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MAR 11, 2016

Court of Appeals  
Division III  
State of Washington

NO. 32968-2-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ERNEST GLASGOW BARELA,

Appellant.

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BRIEF OF RESPONDENT

---

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## I. ASSIGNMENTS OF ERROR

### A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant makes numerous assignments of error. He has set these out as follows;

- 1) Did the trial court err in denying the defendant's motion to arrest judgment and failing to order a new trial, which was based on:
  - a. The prosecutor's violation of a final order in limine allowing the jury to be tainted with discussions from a self-professed expert potential juror, stating that a child's sex abuse complaint is normally credible, with a delay in reporting;
  - b. The trial court's ruling sustaining the State's objection to relevant evidence of the complainant's mother's marital infidelity, which was crucial to the defense theory and supported by expert Dr. Johnson; and
  - c. The prosecutor's acts of committing several types of misconduct in closing argument, including expressions of personal opinion to which the defense objected, and disparagement of defense counsel?
- 2) Did cumulative error deny Mr. Barela a fair trial, including the errors addressed in Mr. Barela's motion to arrest judgment, and also:
  - a. The court's erroneous order allowing Detective Janis to testify regarding "delayed reporting" and is theory that it is normal or common for child sex abuse victims;
  - b. The trial court's erroneous admission of hearsay evidence that did not meet the "hue and cry" doctrine; and
  - c. The State's flagrant misstatement of the burden of proof beyond a reasonable doubt, by stating twice that the jury had to have a reason to find Mr. Barela not guilty?

### B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. The trial correctly denied the motion for arrest of judgment and new trial.
2. There were no errors which individually or combination were sufficient to require reversal of the jury's verdict.

## II. STATEMENT OF THE CASE

Appellant was charged with count one - First Degree Rape of a Child, count two – First Degree Incest, count three Second Degree Rape of a Child, count four First Degree Incest, count 5 Second Degree Child Molestation and count six – Second Degree Incest. CP 4-6 The charges were filed after the victim E.B told two members of her church and her mother that she had been molested by her father. RP 356-66, 371-79) The information set out that the crimes occurred from January through April, 2012. The crimes took place in the family home, a manufactured home consisting of three bedrooms and two bathroom. (RP 484-5) Living in this home was the defendant Ernest Barela, his wife Michele Barela, and their two children. CP 1-2, 3, 13.

The police were informed of the crimes after E.B. told two individual at the church the family attended. She stated to Ms. Mutch who worked with the youth at this church “that her dad had been molesting her.” RP 364, 426-7 Ms. Mutch then contacted the youth pastor’s wife, Mrs. Lindseth, Ms. Mutch also found the victim’s mother and had her come to the room where the victim was sitting with Mrs. Lindseth. RP 365-6 The victim revealed to Mrs. Lindseth something, but the record does not reflect what exactly was stated to Mrs. Lindseth. RP 373-78, 384-89, 427 The victim’s mother came to the room and she

too was told by the victim what had occurred. RP 373-78, 384-89, 427, 487-9 Ms. Mutch and Mrs. Lindseth testified under the “hue and cry” hearsay exception.

The next day Mrs. Barela confronted the defendant about the allegations made by his daughter Barela stated “Yes, I’ve been inappropriate with her.” Mrs. Barela stated to him “something to the effect of, How could you...” after which the defendant stated “There was no sex.” RP 493-4 Mrs. Barela asked about their other daughter, Elizabeth, the defendant stated “...no, he hadn’t touched her.” RP 494 Barela was told by his wife to leave, before he left he asked his wife “if there was any hope for our family.” RP 495, 523

The next day E.B. was interviewed by Detective Chad Janis of the Yakima Police Department, and was medically examined. CP 1-2; RP 497-8, RP 534-8, 545

The victim, E.B., took the stand and testified. RP 380. When asked why she was in court she stated “I’m here because my dad raped me.” RP 382 She testified about her home, her sibling and her mother, father and her age at the time of trial. RP 382-4 She described the how she initially told the two church members about what happened to her. She told Ms. Mutch “[f]or the past few years, my dad’s been hurting me, sexually abusing me.” It was on this same evening that E.B. informed her mother

what the defendant had done. RP 386-88 She testified that she had also told her friend Alyssa who in response had given her a copy of book “Chicken Soup of the Soul” stating that the book has a section in it where people “come out with their stories of sexual abuse.” RP 386-7

E.B. testified that the last time she was sexually assaulted was on April 9, 2012. She testified that the when she awoke she felt a presence behind her and that it was the defendant behind her in her bed. RP 391-2. E.B. testified that the defendant pulled her pants and underwear down. RP 393. The defendant had his clothes off also. He held the victim down and tried to lay down on her, she was face down while this was occurring and that she was trying to get away and was pulling on the bars of her bed, her thinking being that if she could pull herself up she could get out from under the defendant and get away. RP 394-5 She told her father to “get off. No.” She testified that he was trying to pry her legs apart and that “he tried to put his penis between my legs” and that he did get his penis between her legs and that she saw his penis. RP 395 E.B. testified that her father put his penis “between my thighs.” And that it was “hard” when he was trying to put it between her legs and after a few minutes he got up off of her and pulled up his clothes and left. RP 396-397, 432-3

E.B. testified that after the last time he father sexually assaulted her she thought about telling someone but she had “a lot of internal

conflict. I hadn't -- I didn't know what would happen, what people would think. But at that time I didn't really care anymore. I just wanted it to stop...The rape. I didn't want to be hurt anymore.” RP 402

E.B.’s testimony was that later in the year, March of 2012, Barela approached her while she was lying on the bed in her parent’s room watching a television show called Merlin. She stated that her father came in and went into the attached bathroom and cleaned up. The defendant laid down on the bed with E.B. and watched TV with her. RP 404-5 Shortly after he laid down with her he started rubbing her leg. He pulled down his clothes and took her leggings down, and then moved her on the bed so that she was facing the window. Barela pushed her face down in the bed. RP 408-9, 437-8 She testified he laid down on top of her and she was scared and it “kind of hurt.” (RP 408-9) Barela tried to open her legs up and she could feel his penis “[i]t was behind me and between my legs, he was on top of her for minutes and she could not remember if he entered her. When the defendant was done his pulled up E.B. pants as much as he could. (RP 410-11) She testified that in March of 2012 she was 12 years old. (RP 412)

