuated and the product of an independent source?
- C. Did the court correctly admit A.W.'s statements to her mother and to 911 as excited utterances when she was under the stress of the crimes, and correctly admit A.W.'s statements during her sexual assault examination as statements for purposes of medical diagnosis or treatment when they were relevant to treatment?
- D. Did the court properly allow Parker to present his theory of the case through his testimony but preclude him from introducing his own hearsay statement through another witness to escape cross-examination?

- E. Did the prosecutors' closing arguments properly discuss A.W.'s emotional state in relation to her credibility, respond to Parker's attacks on the evidence, and argue based on the evidence that Parker's theory was unsupported by the evidence?
- F. Should the case be remanded so the trial court can strike the filing fee and interest accrual provision in accordance with recent law?

III. STATEMENT OF THE CASE

A. Facts¹

When Shamarr Parker, the defendant, arrived at his girlfriend Dacia Birka's home late in the evening of December 19, 2008, he was nervous and disheveled. 18RP 2346-47, 1246, 2356. He told Birka that earlier in the day he had "hit a lick" (committed a robbery) to make some easy money for Christmas. 18RP 2347, 2357. He was worried because he left the knife he used in the robbery in his mother's vehicle, which had been impounded by police. 18RP 2351. Parker uncharacteristically spent the night thoroughly cleaning Birka's residence. 18RP 2349-50. In the next few weeks, he repeatedly washed the jacket he had been wearing that night. 18RP 2351-52. Parker later told Birka he planned to leave the state. 18RP 2349-50. He conceded to committing a robbery at trial. 22RP 2934-35.

¹ The State cites the record of proceedings as the volumes are labeled, *e.g.*, 1RP for volume 1 and so on. The volume containing the motion hearings on August 7, 8, and 14 of 2017 is labeled as MRP. The State does not directly cite any of the record of proceedings from the first trial. The portion of the first trial read at the second trial is labeled by its exhibit number.

Earlier that evening at approximately 5pm, 17 year-old A.W. waited alone at a bus stop. 8RP 952-54. It was dark and had snowed heavily that day. 8RP 952; 19RP 2531-32. Parker pulled up in front of the stop and asked A.W. if she needed a ride. 8RP 957. A.W., who didn't recognize Parker, told him no. 8RP 957. Parker drove through the nearby intersection then circled back to A.W. by cutting through a parking lot. 8RP 958, 976. He again asked her if she wanted a ride and she again told him no. 8RP 958.

A.W. became nervous and decided to walk to another bus stop. 8RP 958, 9RP 977-79. Parker drove by A.W. honking his horn as she reached the next stop. 9RP 798-79. Growing more anxious, A.W. decided to walk to a friend's house. 9RP 798-79. She felt panicked and frightened as she turned down an alleyway. 9RP 979, 982. A.W. realized too late that Parker was driving towards her, headlights off, from the opposite end of the alley. 9RP 982-83. She turned to run, but Parker was already out of the vehicle and coming towards her. 9RP 982-83. He grabbed her, held a long knife with a tan handle to her throat, and told her to cooperate. 9RP 984-85.

Terrified he would hurt her, A.W. did what he asked as he tied her hands together with cord that felt like plastic and pushed her into the back seat of his car. 9RP 986-87. Parker drove for some time before stopping in an isolated clearing off the roadway. 9RP 922, 989. A.W. climbed into the front passenger seat at his direction. 9RP 922. He told her this was a robbery

and if she cooperated she wouldn't be hurt. 9RP 992. He showed her the knife and started to go through her purse. 9RP 993. Worried about his intentions, A.W. repeatedly asked him if it was just a robbery and tried to help him go through her belongings so she could go home. 9RP 995.

Parker took money and marijuana from A.W.'s purse, then told her to remove her two jackets and shirt so he could look through them. 9RP 994, 1010. When done, Parker complimented A.W.'s looks, displayed the knife, and told her to take off the rest of her clothing. 9RP 994. He climbed into the passenger side of the vehicle, pushed A.W.'s seat back, and vaginally raped her while holding the knife close to her face. 9RP 1001-02. A.W. concentrated on the radio and "went somewhere else" while Parker raped her and sucked on her chest near her breast. 9RP 995, 998. When it was over, he got back in the driver's seat and threw something out of the window. 9RP 1000.

Parker told A.W., "that wasn't so bad, was it?" 9RP 1001. He said it would be "fucked up" to leave her stranded there, and asked for her address. 9RP 1003. A.W. gave him a location 20 blocks from her home. 9RP 1003-04. The car was briefly caught in the snow before leaving the clearing. 9RP 1005. Parker continued talking to A.W. on the ride home and became aggressive when she didn't answer him. 9RP 1004-05, 1007. He told her his name was Steven and since it was Christmas, "you got to do

what you got to do.” 9RP 1008. When he let her out of the car he told her, “Don’t take it personally. Maybe this will teach you to walk around by yourself at night.” 9RP 1010. A.W. wrote the license plate of his vehicle on her arm as he drove away. 9RP 1010.

A.W. focused on getting home to her mother where she knew she would be safe. 9RP 1018; 10RP 1144, 1261. She asked people along the way if she could use their phone. 9RP 1017. All refused until she was almost home. 9RP 1017; 10RP 1263. A.W. was hysterical as she called her boyfriend Justin Lyons and blamed his refusal to drive her home in the snow for what had happened. 10RP 1146, 1153. Lyons said when he got the call A.W. was crying and flooded with emotion. 18RP 2310, 2312. He could barely understand what she was saying as she told him she had been raped. 18RP 2310.

When A.W. arrived home, her mother Tracy Nephew met her at the door.² 8RP 867; 9RP 1018. A.W. was unable to speak. 8RP 867. She collapsed on the ground, crying and shaking. 8RP 866, 869; 9RP 1018. Nephew attempted to calm her down and help her inside the house. 8RP 967-68. A.W., normally expressive, was unable to coherently explain what had occurred. 8RP 867-68. Her mother explained:

² Tracy Nephew was Tracy Miller at the time of the first trial. 8RP 863.

She could only get pieces of sentences out, and all she would say is, He raped me. And as I trying to ask her, What are you talking about? Who? And all she would get was, I don't know. I don't know. He raped me. I don't know. And that's about all I could get out of her at that point.

8RP 868. A.W. kept slumping over and curling her body up into a ball as her mother tried to help her up to the second floor of their home where the phone had been left. 8RP 870-71.

Once upstairs, Nephew called 911. 8RP 871. The call occurred at 8:45pm. Ex. 1; 17RP 2160. The court found that A.W.'s statements on the call were admissible as excited utterances. 7RP 808. A redacted portion of the call was admitted at trial subject to a limiting instruction providing that A.W.'s statements alone were evidence and the statements of others could only be considered as context. CP 968; Ex. 1, 140; 7RP 808; 22RP 2278.

A.W.'s voice can be heard in the background of the redacted call. 7RP 788, 808; Ex 1. A.W. cries out when instructed to keep her clothes on. 8RP 871; 9RP 1019-20; Exhibit 1. She provides the license plate number of her assailant's vehicle and describes its appearance. Ex 1. At the end of the redaction, A.W. calls out for her mother and again expresses distress about remaining in her clothing. Ex 1.

Nephew spoke more with A.W. before paramedics transported them to the hospital. 8RP 879, 885-85. Nephew described how A.W. was broken,

upset, crying, and erratic, as she gradually told her in bits and pieces about what had happened to her. 8RP 871, 874, 879-86. A.W. told her mother:

When he let her out of the car she pulled a pen out of her purse and wrote the license plate number down on her arm. 8RP 879.

She was waiting for a bus. And she had seen him circle a couple of times where she was waiting for the bus. And he had pulled into the parking lot and asked her if she needed a ride. She told him no. But he kind of creeped her out because she saw him drive by a couple of times. So she decided to walk down the street to where her friend lived. And she said she didn't see him come up the alley. So she got out of the car, and he put a knife to her and told her to get in the car. 8RP 880.

She said that he drove her out of town; that she wasn't sure where he had taken her, but she was trying to see where they were going. And I remember her telling me about a wreck they had went through. And then she didn't recognize where they stopped. 8RP 882.

She said he just had her in the car and that he started talking to her like they knew each other. 8RP 883

...[S]he explained how nobody at the Chevron would let her use the phone. And he dropped her off, and she told me about the getting the license plate number, and again, she didn't know him. 8RP 886.

It was mostly about the car and the license plate and her not knowing who he was. 8RP 886

A.W. remained upset during ambulance transport to the hospital, crying and questioning why this had happened to her. 8RP 887. She was treated for headache, abdominal pain, and wrist pain in the emergency department before she was seen by a sexual assault nurse examiner (SANE) from 11pm to 1am. 15RP 1896, 1898, 1935.

The SANE explained the sexual assault examination has both medical and forensic components. 15RP 1882. Patients provide information about what happened to them in response to specific questions and by narrative. 15RP 1883-84. The SANE uses the information collected from the patient to detect and document injuries. 15RP 1883. It is also important in determining whether the patient needs further medical care or additional tests. 15RP 1884.

A.W. gave the following responses to the SANE's questions:

The incident took place on 12/19/08, from 6 to 7pm. 15RP 1938

It happened in his car near 64th, Tacoma. 15RP 1938.

[The assailant] was described as 19, 22, and looking about 20. 15RP 1938

He said his name was Steven, his birthday was June 21st, he was black. 15RP 1938.

She was penetrated by his penis and his finger. 15RP 1939.

Ejaculation occurred. 15RP 1940.

“[I]t's pretty sure he was wearing a condom.” 15RP 1940.

Regarding position, “was laying on the seat, he was in front on knees, the floor of car.” 15RP 1941.

He used a condom. 15RP 1941.

“[T]here's a mark on my left breast, sucking on me.” 15RP 1941.

“No pain now. Got pain meds in ER for headache and abdominal pain.” 15RP 1942.

Vomited at home. "Almost on walk home." 15RP 1942

Assailant had knife. 15RP 1943.

The knife was seven inches. 15RP 1943.

Assailant grabbed her arm. 15RP 1943.

Assailant used physical restraints. "[Y]es, hands, felt like plastic, he had to tie them." 15RP 1943.

"[S]ays if you do anything stupid I will stab you." 15RP 1944.

When asked when she last had intercourse, A.W. initially said May or June 2008, then said "Thursday." 15RP 1945.

A.W. also provided the SANE a narrative account of her ordeal.

15RP 1946-48. This occurred before the physical and genital exam. 15RP 1946-48. A.W.'s narrative was admitted as a statement for purposes of medical diagnosis and treatment. 15RP 1870. It was read by the SANE at trial:

So I guess I should start when I got off the bus at 38th and Pacific. I'm reading this verbatim.

I crossed the street to catch the bus to the Tacoma Mall so I could go home. And then a car went through the Shell parking lot, came around to where he was in front of me and parked at the light. Then he tried to ask me where I was heading -- headed, excuse me--, and if I needed a ride.

I told him no and he drove off. And I start walking down 38th so I would be at another bus stop. But he followed me down 38th Street. And he kept honking at me, continuously asking me if I needed a ride. But every time I told him no.

He turned around twice and came back, and when I thought he was gone I turned right on 37th Street. I saw him pass me again. He didn't say anything. He just went past.

But I ran into the nearest alley so I could take a shortcut to my friend's house. And he had gone around the street, come around the other side of the alley. And his headlights were off, and I didn't know that he was coming.

I was going right towards him until I saw him, but he was quicker than me and he got out of the car and grabbed me.

He held the knife to my neck and then told me not to yell or do anything stupid, to cooperate or he would stab me. And then he put me in the back of the car and tied my hands behind my back. Then he got in the front, was driving for a while, and then we stopped. He had turned in to one of those turnaround spots where cars turn.

I couldn't see much with the snow. There was a store right across the road with a gravel road thing.

Then he made me get into the front passenger seat. He said, don't do anything stupid. I already told you I will stab you. Then he searched through my purse and took the ten dollars that I had and asked me if I had anything else on me, and he said if I was lying he would stab me; that I was not cooperating if I was lying.

He made me take my shoes off and give to him so he could see if I was hiding anything. Then he took my jacket off and searched every pocket to see if there was anything in it.

He had already cut off -- he untied, like, plastic ties so I could get the jacket off. Then he took off my second jacket to see if there was anything there. Then he did my -- then he did -- excuse me -- then he undid my bra and checked up in there to see if I was hiding anything up there.

Then he checked my pants pockets. Then he made me take my pants off. Then he checked my underwear to check I wasn't hiding anything in there. He took off -- then he took his -- then

he took off his jacket, then told me to cooperate and not do anything stupid.

He made me take my underwear off. He climbed over on his knees on the floor of the car. He pushed the little lever thing and made the seat go back, and he pulled his shirt over his head. Then he then pulled my shirt off and stuff.

Then he pulled me to the edge of the seat and made me put my feet on the dashboard. Then he entered me, I guess. Then he was sucking on me, and he kept his head on my neck the whole time. Then he, with his left hand grabbed my hip and pulled me closer. He was just doing what he was doing for about half an hour.

Then when he was done he got off me, told me to put my clothes on. And then he said, I should just leave you out here, but I have some sympathy for you.

Then he asked me where I lived. I think he wanted me to tell him. I'm not sure why, if he wanted to know or to let me off so because I was cooperative he would take me home.

Then on the ride there about 40 minutes and he was talking the whole time telling me where he was from, what he usually was doing. Then he tried to tell me this wasn't something he did every day. Then he dropped me off on 54th, right the street before Chevron. Then he tried to tell me to be safe and he was sure that taught me a lesson and all that.

Then I got a license number before he drove off. Then I walked home. I tried to get 50 cents or use a cell phone. No one seemed to want to help. So I walked to there.

That's pretty much what happened. 15RP 1948-51.

After receiving A.W.'s narrative of the ordeal, the SANE conducted a head-to-toe physical examination, photographing bruising to A.W.'s left breast and inner thigh. 15RP 1952-54. Redness to the vagina and cervix observed during the genital exam were consistent with sexual assault. 15RP

1959-60. Swabs used for later DNA testing were taken from A.W.'s genital and breast area. 15RP 1962. At the end of the examination, the SANE reviewed the examination findings with A.W., ensured her immunizations were up to date, and provided her with medication to prevent sexually transmitted infection. 15RP 1962, 66.

Police tracked the license plate number on A.W.'s arm to a vehicle owned by Parker's mother. 17RP 2167, 2170; 18RP 2345. The vehicle was impounded and later searched. 17RP 2171. Police found thin plastic wire cord in the door pocket of the driver's seat.³ A knife with a wooden handle and 5-inch blade was under the front passenger seat.⁴ A latent print on the knife belonged to Parker.⁵

A.W. was interviewed several times by Tacoma Police Department (TPD) detective Bradley Graham.⁶ She identified Parker in a photo line-up the day after her abduction; her eyes widened and she brought her hands to her face when she saw him. 19RP 2346, 2441. She later identified a clearing off Waller Road as the site of the assault, visibly physically reacting when brought to the location by Detective Graham. 19RP 2458-9. The owner of the property told police he had seen marks in the snow indicating someone

³ 12RP 1531-32, 1553, 1573, 1582, 1589; Ex. 41-45.

⁴ 12RP 1531-32, 1553, 1573, 1582, 1589; Ex. 37-40.

⁵ 12RP 1557, 1572; 13RP 1649, 1654.

⁶ 19RP 2435, 2436, 2453-54, 2462, 2471.

had driven in the clearing and had problems with traction during the snowfall on December 19, 2008, the date of A.W.'s abduction. 18RP 2368, 2373-74. DNA taken from A.W.'s breast matched Parker. 17RP 2238.

