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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

DEREK RAMIREZ NEBREJA, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.17-1-02544-5

BRIEF OF RESPONDENT

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INTRODUCTION

On September 10, 2017, defendant Derek Nebreja (hereafter “Nebreja”) inappropriately touched K.H.’s vagina through her clothes. At the time of the incident Nebreja was 29-years-old and K.H., his sister-in-law, was 12-years-old. Nebreja appeals his conviction of second degree child molestation. Nebreja claims: (1) there was insufficient evidence to establish that he touched K.H. for the purpose of sexual gratification; (2) evidence of a prior bad act in which he inappropriately touched K.H. should not have been admitted at trial; and (3) the prosecutor committed misconduct during closing arguments by misstating the law. However, the State provided sufficient evidence to establish beyond a reasonable doubt that Nebreja touched K.H. for the purpose of sexual gratification, the evidence of Nebreja’s prior bad act was properly admitted at trial, and the prosecutor did not commit misconduct during closing arguments because he did not misstate the law.

The incident occurred at K.H.’s home after her parents went to bed. Nebreja touched K.H.’s arm, thigh, and then her vagina as they sat side-by-side watching a movie. Nebreja was the only adult in the room. Many children in the room were asleep except for K.H.’s three-month-old nephew who sat on her lap, and her two-year-old niece who was intently

watching a Disney movie. K.H. attempted to block Nebreja's touching by repositioning her little nephew on her lap, but Nebreja pushed the child aside and continued to inappropriately touch her. Nebreja and K.H. were not wrestling, maneuvering, or engaged in any other type of physical activity that would explain why Nebreja touched K.H.'s vagina but for only the purpose of sexual gratification.

RESPONSE TO ASSIGNMENTS OF ERROR

- I. The trial court's ruling to allow evidence of Nebreja's prior sexual misconduct with K.H. was proper and the court's ruling should be affirmed.**
- II. The State provided sufficient evidence for a rational trier of fact to conclude that Nebreja touched K.H. for the purpose of sexual gratification.**
- III. The prosecutor did not commit misconduct because he did not misstate the law or reverse the burden of proof; and even if the prosecutor did commit misconduct, such misconduct was not prejudicial.**

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On November 30, 2017, the State charged Nebreja with one count of second degree child molestation contrary to RCW 9A.44.086. CP 7. On August 27, 2018, Nebreja made a motion, referred to as a "*Knapstad* motion," to dismiss the charges. RP 1. Nebreja argued that based on the undisputed facts there was insufficient evidence to support the charges

against him. RP 1. After a hearing, the trial court denied Nebreja's motion and ruled there was sufficient evidence for the trier of fact to review and possibly determine that a crime had been committed. RP 5.

Trial commenced on September 17, 2018. RP 12. During motions in limine, Nebreja made a motion to suppress evidence of a prior bad act in which Nebreja touched K.H. on her bottom when she walked out of his closet. RP 13. Nebreja argued there was no precedent for introducing evidence of a prior bad act in which "there is no clear indication of that the defendant's intent was." RP 13. However, the trial court ruled that evidence of the prior bad act could be admitted because the probative value of the evidence outweighed any prejudicial effect, specifically, the trial court said the prior bad act was relevant for factoring the lack of mistake or accident in the charged offense. RP 14.

Jury selection immediately followed and trial continued for two days. RP 94; 221. After the State rested, Nebreja made another motion to dismiss. He claimed there was insufficient evidence for the jury to convict, but the court denied the motion finding that there was sufficient evidence that a jury could find, by inference, that Nebreja touched K.H. for the purpose of sexual gratification. RP 162-63. Nebreja waived his right to testify. RP 172. After reviewing the evidence, testimony, and arguments from both parties, the jury found Nebreja guilty of second degree child

molestation. RP 221-22. On October 29, 2018, the trial court sentenced Nebreja to a standard range sentence. RP 227; CP 235. Nebreja filed a timely appeal on November 2, 2018. CP 214.

B. STATEMENT OF FACTS

On September 10, 2017, K.H.'s family gathered at their home located at 12110 Northeast 40 Circle, Vancouver, WA, for a typical social gathering. RP 147. Nebreja, his wife and K.H.'s sister, Leelani, and their children arrived later in the evening. RP 147; 149. K.H. testified when her parents went to bed that evening, Leelani joined K.H.'s other adult sibling in a backroom where the two talked. RP 122-23. Meanwhile, K.H.'s nephews and nieces, and Nebreja remained in the living room watching a Disney movie. RP 122. Nebreja was the only adult in the room. RP 122. Several children were on the floor sleeping while Nebreja sat on the couch to K.H.'s left, K.H.'s three-month-old nephew sat on her lap, and her two-year-old niece sat on the couch to her right. RP 122- 23.