E.B. testified that in January of 2012, “that time he grabbed her chest and he kind of rubbed around a little bit, and he said, “You’re developing well.” RP 412, 440-1 E.B. did not recall wearing a bra that

day. She testified that the defendant rubbed underneath her shirt. She testified that her father also pulled his pants down. RP 413, 441 When asked by defense counsel “[t]ouched your bare breasts” E.B. replied “Yes.” RP 441 E.B. when asked if she had previously stated to defense counsel that her father has put his penis in her rectum she had told defense counsel, “yes.” RP 444

E.B. testified that the first time her father had done something was when she was when she was six or seven years old. RP 414 She testified that she was in kindergarten or the first grade when the touching started. RP 414 The first incident she remembered was were the defendant pulled his shorts down, he was naked and he picked up E.B. and “he sits me on his lap.” He hugged her and she stated she was confused and didn’t know if it was normal. RP 416-7 She testified she was in tears when she told her mother a couple of days later that her father had “hugged me too tight” because she did not know what words to use. Her mother’s response to this was sometimes people hug a little tight. E.B. stated “She didn’t know what I meant.” RP 417 E.B. testified that she did other activities with her father. RP 401-23 She did not remember ever witnessing her parents yelling at each other and that they did not discuss divorce in front of her. RP 424

E.B. testified it occurred regularly and happened “in the high hundreds” and “[t]here was no real schedule to it, you would say.” RP 419, 437 E.B. was asked about this number, specifically if the number of incidents was in excess of 250 times, when asked if it was really that many or if it just seemed like that many she stated she believed that was actually how many times she was assaulted. (RP 475-6)

On cross examination E.B. was not able to state that there had been actual penetration and when asked by defense counsel about statements regarding actual penetration she stated the details now were not clear She did state that when the defendant put his penis between her legs that “it was like pressure.” RP 428-32

On redirect E.B stated that reason it was now better was that “I’m not being hurt anymore.” RP 475

Mrs. Barela testified her daughter’s behavior changed since April of 2012 she was more introverted, and it’s been hard for E.B. since that time. RP 486 Michelle Barela, testified that she was called down to the “youth house” by E.B. When she got there, there were to two personnel from the church, Ms. Mutch and Mrs. Lindseth. E.B. told her mother “that her father had sexually abused her.” RP 488-492 The next day, Ms. Barela woke the defendant “and confronted him” with the fact that E.B. had said he molested her and that CPS had been contacted. RP 493 The

defendant stated “Yes. I’ve been inappropriate with her.” RP 493 Mrs. Barela asked the defendant something to the effect of “how could you” and his response was that “[t]here was no sex.” RP 494 She next asked the defendant about their younger daughter Elizabeth he stated that no, he hadn’t touched her. RP 495 Mr. Barela packed a bag but before he left the home he asked if there was any hope for “our family.” RP 495

The day that the defendant left the family home, April 13, 2012, Mrs. Barela got a call from CPS asking her to bring E.B. to the Yakima Police Department. RP 496-97 Both the victim, E.B. and Mrs. Barela where interviewed by Det. Janis. RP 499 Mrs. Barela also took E.B. to the hospital to be examined. RP 499 Mrs. Barela was contacted by Det. Janis who stated the defendant need to come in to be interviewed. Mrs. Barela told the detective that if she asked him to come in he would do so, so she called the defendant and told him that “we had been interviewed and it was his turn.” RP 500

Mrs. Barela testified that she has instituted divorce proceedings but was not able to finalize them because she could not afford the cost. She testified that the marriage had been rocky and there had been financial difficulties throughout the marriage and that the defendant had experienced long periods of unemployment “we had struggled to be married.” RP 500-01 She stated they had conflicts over parenting as well.

Mrs. Barela also testified they had intimacy problems stating “I didn’t like having sex with my husband.” RP 502-3)

During cross-examination defense counsel elicited additional statements regarding the fact that this was a very unhappy marriage and had been so for years. At one point defense counsel asked Mrs. Barela if it was not true that she was unhappy “well before the kids were born.” Mrs. Barela answered “[y]es.” He then asked “Because you had an affair within the first couple of years of your marriage, correct?” The State objected the objection was sustained. Defense counsel did not attempt to place on the record a basis for this question nor did he ask that the jury be excused to address this objection and the court’s ruling. RP 512

Dr. Simms testified for the State. He had been E.B.’s pediatrician and is and has during his entire career been a part of a network of physicians through the University of Washington who are consultants regarding children are victims of child abuse or child sexual abuse or neglect. Dr. Simms was often asked to evaluate children, to physically interview and examine them. He has contact with allegations of child abuse on a weekly basis and had seen dozens of patients for this reason. These interactions always involve an interview of the child. RP 734-7

With regard to the need to do an actual invasive examination of the anus Dr. Simms testified that in a case, such as this, where the patient does not

present with complaints of bleeding or trauma to her anus “we really wouldn’t recommend this invasive testing.” RP 745

Two doctors testified for the defense. Dr. Robert Mendelson was a pediatrician, there was no testimony that he had completed any specific training regarding sexual assault or evaluation of victims of sexual assault. RP 580-6 This doctor stated that he had practiced for 47 years but had never testified in a child sexual assault case, he had never been an expert in a case such as this, never met or spoke to the victim, E.B. RP 585-6, 615-6 None of the lectures or training in his background and training addressed sexual assault allegations. RP 580-4 He was a proponent of anal exams however stated in his report “I wouldn't have expected to find anything, but there are certain things you can find: interior fissures and hemorrhoids particularly." RP 580-620, 617 Dr. Mendelson testified that a case of only anal rape of a child, was unique to him, he had never a similar case. RP 592, 610 619, 630

Dr. Christopher Johnson, a forensic psychologist who testified for defendant reviewed police reports and the interviews of E.B. In his testimony he indicated several times that the interview of E.B. by Detective Chad Janis was a good interviews. RP 648 (jury absent), 665-69 He stated that along with the forensic interview he might do a complete and thorough assessment of the social history of the child, trying to get a

complete family history. RP 642 Many of the standards Dr. Johnson discussed are from protocols from Oregon. RP 660, 662-4, 681-82

The court partially granted a defense motion for directed verdicts and dismissed count 1 for lack of evidence of sexual intercourse. Count 2 was submitted to the jury but as a count of second degree incest, which requires only sexual contact. RP 764-68. Barela was found not guilty on counts 4 and 6, the other offenses which required proof of intercourse. RP 905-06. Barela was found guilty as to counts 2, 3, 5, 7 and 8 and the jury found these to be aggravated as part of an ongoing pattern of abuse.