B. 2010 Trial and Appellate History

Parker was tried for kidnapping in the first degree, rape in the first degree, and robbery in the first degree in March and April of 2010. CP 47-49, 1350-51. He was convicted of kidnapping in the first degree and robbery in the first degree, both including the deadly weapon enhancement. CP 226, 232, 235-36. The jury did not reach a decision on rape in the first degree. CP 230. Parker was sentenced to 246 months incarceration at the Department of Corrections (DOC). CP 415-431.

Parker's convictions were affirmed on direct appeal. *State v. Parker*, 166 Wn. App. 1012, WL 295425 (2012) (unpublished).⁷ In July 2015, his convictions were reversed and remanded subsequent to a personal restraint petition. *In re Parker*, 188 Wn. App. 1061, 2015 WL 4459185 (2015) (unpublished).⁸ On remand, the State filed the third amended information, reinstating the original charges of kidnapping in the first degree, rape in the first degree, and robbery in the first degree. CP 695-97.

⁷ The decision of the Court of Appeals is unpublished and has no precedential value. The opinion is cited only for factual and procedural history of Parker's case. See GR 14.1(a).

⁸ Parker's PRP is also cited as procedural history. See GR 14.1(a).

C. Parker's 2009 Arrest and Motion to Dismiss⁹

The State learned in June 2016 that TPD had filed under seal a trap and trace order for Parker's phone number on January 5, 2009, and used a cell site simulator the day of his arrest on January 6, 2009. CP 825-28. In 2009, the RCW controlling the use of trap and trace devices had not yet been amended to include cell site simulator technology. RCW 9.73.260 (1998). Police were conducting surveillance of Birka's residence the day of Parker's arrest when the cell site simulator was used to confirm his presence there. CP 862, 893. After he left the residence, he was stopped in a public place and arrested on two outstanding warrants. CP 893. No admissions by Parker or physical evidence were obtained from his arrest. CP 894.

Shortly after the prosecution learned of the trace order's existence, they moved to unseal it and provided the order with the supporting affidavit to the defense. CP 495-97, 826, 864, 869-70, 1352. Parker was offered the opportunity to interview the detective who used the device. CP 826, 864. The State gave the court information about the circumstances of the device's use in response to Parker's 8.3(b) motion to dismiss. CP 824-905. The trial court heard and denied Parker's motion on August 8, 2017. MRP 77-108.

⁹ The facts detailed in this section are those provided to the court for its consideration on the issue of the cell site simulator. CP 824-905. Not all of these facts were elicited at trial. Where relevant, the State specifically notes whether or not certain information was introduced at trial.

1. Trap and Trace Order and Cell Site Simulator

On December 31, 2008, a Superior Court judge issued a warrant for Parker's arrest after finding probable cause Parker abducted and raped A.W. CP 1-4, 893, 1348-49. On January 5, 2009, TPD applied for a pen register and trap and trace order for Parker's phone number. CP 883-90. The order was sought under the 1998 version of RCW 9.73.260 which was not amended to cover cell site simulator technology until 2015. RCW 9.73.260 (1998); RCW 9.73.260(1)(f)(2015). The application sought to "trap and trace" the "location and subscriber of telephones" receiving calls from and making calls to Parker's phone number (253-269-2048) pursuant to RCW 9.73.260(1)(e), which defined a "trap and trace device" as:

[A] device that captures the incoming electronic or other impulses that identify the originating number of an instrument or device from which a wire or electronic communication was transmitted.

CP 884, 888, 890; RCW 9.73.260(1)(e)(1998). The application further disclosed to the court that the "trap and trace" would:

provide investigators with information pertaining to the physical location of the cellular phone being used by [defendant] so he can be located and arrested. The sooner the [defendant] is found and arrested, the greater the likelihood that police will also find physical evidence on his person relating to this crime.

CP 887. The application clarified the "trap and trace" would:

[I]dentify the number, location, and subscriber of telephones receiving calls from and making calls to telephone number

(253) 269-2048; and that such information will lead to learning the location of person(s) for whose arrest there is probable cause, which is relevant to this criminal investigation; and that authorization should be granted to install a pen register and trap and trace on the line to telephone number (253) 269-2048, commencing January 5th, 2009 at 11:00A.M., to be completed no later than February 5th, 2009, at 11:00 A.M.

CP 890.

A Superior Court judge issued a pen register trap and trace order.

CP 877-882. Page 2, finding (1) of the order provides:

Detective Jeffery L. Shipp and agents of the US Marshal's Service are engaged in an investigation of the crimes of; [sic] Kidnapping in the First Degree, RCW 9A.40.020; Rape in the First Degree, RCW 9A.44.040; and seek to use a pen register and a trap and trace for learning the location of person(s) for whose arrest there is probable cause[.]

CP 878. Page 2, finding (3) adds:

There is probable cause to believe that the numbers, locations, and subscribers of telephones called from and of telephones used to call telephone number (253) 269-2048 will lead to learning the location of person(s) for whose arrest there is probable cause and to obtaining evidence of the above described crime.

CP 878. Pursuant to RCW 9.73.260 (1998), the court order authorized TPD to "use" a trap and trace device "to trace and identify the [] location of and subscriber of record to all telephones used to place calls to [Parker's phone number], without respect to geographical limitations." CP 879. And the order specifically authorized TPD to receive:

GPS Precision Location Information; and if GPS Precision Location Information is not available, such service provider shall initiate a signal to determine the location of the subject's mobile device on the service provider's network or with such other reference points as may be reasonable available [sic] and at such intervals and times as directed by the law enforcement agency serving this order[.]

CP 880. Thus, a signal trace to ascertain defendant's location was judicially authorized to be obtained through TPD's use of its own pen register and trap and trace device or by the service provider's trap and trace equipment "at such intervals and times as directed" by TPD. CP 879-880.

2. Arrest

Parker was arrested on January 6, 2009, on the warrant issued for the rape and abduction of A.W. as well as a separate outstanding DOC warrant. CP 892-894. A police report submitted to the court in response to Parker's motion to suppress details the investigative steps taken to find and arrest him prior to and on January 6, 2009:

During Det. Graham's investigation he learned that Parker sometimes stayed with his mother but had not been there since the night of the incident. Parker's mother advised that he might be staying with a girlfriend. Det. Graham requested assistance of Special Investigations in locating Parker after a TPD Bulletin was issued advising of probable cause for his arrest.

Special Investigations Sgt. Branham contacted me via Nextel to advise that they had located a possible address for Parker and asked for assistance in surveilling it. I arranged for Detectives Brooks, Aguirre, and Holden to respond to the address for assisting in surveilling it. [] I conducted

computer database research on the address and discovered that the resident was Dacia Birka. Det. Yenne advised that he had a recent case assignment involving Birka at that address and the father of her youngest child was most likely Shamarr Parker. A computer check of Birka found that Parker was a suspect in stealing a handgun from her in 2003 and she called him her boyfriend.

I contacted LESA Records to confirm the warrant status on Parker and learned that he also had an additional DOC warrant in the system and both were confirmed.

CP 893. The cell site simulator was used to confirm Parker was in the residence. CP 862. Surveilling police observed Parker leave the residence and drive away with Birka. CP 894. Police stopped the car at a school on Eustis-Hunt Road and Parker was arrested. CP 892, 894. Parker exercised his right to remain silent and was transported to jail. CP 894. No statements from Parker or physical evidence were obtained as a consequence of his arrest. CP 894.

Birka was in the driver's seat of the vehicle when it was stopped. CP 894. A detective told her Parker was being arrested for assault and she responded, "you mean a rape." CP 894. The detective told Birka she wanted to speak with her, and Birka "said she was sending her daughter home on the bus and wanted me to meet her at her house. I agreed and she was released." CP 894.

No statements made by Birka during the arrest were introduced by the State during trial. 18RP 2344-2366; Ex 122B. The State also did not

elicit any details about the arrest itself through law enforcement witnesses to avoid any prejudice to Parker. 18RP 2336-2338. For his own tactical reasons, Parker sought to introduce evidence that Birka was with him during his arrest on January 6, 2009. 18RP 2336-2338.

When detectives arrived at Birka's house on 117th St. E. later in the day of Parker's arrest, she "answered the door and invited [them] in." CP 893-94. Birka "agreed to talk" to them about Parker. CP 894. She voluntarily shared details about him and became upset. CP 895-96. Birka described Parker's repeated efforts to wash a jacket he brought back to her house in December. CP 895. Detectives collected the jacket. CP 895. The jacket was admitted at trial. 11RP 1361-69. A.W. testified at trial the jacket Parker was wearing the night of the crimes was a dark color but she was unsure whether the jacket collected by law enforcement was the same one Parker wore the night of the crimes. 9RP 1038; 10RP 1215-17.

It was not until January 22, 2009, 16 days after Parker's arrest, that Birka provided a detective with incriminating information about what Parker told her the night of the incident. CP 897. She told the detective "she had not been totally honest with me when we talked on the day of Parker's arrest." CP 897. She related that Parker came to her house on the 19th and described robbing a girl for money and weed. CP 897. She further described his demeanor that night, his version of events, and her knowledge of the

allegations. CP 897. Birka testified consistently with this information in April 2010 at Parker's first trial. CP 1351; Ex 122.

In June 2016, the State requested and received information about how the cell site simulator was used in Parker's apprehension on January 6, 2009. CP 862. TPD provided a statement from Detective Krause which was shared with Parker's counsel and the court:

I remember the case (independent recollection). We were getting good location results from the E911 locate and only went out to the Fredrickson area to confirm that the phone was in a particular residence. Parker left the residence while we were there and was stopped and taken into custody. I guess what I'm trying to say by that is that the detectives would have seen him anyway because they were there based upon the pings and the fact that they had knowledge of the address via other investigative methods. I believe he was somehow linked with the occupant of the residence. I don't remember exactly how, relative, girlfriend, or some such.

CP 862. The State offered to facilitate an interview between Parker's counsel and the detective who provided information about the use of the cell site simulator. CP 864.

3. Motion Hearing and Ruling

Parker asked the court to dismiss the case based on law TPD's use of a cell site simulator pursuant to a trap and trace and pen register order. CP 708-789; MRP 84. He did not challenge probable cause for the search or the court's authorization of the electronic detection of his location

through his phone, but rather the manner the search was conducted. CP 708-789; MRP 82-87, 102-06.

The court gave its oral ruling on August 7, 2017. MRP 106-08. It found there was adequate cause to locate Parker through his cell phone. MRP 106. It also found Parker's expectations of privacy were reduced because of his two outstanding warrants. MRP 107.

The court found law enforcement had not informed the court about how the device it was going to use worked and that it would potentially invade the privacy of people other than Parker. MRP 106. The court noted Parker was attempting to use the theoretically-violated privacy rights of others in support of his motion to dismiss. MRP 107. Although the court was troubled TPD did not tell the court how the cell site simulator device worked, the decision was based on the undeveloped state of the law, the federal government's nondisclosure requirement, and the absence of prejudice to Parker. MRP 108. The court found TPD's actions did not warrant dismissal. MRP 108.

The court further found that Birka's testimony was attenuated because the incriminating information she provided was given 16 days after Parker's arrest and she was an "intervening personality." MRP 108. The court noted the buccal swab (taken in 2017) was "way too far attenuated from the location of the defendant" the day of his arrest. MRP 108; CP 498-

502. Based on those reasons, the court in its discretion denied Parker's motion to dismiss and in the alternative, suppress evidence. MRP 108.

D. 2018 Trial

Parker's second trial began on April 18, 2018, and ended on May 23, 2018. 2RP 112; 22RP 2966. The court found Birka unavailable and her 2010 testimony was admitted. 14RP 1831-34; 18RP 2344-2366; Ex 122B.

1. Parker's Defense

Parker's defense was that he had arranged to buy marijuana from A.W. and robbed her. 22RP 2934. He denied the rape, alleging it was fabricated by A.W. to seek revenge for his robbery and avoid getting in trouble for missing curfew. 22RP 2934. He pursued his theory throughout trial by continuously attacking A.W.'s credibility.¹⁰ He questioned A.W. extensively about inconsistencies in her statements to police and others. 10RP 1136-1260. He tried to support his theory by eliciting hearsay statements he made to Birka to explain the crime he admitted committing against A.W. 18RP 2356-66. Parker told Birka a relative identified A.W. as a good target for robbery. 18RP 2348-49. At trial, he questioned her about his story that he had arranged to buy marijuana from her over the phone:

Q. Then she gave him the weed and then he then basically said this is a lick, get out of the car.

¹⁰ 8RP 900-946; 10RP 1136-1260; 11RP 1473-75, 1478; 16RP 1996-2001, 2006, 2015-28, 2031-33; 17RP 2178-79; 18RP 2322, 2326; 19RP 2498-99, 2531-36, 2543-46, 2561-2, 2566-67; 2577.

A. This is a lick, bitch, yes. Get out.

Q. And that she didn't want to get out of the car.

A. No. He kept saying she didn't want to get out.

Q. So that's why he had to basically pull a knife to force her out of the car; is that what he told you?

A. Uh-huh, yes.

18RP 2358-2359. Parker also questioned Birka about her deletion of a phone number from his phone. 20RP 2637-38. She testified she deleted a number for "Amber." 18RP 2361. Detective Quilio later testified that "Birka said that she had read the information contained in the newspaper article, and between that and contacts with defense had somehow gotten the name [A.]. She said that she remembers deleting a phone number for [A.] from his phone after December 19th. She did not have an explanation for why she deleted the number." 20RP 2661.

Parker attempted to elicit a hearsay statement he made to Detective Graham during a telephone conversation after the incident but prior to his arrest. 19RP 2523. Parker told Detective Graham that "she hadn't called me." 19RP 2524. Graham asked Parker if he were referring to his mother and he said, "No. The girl, [A.]. She got my number. I know she doesn't have a cellphone." 19RP 2524. Parker wanted to question Detective Graham about whether Parker knew who A.W. was, that he knew A.W.'s name, that

A.W. had initially told Graham she didn't talk to Parker, and that A.W. later told Graham she had given Parker her name. 19RP 2526. Parker conceded A.W. had already admitted to being inconsistent with Detective Graham about whether she told Parker her name during the drive back to Tacoma from the crime scene. 19RP 2528.

The court maintained its previous ruling that Parker's claim to knowing A.W. was admissible through his own testimony but that he would not be able to elicit the hearsay statement he made to Detective Graham. CP 967; 19RP 2529. Parker resumed his focus on inconsistencies in A.W.'s statements to Detective Graham. 19RP 2533-36.

In closing, Parker presented his defense that he had robbed but not kidnapped or raped A.W.:

The reality is that what happened is what Shamarr told Dacia Birka that night happened. He made arrangements to meet [A.] to buy some pot. He got -- she got into his car voluntarily. He took the pot from her, refused to give her any money, told her this is a rip. She got out of the car. If he flashed the knife at her, he's guilty of robbery in the first degree. If you don't find evidence that's sufficient enough to find that he flashed a knife at her, he's guilty of robbery in the second degree. But he robbed her. And yeah, the fact that the knife is in the car and the fact that he told Dacia that he flashed her probably means, yeah, that's what he did. But your verdict on one count doesn't control your verdict on the other two counts. And because he's guilty of robbery does not mean he's guilty of kidnapping, does not mean that he is guilty of rape.

22RP 2934-35. Parker spent almost half his closing challenging A.W.'s credibility and highlighting inconsistencies between her statements and the evidence.¹¹ His other major focus was the argument police "presumed guilt" of Parker and consequently did not thoroughly investigate the crimes.¹²

2. State's Closing Argument and Rebuttal

The jury was correctly instructed that it was the sole judge of credibility and that the lawyers' remarks, statements, and arguments were intended to help them understand the evidence and apply the law. CP 1068

In closing, the State addressed Parker's continuous attacks on A.W.'s credibility throughout trial. 22RP 2847-2881. To frame this discussion, the second sentence of the State's closing emphasized the jurors' role in evaluating the credibility of the evidence. 22RP 2847. Shortly thereafter, the State directs the jury's attention to the court's instruction on evaluating witness credibility. 22RP 2851. This occurs before A.W.'s credibility is examined in depth. 22RP 2851. All of this argument was presented in conjunction with the court's instruction on evaluating credibility. 22RP 2851-52; Ex. 144 (pg. 3, pg.25, pg.30).