K.H. testified while they were watching the movie Nebreja started to rub her arm; K.H. re-positioned her nephew to block Nebreja's touching, but he pushed the child aside and began to rub her thigh. RP 124-25. K.H. again repositioned her nephew to block his touching, but Nebreja pushed the child aside and then started to touch K.H.'s vagina. RP 126. K.H. estimated Nebreja touched her vagina for five seconds before she got up

and left the room. RP 126; 158. K.H. said she felt uncomfortable and she initially didn't tell anyone that Nebreja touched her because she was scared. RP 125; 130. However, the next morning after church, K.H. told her mom about the incident. RP 130.

K.H.'s mother, Trina Hola, testified that K.H. was in tears and scared when K.H. told her what happened; Ms. Hola did not confront Nebreja and she called police the day after K.H. told her about the incident. RP 149-150. Officer Jeremy Free testified that he responded to Ms. Hola's call and he interviewed Ms. Hola alone at her house. RP 122. Officer Free said he didn't speak to K.H. at any point and K.H. was not in the room at the time he spoke to Ms. Hola. RP 112. After Officer Free spoke to Ms. Hola, he referred the case to the Children's Justice Center (CJC). RP 113. Detective Monica Hernandez of the Vancouver Police Department was the final witness for the state. RP 152. Detective Hernandez testified that she watched the forensic interview with K.H. at the CJC on September 18, 2018. RP 157. Detective Hernandez said she did not order a medical exam or physical evidence because the touching occurred outside of K.H.'s clothes. RP 157.

K.H. testified that she recalled a prior incident where Nebreja touched her inappropriately. RP 132. About a week prior to the charged incident, K.H. was in Nebreja's closet looking for some shoes and as she walked

out, Nebreja touched her on her bottom with his fingers. RP 104; 132.

There were no other people in the room and the nearest adults were one room over. RP 132; 137. K.H. said she did not tell anyone about the incident and she assumed it was an accident, but it did make her feel “curious” and “uncomfortable.” RP 133; 138.

Private investigator Steve Teply was the sole witness for the defense. RP 173. Mr. Teply reviewed the CJC interview with K.H. and he conducted an interview with her on August 27, 2018, nearly a year after the charged incident. RP 175. Mr. Teply testified that in the CJC interview and in his interview, K.H. did not mention that she re-positioned her nephew to block Nebreja from touching her. RP 180.

ARGUMENT

I. The trial court’s ruling to allow evidence of Nebreja’s prior sexual misconduct with K.H. was proper and the court’s ruling should be affirmed.

Nebreja argues that evidence of his previous sexual misconduct directed at K.H. was improperly admitted at trial. Br. of App. at 6. However, K.H.’s testimony was properly admitted because it demonstrates Nebreja’s “lustful disposition” toward K.H., the prior bad act is “substantially similar” to the charged offense, and the probative value of

K.H's testimony far outweighs any prejudicial effect. The trial court should be affirmed.

ER 404(b) provides: "Evidence of other . . . wrongs or acts [may be] admissible for the other purposes of pro[ving] motive, opportunity, intent, preparation, plan knowledge, identity, or absence of mistake or accident." ER 404(b). The Washington Supreme Court established a three tier standard for reviewing the admissibility of evidence under 404(b):

To admit evidence of other crimes or wrongs under Washington law, the trial court must (1) identify the purpose for which the evidence is sought to be introduced, (2) determine whether the evidence is relevant to prove an element of the crime charged and (3) weigh the probative value of the evidence against its prejudicial effect.

State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995).¹ "The purpose of ER 404(b) is to prohibit admission of evidence designed simply to prove bad character; it is not intended to deprive the State of relevant evidence necessary to establish an essential element of its case." *Id.* at 859.

When evidence of a defendant's prior sexual misconduct toward a victim is relevant for the prosecution to prove an element of the crime

¹ In *Lough*, the Washington Supreme Court allowed testimony about prior bad acts from four women who accused the defendant of drugging and raping them while the victim in the charged offense testified she was also drugged by the defendant before he took off her clothes and attempted to rape her. *Lough*, 125 Wash.2d at 849-852.

charged, it is admissible at trial. *State v. Ray*, 116 Wn.2d 531, 547, 806 P.2d (1991). “This court has consistently recognized that evidence of collateral sexual misconduct may be admitted under ER 404(b) when it shows the defendant's lustful disposition directed toward the [victim].” *Id.*; *see also State v. Russell*, 171 Wn.2d 118, 120, 249 P.3d 604 (2011) (upholding the trial court’s ruling to admit evidence of the defendant’s “lustful disposition” towards his victim because the prior misconduct was “corroborative of the alleged sexual misconduct.”).