### III. ARGUMENT

The trial court sitting through the entire trial, watching the actions and interactions of the witnesses, the attorneys and the jury stated the following when he ruled against Appellant when he moved for arrest of judgment and filed a motion for a new trial:

THE COURT:...So, although, you know, it may be that in some instances Mr. Jackson's passion caused him to approach the area of prosecutorial misconduct, I can't say that on the basis of what I heard and what I was asked to rule upon that he did, in fact, commit misconduct in that regard. So I think Mr. Barela did have a fair trial.

And the only other comment I'd make, too -- and I guess for what's it's worth -- is that I don't think that the -- this midnight conversation between Mr. Barela and Ms. Barela was critical to this particular -- in this particular case. There were some -- there was a fuzzy aspect of it: Who? What did you mean? And what he did say? And what did he mean when he said what he said? I don't think it was critical.

I think that the jury decided this case purely on their belief of Emily and no other basis at all. That's -- there's no other way to explain their decision: the guilty and the not guilty. So I think the key to this was a finding by the jury that Emily was credible beyond a reasonable doubt.

And so I'm denying the motion for arrest of judgment and for a new trial.

**RESPONSE TO ALLEGATION ONE - ARREST OF JUDGMENT  
MOTION FOR NEW TRIAL. Response to sub “a and b.”**

Barela filed a motion for arrest of judgment and for a new trial. He alleged actions by the State, evidentiary issues and issues claimed to have occurred during voir dire were grounds for these requests.

In his brief Appellant states there were “violations” of the court’s rulings regarding his motions in limine, he then admits that the trial court denied this motion. There was no objection to the process or the questions asked in voir dire. Appellant states without any support from the record that “[t]he defense objection to the predicted event was preserved, and it was also manifest error under RAP 2.5(a) and State v. Lynn 67 Wn. App. 339, 345, 835 P.2d 251 (1992).”

Appellant states in footnote “4” that the mere use of a motion in limine preserved this allegation with no further action on the part of the Appellant, that there was no need for further objection. The case before this court is far more like Fenimore v. Donald M. Drake Constr. Co., 87 Wash.2d 85, 91, 549 P.2d 483 (1976), this court in State v. Kelly, 102

Wn.2d 188, 685 P.2d 564 (Wash. 1984) stated “we set forth the rules governing trial court consideration of motions in limine:

[T]he trial court should grant such a motion if it describes the evidence which is sought to be excluded with sufficient specificity to enable the trial court to determine that it is clearly inadmissible under the issues as drawn or which may develop during the trial, and if the evidence is so prejudicial in its nature that the moving party should be spared the necessity of calling attention to it by objecting when it is offered during the trial.

The trial court ruling here was not dispositive. (See the court’s ruling below.) The court clearly stated that it would have to hear what was offered in the context of the trial, therefore indicating that Barela was not absolved of the requirement that he object.

What Barela actually asked for was; “My request would be that that be somewhat limited to what is required to uncover bias and whatever else might make someone an unsuitable juror, but to not just allow a wholesale brainstorming session on that.” RP 49

What is referenced by Appellant as supporting his allegation that the State overstepped some sort of ruling by the court are motions in limine and post-trial motions filed by Barela, not rulings by the court. Two sections of the record he references as supportive of the position that he preserved this issue for review, one of which is CP 92 the other RP 262 appear to have nothing to do with this allegation or the preservation for

review of this allegation. The CP cited is the special verdict form for Count 6 and the RP cited as preserving the issue of delayed reporting is the following:

MR. WALKER: Okay. Let me tuck my cord in here so I don't trip over it real quick.

Just as a couple of housekeeping matters. Something that I often mention toward the outset is that if you see me in the hallway or see me walking on the street or something and I don't say hi or engage in pleasantries, it's because we're generally precluded from doing that.

The court did not rule that there would be no discussion of delayed reporting, in fact the ruling by the court regarding delayed reporting was the opposite;

THE COURT: Well, delayed disclosure is one of those phenomenons that's somewhat beyond the -- well, it's counterintuitive to what people think their reaction would be or might be or what they would think that the normal -- the -- a common reaction would be. And it is, you know, a phenomenon that it's appropriate to have some testimony about.

Whether Detective Janis is the person who's going to provide that testimony or not is a different issue, and I'll have to hear his proffer or -- of his expertise in that area outside the presence of the jury. But I think it's appropriate to allow some testimony in the State's case in chief regarding the delayed disclosure.

And similarly, the -- I think it is an area that is appropriate for discussion during the jury selection process too. You know, I mean, biases and prejudices, it may be -- and point well taken, Mr. Walker. It may be that you're not going to get people who say that I would disbelieve somebody under those circumstances.

But on the other hand, I think it's for -- it's appropriate for the State to be able to identify people who,

you know, would support that theory, I guess, to some degree and that jury -- in the process of jury selection. And I'm not -- I'm going to allow it, but I'm not, you know --

Not once did trial counsel object or ask for the court to stop what was being said by this juror. In fact counsel acknowledged that there was a remedy for this alleged error and that he specifically did not take action regarding that method because counsel liked the jurors that he was interacting with in the pool. Counsel never mentions any objection to this alleged error, because there was no objection. Counsel states the following as to why he did nothing about the alleged jury problem;

MR. WALKER: ...And so, Judge, it was completely improper. It tainted the jury. I supposed my remedy might have been to ask for a new jury panel, which would have been -- which would have gone over really, really well. But *I felt kind of good about some of the people that we had*. But at the same time, once that bell was rung, there was nothing we could do about it. That alone was a bad error.

RP 924(Emphasis mine.)

...

MR. WALKER: Judge, I just -- I hate to use the word "malicious," but it was. It was simply cold and calculated and simply against what the law says. It says specifically it is not a function of voir dire examination to educate the jury panel to the particular facts of the case; to compel the jurors to commit themselves to vote in a particular way; to prejudice the jury for or against a particular party; to argue the case; to indoctrinate the jury; or to instruct the jury in matters of the law. It was simply an attempt to do exactly what the law says not to do.

RP 926

The courts in this State have been emphatic regarding the duty to object, State v. Moen, 129 Wn.2d 535, 919 P.2d 69 (1996) “This principle, recognized by the court in Paine, applies to appeals. Further, the purpose of requiring an objection in general is to apprise the trial court of the claimed error at a time when the court has an opportunity to correct the error. E.g., State v. Wicke, 91 Wn.2d 638, 591 P.2d 452 (1979). Basil v. Pope, 165 Wash. 212, 218-19, 5 P.2d 329 (1931) (failure to challenge juror or move for mistrial waives litigant's right to claim deprivation of right to a fair trial because of biased juror.)” See also, State v. Finch, 137 Wn.2d 792, 975 P.2d 967 (1999);

Defense counsel, however, with one exception, made no objection to the testimony it now argues was erroneously admitted. Without such objection, an evidentiary error is not preserved for appeal. State v. Powell, 126 Wash.2d 244, 256, 893 P.2d 615 (1995).