The State emphasized the credibility in A.W.'s emotional reaction to the crimes, as demonstrated by her demeanor and description of events

¹¹ 22RP 2898-2915, 1917, 1919-20, 2924, 2926, 2932-33.

¹² 22RP 2885-92, 2918-19, 2927, 2932-34.

to her mother when she arrived home, her “flood” of emotions when talking to Lyons, her physical response to seeing Parker’s photograph, her emotional response to being in the alley where she was abducted, her reaction about being brought to the scene of the crime, and her emotional response to finding her high school journal entry about the events. 22RP 2848, 2857, 2869-70; 2872; 2877.

Parker did not object to either of the two instances in the State’s closing argument where the prosecutor used the phrase “emotional truth.” 22RP 2870, 2880. Parker made a nonspecific objection to the prosecutor’s recounting of A.W.’s description of the rape, which was overruled. 22RP 2863-64. He later made another nonspecific and overruled objection to the prosecutor’s discussion of how many people A.W. has had to talk to about the crimes over the years, and how she was asked for three days “to relive the thing that she’s tried to block out of her memory.” 22RP 2879.

During the State’s discussion of the presumption of innocence and the State’s burden of proof beyond a reasonable doubt, Parker objected and alleged counsel was “practically crying to this jury.” 22RP 2848-49. The court overruled the objection. 22RP 2849. At sentencing, this issue was addressed again, and the court noted it did not see evidence of the prosecutor crying. 23RP 2980.

Four objections were made during the State's rebuttal argument accusing the prosecutor of "denigrating" defense counsel, and Parker alleges on appeal one additional argument made by the prosecutor that was not objected to but is now being characterized as "denigration." 22RP 2937-40, 2943-44, 2957. All four objections were overruled. 22RP 2937-40, 2943-44. Parker also made a nonspecific objection in rebuttal to the use of the phrase "emotional truth." 22RP 2950.

In rebuttal argument, counsel reminded the jurors to follow the court's instructions, rely on their own memory of evidence, and remember that defense counsel's theories are not evidence. 22RP 2938-39, 2943-44. This last argument appeared in response to defense counsel's recitation of facts in closing regarding the amount of marijuana A.W. possessed that were not supported by any evidence. 22RP 2904, 2938-39. In response to Parker's extensive criticism of A.W., the prosecutor reminded jurors that she was 17 years old at the time of the crimes, should not be held to some theoretical behavioral standard for rape victims, and had to endure criticism for her teenage behavior while having to recall the traumatic events she endured. 22RP 1937-38, 1957. Counsel also argued in response to Parker's assertion law enforcement "presumed guilt", that law enforcement's actions should not be evaluated in a piecemeal fashion but rather examined in the context of the entire investigation. 22RP 2939-40.

The State argued in both closing and rebuttal that A.W. did not know who Parker was when he kidnapped, raped, and robbed her. 22RP 2848, 2856, 2939, 2942, 2944, 2950, 2955. This argument was not objected to and Parker did not make any motion for a mistrial. 22RP 2848, 2856, 2939, 2942, 2944, 2950, 2955. At the end of the State's closing, the prosecutor remarked, "[t]here are a lot of decisions for you to make. Whatever decision you ultimately reach in your collective wisdom, we're grateful for the time and the careful service that you committed to this case." CP 2881.

3. Post-Trial

Parker was convicted of kidnapping in the first degree and robbery in the first degree, both while armed with a deadly weapon, a knife. CP 1106, 1109, 1115, 1117. He was acquitted of rape and the allegation of sexual motivation for kidnapping. CP 1108, 1111. On July 13, 2018, the court again imposed a sentence of 246 months incarceration. CP 1315, 1321. The judgment and sentence included the \$200 filing fee and interest accrual provision. CP 1319, 1320. Parker timely appealed. CP 1334. The court found him indigent. CP 1335-36.

IV. ARGUMENT

- A. **The trial court did not abuse its discretion in denying Parker’s motion to dismiss because police did not commit misconduct by conducting a judicially authorized search for Parker’s location and even if misconduct is incorrectly assumed, Parker was not prejudiced since his arrest was not the source of evidence used against him at trial and he was arrested based on two valid outstanding warrants.**

The trial court did not abuse its discretion in denying Parker’s motion to dismiss based on use of the cell site simulator when the search was judicially authorized and he was not prejudiced by its use. Dismissal under Criminal Rule (CrR) 8.3(b) is an “extraordinary remedy to which the court should resort only in truly egregious cases of mismanagement or misconduct.” *State v. Wilson*, 149 Wn.2d 1, 9, 65 P.3d 657 (2003). The court may not dismiss unless arbitrary action or governmental misconduct results in “prejudice to the rights of the accused which materially affect the accused’s right to a fair trial.” CrR 8.3(b). It is the defendant’s burden to establish facts justifying dismissal under CrR 8.3. *State v. Michielli*, 132 Wn.2d 229, 239-40, 937 P.2d 587 (1997). The defendant must show by a preponderance: (1) arbitrary action or governmental misconduct; and (2) actual prejudice affecting the defendant’s right to a fair trial. *Id.*

Misconduct under CrR 8.3(b) is predicated on a violation of the right to a fair trial guaranteed under the Fourteenth Amendment. *State v. Solomon*, 3 Wn. App.2d 895, 908, 419 P.3d 436 (2018). Misconduct has

been found in egregious circumstances such as when the government intrudes upon a defendant's right to counsel or fails to provide exculpatory evidence until after trial has commenced. *State v. Irby*, 3 Wn. App.2d 247, 256, 415 P.3d 611 (2018); *State v. Martinez*, 121 Wn. App. 21, 33, 86 P.3d 1210 (2004).

Even when misconduct has occurred, dismissal does not follow unless there was prejudice. *State v. Blizzard*, 195 Wn. App. 717, 732, 381 P.3d 1241, *review denied*, 187 Wn.2d 1012, 388 P.3d 485 (2016). To establish prejudice, the defendant must demonstrate more than speculation or the possibility that prejudice occurred. *State v. Rohrich*, 149 Wn.2d 647, 659, 71 P.3d 638 (2003). Prejudice must have actually interfered with the defendant's ability to present his case. *City of Kent v. Sandhu*, 159 Wn. App. 836, 841, 247 P.3d 454 (2011).

The trial court's decision on whether to dismiss under CrR 8.3(b) is reviewed for "manifest abuse of discretion." *Michielli*, 132 Wn.2d at 239-40. Discretion is abused only when the trial court's decision is manifestly unreasonable, based on untenable grounds, or exercised for untenable reasons. *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993). This occurs when the decision rests on unsupported facts, the wrong legal standard, or when the court uses the correct facts and legal standard but "adopts a view that no reasonable person would take." *Rohrich*, 149 Wn.2d

at 654. The burden is on the appellant to demonstrate abuse of discretion. *State v. Williams*, 137 Wn. App. 736, 743, 154 P.3d 322 (2007).

Parker has failed to demonstrate the trial court abused its discretion in denying his motion to dismiss under CrR 8.3(b). First, he has failed to show the government committed misconduct by engaging in an electronic search for his phone pursuant to a judicially-authorized order based on the law existing at the time of his arrest. Second, he cannot demonstrate prejudice when law enforcement's use of a cell site simulator to verify his location prior to arrest did not affect his ability to defend against the charges and even illegal arrest is no bar to prosecution. Parker's further contention that the government's conduct was so outrageous and extreme to warrant dismissal fails as the use of the cell site simulator was minimal, the law at the time was undeveloped, and law enforcement is currently permitted to use the device to arrest dangerous fugitives like Parker. The trial court did not abuse its discretion in denying Parker's motion to dismiss.

- 1. Parker cannot show by a preponderance of the evidence the government committed misconduct by using a cell site simulator pursuant a valid court order supported by probable cause allowing electronic detection of the location of his cell phone according to the 1998 version of RCW 9.73.260 which did not differentiate trap and trace devices from cell site simulators.**

Parker fails to show by a preponderance of the evidence the state committed misconduct when there was probable cause to believe he had

raped and abducted a teenage girl and the electronic search for the location of his phone with a cell site simulator was conducted pursuant to a valid court order. A search for cell site location information requires a warrant based on probable cause under Art. I, § 7 of the Washington Constitution and the Fourth Amendment. *State v. Muhammad*, 194 Wn.2d 577, 596, 451 P.3d 1060, (2019); *State v. Phillip*, __ Wn. App. __, 452 P.3d 553, 559 (2019), *review denied*, *State v. Phillip*, 194 Wn.2d 1017 (2020); *Carpenter v. United States*, 138 S.Ct. 2206, 2217-19, 201 L.Ed.2d 507 (2018).

"A court order may function as a warrant so long as it meets constitutional requirements." *State v. Garcia-Salgado*, 170 Wn.2d 176, 186, 240 P.3d 153 (2010). An order may therefore support an intrusion into constitutionally protected information or space if: (1) it is issued by a neutral-detached magistrate; (2) it particularly describes the place to be searched and items to be seized; (3) it is supported by probable cause based on oath or affirmation; (4) there is clear indication that the desired evidence will be found; (5) the method of intrusion is reasonable; and (6) the intrusion is performed in a reasonable manner. *Id.*

A defendant bears the burden of proving the unreasonableness of a judicially-authorized search by a preponderance. *See Garcia-Salgado*, 170 Wn.2d at 186; *State v. Hopkins*, 113 Wn. App. 954, 958, 55 P.3d 691 (2002); *Franks v. Delaware*, 438 U.S. 154, 171, 98 S.Ct. 2674 (1978). The

reviewing court acts in an appellate-like capacity as its review of the order's validity is limited to the four corners of the order and supporting affidavit. *See Garcia-Salgado*, 170 Wn.2d at 186; *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). Both are tested in a commonsense, non-hyper technical manner with great deference given to the issuing court's determination of probable cause with all doubts resolved in favor of the order's validity. *Garcia-Salgado*, 170 Wn.2d at 186; *State v. Chamberlin*, 161 Wn.2d 30, 41, 162 P.3d 389 (2007); *State v. Chenoweth*, 127 Wn. App. 444, 455, 111 P.3d 1217 (2005); *affirmed by State v. Chenoweth*, 160 Wn.2d 454, 158 P.3d 595 (2007), *State v. Tarter*, 111 Wn. App. 336, 341, 44 P.3d 899 (2002). On appeal, the trial court's findings regarding the order are reviewed de novo. *Garcia-Salgado*, 170 Wn.2d at 186; *State v. Perrone*, 119 Wn.2d 538, 549, 834 P.2d 611 (1992).

The 1998 version of RCW 9.73.260 that informed the challenged application and order defined "trap and trace device" as:

[A] device that captures the incoming electronic or other impulses that identify the originating number of the instrument or device from which a wire or electronic communication was transmitted.

RCW 9.73.260(1)(e). "Electronic communication" means:

Any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photo-optical system, but does not include: (i) Any wire or oral

communication; (ii) Any communication made through a tone-only paging device; or (iii) any communication from a tracking device.

RCW 9.73.260(1)(b). "Captures" is not defined. Courts assign plain and ordinary meaning to terms the Legislature does not define. *Tingey v. Haisch*, 159 Wn.2d 652, 664, 152 P.1020 (2007). Courts avoid readings that "result in unlikely, absurd, or strained consequences" since "it will not be presumed that the legislature intended absurd results." *Id.* "The outcome of plain language analysis may be corroborated by validating the absence of an absurd result." *Id.* The plain and ordinary usage of the word "capture" is generally understood to mean:

To take, seize, or catch esp. as a captive or prize by force, surprise, stratagem, craft, or skill...

Websters Third New International Dictionary 334 (2002). Neither constitutional text nor precedent suggests search warrants must include specification of the precise manner in which they are to be executed. *Dalia v. United States*, 441 U.S. 238, 256, 99 S.Ct. 1682 (1979). The execution of a search warrant is in the discretion of law enforcement, subject to the constitutional requirement it be reasonable. *State v. Alldredge*, 73 Wn. App. 171, 176, 868 P.2d 183 (1994).

The court's challenged trap and trace order functioned as a search warrant for the location of defendant's phone. *Garcia-Salgado*, 170 Wn.2d

at 186. The order was issued by a judge. CP 877-882. The order particularly described information police were authorized to search for and seize— among other things, GPS location data for Parker’s phone. CP 879-880; *See State v. Tate*, 357 Wis.2d 172, 189, 196, 849 N.W.2d 798 (2014), 357 Wis.2d at 197 (order using electronic serial number to find location of phone satisfied particularity requirement given impossibility of using traditional descriptions such as addresses to describe location of mobile devices).

The order was supported by probable cause to search for and arrest Parker. CP 883-887. There was probable cause to believe the phone number sought to be tracked was associated with Parker as it had been provided by his mother. CP 887. There was clear indication the desired evidence, Parker’s location, would be found by the electronic detection of signals emitted from phone using his number. CP 890. The device actually used to do this had the same function and purpose as a trap and trace device but was then not accounted for under the applicable statute. RCW 9.73.260 (1998). The method of intrusion used by law enforcement was reasonable to apprehend a dangerous person wanted for the first degree kidnapping and rape of a teenage girl unknown to him. RCW 9.73.260 (2015) (amendment in 2015 differentiated trap and trace devices and cell site simulators, but authorized the latter to conduct criminal investigations); RCW 9A.40.020; 9A.44.040. And the intrusion was performed in a reasonable, limited

manner, to verify Parker was in the location law enforcement was surveilling as a result of independent investigation. CP 862.

Parker failed to meet the burden of establishing government misconduct by a preponderance of the evidence. *Michielli*, 132 Wn.2d at 239-40. Prior to RCW 9.73.260's amendment in 2015, the statute's definition of "trap and trace device" was the closest statutory fit for a cell site simulator, a device similarly used to electronically detect a phone's location. RCW 9.73.260(1)(f)(2015). Law enforcement's use of this device pursuant to a lawfully-issued court order allowing the type of search it performed was reasonably in its discretion as a means to carry out the search. *Dalia*, 441 U.S. at 256; *Alldredge*, 73 Wn. App. at 176. This Court should find the trial court did not abuse its discretion in declining to find misconduct based on these circumstances. MRP 108.

2. The court did not err in denying the request for a *Franks* hearing because there was no dispute probable cause supported the search for Parker and his location through the signal emitted from his phone.

The court did not abuse its discretion in denying Parker's request for a *Franks* hearing. A search warrant must be based on probable cause a defendant has committed a crime and evidence of crime will be found in the place to be searched. *Neth*, 165 Wn.2d at 182. Under *Franks*, a defendant may challenge the truthfulness of statements in a warrant affidavit supporting a search in an evidentiary hearing. *State v. Atchley*, 142 Wn.

App. 147, 157, 173 P.3d 323 (2007) citing *Franks v. Delaware*, 438 U.S. at 155-56.

A *Franks* hearing is warranted only when a defendant makes a substantial preliminary showing that false information or an omission was (1) intentional or made in reckless disregard of the truth (negligent omissions are inadequate to invalidate a warrant); and (2) material to the finding of probable cause. *Franks*, 438 U.S. at 155-56, *State v. Garrison*, 118 Wn.2d 870, 872, 827 P.2d 1388 (1992). If the alleged misstatements are removed, or the alleged omissions included, and the finding of probable cause remains, a *Franks* hearing is not required. *Atchley*, 142 Wn. App. at 160. This Court reviews the denial of a *Franks* hearing for abuse of discretion. *State v. Wolken*, 103 Wn.2d 823, 830, 700 P.2d 319 (1985).