Furthermore, courts will allow evidence of prior bad acts under ER 404(b) in sex offense cases when there are “strong similarities” between the alleged prior bad act and the charged allegations. *State v. Baker*, 89 Wn.App. 726, 733-734, 950 P.2d 486 (1997).² However, the prior sexual misconduct and the misconduct from the charged offense need not be exactly the same. *State v. Gresham*, 173 Wn.2d 405, 423, 269 P.3d 207 (2012)(“[The] differences are not so great as to dissuade a reasonable mind from finding that the instances are naturally to be explained as

² In *Baker*, the Court allowed testimony about prior bad acts from the Defendant’s daughter who accused the defendant of molesting her 10 to 12 years earlier when she was sleeping while the victim in the charged allegation reported she was also sleeping when the defendant molested her. *Baker*, 89 Wn. App. at 730.

‘individual manifestations’ of the same plan.”). *Id.* at 423 (citing *State v. Lough*, 125 Wn.2d 847, 860, 889 P.2d 487 (1995)).

Once the Court establishes prior bad act evidence is offered for a proper purpose, it determines if the probative value of the evidence outweighs any prejudicial effect. *State v. Sexsmith*, 138 Wn.App. 497, 506, 157 P.3d 901 (2007). “Probative value is substantial . . . particularly where the only other evidence is the testimony of the child victim.” *Id.* at 506. Evidence of prior bad acts that demonstrates the charged offense is part of a “design to fulfill sexual compulsions” is “probative of the defendant’s guilt.” *Id.* at 504.

The decision to admit or exclude evidence lies within the sound discretion of the trial court and will not be overturned on appeal absent a manifest abuse of discretion. *State v. Neal*, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001); *State v. Moran*, 119 Wn.App. 197, 218, 81 P.3d 122 (2003), *review denied*, 151 Wn.2d 1032 (2004). A trial court abuses its discretion if it is “manifestly unreasonable” or if its decision is “based upon untenable grounds.” *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

Here, Nebreja demonstrated a “lustful disposition” toward K.H. when he touched her inappropriately in the closet of his bedroom. RP 132.

About one week prior to the charged offense, K.H. was in the closet picking out some shoes for her nephew's blessing and as she walked out of the closet, Nebreja touched her bottom with his fingers. *Id.* In *Russel*, the Washington Supreme Court held that evidence of the defendant's "lustful disposition" toward the victim was admissible because it was "corroborative of the alleged sexual misconduct." *Russell*, 171 Wn.2d at 121. Similarly, Nebreja's "lustful disposition" toward K.H. is corroborative of charged offense; Nebreja's "lustful disposition" in his prior bad act makes it more likely that the inappropriate touching from the charged offense was opportunistic and intentional, and less likely that it was a mistake or accident.

Nebreja argues, "Unlike *Lough* and *Baker*, there was no allegation that K.H. was drugged, asleep, or otherwise incapacitated. Evidence of the prior touching was thus not necessary to corroborate her testimony." Br. of App. at 9. However, Nebreja misconstrues the holdings in *Baker* and *Lough*. The issue of whether or not K.H. was "drugged, asleep, or otherwise incapacitated" is not dispositive. Instead, when determining whether to admit evidence under ER 404(b), this court should consider, in part, whether or not there are "strong similarities" between the prior bad act and the charged offense. *Baker*, 89 Wn.App. at 733-34. Furthermore, evidence from a defendant's prior bad act may corroborate the victim's

testimony in the charged offense, but corroboration of testimony is not the only permissible purpose for admitting evidence. *Id.* at 734. “The trial court must consider common scheme or plan evidence in terms of the closeness in time, place, and modus operandi (meaning similarity, not signature).” *Id.*

Here, as in *Lough* and *Baker*, the facts and circumstances from the prior bad act are “strongly similar” to those in the charged offense. In the prior bad act, Nebreja and K.H. were the only people in the room when he inappropriately touched her and the nearest adult was one room over. RP 136. Whereas in the charged offense, Nebreja touched K.H.’s vagina through her clothes while they sat on a couch at the victim’s house watching a Disney movie, there were no other adults in the room, and the only children awake in the room were a three-month-old baby and a two-year-old who was leaning forward watching a Disney movie. *Id.* at 122-127. Like *Gresham, supra*, there are some differences between Nebreja’s prior sexual misconduct and the misconduct from the charged offense. However, the two incidents are still “individual manifestations” of the same plan, i.e., Nebreja had a plan to inappropriately touch K.H. in settings where it was unlikely no other person could corroborate the misconduct.