Defendant, however, argues that the motion in limine preserved the issue. When an evidentiary ruling is pursuant to a motion in limine, only the losing party is deemed to have a standing objection and need not specifically object at trial to preserve the issue for appeal. *Id.* In this case, the Defendant's motion in limine was granted. Additionally, a party's objections to evidence made in their motion in limine are not preserved for appeal if the “trial court indicates that further objections at trial are required when making its ruling.” *Id.* (quoting State v. Koloske, 100 Wash.2d 889, 895, 676 P.2d 456 (1984), overruled on other grounds by State v. Brown, 111 Wash.2d 124, 761 P.2d 588 (1988)).

Appellant makes sweeping accusations that apparently anyone connected to this case, juror Wilkensen, his own expert Dr. Johnson, Det. Janis, “and others, who had decided amongst themselves that delayed reporting is a characteristic of genuine child sex victims” had come together to deny appellant a fair trial. (Appellants brief at 13)

Barela relies on Mach v. Stewart, 137 F.3d 630 (9th Cir.1997), to argue the court erred in denying his motion to for a new trial. A criminal defendant has a constitutional right to be tried by an impartial jury. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22 (amend. 10); State v. Davis, 141 Wn.2d 798, 824-25, 10 P.3d 977 (2000). The first thing that Barela was required to do was place this matter on the record at the time he perceived the error. This would allow the trial court to evaluate the objection and make further inquiry as needed, that did not happen.

Appellant liked the pool until it convicted him. Even if the court would have considered a motion to dismiss the panel the court's decision to deny the request to dismiss the jury venire is within the sound discretion of the trial court, and this court will not disturb that decision unless it was an abuse of discretion. State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). A court abuses its discretion if its decision is manifestly unreasonable, or based on untenable grounds or untenable reasons. State v. Bankston, 99 Wash.App. 266, 268, 992 P.2d 1041 (2000). The trial court

is in the best position to determine whether a juror can be fair and impartial based on mannerisms, demeanor, and general behavior. State v. Noltie, 116 Wn.2d 831, 839, 809 P.2d 190 (1991).

Assuming for sake of argument that Barela had in fact objected or asked for a new pool Mach would be distinguishable. In Mach, the government charged the defendant with sexual conduct with a minor. Mach, 137 F.3d at 631. Similar to the juror here one prospective juror had a psychology background and worked for Child Protective Services (CPS). During voir dire, the juror stated that in the three years she had worked for CPS, every single allegation a child had made about sexual abuse was true. Mach, 137 F.3d at 631-32. In response to further questioning, the juror repeated her position and described her experience working with psychologists and psychiatrists. Mach, 137 F.3d at 632. The court struck the juror for cause but denied the defendant's motion for a mistrial. Mach, 137 F.3d at 632. The Ninth Circuit reversed. Mach, 137 F.3d at 634. The Court held that the statements made by the prospective juror were directly connected to **guilt**, and that " [a]t a minimum, when Mach moved for a mistrial, the court should have conducted further voir dire to determine whether the panel had in fact been infected by [the prospective juror's] expert-like statements." Mach, 137 F.3d at 633. Here counsel for both sides had an opportunity to extensively question the

jurors, and the defense was able to identify jurors who expressed an inability to keep an open mind. See also State v. Strange, 188 Wn.App. 679, 354 P.3d 917 (Div. 2 2015)

And most critical to this entire analysis is that fact that there was never once an objection or a request for a new pool or a mistrial because of the alleged taint. Mack took the action needed to preserve the matter for review and most critically allowed the court to review the allegation at the time it occurred. Here Appellant waited to see if the jury that he chose, and liked, would find in his favor, when it did not then and only then was this issue raised.

Appellant states in footnote “5” that post-trial motions regarding voir dire was an appropriate approach. This flies in the face of all case law that requires the parties to address issues during the pendency of the trial so that the trial court can address it and take curative measures. The use of post-trial motions as was done here in effect uses a very appellate like mechanism wherein the entire trial process has been completed and after the verdict has been rendered a party can ask for a “do over” if the result of the trial is not to their satisfaction. This is why cases such as State v. Perry, 24 Wn.2d 764, 167 P.2d 173 (1946), State v. Moen, 129 Wn.2d 535, 919 P.2d 69 (1996) and State v. Wicke, 91 Wn.2d 638, 591 P.2d 452 (1979) and other cases too numerous to name state, “In order to

preserve error for consideration on appeal, the general rule is that the alleged error must be called to the trial court's attention at a time that will afford the court an opportunity to correct it. Id at 642, citing State v. Fagalde, 85 Wn.2d 730, 539 P.2d 86 (1975).”

The ruling by the trial court regarding this issue at the motion for a new trial is as follows;

THE COURT: Well, as I recall, the -- Mr. Wilkensen -- or Wilkensen, I guess it was -- he -- it was narrative. He made essentially a speech, and I don't know that maybe -- maybe I should have jumped into the middle of it. But in any event, I don't know that Mr. Jackson had that obligation to do so.

But in any event, when we get -- when we look at the trial as a whole -- and one part of it that really stands out in my mind was the testimony of Dr. Johnson when he testified that delayed disclosure is the norm and not the exception. And that -- you know, whatever Mr. Wilkensen said pales in comparison to what -- Dr. Johnson testified under oath about his years of experience in this particular area that delayed disclosure is norm and not the exception to the norm.

So I think in the big scheme of things, I don't think it had any effect upon the jury's decision-making process in this particular case.

And then you have your -- the expressions of personal belief and inflammatory comments.

MR. WALKER: Right.

THE COURT: Okay. RP 926

This would also appear to be a classic case of invited error. Barela liked the jurors and did not have a problem with them until he was found guilty by those jurors, he cannot create this error, here he alleges that the

actions of this juror were known to him and he could have asked for a new pool or jurors but he instead chose to sit mute until such time as the “error” would benefit him the most. The basic premise of the invited error doctrine is that a party who sets up an error at trial cannot claim that very action as error on appeal and receive a new trial;

In some cases, courts have used the invited error doctrine to analyze the impact a party's tactical choices have on alleged error. The basic premise of the invited error doctrine is that a party who sets up an error at trial cannot claim that very action as error on appeal and receive a new trial. The doctrine was designed in part to prevent parties from misleading trial courts and receiving a windfall by doing so. State v. Henderson, 114 Wash.2d 867, 868, 792 P.2d 514 (1990). State v. Momah, 167 Wn.2d 140, 153, 217 P.3d 321 (2009).