The trial court in this case did not abuse its discretion in denying Parker's motion for a *Franks* hearing. Br. of Appellant at 42; MRP 104. Parker's challenge was based on the device the police used to electronically detect his location, not probable cause to believe he committed crimes or that he could be found by electronic detection of the location of his phone. MRP 82. The fact that a cell site simulator was used instead of a pen register was a stipulated fact before the court. MRP 77-108; CP 708-789, 824-905.

3. Parker cannot show prejudice from use of the cell site simulator when even illegal arrest is no bar to prosecution, the evidence shows legal means led to his arrest, and his ability to present his case was not harmed.

Parker cannot show by a preponderance of the evidence he was prejudiced by use of the cell site simulator to verify his location. Parker did not dispute that the simulator was used to verify his location after other investigative methods produced Birka's residence and law enforcement was there conducting surveillance. CP 708-789, 862; MRP 77-108. Rather, his focus was on the remedy for an invasion of privacy by use of the device. CP 708-789; MRP 77-108. Certainly prejudice cannot accompany Parker's detection and arrest by legal means even if an unnecessary improper search was also used to "double-check" his location. *Rohrich*, 149 Wn.2d at 659 (dismissal only appropriate where there has been actual prejudice stemming from government misconduct).

Parker also cannot show prejudice because even illegal arrest is not a bar to prosecution or a defense to a valid conviction. *City of Pasco v. Titus*, 26 Wn. App. 412, 415, 613 P.2d 181 (1980) (illegal arrest is "not a basis for dismissal.") (quoting *United States v. Crews*, 445 U.S. 463, 474, 100 S.Ct.

1244, 63 L.Ed.2d 537 (1980)).¹³ Consequently, any impropriety in the manner in which the judicially-authorized trap and trace order was used to detain Parker cannot insulate him from responsibility for his crimes.

A final basis on which Parker's prejudice claim fails is that use of the cell site simulator did not impede his ability to prepare for trial, secure witnesses, pursue a specific defense, or otherwise harm the presentation of his case. Prejudice must actually interfere with the ability to present a case. *Sandhu*, 159 Wn. at 841. Invasion of privacy by improper detection of one's location pre-arrest does not affect the ability to defend against criminal charges. And as will be explained further below, no statements or evidence were collected pursuant to his arrest. The trial court did not abuse its discretion in denying Parker's motion to dismiss because Parker was not prejudiced even if misconduct occurred.

4. The State's disclosure of the cell site simulation information after the first trial did not prejudice Parker.

Any discovery violation associated with nondisclosure of use the cell site simulator does not support Parker's argument for dismissal because the prosecutors complied with their continuing duty to disclose information

¹³ See also *State v. Eserjose*, 171 Wn.2d 907, 916, 259 P.3d 172 (2011); *State v. Rhay*, 68 Wn.2d 496, 499, 413 P.2d 654 (1966); *State v. Ryan*, 48 Wn.2d 304, 305-06, 293 P.2d 399 (1956); *State v. Waters*, 93 Wn. App. 969, 976, 971 P.2d 538 (1999); *Gerstein v. Pugh*, 420 U.S. 103, 119, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975); *Frisbe v. Collins*, 342 U.S. 519, 522, 72 S.Ct. 509, 96 L.Ed. 541 (1952).

and the nondisclosure did not prejudice Parker. CrR 4.7 is limited to “material and information within the knowledge, possession or control of members of the prosecuting attorney’s staff.” CrR 4.7(a)(4); *State v. Krenick*, 156 Wn. App. 314, 318, 231 P.3d 252 (2010); *Blackwell*, 120 Wn.2d at 826. Dismissal for a discovery violation is an extraordinary remedy and is only warranted when the defendant has shown actual prejudice by a preponderance of the evidence. *Krenick*, 156 Wn. App. at 320 (citing *State v. Cannon*, 130 Wn.2d 313, 328, 922 P.2d 1293 (1996)); *State v. Hoffman*, 115 Wn. App. 91, 103, 60 P.3d 1261, *reversed on other grounds*, *State v. Hoffman*, 150 Wn.2d 536, 78 P.3d 1289 (2003).

Actual prejudice results when the information is material to guilt or innocence and favorable to the defendant. *See, e.g., State v. Mines*, 35 Wn. App. 932, 941, 671 P.2d 273 (1983) (due process violation based on destruction of evidence requires that evidence be material to guilt or innocence and favorable to the defendant). The trial court’s decision is reviewed for manifest abuse of discretion. *Krenick*, 156 Wn. App. at 320.

In this case, the evidence pertaining to use of the cell site simulator was a sealed order known to TPD and the clerk of court. CP 862. The prosecutors moved to unseal the order and provided it to Parker as soon as knowledge of it was acquired. CP 495-497, 825-26, 1352; MRP 78. Parker was not prejudiced by the lack of this information prior to his first trial

because it was immaterial to his guilt or to the presentation of a defense. *See, e.g., Mines*, 35 Wn. App. at 941. Furthermore, use of the cell site simulator did not result in Parker making inculpatory statements to law enforcement and did not produce physical evidence. CP 892-94. The trial court did not abuse its discretion in declining to dismiss based on a discovery violation.

5. Parker inappropriately invokes the privacy rights of others in support of his motions to dismiss and suppress.

Parker inappropriately invokes the privacy rights of others to argue his case should be dismissed or the evidence suppressed. A defendant who has a legitimate and reasonable expectation of privacy in an invaded place has standing to assert a privacy violation. *State v. Link*, 136 Wn. App. 685, 692, 150 P.3d 610 (2007). The burden is on the defendant to make this showing. *Id.* Fourth Amendment rights are personal rights that may not be vicariously asserted. *State v. Jones*, 68 Wn. App. 843, 847, 845 P.2d 1358, 1360 (1993). Automatic standing is limited to possessory offenses. *State v. Goucher*, 124 Wn.2d 778, 787-88; 881 P.2d 210 (1994). Issues regarding standing are reviewed de novo. *Link*, 136 Wn. App. at 692.

There is no information in the record to support a finding that the use of a cell site simulator in Parker's case invaded the privacy rights of other people. MRP 107. Yet Parker's argument to the trial court relied at least in part on the potentially-invaded rights of others. MRP 82. Parker's

briefing to this Court and his citations to secondary sources further invokes the specter of government-sponsored technological invasion of citizen privacy. Br. of Appellant at 17-19, 22-23, 28, 32, 41. But the privacy of citizens other than Parker is irrelevant to whether he was prejudiced in his ability to present his case due to improper conduct. *Michielli*, 132 Wn.2d at 239-40. Furthermore, Parker is not charged with a possessory offense and has no standing to invoke the rights of others in support of his motion to suppress. *Goucher*, 124 Wn.2d at 787-88. This Court should disregard Parker's attempt to use displeasure about TPD's use of a new technology or the potentially-invaded rights of others by the minimal use of the device in his case to support of his arguments for dismissal and suppression.

6. TPD's mere confirmation of Parker's location with a cell site simulator pursuant to a valid order at a time when the law was undeveloped does not warrant dismissal for extreme and outrageous conduct.

The trial court did not abuse its discretion in denying Parker's motion to dismiss on the basis of outrageous and extreme governmental misconduct given law enforcement's minimal use of the cell site simulator to confirm Parker's location pursuant to a valid court order at a time it was undefined by statute. "The banner of outrageous misconduct is often raised but seldom saluted." *United States v. Santana*, 6 F.3d 1, 4 (1st Cir. 1993). To obtain dismissal of a criminal prosecution on the basis of outrageous conduct in violation of fundamental fairness required by due process, the

conduct must “shock the universal sense of fairness.” *State v. Lively*, 130 Wn.2d 1, 19, 921 P.2d 1035 (1996) (citing *United States v. Russell*, 411 U.S. 423, 431-32, 93 S. Ct. 1637, 36 L. Ed. 2d 366 (1973)).

Outrageous conduct must be more than mere deception. *Lively*, 130 Wn.2d at 20. Dismissal is a “rarely used judicial weapon” reserved for only the most egregious circumstances, and “[i]t is not to be invoked each time the government acts deceptively.” *Id.* at 20 (internal citations omitted); *State v. Rundquist*, 79 Wn. App. 786, 797, 905 P.2d 922 (1995). The court must examine the totality of the circumstances to determine when conduct is so outrageous that dismissal is required. *State v. Solomon*, 3 Wn. App.2d 895, 909, 419 P.3d 436 (2018). The trial court’s determination will only be reversed upon abuse of discretion. *Id.* at 910.

Examination of the totality of the circumstances in Parker’s case reveals the absence of conduct shocking to the universal sense of fairness. *Solomon*, 3 Wn. App.2d at 909; *Lively*, 130 Wn.2d at 19. Parker was a supervised offender with a diminished expectation of privacy. *State v. Winterstein*, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009). He had a warrant issued by DOC as well as a judicially-issued warrant for the abduction and rape of a 17 year-old girl, further diminishing his expectation of privacy.

CP 893, 1348-49. "[O]nce a neutral magistrate has issued an arrest warrant, probable cause exists to believe that a citizen has violated the law of the land, and the citizen's privacy concerns are outweighed by society's interests in requiring him to answer those charges." *State v. Hatchie*, 133 Wn. App.100, 111, 113 P.3d 519 (2006), *affirmed by State v. Hatchie*, 161 Wn.2d 390, 402, 166 P.3d 698 (2007).

Parker was both a fugitive and unquestionably dangerous. TPD had learned through investigation of an address where he might be staying and set up physical surveillance of the location. CP 893. The cell site simulator was briefly used to verify his presence there and then he was arrested in a public place after he was seen leaving the residence. CP 862, 892-94. A minimal invasion of privacy to effectuate the arrest of a DOC-supervised fugitive wanted for a very serious crime does not shock the conscience, especially when there was no case law to guide use of the device in 2009.¹⁴ Dismissal, when police conduct did not prejudice the rights of accused, would be shocking to the conscience. The trial court did not abuse its discretion in denying Parker's motion.

¹⁴ Parker incorrectly argues the court used a "good faith" rationale to deny the motion to dismiss. Br. of Appellant at 26, 36. But "good faith" is inapplicable here as it pertains to the exclusionary rule. *State v. Afana*, 169 Wn.2d 169, 179, 233 P.3d 879 (2010). The court was justified in examining the circumstances of police actions in considering whether there was misconduct to justify dismissal. MRP 106-108.

B. Even incorrectly assuming use of the cell site simulator was misconduct, the trial court did not err in denying Parker’s motion to suppress when there was no evidentiary fruit of the arrest, Birka’s independent decision to testify against Parker was not subject to suppression based on her presence at Parker’s arrest, and the jacket and DNA swab were attenuated from the arrest as well as the product of an independent source.

No physical evidence or statements from Parker were obtained as fruit of his January 6, 2009 arrest. Birka’s testimony was the product of independent free will and the jacket and DNA sample were not proximately derived from Parker’s arrest. “The purpose of our state exclusionary rule is to protect individual privacy rights, not to permanently immunize suspects from investigation and prosecution” when police have made an error in an investigation. *State v. Mayfield*, 192 Wn.2d 871, 896, 434 P.3d 58 (2019). The exclusionary rule’s general mandate that evidence acquired from improper police conduct be suppressed applies *only* to evidence obtained as a proximate result of an unlawful search. *Id.* at 888-89 citing *State v. Rothenberger*, 73 Wn.2d 596, 600, 440 P.2d 184 (1968).

A witness’s independent decision to testify is not subject to the exclusionary rule because it does not stem from improper police conduct. *United States v. Ceccolini*, 435 U.S. 268, 274–280, 98 S.Ct. 1054, 55 L.Ed.2d 268 (1978); *State v. Hilton*, 164 Wn. App. 81, 89-90, 261 P.3d 683 (2011). Furthermore, physical evidence discovered following an illegal search is not subject to suppression if it is attenuated from that search or is

discovered pursuant to an independent source. *Mayfield*, 192 Wn.2d at 896 (quoting *State v. Gaines*, 154 Wn.2d 711, 718, 116 P.3d 993 (2005)); see also *State v. Betancourth*, 190 Wn.2d 357, 365, 413 P.3d 566 (2018). The State bears the burden of proving evidence is admissible despite a constitutional violation. *Mayfield*, 192 Wn.2d at 898. The trial court's conclusions of law relating to the suppression of evidence are reviewed de novo. *Betancourth*, 190 Wn.2d at 363.

1. Birka's independent decision to testify against Parker more than a year after his arrest is not subject to suppression regardless of how Parker was arrested.

Parker wrongly characterizes Birka's decision to testify against him more than a year after his arrest as evidence illegally seized during his arrest because her testimony was an independent act of free will. For it is well-established under Federal and Washington law that the free will of a witness attenuates any taint that led to the discovery of the witness. *Ceccolini*, 435 U.S. at 274–280; *Hilton*, 164 Wn. App. at 89-90.¹⁵

¹⁵ See also *Michigan v. Tucker*, 417 U.S. 433, 449–452, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974); *United States v. Hooton*, 662 F.2d 628, 633 (9th Cir. 1981); *United States v. Kandik*, 633 F.2d 1334, 1336 (9th Cir. 1980); *State v. Russell*, 125 Wn.2d 24, 57 n. 9, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129, 115 S.Ct. 2004, 131 L.Ed.2d 1005 (1995); *State v. O'Brenski*, 70 Wn.2d 425, 429–430, 423 P.2d 530 (1967); *State v. Dods*, 87 Wn. App. 312, 316–319, 941 P.2d 1116 (1997); *State v. Stone*, 56 Wn. App. 153, 161–162, 782 P.2d 1093 (1989), review denied, 114 Wn.2d 1013, 790 P.2d 170 (1990); *State v. West*, 49 Wn. App. 166, 168–171, 741 P.2d 563 (1987); *State v. Early*, 36 Wn. App. 215, 220–222, 674 P.2d 179 (1983); *State v. Childress*, 35 Wn. App. 314, 316–317, 666 P.2d 941, review denied, 100 Wn.2d 1031 (1983); *State v. Smith*, 177 Wn.2d 533, 544-45, 303 P.3d 1047 (2013).

The exclusionary rule does not apply to the testimony of third parties even if their identities are discovered following an unlawful police contact. *Id.* Our Supreme Court has described as "dubious" such claims that testimony of people contacted because of an unlawful search is "fruit" of the search. *State v. Smith*, 177 Wn.2d 533, 544, 303 P.3d 1047 (2013) (observations of victims and their testimony admissible if unlawful discovery is followed by lawful intrusion). It is reasonable to assume witnesses would be willing to testify regardless of an unlawful police intrusion. *Id.*

Mayfield clarified Washington's attenuation doctrine and did not change the rule on the admissibility of the voluntary testimony of third parties irrespective of the means of their discovery. *Mayfield*, 192 Wn.2d at 898. *Mayfield* held that the exclusionary rule does not apply to fruit of an unlawful search if an unforeseeable intervening act severs the causal connection between the illegality and the discovery of evidence. *Id.*

The Court in *Mayfield* addressed whether evidence produced from a person's consent to search of his person and vehicle was attenuated from an immediately preceding illegal seizure. *Mayfield*, 192 Wn.2d at 899. The Court noted this sequence of events left no room for the defendant to exercise his free will, and would allow law enforcement to purposefully illegally seize individuals then attempt to get consent to search. *Id.* at 900-

01. In contrast, the *Mayfield* Court used the factual scenario in *Wong Sun* to illustrate a scenario in which a person's free will breaks the causal connection between the illegality and the evidence. *Id.* at 897 (citing *Wong Sun v. United States*, 371 U.S. 471, 488, 491, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)). In *Wong Sun*, the defendant was unlawfully arrested but then voluntarily returned to police days later and confessed. *Wong Sun*, 371 U.S. at 488. Here, the resulting evidence of his confession was the product of free will, not the police misconduct.¹⁶ *Id.*

The testimony of Birka at Parker's trial in April 2010 was a product of her own free will and not subject to the exclusionary rule. Ex 122B; CP 1351; *Ceccolini*, 435 U.S. at 274–280; *Hilton*, 164 Wn. App. at 89-90, *et al.* Even under the *Mayfield* attenuation analysis, however, her testimony is sufficiently attenuated from any misconduct by police in detaining and arresting Parker.