Nebreja argues that the alleged prior bad act with the victim was “too factually dissimilar” from the charged offense for the probative value of the prior bad act to outweigh its prejudicial effect. Br. of Ap. at 10. Nebreja claims the prior bad act was a “fleeting touch on the bottom” whereas the charged allegation “occurred in the evening, with other children in the room and adults close by.” *Id.* at 10-11. However, Nebreja fails to draw a meaningful distinction between the two incidents. First, there were no adults in the room at the time of either incident. Second, while there was no one in the room during the first inappropriate touching, the only people who were present and awake at the time of the charged offense, besides Nebreja and K.H., were a three-month-old and a two-year-old, and it’s unlikely either child would be able to appreciate that Nebreja inappropriately touched K.H.³ Third, Nebreja inappropriately touched K.H. in a similar manner in each instance: discretely and through her clothes.

Lastly, the probative value of K.H.’s testimony that Nebreja previously touched her inappropriately far outweighs any prejudicial effect. Similar to *Sexsmith, supra*, the only evidence from the charged offense comes from testimony of the child victim. Additionally, evidence

³ It is also unlikely that either child would be able to testify in court that Nebreja inappropriately touched K.H. *See generally State v. Allen*, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967).

of Nebreja's prior bad act illustrates a "design to fulfill sexual compulsions" and it is thus "probative of the defendant's guilt."

Nebreja's inappropriate touching of K.H. in the closet of his bedroom demonstrated his "lustful disposition" toward K.H., the incident from the prior bad act is "strongly similar" to the incident in the charged offense, and the probative value of the evidence from the prior bad act far outweighs any prejudicial effect. Therefore, the trial court's ruling to admit evidence of Nebreja's prior bad act was not "manifestly unreasonable," and the court's ruling should be affirmed.

II. The State provided sufficient evidence for a rational trier of fact to conclude that Nebreja touched K.H. for the purpose of sexual gratification.

Nebreja claims the State failed to present sufficient evidence to prove he touched K.H. for the purpose of sexual gratification. However, after a full review of the record it is clear that the State presented ample evidence to prove Nebreja touched K.H. for the purpose of sexual gratification beyond a reasonable doubt, and Nebreja's claim fails.

Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that

reasonably can be drawn therefrom.” *Salinas*, 119 Wn.2d at 201. The reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); *State v. Walton*, 64 Wn.App. 410, 415-16, 824 P.2d 533 (1992). In order to determine whether the necessary quantum of proof exists, the reviewing court “need not be convinced of the defendant’s guilt beyond a reasonable doubt but only that substantial evidence supports the State’s case.” *State v. Gallagher*, 112 Wn.App. 601, 613, 51 P.3d 100 (2002) (citations omitted).

A person is guilty of second degree child molestation if the person, “has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.” RCW 9A.44.086(1). “Sexual contact” is defined as “any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party . . .”. RCW 9A.44.010(2).

When a defendant touches a victim over the victim’s clothes, the **State** is required to provide additional proof that the defendant touched the victim for the purpose of sexual gratification. *State v. Hernandez-Leon*,

174 Wn.App. 174 1030, 2013 WL 1320423 (2013)⁴ (citing *State v. Harstad*, 153 Wn.App. 10, 21, 218 P.3d 624 (2009); *State v. Powell*, 62 Wn.App. 914, 918, 816 P.2d 86 (1991)).

Nebreja relies on *Powell* to argue that Nebreja’s touching of K.H. was “fleeting and ‘susceptible of innocent explanation.’” Br. of App. at 15. However, *Powell* is not informative here. In *Powell*, the defendant allegedly touched his niece on two occasions: once over her underpants as he assisted her off of his lap and a second time over her pants on her thigh as the two waited alone in his truck. *Powell*, 62 Wn. App. at 916. The Court held both incidents were “susceptible of an innocent explanation,” and it reversed and dismissed the charges against the defendant. *Id.* at 918, 920.