A similar allegation was addressed in State v. Ford, 151 Wn.App. 530, 542, 213 P.3d 54 (2009), reversed on other grounds;

Ford's argument that the "expert-like statements presented during voir dire violated [his] right to an impartial jury trial" also fails.... Ford contends that because two prospective jurors (Wiggs and Siciliana) spoke directly about a child's incapability of lying and the importance of believing survivors, their bias tainted the resulting jury verdict, requiring automatic reversal. We reverse a trial court's ruling on the scope of voir dire for an abuse of discretion if the defendant demonstrates that the abuse substantially prejudiced his case. State v. Brady, 116 Wash.App. 143, 147, 64 P.3d 1258 (2003) (citing State v. Davis, 141 Wash.2d 798, 825-26, 10 P.3d 977 (2000)), review denied, 150 Wash.2d 1035, 84 P.3d 1230 (2004).

During voir dire, two jurors, Siciliana and Wiggs, stated that their past experiences as victims of sexual abuse

would affect their ability to be fair and impartial. The trial court struck both Wiggs and Siciliana for cause. Ford did not object to this at trial.

...

Neither do we agree with Ford's contention that these statements were "expert-like." SAG at 11 (capitalization omitted). Wiggs and Siciliana made these statements based on their personal experiences with sexual abuse; neither of these women purported to offer an expert opinion. Additionally, Wiggs and Siciliana fully disclosed their viewpoints on sexual abuse during voir dire. We find no error here.

**Response to (b)(iii)**

This allegation is that the entire trial should be overturned based on the Appellant not being able to ask his wife if she had an "affair." At the time this question was asked there was nothing done by Appellant other than moving on to the next question in this series of questions. Appellant never asked for a hearing outside the presence of the jury, nor explained on the record when the objection was sustained why this specific and unfounded question should be allowed in a trial regarding the sexual abuse of the twelve year old daughter of the defendant. Barela did not ask for the witness to be left on the stand and an offer of proof made to support the need and the basis upon which the trial court should allow this inflammatory testimony in a child molestation trial. he did elicit statements that the marriage was and had been bad and broken.

It should be noted that while the objection was sustained the State did not ask for nor did the court on its own, move to have the question stricken and the jury ordered to disregard the question, therefore the question was allowed to hang before the jury. The series of questions that were asked at this time revolved around the fact that this was an unhappy marriage and that the defendant's wife had for a period of time contemplated separation or divorce. Other than a bald assertion that this specific question was "important for the defense to support Dr. Johnson's testimony with information regarding conflict in the Barela family...this evidence would have been particularly persuasive to the jury." This court is to assume that the jury would have found this one answer, if it even actually existed, to be the lynchpin to sway the jury away from the statements of the victim that her father had placed his penis between her legs on numerous occasions and had felt her breasts stating that she was "developing" well.

This theory now posited on appeal that this one question was essential to the defense is not supported by the record before the trial court. Trial counsel never mentioned this need, asked leave of the court to explore this allegation, tied the alleged infidelity to the defense, proffered proof that the alleged act had even occurred, nothing. It is only at the motion for a new trial and now on appeal that this theory comes forth.

Appellant refers this court CP 110 (Motion to arrest judgment) to support this allegation, however CP 110 is in fact second page of the State's memorandum regarding "Prosecutorial Misconduct , Et Cetera" not Appellant's motion. The one line in that motion that might pertain to this allegation is at CP 100 and in totality states "12. The Court's refusal to allow inquiry into witness Michelle Barela's infidelity." Once again there wasn't one single syllable uttered on the record during trial that would allow this court to evaluate this information in context with the defense theory of the case, which appears to have been that none of the abuse actually occurred what did happen is that the mother and the daughter, the 12 year old victim, hatched this plan to get the husband/father out of their lives and decided they would accuse him of rape and molestation, subjecting themselves to the stress, fright and embarrassment of testifying about being raped in front of twelve strangers rather than just divorce the defendant an action that can be done in ninety days by mail in this State.

The court did not err when it sustained the objection. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 482 P.2d 775 (1971);

Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously. State ex rel. Clark v. Hogan, 49 Wash.2d 457, 303 P.2d 290 (1956). Where the decision or order of the trial court is a matter of discretion, it will not

be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. MacKay v. MacKay, 55 Wash.2d 344, 347 P.2d 1062 (1959); State ex rel. Nielsen v. Superior Court, 7 Wash.2d 562, 110 P.2d 645, 115 P.2d 142 (1941).

Whether this discretion is based on untenable grounds, or is manifestly unreasonable, or is arbitrarily exercised, depends upon the comparative and compelling public or private interests of those affected by the order or decision and the comparative weight of the reasons for and against the decision one way or the other.

The determination of relevance is within the broad discretion of the trial court and will not be disturbed absent a manifest abuse of discretion.

State v. Swan, 114 Wn.2d 613, 658, 790 P.2d 610 (1990). Similarly, a determination of whether the probative value outweighs substantial prejudice is within the broad discretion of the trial court and will only be reversed in the exceptional circumstance of a manifest abuse of discretion. State v. Gould, 58 Wn.App. 175, 180, 791 P.2d 569 (1990).

Generally, all relevant evidence is admissible and all irrelevant evidence is inadmissible. ER 402. Relevant evidence is any "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. "Relevancy means a logical relation between evidence and the fact to be established. Any evidence which tends to identify the accused as the person guilty is

relevant." State v. Whalon, 1 Wn.App. 785, 791, 464 P.2d 730 (1970) (citation omitted). Material evidence is also admissible. Id. Material evidence is evidence that logically tends to prove a defendant's connection with a crime either alone or from whatever inferences may be drawn when it is considered with other evidence. Id.

Even relevant evidence can be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice." ER 403. Unfair prejudice is that which is more likely to arouse an emotional response rather than a rational decision by the jury. Gould, 58 Wn.App. at 183. Crucial consideration is given to the word "unfair" when applying ER 403 to prejudicial evidence. State v. Bernson, 40 Wn.App. 729, 736, 700 P.2d 758 (1985). "In almost any instance, a defendant can complain that the admission of potentially incriminating evidence is prejudicial in that it may contribute to proving beyond a reasonable doubt he committed the crime with which he is charged. Addition of the word 'unfair' to prejudice obligates the court to weigh the evidence in the context of the trial itself, bearing in mind fairness to both the State and defendant." Id.