After Parker was removed from the vehicle, police informed Birka that he had been arrested for assault. CP 894. She was not asked any questions, and replied, unforeseeably and of her own free will, “you mean

¹⁶ Although free will was the superceding factor in *Wong Sun*, that case did not address the general principle that the testimony of a witness with free will is not subject to the exclusionary rule. This is because the statements in *Wong Sun* were those of the defendant and therefore the admission of those statements as evidence *at trial* was not the product of a witness's decision to testify.

a rape.”¹⁷ CP 894. Detectives then asked to speak with her and when she agreed, she set the terms, telling them she was going to send her daughter home on the bus and they could meet her at her house. CP 894. When police arrived there later that day, Birka is not being detained or in police custody. CP 894. She acts of her own free will and invites them in, not a foreseeable act especially given her relationship with Parker. CP 894. Birka then voluntarily gives the police information. CP 895-96. Some of the information she provides are reasons she might have to contact the police on her own, even in the event she was not with Parker at the time of his arrest. *Id.* Birka at this time does not provide police with any inculpatory statements Parker made to her about his crimes. CP 895-96. She does provide law enforcement a jacket she says Parker repeatedly washed which A.W. is unable to definitively identify as what Parker was wearing the night of the crimes. CP 895; 9RP 1038; 10RP 1215-17; 11RP 1361-69.

It is not until *16 days after Parker’s arrest* that Birka gives TPD information about his inculpatory statements about committing a robbery. CP 897. Her decision to talk at this time was preceded by over two weeks during which to decide what she wanted to do based on her own free will, uninfluenced by police. CP 897. That she would volunteer this information

¹⁷ Birka’s statements at Parker’s arrest were not introduced at trial but were before the court and relevant to the 8.3(b) and suppression motion. CP 824-905; Ex. 122B.

was unforeseeable to law enforcement and unconnected with police conduct at Parker's arrest. *Mayfield*, 192 Wn.2d at 898; *Wong Sun*, 371 U.S. at 488 and 491. Her testimony *over a year later* about Parker's inculpatory statements is far more disconnected from the alleged police misconduct and the unforeseeable product of Birka's free will. Ex. 122B; CP 1351.

In *Smith*, the defendant moved to suppress the testimony of his adult assault victim and minor rape victim because they had been discovered in his motel room pursuant to an unlawful motel registry search. *Smith*, 177 Wn.2d at 537. The Court rejected the defendant's claim that witness testimony could be characterized as "fruit" of a search. *Id.* at 544. The Court noted that presumably these witnesses would be willing to testify against the defendant and there was no indication the improper search of the motel room had any effect on this decision. *Id.* at 544-45. Similarly, there is no indication any improper conduct by police on the day of Parker's arrest had any influence on Birka's willingness to testify, especially given her independent decision to offer information to police 16 days later. CP 897.

Under Parker's theory, the willing testimony of a child who talks about the abuse of a sibling would have to be suppressed if the child first spoke during an unlawful stop of the perpetrator. Birka's independent decision to testify was not subject to the exclusionary rule and the trial court

did not abuse its discretion in finding her testimony attenuated from Parker's arrest. MRP 108.

2. The jacket and DNA swab collected subsequent to Parker's lawful arrest on two outstanding warrants is admissible.

The trial court did not abuse its discretion in declining to suppress the jacket or DNA swab as they were both attenuated from use of the cell site simulator and the product of an independent source. Under the independent source doctrine, "evidence tainted by unlawful governmental action is not subject to suppression ... provided that it ultimately is obtained pursuant to a valid warrant or other lawful means independent of the unlawful action." *Mayfield*, 192 Wn.2d at 896 (quoting *Gaines*, 154 Wn.2d at 718); see also *Betancourth*, 190 Wn.2d at 365. Under the attenuation doctrine, the exclusionary rule does not apply if an unforeseeable intervening act severs the causal connection between the illegality and the discovery of evidence. *Mayfield*, 192 Wn.2d at 898.

In *Rothenberger*, an officer identified the defendant during an unlawful stop, later learned he had a warrant for his arrest, and transmitted this information to other officers who stopped and arrested him. *Rothenberger*, 73 Wn.2d at 598. This arrest led to evidence the defendant had committed a burglary. *Id.* The Court noted it would be "ridiculous" if this scenario meant the officer who unlawfully detained the defendant had

to ignore his subsequent knowledge of the defendant's warrant. *Rothenberger*, 73 Wn.2d at 599. The Washington Supreme Court spoke approvingly of *Rothenberger* in *Mayfield*, discussing the case as an example where suppression was not required even though the improper police conduct was a "but for" cause of the discovery of evidence. *Mayfield*, 192 Wn.2d at 889.

In this case, use of the cell site simulator confirmed Parker was present at Birka's home when police were present surveilling the residence. CP 862. This search revealed Parker's location, not any evidence used at trial. CP 862. This search was over when Parker was seen leaving the residence, getting into a vehicle, and driving onto public roads. CP 862, 892-94. At this time, he was a fugitive wanted for the rape and abduction of a teenager, driving on public roads with two outstanding warrants, and entering the vicinity of a school. CP 892-94. Parker's actions subsequent to the cell site search, unprompted by officers, created a situation where law enforcement had a duty to stop and arrest him on his warrants. *Rothenberger*, 73 Wn.2d at 599. The time and circumstances thus separate Parker's arrest from any improper search for his location while he was in Birka's home. *Id.* at 601.

Even if this Court finds that Parker's valid arrest in a public place on two outstanding warrants is not sufficient separation from an improper

search, the physical evidence produced afterwards is still both attenuated and the product of an independent source. First, the jacket provided by Birka was not found as a result of a search, but was provided by a witness with independent and free will who was voluntarily speaking to police. CP 892-97. That piece of evidence is thus both attenuated by an unforeseeable superseding event and produced from a lawful source completely independent of the cell site simulator. *Mayfield*, 192 Wn.2d at 896 and 898. Even if this Court finds the evidence should have been suppressed, its admission was harmless as A.W. could not identify it as the coat Parker wore during the incident. 9RP 1038; 10RP 1215-17; *State v. Thomas*, 91 Wn. App. 195, 203, 955 P.2d 420 (1998) (constitutional error harmless if other evidence overwhelmingly proves guilt).

Second, the DNA swab taken from Parker in 2017 was remote in time from his 2009 arrest and the product of the court's independent superseding order. CP 498-502; MRP 108; see *Betancourth*, 190 Wn.2d at 372-73. Combined with the fact Parker's person cannot be considered the "fruit" of improper police conduct, this evidence was similarly attenuated and the product of a source independent of the cell site simulator search. *State v. Eserjose*, 171 Wn.2d 907, 916, 259 P.3d 172 (2011) (in-court identification not excluded by unlawful arrest). Even if this Court finds it should have been suppressed, its admission was harmless because the jury

acquitted Parker of rape. CP 1108; *Thomas*, 91 Wn. App. at 203. The trial court did not abuse its discretion in finding any physical evidence found after Parker's arrest to be attenuated and admissible. MRP 108.

3. Remand for an evidentiary hearing is unnecessary when the trial court was not required to enter written findings.

CrR 8.3 only requires a written order when the court dismisses a prosecution after finding state misconduct prejudiced the rights of the accused. CrR 8.3(b). Upon a motion to suppress pursuant to CrR 3.6, the court may determine if an evidentiary hearing is required based on the moving papers. CrR 3.6(a). Written findings are only required if an evidentiary hearing is conducted. CrR 3.6(b); *State v. Powell*, 181 Wn. App. 716, 719, 326 P.3d 859 (2014). If no evidentiary hearing is required, the court shall enter a written order setting forth its reasons. CrR 3.6(a).

In this case the court declined to hold an evidentiary hearing and thus was not required to enter written findings. MRP 106-08; *Powell*, 181 Wn. App. at 719. Although the court did not enter a written order, its oral ruling is clear that the testimony of a witness with free will and evidence unconnected to Parker's arrest was attenuated from any improper search. MRP 106-108; *State v. Smith*, 76 Wn. App. 9, 16, 882 P.2d 190 (1994). It is also clear the court adopted the arguments of the state in denying the motions to dismiss and suppress. MRP 106-08; *See, e.g., State v. Carleton*, 82 Wn. App. 680, 686, 919 P.2d 128 (1996); *State v. Gogolin*, 45 Wn. App.

640, 645, 727 P.2d 683 (1986); *State v. Pirtle*, 127 Wn.2d 628, 650-51, 904 P.2d 245 (1995). This Court should deny Parker's request for remand as findings were not required absent an evidentiary hearing and the court's reasoning was clearly set forth in its oral ruling.

C. The trial court did not abuse its discretion in admitting A.W.'s statements to 911 and her mother as excited utterances and A.W.'s statements to the SANE as statements for the purposes of medical diagnosis or treatment.

A.W.'s statements to her mother and to 911 were properly admitted as excited utterances and her statements to the SANE were properly admitted as statements for purposes of medical diagnosis or treatment. The evidence rules, court rules, and relevant statutes control whether an out-of-court statement offered to prove the truth of the matter asserted is admissible in evidence. ER 801(c); ER 802. Excited utterances and statements for purposes of medical diagnosis or treatment are exceptions to the general prohibition against the admission of hearsay statements. ER 803(a)(2); 803(a)(4). Even when these statements are testimonial, the confrontation clause is not implicated when the declarant testifies and is subject to cross-examination. *Crawford v. Washington*, 541 U.S. 36, 50-51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004); *State v. Scanlon*, 193 Wn.2d 753, 769-70, 445 P.3d

960 (2019); *State v. Burke*, 6 Wn. App. 950, 970, 431 P.3d 1109 (2018), review granted by *State v. Burke*, 194 Wn.2d 1009, 452 P.3d 1240 (2019).¹⁸

The decision to admit evidence lies within the sound discretion of the trial court and should not be overturned absent a manifest abuse of discretion. *State v. Bourgeois*, 133 Wn.2d 389, 399, 945 P.2d 1120 (1997). A trial court abuses its discretion when its decision is manifestly unreasonable or is based upon untenable grounds or reasons. *State v. Garcia*, 179 Wn.2d 828, 844, 318 P.3d 266 (2014); *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992). The trial court's evidentiary rulings can be affirmed on any grounds supported by the record and the law. *State v. Grier*, 168 Wn. App. 635, 644, 278 P.3d 225 (2012).

1. A.W.'s statements to her mother and on the 911 call were made while under the stress of the rape, robbery, and kidnapping she had recently endured.

ER 803(a)(2) defines an excited utterance as “[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” ER 803(a)(2). A statement is admissible as an excited utterance when: (1) a startling event or condition occurred; (2) a statement was made while the declarant was under the stress of excitement caused by the event or condition; and (3) the

¹⁸ This case has been accepted for consideration by the Washington Supreme Court. The case involves statements made to a SANE nurse and whether admission of those when the victim does not testify violates the confrontation clause.

statement relates to the startling event or condition. *State v. Chapin*, 118 Wn.2d 681, 686, 826 P.2d 194 (1992). Fulfillment of these requirements ensures the statement is based on the declarant's reaction to the event rather than conscious reflection. *Id.*

Determining whether the three requirements are fulfilled requires analysis of the statement itself, the declarant's emotional state, the nature of the event, and the surrounding context. *State v. Young*, 160 Wn.2d 799, 810, 161 P.3d 967 (2007). Evidence statements were made under the stress of the event can include "the declarant's behavior, appearance, and condition, appraisals of the declarant by others, and the circumstances under which the statement is made." *Id.* Timing is just one factor to consider along with the totality of the circumstances. *State v. Fleming*, 27 Wn. App. 952, 956, 621 P.2d 779 (1980); *State v. Downey*, 27 Wn. App. 857, 861, 620 P.2d 539 (1980). An extremely traumatic event may have prolonged effects upon the declarant. *See State v. Guizotti*, 60 Wn. App. 289, 295-96, 803 P.2d 808 (1991) (victim still under influence of rape after hiding from assailant for 7 hours); *Fleming*, 27 Wn. App. at 958 (rape victim's statements to friend 3 hours after rape admissible as excited utterances); *State v. Woodward*, 32 Wn. App. 204, 206-07, 646 P.2d 135 (1982) (child's statement in response to mother's question 20 hours after an excited utterance).

An excited utterance may be made in response to a question. *State v. Pugh*, 167 Wn.2d 825, 841, 225 P.3d 892 (2009); *State v. Hieb*, 39 Wn. App. 273, 278, 693 P.2d 145 (1984), *reversed on other grounds*, *State v. Hieb*, 107 Wn.2d 97, 727 P.2d 239 (1986). The proper inquiry in this scenario is whether the declarant remained under the stress of the event when questioned so that spontaneity and the inability to reflect is preserved. *State v. Woods*, 143 Wn.2d 561, 597, 23 P.3d 1046 (2001); *Williams*, 137 Wn. App. at 749. Responses to questions by 911 dispatch meet this criteria when the declarant is still under the stress of the event. *State v. Briscoeray*, 95 Wn. App. 167, 174, 974 P.2d 912 (1999) (timing and emotional state during 911 call established victim's statements excited utterances). There is no requirement the questions prompting the excited utterances be edited from a call introduced at trial. *See, e.g., Pugh*, 167 Wn.2d at 829.

Factual omissions in a statement made while under the stress of a startling event do not render a statement inadmissible. *Woods*, 143 Wn.2d at 599-601. In *Woods*, the trial court admitted a rape, robbery, and assault victim's statement to her father hours after the crimes as an excited utterance. *Id.* at 569-71. The defendant argued this was error because she did not tell her father about her use of alcohol that night and that she wanted to buy marijuana from the defendant. *Id.* at 599-601. He further argued she lied to her father by telling him she had gone to bed early when she was

actually awake and partying with friends at 3am. *Id.* The Washington Supreme Court characterized these facts as omissions and found that even if consciously made, they did not change the character of her statements as excited utterances “after being brutalized in such an egregious manner.” *Id.* at 600. The Court distinguished these omissions from the scenario in *State v. Brown*, where the victim admitted to fabricating details of the crime itself in order to deceive law enforcement before she called 911. *Id.* (citing *State v. Brown*, 127 Wn.2d 749, 753, 757-58 903 P.2d 459 (2000)).

Even inconsistencies or false information must be evaluated within the totality of the circumstances and do not necessarily render an excited utterance inadmissible. *State v. Magers*, 164 Wn.2d 174, 188, 189 P.3d 126 (2008). In *Magers*, the victim told the officer who responded to her home following a 911 call that the defendant was not there. *Id.* at 178. The officer asked her to step away from the residence, at which time she admitted the defendant was in the residence. *Id.* at 179. Her subsequent statements about her fear, the defendant’s assault, and the defendant’s statements were admitted at trial as excited utterances. *Id.* She later recanted these statements. *Id.* The Washington Supreme Court held that the victim’s initial false statement did not render the following statements untruthful or lacking spontaneity given the circumstances surrounding the statements. *Id.* at 188.