However, the context and circumstances surrounding Nebreja’s touching of K.H. vary greatly from the alleged touching in *Powell*. Nebreja was not trying to move K.H. when he touched her; nor was he wrestling or engaged in any other form of physical activity that would reasonably explain why he might “accidentally” touch K.H. on her vagina. RP 125. Instead, Nebreja sat next to K.H. and touched her on her vagina as

⁴ GR 14.1(a) provides that: “unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as non-binding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate.”

she sat watching a movie with her nieces and nephews. *Id.* at 124.

Furthermore, there were no adults in the room and the only other alert and awake children in the room were a two-year-old and a three-month-old. *Id.* There is no reasonable explanation for why Nebreja would touch K.H. on intimate parts of her body in this setting.

Nebreja also argues, “It is likely that [Nebreja] accidentally touched K.H. for a few seconds without thinking.” However, this claim is wholly without merit. Nebreja did not unwittingly reach to his right and touch K.H.’s vagina without thinking. Instead, he reached over with his right hand and rubbed her arm, then he rubbed her thigh, and then he touched her vagina. *Id.* at 125-26. The fact that Nebreja touched K.H. in three distinct and separate body parts obliterates the possibility of an accidental touching.

Lastly, Nebreja relies on the temporal element of the touching, “a few seconds,” to argue that the state did not provide sufficient evidence that Nebreja acted for the purpose of sexual gratification. Br. of App. 15-16. However, this court has previously upheld convictions for child molestation based on inappropriate touching over a child’s clothes that lasted for a matter of seconds. *Hernandez-Leon*, 174 Wn.App. at 1030 (holding that the State provided sufficient evidence to establish the

defendant acted for the purpose of sexual gratification when he rubbed a twelve-year-old's buttocks and chest for "[a] few seconds").

As stated earlier, the prior instance when Nebreja touched K.H. inappropriately in his bedroom closet makes it clear that Nebreja's second touching of K.H. was not an accident. When considering the prior touching, the fact that Nebreja touched K.H. while no other adults were present, and the fact that there was no reasonable explanation for why Nebreja would touch K.H.'s arm, thigh, and vagina while they sat next to each other watching a movie, the evidence and inferences viewed most favorable to the State are sufficient for a rational trier of fact to conclude that Nebreja touched K.H. for the purpose of sexual gratification. Accordingly, Nebreja's claim that the state provided insufficient evidence fails.

III. The prosecutor did not commit misconduct because he did not misstate the law or reverse the burden of proof; and even if the prosecutor did commit misconduct, such misconduct was not prejudicial.

Nebreja claims that the prosecutor misstated the law by saying "the act speaks for itself" during closing arguments and he claims that this statement unduly prejudiced him and resulted in an unfair trial. Br. of App. 19-20. However, the prosecutor did not misstate the law by saying

“the act speaks for itself” and even if this statement is a misstatement of the law, Nebreja cannot establish that the prosecutor’s comments were unduly prejudicial.

To prevail on a claim of prosecutorial misconduct, a defendant must establish that the prosecutor’s complained-of conduct was “both improper and prejudicial in the context of the entire record and the circumstances at trial.” *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008) (quoting *State v. Hughes*, 118 Wn.App. 713, 727, 77 P.3d 681 (2003)). To prove prejudice, the defendant must show that there was a substantial likelihood that the misconduct affected the verdict. *Magers*, 164 Wn.2d at 191 (quoting *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). Furthermore, when a defendant fails to object to a prosecutor’s purported misconduct at trial, the defendant’s claim of prosecutorial misconduct on appeal is subject to a higher level of scrutiny and the defendant must demonstrate that the prosecutor’s misconduct was, “so flagrant and ill-intentioned that it caused an enduring and resulting prejudice that cannot be cured by a jury instruction.” *State v. Sakellis*, 164 Wn.2d 170, 184, 269 P.3d 1029 (2011) (citing *State v. Gregory*, 158 Wn.2d, 759, 840, 147 P.3d 1201 (2006)). The defendant carries the burden of showing the prosecutor’s statements were improper and prejudicial. *Magers*, 164 Wn.2d at 191 (citing *Hughes*, 118 Wn.App. at 727).

In the context of closing arguments, a prosecuting attorney has “wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence.” *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (citing *Gregory*, 158 Wn.2d at 860). The court should review a prosecutor’s comments during closing in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003); *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998).