See also, State v. Stenson, 132 Wn.2d 668, 940 P.2d 1239 (1997):

This Court reviews a trial court's decisions as to the admissibility of evidence under an abuse of discretion standard. E.g., State v. Pirtle, 127 Wn.2d 628, 648, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026 (1996); State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995) (this

court will not disturb a trial court's rulings on a motion in limine or the admissibility of evidence absent an abuse of the court's discretion); State v. Swan, 114 Wn.2d 613, 658, 790 P.2d 610 (1990) (the admission and exclusion of relevant evidence is within the sound discretion of the trial court and the court's decision will not be reversed absent a manifest abuse of discretion). When a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons, an abuse of discretion exists. Powell, 126 Wn.2d at 258.

Appellant claims this one question was essential and yet he was given great latitude with both Mrs. Barela and with Dr. Johnson to explore his theory that some form of “parental alienation” was what had actually occurred and the victim was siding with her mother due to this alienation theory and that E.B. was making up the allegations. He was also allowed to introduce testimony of “stereotyped inducement/stereotyped induction another “alternative” theory as to how and why the victim had come up with this story of being raped repeatedly by her father. RP 666 It should be noted that neither of these “theories” was shown to be accepted by other experts. Dr. Johnson testified that this theory “really comes from some material that was written in the mid '90s from a researcher in this area talking about how a child can be manipulated or trained to see a person negatively.” Not a widely accepted or recognized theory but one that comes from “some” material from “a” researcher. The court and, the state, allowed Barela great leeway in presenting his theory that the victim

and her mother, the defendant's wife, worked together to concoct this entire series of rapes and molestations.

Barela failed to even have his own expert make complete assessment of the victim and the mother and the family dynamic to explore his own theory;

Q. Now, from all the materials that you reviewed in this case, did you identify indications of parental alienation?

A. I did not do a full assessment, and so I can't give an opinion as to whether that exists or not. RP 665

The courts limitation of defense counsel going on a fishing expedition in front of the jury for any and all possible problems in this marriage was a correct ruling, a valid use of the court's power to limit admission of highly prejudicial information that was not relevant nor had it been considered by his own expert. Appellant was clearly attempting to introduce this purely for its prurient effect.

**Response to allegation 1(c) Closing arguments.**

The first allegation regarding alleged misconduct on the part of the deputy prosecuting attorney was that he stated that "I" had not heard the state that he had not heard the statement to be that "it was not sexual" when in fact the testimony was that "it was not sex." While it is not the best verbiage to use when referring to the record in this instance defense had over and over and over stated in his closing that in his response to his

wife when she confronted him about the statements made by their daughter was that Barela stated that “it was not sexual” when in fact the testimony from Mrs. Barela was that he used the word “sex.” This is a very critical difference. The fact is Mrs. Barela said the defendant stated “[t]here was no sex” not that “it was not sexual.” Being “sexual” with your 12 year old daughter may not be criminal but having “sex” with that same daughter is. The statement made by the DPA in closing while stated using the pronoun “I” clearly was not misconduct in that he was merely pointing out that the defense was misstating the evidence presented, this is not error. The testimony of Mrs. Barela is as follows:

Q. So you take space from your husband after he says he's been inappropriate with Emily. Does he say anything else?

A. There was no sex.

Q. Now, had you asked him something specifically to elicit that, or was that just -- he said it without any prompting, if you remember?

A. When I moved to the end of the bed, I said something to the effect of, How could you, and that's what prompted the, No sex. I don't remember what I said next or if there was an initiating –

Q. Okay.

A. -- comment.

Q. After he says that, is there silence or is there more talking?

A. I asked about Elizabeth.

Q. What did he say?

A. He said no, he hadn't touched her.

Q. Did you ask about anything else?

A. I did, but I can't recall right at the moment.

Q. Do you recall anything else that your husband said to you after he said that he had been inappropriate with Emily and that there was no sex? (RP 494-5)

Barela objected but took no other action to “cure” this problem.

He did not ask for a motion to strike nor a motion from the court to admonish the jury to disregard the “I” pronoun use. See United States v. Prantil, 764 F.2d 548, 555 n.4 (9th Cir. 1985) (mistrial motion following the prosecutor's closing is "an acceptable mechanism by which to preserve challenges to prosecutorial conduct"). This court will review a judge's decision to deny a mistrial for prosecutorial misconduct for an abuse of discretion. State v. French, 101 Wn. App. 380, 385, 4 P.3d 857 (2000); State v. Wilson, 71 Wn.2d 895, 899, 431 P.2d 221 (1967). While there was an objection the objection was “improper argument” there was no motion before jury deliberation. Where there is a failure to object to prosecutorial misconduct, request a curative instruction, or move for a mistrial, it constitutes a waiver of our review unless the misconduct is so flagrant and ill-intentioned that no instruction could erase the prejudice. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).

The standard is that this court will review a prosecutor's remarks 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." French,

101 Wn. App. at 385 (quoting State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)).

The first inquiry is whether the prosecutor's comment was improper. State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1998). It is the State's position that the comment was not improper, perhaps the pronoun "I" but the words and meaning of the comment would not change if "the State" or "the testimony was not sexual it was sex." Even if, for the sake of argument, this was improper the court must still decide whether there is a substantial likelihood that the comment affected the jury. Id. Here the defendant must show both improper conduct and prejudicial effect. State v. Roberts, 142 Wn.2d 471, 533, 14 P.3d 713 (2000). To establish prejudice resulting from prosecutorial error, the defendant must show a substantial likelihood that the error affected the jury's verdict. Belgarde, 110 Wn.2d at 508.

When this prosecutor's comment is viewed in "the context of the total argument, the issues in the case, [and] the evidence addressed," the remark correctly addressed the fact that the defense was misstating the actual testimony of the victim's mother, this did not create a substantial likelihood that the jury's verdict was affected. French, 101 Wn. App. at 385 (quoting Brown, 132 Wn.2d at 561). Barela has not shown a prejudicial effect. Roberts, 142 Wn.2d at 533.

To prevail on a claim of prosecutorial error, a defendant must show that “in the context of the record and all the circumstances of the trial, the prosecutor’s conduct was both improper and prejudicial.” In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 704, 286 P. 3d 673 (2012).