Thus, the trial court had not abused its discretion in admitting those statements despite the initial falsehood. *Id.*

The court in this case did not abuse its discretion in admitting A.W.'s audible statements on the 911 call and the statements to her mother as excited utterances based on the circumstances from which those statements arose. *Young*, 160 Wn.2d at 810. The rape, robbery, and abduction A.W. experienced as a teenager was an extreme and traumatic startling event or condition. 8RP 946-11RP 1353; *Chapin*, 118 Wn.2d at 686. She was still under the stress of the event when she arrived home shortly after the crimes. *Chapin*, 118 Wn.2d at 686. Lyons described her as crying, almost incoherent, and flooded with emotion when she called him on the walk home. 18RP 2310, 2312. A.W. described herself as a hysterical mess when she reached her mother. 9RP 1018. Nephew observed A.W. was broken, upset, crying, erratic, and physically reacting to what happened by first collapsing on the floor then curling her body repeatedly into a ball. 8RP 866-67, 869-71, 874, 879-86 ; 9RP 1018. The statements A.W. made during the 911 call and to her mother all related to what she had endured. *Chapin*, 118 Wn.2d at 686.

The tone and character of A.W.'s statements on the 911 call is evidence of her continued distress from the startling crimes. Ex. 1; *Briscoeray*, 95 Wn. App. at 174. The content of her statements about the

license plate, the appearance of the vehicle, and her upset about keeping her clothes on relate to the event she just experienced. Ex 1; *Chapin*, 118 Wn.2d at 686. The statements of the 911 operator and her mother were necessary to put A.W.'s statements in context and the court's limiting instruction clearly informed the jury they were not admitted as evidence. *See, e.g., Pugh*, 167 Wn.2d at 829; Ex. 140. The jury is presumed to follow the court's instructions. *State v. Anderson*, 153 Wn. App. 417, 428-29, 220 P.3d 1273 (2009).

The tone and character of A.W.'s statements on the 911 call is also circumstantial evidence of her credibility and thus proof of the crime itself. Ex. 1; *See, e.g., Fleming*, 27 Wn. App. at 956; *In re Detention of Stout*, 159 Wn.2d 357, 382-83, 150 P.3d 86 (2007). Recorded evidence of a crime victim's reaction is highly relevant evidence in the jury's evaluation of credibility. ER 401, 402, 403. The probative value of that evidence is not outweighed here by its prejudicial effect as Parker argues. ER 403; Br. of Appellant at 72. The audio is short, A.W.'s reaction and statements are relevant to the crimes, and jurors' ability to reason was clearly not overcome given their acquittal on the count of rape. CP 1108.

A.W.'s statements to her mother, made in the same general timeframe as the 911 call and under the same stress, were similarly qualified as excited utterances. 8RP 868, 871, 880, 882-83, 886, 874, 879-86. A.W.'s

stress was further demonstrated by her inability to coherently tell her mother in a linear manner what had happened to her. *Id.* Nephew contrasted this with her normal ability to effectively express herself. 8RP 867-68.

Parker argues that A.W.'s statements cannot be excited utterances because she, as a teenager, did not tell her mother about being with her boyfriend and her use of marijuana earlier that day when she was describing the mind and life-altering traumatic events she endured. Br. of Appellant at 65. But the absence of these facts makes sense when evaluating the totality of the circumstances. The content of A.W.'s statements reveal reaction to the startling event itself, not a focus on the surrounding circumstances. Even to the extent this Court finds them omissions, they are comparable to the omissions in *Woods*, where the victim did not tell her father she was drinking alcohol, wanted to buy marijuana from the defendant, and went so far as to lie about being asleep prior to crimes as she recounted the brutal assault, rape and robbery she endured. *Woods*, 143 Wn.2d at 599-601; *see also Magers*, 164 Wn.2d at 188 (evaluation of the totality of the circumstances when deciding whether falsehood affects the admissibility of an excited utterance). A.W.'s teenage omissions of bad behavior unrelated to the rape, robbery and abduction she endured did not change that she was under the stress of the events when describing them to her mother.

Even if any of these statements were admitted in error, the error was harmless. Evidentiary error is only grounds for reversal if it results in prejudice. *Bourgeois*, 133 Wn.2d at 403. Prejudice only exists if there is a reasonable probability the outcome of the trial would be different. *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986). There is harmless error if the evidence is of minor significance to the whole. *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). A.W. testified consistently with the statements she made to her mother and to 911. The prejudice Parker argues from her cries on the 911 is refuted by the jury's ultimate acquittal of rape. CP 1108. Their relevance is not substantially outweighed by any prejudicial effect. ER 403. The trial court did not abuse its discretion by carefully considering the circumstances of the A.W.'s statements to 911 and her mother in finding they were admissible as excited utterances.

2. A.W.'s statements to the SANE were made for the purposes of medical diagnosis or treatment.

A.W.'s statements to the SANE were made for the purposes of identifying injuries, documenting injuries, determining further treatment needs, documenting her account, and making medical decisions such as prescribing drugs to prevent sexually transmitted infection. "[S]tatements made for the purposes of medical diagnosis or treatment and describing medical history, or past and present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar

as reasonably pertinent to diagnosis or treatment” are not excluded by the hearsay rule.” ER 803(a)(4). A statement is reasonably pertinent to treatment when: (1) the declarant’s motive is to promote treatment, and (2) the medical professional reasonably relied on the statement for purposes of treatment. *Williams*, 137 Wn. App. at 746.

Statements for medical purposes are made to a variety of medical professionals performing different roles. *State v. Ackerman*, 90 Wn. App. 477, 482, 953 P.2d 816 (1998) (statement to counselor); *State v. Robinson*, 44 Wn. App. 611, 616 ft.1, 722 P.2d 1379 (1986) (statements to nurse and physician). This includes statements made to witnesses with both medical and forensic roles. *Williams*, 137 Wn. App. at 745-47.¹⁹ Even statements made to a medical professional consulted solely for the purpose of testifying qualify if reasonably pertinent to diagnosis or treatment. *In re Dependency of Penelope B.*, 104 Wn.2d 643, 656, 709 P.2d 1185 (1985).

A statement made to a medical provider following a request to describe “what happened” is properly characterized as a statement for the purposes of medical treatment. *See State v. Moses*, 129 Wn. App. 718, 728-29, 119 P.3d 906 (2005). The patient understands this description is relevant

¹⁹ *See also State v. Payne*, 225 W. Va. 602, 608, 694 S.E.2d 935, 941 (2010); *North Carolina v. Isenberg*, 148 N.C.App. 29, 557 S.E.2d 568, (2001), *cert. denied*, 355 N.C. 288, 561 S.E.2d 268 (2002); *Torres v. Texas*, 807 S.W.2d 884, 886-87 (Tex.Ct.App.1991); *State v. Vigil*, 21 Neb 129, 810 NW.2d 687 (2012).

to receiving appropriate treatment. *See, e.g., Id.* at 730. The medical professional must also have a complete understanding of what a patient has experienced to provide necessary and comprehensive physical and psychological treatment and follow-up care. *Woods*, 143 Wn.2d at 602-03.

In *Williams*, this Court found that even when both the patient and the medical provider have mixed treatment and forensic motives, statements are still admissible as “reasonably pertinent to diagnosis or treatment.” *Williams*, 137 Wn. App. at 745-47. In that case, even though the victim stated her primary purpose of undergoing the sexual assault exam was to provide evidence, the context did not indicate her intention to exclude medical treatment as a result of the exam. *Id.* at 747. Similarly, the nurse who performed the sexual assault examination testified she obtained information from the victim to both gather evidence and identify injuries needing treatment. *Id.*

Like *Williams*, A.W.’s statements in an exam with both medical and forensic components are admissible as statements for medical purposes. *Williams*, 137 Wn. App. at 745-47. The nurse who performed A.W.’s exam acknowledged the dual purpose of the exam and described how statements obtained during the exam are relevant to medical treatment. 15RP 1882-84. Information from a patient about what happened is necessary to detect injuries, document injuries, determine whether a patient needs further

medical care, and determine whether a patient needs further diagnostic tests. 15RP 1883-84. A patient is asked specific questions and then to describe the event in detail before the physical and genital examinations take place. 15RP 1952-54, 1959-60. After A.W. had provided information and been physically examined, the nurse reviewed her findings with her and performed medical care by checking on her immunizations and prescribing her medication to prevent sexually transmitted infection. 15RP 1962, 66. Unlike *Williams*, there is no evidence A.W. sought a SANE exam primarily to provide evidence. 9RP 1041-44; 15RP 1936. There is also no evidence she underwent a duplicative genital exam or narrative of the events in the ER. 15RP 1897-1936.

Given these circumstances, the trial court did not abuse its discretion when it found that for A.W.'s exam, "the overall purposes [sic] here is knowing that this person is going in for treatment and knowing that the medical providers need to know what happened in order to be sure that they provided full medical care and guidance that the alleged victim may need..." 15RP 1870. To do this, the court later noted, the medical providers "have to know the details." 15RP 1870.

Even if A.W.'s statements were admitted in error, they were harmless because they were duplicative of A.W.'s statements about the crime. *State v. Hopkins*, 134 Wn. App. 780, 792, 142 P.3d 1104 (2006).

Thus, there is not “any reasonable possibility that the use of the inadmissible evidence was necessary to reach a guilty verdict.” *Williams*, 137 Wn. App. at 747 (citing *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985)). Another consideration is that Parker made use of A.W.’s statements to the SANE in support of his theory that inconsistencies in her account were evidence of fabrication. 22RP 2899. The trial court did not abuse its discretion in admitting A.W.’s statements during her sexual assault examination as statements for medical purposes.

3. Because A.W.’s statements were not admitted in error, there was no cumulative error.

Parker alleges there was cumulative error based on the court’s evidentiary rulings. Br. of Appellant at 72. “The test to determine whether cumulative errors require reversal of a defendant’s conviction is whether the totality of circumstances substantially prejudiced the defendant and denied him a fair trial.” *In re Pers. Restraint of Cross*, 180 Wn.2d 664, 690, 327 P.3d 660, 678 (2014), *abrogated on other grounds*, *State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018). “The defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary.” *State v. Yarbrough*, 151 Wn. App. 66, 98, 210 P.3d 1029 (2009). If no prejudicial error occurred, then the cumulative error doctrine does not apply. *See, e.g., State v. Stevens*, 58 Wn. App. 478, 498, 795 P.2d 38, *review denied*, 115 Wn.2d 1025, 802 P.2d 38 (1990). Moreover, there is no

prejudice if the evidence is overwhelming. *In re Cross*, 180 Wn.2d at 691. The cumulative error doctrine “does not apply where the errors are few and have little or no effect on the outcome of the trial.” *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646, 660 (2006).

Even if this Court incorrectly finds the admission of A.W.’s statements to 911, to her mother, and to the SANE nurse were wrongly admitted, there is no cumulative error. Those statements were similar to her own testimony, and there is other supporting evidence corroborating her account. *In re Cross*, 180 Wn.2d at 690. This is not, as Parker asserts, a pure credibility determination. Br. of Appellant at 73. A.W.’s testimony is corroborated by Parker’s statements about robbing her with a knife, the plastic ties in his mother’s vehicle, the knife in his mother’s vehicle, and his DNA on her breast. Furthermore, the statements were not “needlessly cumulative,” as Parker argues, as excited utterances and statements for medical treatment are made with different purposes than statements in testimony, have different indicia of reliability, and are relevant explain the circumstances of an event. ER 401, 402, 403. This Court should find that even if evidentiary error occurred, it did not affect the outcome of trial.

D. The court’s decision to allow evidence of Parker’s theory through his own testimony but preclude him from admitting his hearsay statement to escape cross-examination did not violate his right to present a defense.

The Sixth and Fourteenth amendments guarantee a criminal defendant “a meaningful opportunity to present a complete defense.” *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006). This fundamental due process right includes the right to offer testimony, compel the presence of a witness, and cross-examine the witnesses against him. *State v. Lizarraga*, 191 Wn. App. 530, 552, 364 P.3d 810 (2015); *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). An alleged denial of the constitutional right to present a defense is reviewed de novo. *Lizarraga*, 191 Wn. App. at 551.

The defendant’s right to present evidence is not absolute. *Id.* at 553; *State v. Thomas*, 150 Wn.2d 821, 857, 83 P.3d 970 (2004), *abrogated on other grounds*, *Crawford v. Washington*, 541 U.S. 36, 50-51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). “The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence,” despite his Sixth and Fourteenth amendment right to present a defense. *Taylor v. Illinois*, 484 U.S. 400, 410, 108 S.Ct. 646, 98 L.Ed2d 798 (1988). Compliance with “established rules of procedure and evidence ... assure(s) both fairness and

reliability in the ascertainment of guilt and innocence.” *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

Evidentiary rules “do not abridge an accused’s right to present a defense so long as they are not arbitrary or disproportionate to the purposes they are designed to serve.” *U.S. v. Scheffer*, 523 U.S. 303, 308, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998). A claim the right to present a defense has been violated is evaluated through a three-part test. First, the evidence that a defendant desires to introduce “must be of at least minimal relevance.” *Jones*, 168 Wn.2d at 720 (quoting *State v. Darden*, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002)). Second, if the defendant establishes the minimal relevance of the evidence sought to be presented, the burden shifts to the State “to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial.” *Id.* Third, the State’s interest in excluding prejudicial evidence must be balanced against the defendant’s need for the information sought, and relevant information can be withheld only if the State’s interest outweighs the defendant’s need. *Id.*

1. The right to present a defense under the 6th Amendment does not include the admission of hearsay statements so as to deprive the jury of the truth-seeking benefit of cross examination.

A criminal defendant may testify and present his version of events to the jury. *Jones*, 168 Wn.2d at 721. However, the Washington State Supreme Court has held that the right to present a defense does not include

the right to present one's own exculpatory hearsay statements through the testimony of another. *State v. Finch*, 137 Wn.2d 792, 824, 975 P.2d 967 (1999). The Court explained:

The problem with allowing such testimony is that it places the defendant's version of the facts before the jury without subjecting the defendant to cross-examination. [] This deprives the State of the benefit of testing the credibility of the statements and also denies the jury an objective basis for weighing the probative value of the evidence. *Id.*

Id. at 825; see also *State v. Haga*, 8 Wn. App. 481, 494-95, 507 P.2d 159 (1973); *State v. Huff*, 3 Wn. App. 632, 636, 477 P.2d 22 (1970), review denied, 79 Wn.2d 1004 (1971). A more recent opinion has affirmed the long-standing rule that a defendant's hearsay statements are inadmissible absent an applicable exception. *State v. Pavlik*, 165 Wn. App. 645, 654, 268 P.3d 986 (2011). Another even more recent decision affirms the principle that exclusion of an exculpatory hearsay statement does not violate the right to present a defense. *Lizarraga*, 191 Wn. App. at 551-63 (regarding the hearsay statement of a witness).

The trial court did not exclude the evidence Parker knew A.W.'s first name when he spoke to Detective Graham on the phone. 19RP 2529. Rather, the court ruled the defendant's statement was inadmissible through Detective Graham. 19RP 2529, 2531; CP 967. As the court explicitly noted, its ruling "doesn't prevent the defendant from taking the stand and telling

his side of the story; doesn't at all prevent that, and the state can cross-examine him on that point." 19RP 2529.

Parker's argument the trial court excluded his theory that he knew A.W. is inaccurate. Br. of Appellant at 50. Rather, the court emphasized Parker was allowed to present his version of events, but had to do so in accordance with the rules of evidence. 19RP 2529, 2531; CP 967. To allow the admission of Parker's statements absent cross-examination would disrupt the truth-seeking, fact-finding function of the trial. *Jones*, 168 Wn.2d at 720; *Finch*, 137 Wn.2d at 825.