In arguing the law, a prosecutor is confined to correctly characterizing the law stated in the court’s instructions. *State v. Estill*, 80 Wn.2d 196, 199-200, 492 P.2d 1037 (1972)). It can be misconduct for a prosecutor to misstate the court’s instruction on the law, to tell a jury to acquit you must find the State’s witnesses are lying, or that they must have a reason not to convict, or to equate proof beyond a reasonable doubt to everyday decision-making. *State v. Davenport*, 100 Wn.2d 757, 675 P.2d 1213 (1984); *State v. Fleming*, 83 Wn. App. 209, 921 P.2d 1076 (1996); *State v. Anderson*, 153 Wn.App. 417, 220 P.3d 1273 (2009); *State v. Warren*, 165 Wn.2d 17, 195 P.3d 940 (2008).

- a. The Prosecutor's statements during closing arguments were not improper because the prosecutor did not misstate the law.

Nebreja contends that the prosecutor misstated the law and shifted the burden of proof concerning sexual gratification. He claims, "the prosecutor argued that the state did not need to provide [evidence of sexual gratification] because the act spoke for itself." Br. of App. 19-20. However, Nebreja's contention is a mischaracterization of the record. The prosecutor never said that the State did not need to provide evidence of the crime; nor did the prosecutor shift the State's burden of proof. RP 196. In fact, the prosecutor unambiguously defined the State's burden at the outset of the State's closing arguments, "I have the burden of proving all of the elements of the charge beyond a reasonable doubt[,] . . . [and] you should absolutely hold me to that burden." *Id.*

Furthermore, prosecutors are allowed to "draw reasonable inferences from the evidence." *Fisher*, 165 Wn.2d at 747. Here, the prosecutor said "sometimes an act simply speaks for itself" and he later reiterated "sometimes the act does speak for itself and in the context of what happens." RP 199, 215-16. However, these statements are not a misstatement of the law nor do they reverse the burden of proof. "The act speaks for itself" is another way of saying that certain inferences can be drawn from the act itself. *State v. Woods*, 63 Wn.App. 588, 591, 821 P.2d

1235 (1991) (“The intent to commit a crime may be inferred if the defendant's conduct and surrounding facts and circumstances plainly indicate such an intent as a matter of logical probability.”) (citing *State v. Bergeron*, 105 Wn.2d 1, 20, 711 P.2d 1000 (1985)); *Anderson*, 153 Wn.App. at 431 (holding that the prosecutor’s closing argument statements that were intended to clarify the law and argue inferences from the evidence were permissible).

Therefore, when viewing the prosecutor’s statement, “sometimes the act simply speaks for itself,” in the context of the entire closing argument and when allowing the prosecutor to “draw reasonable inferences from the evidence,” the prosecutor did not misstate the law and Nebreja’s claim that the prosecutor committed misconduct fails.

- b. Even if the prosecutor misstated the law during closing arguments, Nebreja did not prove there was a “substantial likelihood” that the misconduct affected the jury’s guilty verdict.

The prosecutor’s statement, “the act speaks for itself,” was not improper. However, even if the statement was improper Nebreja’s claim that he was prejudiced by the prosecutor’s statements is without merit. In *Sakellis, supra*, this court held that a defendant could not demonstrate a substantial likelihood that the prosecutor’s improper comments during closing arguments affected the jury’s guilty verdict because the State

provided “very strong evidence” of the defendant’s guilt. *Sakellis*, 164 Wn.2d at 186. Similarly, Nebreja cannot establish that the prosecutor’s comments affected the jury’s verdict because the State produced “very strong evidence” that described the context and setting in which Nebreja inappropriately touched K.H., i.e., undisputed witness testimony that described a setting in which there was only one explanation for why Nebreja would rub K.H.’s arm and thigh and then touch her vagina.

This Court need not inquire whether the prosecutor’s alleged misstatement was “so flagrant and ill-intentioned that it caused an enduring and resulting prejudice that cannot be cured by a jury instruction,” notwithstanding Nebreja’s failure to object at trial, because Nebreja cannot overcome the less burdensome standard that he would have been entitled to had he objected at trial: Nebreja failed to show there was a “substantial likelihood” that the prosecutor’s purported misconduct affected the verdict. Therefore, Nebreja’s claim that the prosecutor committed misconduct fails.

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CONCLUSION

For the reasons stated above, the State provided sufficient evidence to support that Nebreja touched K.H. for the purpose of sexual gratification, the trial court properly admitted evidence of the prior bad act, and the prosecutor did not commit misconduct during his closing arguments because he did not misstate the law. Accordingly, this Court should affirm Nebreja's second-degree child molestation conviction and sentence.

DATED this 7th day of August, 2019.

Respectfully submitted:

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