Barela could have proposed an instruction directing the jury to disregard the prosecutor’s personal opinions. The trial court already had instructed the jury that the lawyers’ statements and arguments were not evidence and that the jury must render its verdict based solely upon the evidence presented at trial. This instruction is given to help instruct the jurors once again that the evidence is what they are considering not the words of the lawyers. Clearly if there was any error this instruction would minimize any prejudice. State v. Emery, 174 Wn.2d 741, 764 & n. 14, 278 P.3d 653 (2012) (courts presume that juries follow the court’s instructions); State v. Anderson, 153 Wn. App. 417, 428, 220 P. 3d 1273 (2009). Here the Deputy Prosecutor was not vouching for any witness, he was not introducing new evidence, he was merely correcting the misstatement made by defense in its closing argument. Here the allegation appears to be the prosecutor's use of the pronoun "I" **constitutes vouching**. The State acknowledges that prosecutors should generally avoid using the pronoun "I" or “we” in closing argument, its use is not always improper. In United States v. Younger, 398 F.3d 1179 (9th Cir.

2005), for example, the Ninth Circuit concluded that the prosecutor had not engaged in misconduct by repeatedly saying "we know" in reference to what he argued was shown by the evidence. While ultimately concluding that the prosecutor's statements were not improper, the court also acknowledged the ambiguity caused by a prosecutor using the phrase "we know," reasoning as follows:

We do not condone the prosecutors' use of "we know" statements in closing argument, because the use of "we know" readily blurs the line between improper vouching and legitimate summary. The question for the jury is not what a prosecutor believes to be true or what "we know," rather, the jury must decide what may be inferred from the evidence. We emphasize that prosecutors should not use "we know" statements in closing argument.

Nonetheless, the record in this case confirms that the prosecutors used the phrase "we know" to marshal evidence actually admitted at trial and reasonable inferences from that evidence, not to vouch for witness veracity or suggest that evidence not produced would support a witness's statements. United States v. Leon-Reves, 177 F.3d 816, at 822 [(9th Cir. 1999)]. The prosecutors' statements thus were not improper, United States v. Cabrera, 201 F.3d 1243, at 1250 (9th Cir. 2000); United States v. Toomey, 764 F.2d 678, at 681 (9th Cir. 1985). Moreover, in the context of the entire trial, we conclude that the prosecutors' use of "we know" did not materially affect the verdict. *See* Toomey, 764 F.2d at 681. Younger, 398 F.3d at 1191.

The determination of whether an act constitutes error depends on the context in which it is used, courts are particularly reliant on defense counsel to object and make a record when its use appears "critically

prejudicial." State v. Edvalds, 157 Wn.App. 517, 525-26, 237 P.3d 368 (2010). Moreover, even if this court were to conclude that the prosecutor's comments were improper, they certainly did not rise to the level of being flagrant and ill-intentioned. Furthermore, even though Barela objected, any potential prejudice could have been cured by a proper instruction. See Younger, 398 F.3d at 1190.

The State prefaced the one section of closing that was objected to by stating "You heard the testimony. We're not testifying. Oh, and here comes the big spin. Here's the money shot: It wasn't sexual. Where did that come from? Gosh, I didn't hear that. I didn't hear that at all. But a sweet, little, slick spin on the evidence that was." (RP 877)

The deputy prosecuting attorney once again reminded the jury that they had heard the evidence and what was being done by the defense was he was making statements that were not in the record, this is born out above from the quoted section of Mrs. Barela's testimony. The DPA here continued this section of closing as follows:

MR. JACKSON: You heard the evidence. It wasn't sexual. You heard the evidence. The evidence was, there was no sex. "I've been inappropriate with her," segues into, "Well, I've been inappropriate, but not in that way. Not in that way At all." Some other way that -- God knows what. No Evidence about some other way. "There was no sex"; that was the testimony. We don't get to testify. We don't get to put facts, evidence, statements into the record that are not there. (RP 877-8)

A prosecutor may not vouch for a witness by expressing an opinion as to that witness's credibility. State v. Horton, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). In Horton, the prosecutor pronounced in closing, "I believe Jerry Lee Brown." The prosecutor in this case did not state a personal opinion as to whether Mrs. Barela was or was not telling the truth. Nor did the prosecutor suggest that there was evidence, not admitted at trial, which would provide additional grounds for finding the defendant guilty, contrary to State v. Stith, 71 Wn. App. 14, 856 P.2d 415 (1993) or State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994). Instead, the prosecutor's comments were to point out to the jury that the previous statements of defense counsel were in fact not the actual testimony of the witness.

Barela argued in the trial court when he made his motion for a new trial that the DPA had disparaged his attorney, there is no legal basis nor standard by which this court can judge the tone of his voice. The trial court sat through this trial and found no error. As addressed below this was in response to the statement made by Defense counsel in his closing regarding the reasonable doubt standard. The response by the State was based on this misstatement of the law and was an attempt to explain to the jury using the verbiage of the defendant what the standard really was. The response by the State may have been less than artful but it was not

intended to mislead the jury regarding this standard. If the intent of the State was to mislead it would not have stated to the jury after the alleged misstatement “Read the instructions.” RP 882 The last three sentences of the rebuttal by the State are supported by State v. Feely, Slip Opinion 72450-9-I (February 22, 2016):

A prosecutor who addresses the reasonable doubt standard in closing argument acts improperly by "[trivializing] and ultimately fail[ing] to convey the gravity of the State's burden and the jury's role in assessing' the State's case against the defendant."21 In essence, the State acts improperly when it mischaracterizes the standard as requiring anything less than an abiding belief that the evidence presented establishes the defendant's guilt beyond a reasonable doubt.22

21 State v. Johnson, 158 Wn. App. 677, 684, 243 P.3d 936 (2010) (quoting State v. Anderson 153 Wn. App. 417, 431, 220 P.3d 1273 (2009)).

22 See State v. Pirtle, 127 Wn.2d 628, 657-58, 904 P.2d 245 (1995); see also State v. Qsman, No. 71844-4-1, 2016 WL 298802, at \*7 (Jan. 25, 2016).

This is the final portion of the State’s rebuttal closing:

Reasonable doubt, some reason, not any reason. It's not beyond any doubt. **Read the instructions.** If you have an abiding belief in the guilt of Mr. Barela based on evidence that's been provided to you, you must come back with guilty verdicts as to all the counts. (Emphasis added.)  
RP 882

...

Remember, this is a really serious case. This requires proof beyond a reasonable doubt. You should have a comfortable, clear, picture in your mind of what happened. You have to for that kind of proof. If you have something like a jumble in your head about what exactly happened,

that's not proof beyond a reasonable doubt.