The cases Parker cites are distinguishable from the present case. *Jones* related to a trial court preventing the defendant from testifying himself about the events surrounding the crime. *Jones*, 168 Wn.2d at 579-80. The Court in *Cayetano-Jaimes* addressed a situation where relevant telephonic testimony of another witness was excluded when there was no evidence its admission would not have disrupted the fairness of the fact-finding process at trial. *State v. Cayetano-Jaimes*, 190 Wn. App. 286, 303, 359 P.3d 919 (2015). This situation is vastly different from a scenario where the accused is offering an exculpatory version of events in a manner to avoid cross-examination. Parker's right to present a defense was not abridged by the court's ruling he was allowed to present the evidence at trial.

2. The trial court's correct exclusion of Parker's hearsay statements did not affect his ability to impeach A.W.

A witness may be impeached by evidence of their own prior inconsistent statement. ER 607; ER 613. The introduction of testimony that contradicts another witness is not impeachment but rebuttal evidence by contradiction. See *Jacqueline's Washington, Inc. v. Mercantile Stores Co.*, 80 Wn.2d 784, 788-89, 498 P.2d 870 (1972). It is generally improper to question a witness about the statement of another witness. *State v. Jerrels*, 83 Wn. App. 503, 507-08, 925 P.2d 209 (1996); *State v. Wright*, 76 Wn. App. 811, 821, 888 P.2d 1214 (1995), *review denied* 127 Wn.2d 1010, 902 P.2d 163 (1995) *superseded by statute on other grounds*, RCW 9.94A.360(6).

Parker wrongly claims his ability to impeach A.W. was impeded by the court's ruling he had to abide by the rules of evidence. Br. of Appellant at 54. Parker cross-examined A.W. yet chose not confront her with his theory of knowing her before the incident. 10RP 1136. Evidence of the claim he knew her before is not impeachment but rather contradiction of her account they were strangers. *Mercantile Stores Co.*, 80 Wn.2d at 788-89.

Further, as the trial court noted, evidence had already been admitted that A.W. had been inconsistent about whether she told Parker her name. 19RP 2453-54, 2529. In fact, in A.W.'s cross-examination, counsel asked her, [You] "[t]alked to Detective Graham when he called you a week later

to figure out how it is Mr. Parker may have known your name ... Correct?” 10RP 1164. A.W. replied, “Yes.” 10RP 1164. Later on, counsel again questioned her about not initially telling law enforcement she had given Parker her name. 10RP 1187. A.W. had also been questioned about writing his name in her journal, which Parker used to argue she had known him prior to the incident. 10RP 1126; 1164; 22RP 2948. Detective Graham had testified he called A.W. to ask her whether she had given the defendant her first name. 19RP 2453. Parker’s right to present a defense was not violated by an inability to impeach A.W. with his own hearsay statement, which was impermissible, and when he was able to cross-examine A.W. on the subject and provide his own contradictory account.

3. Any error is harmless because Parker presented the defense he now contends he was prevented from presenting by the court’s ruling.

Even error of constitutional magnitude can be harmless if the reviewing Court is “convinced beyond a reasonable doubt that any reasonable jury would have reached the same result without the error.” *Jones*, 168 Wn.2d at 724 (citing *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)). In this case, Parker presented the defense he now claims he was unable to present through the admitted evidence on the same subject as his hearsay statement to Detective Graham. In closing he stated, “The reality is that what happened is what Shamarr told

Dacia Birka that night happened. He made arrangements to meet [A.] to buy some pot.” 22RP 2934-35. Parker presented the defense that he knew A.W., called her, set up a drug deal, and robbed her. Even if the court erred in excluding Parker’s hearsay statement through Detective Graham, he was not prevented from presenting his defense.

E. Prosecutors did not commit misconduct in closing argument when they properly discussed A.W.’s emotional state in relation to her credibility, responded to defense counsel’s attacks on A.W.’s credibility and law enforcement’s investigation, and argued from the evidence Parker did not know A.W.

The prosecutors properly discussed A.W.’s emotional reaction to the traumatic crimes in relation to her credibility, responded to defense counsel’s attacks on A.W. and the police investigation, and argued from the evidence that A.W. did not know Parker. In order to prevail on a claim of prosecutorial misconduct, a defendant is required to show that in the context of the record and all of the circumstances of the trial, the prosecutor’s conduct was both improper and prejudicial. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). Once a defendant establishes that a prosecutor’s statements are improper, the court assesses whether the defendant was prejudiced under one of two standards of review. 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. *Id.*; *State v. Ish*, 170 Wn.2d 189, 195, 241 P.3d 389 (2010); *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

Lack of objection or motion for mistrial at the time of the now-allegedly improper argument “strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.” *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990). If the defendant did not object, he or she is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. *Thorgerson*, 172 Wn.2d at 443; *State v. Stenson*, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997), *relief granted by In re Stenson*, 174 Wn.2d 474, 276 P.3d 286 (2012). Under this heightened standard, the defendant must show that (1) “no curative instruction would have obviated any prejudicial effect on the jury” and (2) the misconduct resulted in prejudice that “had a substantial likelihood of affecting the jury verdict.” *Thorgerson*, 172 Wn.2d at 442-43; *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653, 664 (2012).

To preserve an issue of prosecutorial misconduct for appellate review, an objection to a prosecutor's argument or question must call the trial court's attention to the specific reason for the impropriety of the argument or question. *See State v. Casteneda–Perez*, 61 Wn. App. 354, 363–64, 810 P.2d 74 (1991). Trial court rulings based on allegations of

prosecutorial misconduct are reviewed under an abuse of discretion standard. *State v. Lindsay*, 180 Wn.2d 423, 430, 326 P.3d 125 (2014). The Washington Supreme Court has recognized that the trial court is in the best position to judge the impact of a prosecutor's arguments and if there is prejudice to the defendant's right to a fair trial. *Stenson*, 132 Wn.2d at 718.

Concessions made by defense about the defendant's guilt may be taken into consideration when assessing the prejudicial impact of improper argument. *See State v. Yates*, 161 Wn.2d 714, 776, 168 P.3d 359 (2007) *abrogated on other grounds*, *State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018). It is also proper to consider whether the improper comments occurred during a minor portion of a lengthy closing argument. In *State v. Rafay*, for example, the prosecutor's comparison of the defendants' crime to a recent retaliatory beheading of American civilian military personnel in retaliation for mistreatment of Iraqi war prisoners was improper, but not prejudicial given the lengthy closing argument that otherwise focused on the evidence before the jury. *State v. Rafay*, 168 Wn. App. 734, 825, 285 P.3d 83 (2012). Finally, counsel is entitled to rely on a court's prior ruling that an argument is proper. *See, e.g., State v. Koloske*, 100 Wn.2d 889, 896, 676 P.2d 456 (1984), *overruled on other grounds by State v. Brown*, 113 Wn.2d 520, 782 P.2d 1013 (1989).

1. The prosecutor’s argument regarding A.W.’s “emotional truth” were grounded in the court’s instruction on witness credibility which identifies emotional demeanor as a factor relevant to credibility.

A prosecutor’s argument is evaluated “in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.” *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)). A prosecutor enjoys wide latitude in arguing inferences from the evidence, including inferences as to witness credibility. *State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008) *cert. denied*, 556 U.S. 1192, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009); *Stenson*, 132 Wn.2d at 727; *State v. Gregory*, 158 Wn. 2d 759, 810, 147 P.3d 1201, 1228 (2006), as corrected (Dec. 22, 2006), *overruled on other grounds* by *State v. W.R., Jr.*, 181 Wn.2d 757, 336 P.3d 1134 (2014), *abrogated on other grounds* by, *State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018); *State v. Lewis*, 156 Wn. App. 230, 240, 233 P.3d 891 (2010).

A witness’s demeanor and response to an event, including an emotional response, is an essential part of a credibility determination. *See In re Stout*, 159 Wn.2d at 382-83. “The words used are by no means all that we rely on in making up our minds about the truth of a question that arises in our ordinary affairs, and it is abundantly settled that a jury is as little confined to them as we are.” *Id.* at 383 (quoting *Dyer v. MacDougall*, 201

F.2d 265, 268-69 (2d Cir 1952)). Statements made when the speaker is exhibiting emotional distress are considered more credible. *See, e.g., Fleming*, 27 Wn. App. at 956. Similarly, the lack of emotional response to an event which would normally produce one can be used to attack credibility. *State v. Day*, 51 Wn. App. 544, 552, 754 P.2d 1021 (1998).

Jurors, as fact-finders, are tasked with assessing the credibility of witnesses. *State v. Demery*, 144 Wn.2d 753, 762, 30 P.3d 1278 (2001). As in this case, jurors are instructed they are the sole judges of the credibility of each witness and may take into account any factor that affects belief of a witness. CP 1068; WPIC 1.02. A jury is presumed to follow the court's proper instructions. *Anderson*, 153 Wn. App. at 428-29.

A prosecutor's argument regarding a witness's emotional reaction to an event is proper when it is connected to the jurors assessment of the witness's credibility and the evidence in a case. In *Baker*, a recent unpublished case, the defendant alleged the prosecutor invited the jury to decide the case based on emotions by arguing them "to consider the emotional state of various witnesses as part of evaluating the credibility of the witnesses and other evidence at trial." *State v. Baker*, 4 Wn. App. 2d 1013, 11, 2018 WL 2946160, (2018).²⁰ This Court held that the prosecutor's

²⁰ Unpublished cases have no precedential value and are not binding on any court. An unpublished case filed after March 1, 2013 may be cited as non-binding authority and may be accorded such persuasive value as this Court deems appropriate. GR 14.1(a).

arguments were not improper because: (1) the comments regarding emotional reactions were couched in terms of “assessing the credibility of witnesses and judging the evidence,” and (2) the comments on emotions were part of the State’s response to the defendant’s argument a particular witness’s emotional state was irrelevant. *Id.* Because the arguments were so presented, they did not constitute improper encouragement to decide the case on an emotional basis. *Id.*

A prosecutor may not make statements that are unsupported by the evidence or invite jurors to decide a case based on emotional appeals to their passion or prejudices. *State v. Jones*, 71 Wn. App. 798, 807-08, 863 P.2d 85 (1993). Any reference to emotion, however, is not necessarily an improper argument. The court in *Claflin* noted that "reference to the heinous nature of a crime and its effect on the victim can be proper argument[.]" *State v. Claflin*, 38 Wn. App. 847, 849-50, 690 P.2d 1186 (1984) (citing *State v. Fleetwood*, 75 Wn.2d 80, 84, 448 P.2d 502 (1968), and *State v. Buttry*, 199 Wash. 228, 251, 90 P.2d 1026 (1939)). The Supreme Court has continued to cite to *Fleetwood* for the proposition that a prosecutor is not muted in summation because the acts committed arouse natural indignation. *See State v. Borboa*, 157 Wn.2d 108, 123, 135 P.3d 469 (2006); *State v. Gentry*, 125 Wn. 2d 570, 644, 888 P.2d 1105 (1995). Under this authority, argument based on the evidence and issues in a case is permissible even if

it also arouses sympathy toward the victim or disfavor towards the perpetrator.

- a. Discussion of A.W.'s emotions in relation to her credibility in closing argument was proper.

Parker did not object to the prosecutor's use of the phrase "emotional truth" in closing argument. 22RP 2870, 2880. There were no objections to the other arguments in closing pertaining to the credibility shown by A.W.'s emotional reactions to events. 22RP 2847-49, 2862-64, 2870; Br. of Appellant at 74-75. There was one nonspecific objection to the prosecutor's summation of the testimony A.W. gave relevant to the count of rape in the first degree which included A.W.'s description of mentally disengaging during the rape itself. 9RP 995; 22RP 2863-64. Parker's lack of objection waived any error associated with these arguments. *Thorgerson*, 172 Wn.2d at 443. Parker cannot now show that a curative instruction would have failed to cure any prejudice. *Id.* at 442-43.

In fact, there was no prejudice because the prosecutor's arguments were properly couched in relation to the jury's evaluation of A.W.'s credibility and in response to Parker's continuous attacks on her credibility throughout trial. *McKenzie*, 157 Wn.2d at 52 (arguments evaluated in context of issues at trial). Parker had extensively attacked A.W.'s credibility

throughout trial.²¹ Thus, the prosecutor's arguments, even in closing, were in response to that issue. *McKenzie*, 157 Wn.2d at 52.

The prosecutor properly addressed this important issue by couching the discussion of emotions in the context of the jury's assessment of A.W.'s credibility. *Baker*, 4 Wn. App. 2d at 11.²² The second sentence of the State's closing emphasized the jurors' role in evaluating the credibility of the evidence. 22RP 2847. Shortly thereafter, the State directs the jury's attention to the court's instruction on evaluating witness credibility. 22RP 2851; Ex. 144. This occurs before A.W.'s credibility is examined in depth. 22RP 2851. Argument regarding her credibility was presented in conjunction with the court's instruction on evaluating credibility. 22RP 2851-52; Ex. 144 (pg. 3, pg.25, pg.30). Thus, A.W.'s emotional reactions to the crimes and subsequent events were offered as circumstantial evidence of the reaction of a person who had genuinely experienced trauma, not someone who just made up a story as Parker argued. *See, e.g., Fleming*, 27 Wn. App. at 956; *In re Stout*, 159 Wn.2d at 382-83.

²¹ 8RP 900-946; 10RP 1136-1260; 11RP 1473-75, 1478; 16RP 1996-2001, 2006, 2015-28, 2031-33; 17RP 2178-79; 18RP 2322, 2326; 19RP 2498-99, 2531-36, 2543-46, 2561-2, 2566-67, 2577.

²² Unpublished cases have no precedential value and are not binding on any court. An unpublished case filed after March 1, 2013 may be cited as non-binding authority and may be accorded such persuasive value as this Court deems appropriate. GR 14.1(a).

The phrase “emotional truth” is not problematic because it is used in conjunction with the argument that A.W.’s emotions show her credibility. In *State v. Warren*, the prosecutor argued the details in the victim’s testimony gave it a “badge of truth” and “ring of truth.” *Warren*, 165 Wn.2d at 30. The Supreme Court found this argument was proper based on reasonable inferences from the evidence and did not amount to personally vouching for the witness’s credibility. *Id.*

The prosecutor’s recounting of A.W.’s description of the rape itself is not problematic solely because her words and description provoke an emotional response. 9RP 995; 22RP 2863-64; *Claflin*, 38 Wn. App. at 849-50; *Fleetwood*, 75 Wn.2d at 84. Any description of the crime of rape will tend to provoke an emotional response and a victim’s memory of separating herself from the event is a detail relevant to her credibility. *Warren*, 165 Wn.2d at 30. Furthermore, there clearly wasn’t prejudice affecting the verdict associated with this argument given the jury’s acquittal on the rape. CP 1108. Parker has not shown the arguments regarding A.W.’s credibility were improper or were so flagrant and ill-intentioned that an instruction would not have cured the prejudice.

b. Discussion of A.W.’s willingness to bear the scrutiny of trial was not improper argument.

Parker also takes issue with the prosecutor’s comments in rebuttal about the criticism A.W. faced on the stand. Br. of Appellant at 79. These

comments must be evaluated as response to the arguments of defense counsel. *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129, 115 S.Ct. 2004, 131 L.Ed.2d 1005 (1995).

A prosecutor may also argue that a witness's willingness to endure the scrutiny inherent in a trial is relevant to credibility. The facts of *Gregory*, are somewhat similar to this case. *Gregory*, 158 Wn.2d at 777. In a credibility contest between Gregory and R.S., Gregory claimed that R.S. fabricated the rape story and pursued prosecution in revenge for his failure to pay \$20 to compensate R.S. for a broken condom. *Id.* at 806. The prosecutor argued that it was unlikely that R.S. would have put herself through a trial to avenge a broken condom. *Id.* On appeal, Gregory argued this was both a comment on his right to trial and an appeal to passion and prejudice. *Id.* The Washington Supreme Court rejected both arguments finding that the argument had a proper purpose – to rebut Gregory's argument that R.S. was not credible – and that the jury instruction explaining that the jury should not let sympathy guide its decision would arguably have cured any sympathetic tendencies the jury may have had in this regard. *Id.* at 808-09.

Counsel's rebuttal argument about A.W.'s willingness to subject herself to the criticism inherent in a trial was based on the evidence and proper. A.W. testified for three days about an extremely traumatic event and

was cross-examined extensively about her mistakes as a teenager and inconsistencies in her statements. CP 1353-54; 10RP 1136-1260. Parker spent almost half his closing argument attacking her credibility.²³ The prosecutor's argument about the criticism A.W. faced was a proper rebuttal to Parker's attacks to point out the unlikelihood A.W. would still almost ten years after the crime be testifying because she missed curfew and was angry at Parker for robbing her. *See Gregory*, 158 Wn.2d at 808-09. This Court should find the argument was proper rebuttal to Parker's attacks upon A.W.'s credibility.

- c. The record does not support Parker's claim the prosecutor cried while explaining the burden of proof and presumption of innocence.

Parker argues the prosecutor in closing appealed to the passions and prejudices of the jury by crying. Br. of Appellant at 63. But when Parker objected and accused the prosecutor of "practically crying to this jury," the prosecutor was discussing the presumption of innocence and the burden of proof beyond a reasonable doubt. 22RP 2848-49. The court overruled the objection. 22RP 2849. At sentencing, the court noted it did not see evidence the prosecutor was crying during closing argument. 23RP 2980. An objection to *practically* crying in conjunction with the court's lack of any

²³ 22RP 2898-2915, 2917, 1919-20, 2924, 2926, 2932-33.

observation of *actual* crying does not establish improper argument or prejudice.

2. The prosecutor did not personally attack Parker's counsel or suggest he was engaged in dishonesty in responding to his arguments.

Parker's incorrect assertion the prosecutors impugned his counsel are unsupported by law or fact. "[T]he evidence supporting a defendant's theory of the case is subject to the same searching examination as the State's evidence." *State v. Contreras*, 57 Wn. App. 471, 476, 788 P.2d 1114 (1990). Thus, it is proper argument for a prosecutor to argue the evidence does not support a defense theory. *Russell*, 125 Wn.2d at 87.

A prosecutor is also entitled to make a fair response to the arguments of defense counsel. *Russell*, 125 Wn.2d at 87. Defendants are not permitted to argue favorable inferences from the evidence then bar the State from responding with countervailing interpretations that discredit the argument. *Russell*, 125 Wn.2d at 87; *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969), *overruled on other grounds by State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994). Furthermore, "[r]emarks of the prosecutor, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative

instruction would be ineffective.” *Russell*, 125 Wn.2d at 86; *McKenzie*, 157 Wn.2d at 56.

Prosecutors, as advocates, as allowed to make “strong, but fair” “editorial comments” in response to defense arguments. *Russell*, 125 Wn.2d at 87; *Brown*, 132 Wn.2d at 566 (“characterization of ... defense theory as ludicrous reasonable in light of the evidence”). These responses are proper unless the prosecutor impugns the role of a defense attorney or suggests there is a problem with the personal integrity of the defense attorney in the case. *Lindsay*, 180 Wn.2d at 431-32.

Cases in which improper denigration of counsel occurred demonstrate the propriety of the arguments in this case. In *Thorgerson*, the court found the prosecutor’s description of the defendant’s case as “bogus” and “sleight of hand” an improper comment on counsel’s integrity. *Thorgerson* 172 Wn.2d at 451-52. In *Warren*, the court found the prosecutor’s description of counsel’s tactics as an “example of what people go through in a criminal justice system when they deal with defense attorneys,” and the comment counsel was “taking these facts and completely twisting them to their own benefit, and hoping that you are not smart enough to figure out what in fact they are doing” was impugning defense counsel. *Warren*, 165 Wn.2d at 29-30.

In *Negrete*, the prosecutor’s characterization of defense counsel as “being paid to twist the words of witnesses” was found improper. *State v. Negrete*, 72 Wn. App. 62, 66, 863 P.2d 137 (1993). In *Gonzales*, the court found the prosecutor’s contrast between the prosecutor’s duty to seek justice with the argument the defense counsel’s duty was to his client improper. *State v. Gonzales*, 111 Wn. App. 276, 283, 45 P.3d 205 (2002). Finally, in *State v. Lindsay*, the court found the prosecutor’s description of defense counsel’s argument as a “crook” improper as it implied dishonesty and was a shortening of a vulgar phrase. *Lindsay*, 180 Wn.2d at 431-33.

Each of the arguments Parker characterizes as denigrating were in response to Parker’s arguments in closing and did not impugn defense counsel’s role or his character. Parker spent almost half his closing challenging A.W.’s credibility and highlighting inconsistencies between her statements and the evidence.²⁴ His other major focus was the argument police “presumed guilt” of Parker and consequently did not thoroughly investigate the crimes.²⁵

The first denigrating objection was during the following argument:

MS. SANCHEZ: Apparently, however, if someone is going to be kidnapped and raped they have to behave in a certain way. They have to behave –

MR. TOLZIN: Objection, Your Honor.

²⁴ 22RP 2898-2915, 1917, 1919-20, 2924, 2926, 2932-33.

²⁵ 22RP 2885-92, 2918-19, 2927, 2932-34.

THE COURT: Overruled.

MR. TOLZIN: Denigrating argument.

THE COURT: Overruled. You may continue.

MS. SANCHEZ: -- in a precisely certain way so that they're not criticized. There is no manual for what you're supposed to do, for what a 17-year-old girl is supposed to do when this happens to her. There is no manual about the correct behavior so that you're believed.

22RP 2937-38. The prosecutor was not committing misconduct but rather responding to Parker's attacks on A.W.'s credibility. *Russell*, 125 Wn.2d at 87. There was no denigration of counsel or his role. *Lindsay*, 180 Wn.2d at 431-32.

The second objection occurred from the following argument:

As you're deliberating, please remember that the arguments that Mr. Ruyf gave, that Mr. Tolzin gave, that I'm giving now, this is not the evidence. ... For example, Mr. Tolzin made a great number of arguments regarding the large quantity of marijuana, the dime bags separately packaged, what they're worth, what that means. There's no evidence of that. ... His theory in a nutshell is that there was an arrangement between [A.W.] and the defendant for him to buy pot from her. ... Somehow Mr. Tolzin did not have an explanation for this; his DNA ended up on her nipple, not just her breast -- there was a separate swab for breast -- on her nipple. This is what his story is in a nutshell. And I submit to you there is no evidence to support this theory, and all of the evidence that you do have is to the contrary.

MR. TOLZIN: At this time I'm going to object. This is denigrating counsel.

THE COURT: Overruled.

22RP 2938-39. Here, the prosecutor first properly responded to counsel's recitation of facts in closing that were not in evidence by reminding jurors that the comments of attorneys, including the prosecutors, is not evidence. 22RP 2904, 2938-39. She ended by properly arguing that the DNA taken from A.W.'s nipple did not support Parker's theory she fabricated the rape. 22RP 2938; *Contreras*, 57 Wn. App. at 476.

The third denigration objection occurred as follows:

...Mr. Tolzin also spent a lot of time on what law enforcement didn't do. We want you to focus on what wasn't done, in a vacuum as though all the other things did not exist and were not done. Doesn't want you to focus on what Detective Graham said as to why these things weren't done. Take it out of context and ignore everything else.

MR. TOLZIN: Again Your Honor, Counsel is arguing that I am taking something out of context, denigrating of defense argument.

THE COURT: Overruled. You may continue.

22RP 2939-40. This argument responds to Parker's theory that law enforcement "presumed guilt" and didn't test all of the evidence. 22RP 2885-92, 2918-19, 2927, 2932-34. The prosecutor properly responds that the investigation should be evaluated as a whole. An argument that opposing counsel is taking evidence out of context is a fair characterization and not denigration. *Brown*, 132 Wn.2d at 566.

The fourth argument Parker alleges is denigration arises from his theory A.W.'s account of being pushed in the back seat was made up because there were usually items in the back of the car. 22RP 2918-19.

They could have been placed on the floor so that the defendant would have room in the backseat that he needed to throw her in there, or in the very back of the car, and then when he was done with her he could have put them back in place because he had to return the car to his mother. Didn't want to be questioned about why these items had been moved perhaps. Remember again, the defense counsel's argument is not evidence, but what is evidence is all of the testimony that you heard. ... That is evidence. Mr. Tolzin's theories are not. Defense wants you to focus on anything but the evidence. But the evidence –

MR. TOLZIN: Again Your Honor, that -- objection, degrading to defense.

THE COURT: Overruled. You may continue.

22RP 2943-44. This argument is a specific rebuttal to defense counsel's theory, which is not immunized from attack. *Contreras*, 57 Wn. App. at 476. Argument that counsel is raising theories unsupported by the evidence is not denigrating.

The fifth argument Parker contends was denigration but was not specifically objected to at trial is:

MS. SANCHEZ...But she did submit to it. She takes her clothes off and she's on her back on a medical table, her feet up in stirrups ... Again, it doesn't make sense that she's willing to go through all of this for a lie just to get out of trouble. And again, because it did happen she comes to testify in court. She is called a liar by defense counsel multiple times.

MR. TOLZIN: Objection, Your Honor.

THE COURT: Overruled.

MR. TOLZIN: Your Honor, that argument specifically –

THE COURT: Overruled. Counsel, that's enough.

This was proper rebuttal to express that A.W.'s willingness to subject herself to the unpleasant aspects of a rape investigation and trial were because she had experienced them, not because she was mad at Parker ten years prior. *Gregory*, 158 Wn.2d at 808-09. Accurately describing A.W.'s experience of her credibility being questioned throughout trial as being “called a liar,” is a permissible editorial comment in rebuttal. *Brown*, 132 Wn.2d at 566.

The sixth argument Parker now contends was denigration but was not objected to at trial was:

MS. SANCHEZ: Her life and her actions both now as an adult and then when she was 17 are criticized and judged. She's criticized for not behaving appropriately, for not taking a route that makes sense, for not telling people I smoked marijuana, I spent the day with my boyfriend while she is on the stand telling you about this awful thing that happened to her ten years ago. ...

22RP 2957; Br of Appellant at 79. This argument specifically responds to Parker's extensive attacks on A.W. throughout closing argument. It is not denigration to point out that a victim's credibility was attacked and there are reasons she is in fact credible. *Gregory*, 158 Wn.2d at 808-09.

At no time did the prosecutor's arguments reach anywhere near the instances where a court has found comments denigrating to the role of a defense attorney or defense counsel in particular. *Thorgerson* 172 Wn.2d at 451-52; *Warren*, 165 Wn.2d at 29-30; *Negrete*, 72 Wn. App. at 66; *Lindsay*, 180 Wn.2d at 431-33; *Gonzales*, 111 Wn. App. at 283. All of the prosecutor's comments were responsive to Parker's arguments about A.W.'s credibility, the investigation, Parker's recitation of facts not in evidence, and his theory A.W. fabricated the rape. The trial court rightly overruled these objections as the arguments were not misconduct.

3. Prosecutors did not commit misconduct when arguing there was an absence of evidence Parker knew A.W.

A prosecutor's latitude in drawing and expressing reasonable inferences from the evidence extends to arguing the evidence does not support the defense theory. *Stenson*, 132 Wn.2d at 718; *Thorgerson*, 172 Wn.2d at 449; *see also McKenzie*, 157 Wn.2d at 57-60. "When a defendant advances a theory exculpating him, the theory is not immunized from attack. On the contrary, the evidence supporting a defendant's theory of the case is subject to the same searching examination as the State's evidence." *Contreras*, 57 Wn. App. at 476.

A prosecutor may point out improbabilities or the lack of evidentiary support for the defendant's theory of the case. *State v. Killingsworth*, 166 Wn. App. 283, 290-92, 269 P.3d 1064, *review denied.*, 174 Wn.2d 1007,

278 P.3d 1112 (2012). A prosecutor can argue there is an absence of evidence if persons other than the defendant could have testified about that evidence. *State v. Jackson*, 150 Wn. App. 877, 887, 209 P.3d 553 (2009).

Parker alleges it was misconduct for the prosecutors to argue he was a stranger to A.W. because Detective Graham was not permitted to repeat his hearsay statement that he knew A.W.'s name *after the incident*. Br. of Appellant at 57; 19RP 2529. But Parker's statement to Detective Graham did not show Parker actually knew A.W. *before the crimes*, rather than learning it on the ride back to Tacoma after the crimes when he was aggressively talking to her. Br. of Appellant at 57; 9RP 1004-05, 1007.

The State's arguments Parker was a stranger to A.W. were proper arguments based on her account. *State v. Warren*, 165 Wn.2d at 30. It was proper for the prosecutors to further argue Parker's theory he met A.W. solely to commit robbery against her was unsupported by anything other than his own statements to Birka and was inconsistent with A.W.'s emotional reaction and the physical evidence such as the plastic ties and the DNA. *Contreras*, 57 Wn. App. at 476; *Killingsworth*, 166 Wn. App. at 290-92. Parker could have, but decided not to, subject his claim of knowing A.W. prior to the incident to cross examination.

The case Parker cites in support of his argument, *State v. Kassahun*, is inapplicable to this case. There, the State prevented the defendant from

pursuing gang evidence then argued there was no evidence of gang activity. *State v. Kassahun*, 78 Wn. App. 938, 946-47, 900 P.2d 1109 (1995). Here, the State did not prevent admission of the evidence but only objected to Parker's hearsay comments coming in through Detective Graham. That the evidence itself was a self-interested statement made after the crimes, it was proper argument that the evidence showed Parker and A.W. were strangers. *Killingsworth*, 166 Wn. App. at 290-92.

Parker's lack of objection to the prosecutors' arguments he and A.W. were strangers demonstrates its lack of prejudice in the context of the trial. *Swan*, 114 Wn.2d at 661. This Court should find the prosecutors did not commit misconduct by properly arguing inferences from the evidence.

F. This Court should remand so the criminal filing fee and interest accrual provision may be stricken in accordance with HB 1783.

House Bill 1783 prohibits the imposition of the \$200 filing fee and the interest accrual provision on non-restitution legal financial obligations for defendants indigent at the time of sentencing and *State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714 (2018), holds that it is applicable to cases on appeal and not yet final. The State agrees this Court should remand for the trial court to strike the filing fee and interest accrual provision from Parker's judgment and sentence given the finding he is indigent. CP 1335-36.

V. CONCLUSION

Minimal use of the cell site simulator pursuant to a judicially-authorized order was not misconduct and did not prejudice Parker's ability to present his case. The exclusionary rule does not apply to the testimony of a witness and the other evidence discovered after Parker's arrest was attenuated and independent from any improper search. The trial court properly admitted the statements of A.W. to her mother, 911, and a nurse. Parker was allowed to present his own version of events but rightly could not do so by eliciting his own hearsay to avoid cross-examination. The prosecutors did not commit misconduct by arguing A.W.'s emotional state was relevant to her credibility and evidence of the crimes. Prosecutors also properly argued inferences from the evidence and responded to Parker's theories. This Court should affirm Parker's convictions and remand for the trial court to strike the criminal filing fee and interest accrual provision.

RESPECTFULLY SUBMITTED this 7th day of August, 2020.

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8-7-20 *s/Therese Kahn*
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

August 07, 2020 - 1:59 PM

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Superior Court Case Number: 08-1-06144-4

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