RP 845

**RESPONSE TO ALLEGATION TWO – CUMULATIVE ERROR.**

Appellant list three allegations (b-d) within his claim of cumulative error. It is noteworthy that even Barela does not believe these alleged errors of and by themselves warrant reversal.

**(a) Cumulative error standard.**

State v. Garcia, 177 Wn.App. 769, 786, 313 P.3d 422

(Wash.App. Div. 2 2013); “Even where several errors standing alone do not warrant reversal, the cumulative error doctrine requires reversal when the combined effect of the errors denied the defendant a fair trial. Davis, 175 Wn.2d at 345, 290 P.3d 43. Failure to preserve alleged errors negates a parties ability to use this doctrine. See State v. Embry, 171 Wn.App. 714, 766, 287 P.3d 648 (2012) (failure to preserve claimed errors for appeal precluded defendant's cumulative error claim based on alleged unpreserved errors), review denied, 177 Wn.2d 1005, 300 P.3d 416 (2013).” “The application of that doctrine is limited to instances when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial.” State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

The errors alleged by Appellant are not sufficient individually or cumulatively to require reversal of these convictions. The trial court stated the following at the end of the defense motion for arrest of judgment and a new trial;

THE COURT:...So, although, you know, it may be that in some instances Mr. Jackson's passion caused him to approach the area of prosecutorial misconduct, I can't say that on the basis of what I heard and what I was asked to rule upon that he did, in fact, commit misconduct in that regard. So I think Mr. Barela did have a fair trial.

And the only other comment I'd make, too -- and I guess for what's it's worth -- is that I don't think that the -- this midnight conversation between Mr. Barela and Ms. Barela was critical to this particular -- in this particular case. There were some -- there was a fuzzy aspect of it: Who? What did you mean? And what he did say? And what did he mean when he said what he said? I don't think it was critical.

I think that the jury decided this case purely on their belief of Emily and no other basis at all. That's -- there's no other way to explain their decision: the guilty and the not guilty. So I think the key to this was a finding by the jury that Emily was credible beyond a reasonable doubt.

And so I'm denying the motion for arrest of judgment and for a new trial.

**(b) Det. Janis – Delayed reporting.**

Det. Janis is qualified as an expert, perhaps the “magic” words were not spoken “I would ask the court to qualify Det. Janis as an expert” the detectives entire background, training and knowledge was laid out by the court and accepted as such and there was no objection. Det. Janis had previously been qualified and had testified as an expert;

Q. Now, have you testified before in court?

A. I have.

Q. And have you testified before as an expert in interviewing children?

A. Yes.

Q. In superior court?

A. Yes.

Q. Any specific areas or just generally in interviewing children?

A. I recall a case, but I don't recall the specific questions. It was regarding delayed disclosure and child interviews.

Q. And do you teach classes in this area?

A. I do.

Q. Who do you teach to?

A. I'm on a cadre of facilitators for the Criminal Justice Training Center, the weeklong class for child interviewing, as well as local trainings for the Yakima Police Department and any other person that really asks.

This qualification process winds up at RP 547. Even defense counsel acknowledged this “Detective Janis, and also looking at his CV and so forth, he's being used by the State as an expert for forensic child abuse interviewing; that procedure and how that was done. He's also putting himself out as an expert in delayed reporting. And though he might be in some capacity, I don't know that it's appropriate for him to testify about that in the State's case in chief.” RP 48. The court ruled as follows:

THE COURT: Well, delayed disclosure is one of those phenomenons that's somewhat beyond the -- well, it's counterintuitive to what people think their reaction would be or might be or what they would think that the normal -- the -- a common reaction would be. And it is, you know, a phenomenon that it's appropriate to have some testimony

about.

Whether Detective Janis is the person who's going to provide that testimony or not is a different issue, and I'll have to hear his proffer or -- of his expertise in that area outside the presence of the jury. But I think it's appropriate to allow some testimony in the State's case in chief regarding the delayed disclosure. RP 52-3

Appellant's claim is that the testimony of Det. Janis regarding delayed disclosure was so prejudicial that the entire trial must be overturned. The defendant fails to acknowledge that his own two experts testified regarding delayed disclosure and delayed reporting.

Dr. Johnson:

A. The vast majority of sexual abuse is never reported. And that abuse that is reported, there is frequently a substantial delay. And I think that that delay is much more common in intrafamilial abuse where the dynamics can be so complex and difficult for the child.

Q. So why do children delay in disclosing these types of allegations? Why do they delay?

A. What I said, relative to the child being fearful of not being believed, the child being concerned of harm to the parent -- harm to the parent that is abusing them; the family losing resources; the child believing on some level that it is his or her fault; the shame involved. So those would be some of the -- some of the reasons. RP 693

Dr. Johnson, Appellant's expert is asked a series of questions to establish that he is in fact an expert in this area of the law. Those questions and answers are extremely similar to the answers given by Det. Janis when he gave his background training and knowledge. Neither party specifically asked the court to consider or qualify these two

witnesses as experts. But they both testified in that capacity. So the Berela's argument to the trial court:

“Well, Judge, first of all, he's performed this function for police departments before. He's testified in these cases many, many times. He's not a police officer, just as Detective Janis is not an expert in forensic interviews and assessment. It's what he does. It's what he's trained for. Dr. Johnson is an expert, and he's able to identify the factors that are -- that are important in evaluating and assessing the allegations.”

This is refuted by the record made at the time both witnesses testified, establishing both as experts. It does not take a college degree from a university to make a witness an expert, it is the background, training and knowledge they have that allows them to be considered an expert. If Dr. Johnson or Dr. Mendelson are experts then there can be no doubt Det. Janis is also an expert. In fact the training that Det. Janis has is more current than that of Dr. Johnson who testified that his last course or training in “the Harborview method” was back in the “mid ‘80’s.” (RP 684) As was stated by Dr. Johnson “I think the detective involved has been trained at Harborview, and, in fact, does training for Harborview.” RP 648.

Dr. Johnson went on to endorse the interview done in this case by Det. Janis;

Q. Now, you also reviewed, you said, an interview of the child by Detective Janis; is that correct?

A. Correct.

Q. Was that -- was that a forensic interview?

A. Correct.

Q. Did he -- what kind of job did he do? Did he do a good job?

A. Yeah. I thought that -- you know, what I always say is that, you know, there's no such thing as a perfect interview, and there are always things that can be improved and things that can be kind of picked apart and criticized. But, generally, I thought -- I thought that the interview was certainly -- attempted to adhere to the appropriate protocol. RP 661-2

When questioned Dr. Johnson had this to say about the interview conducted by Det. Janis;

Q. You watched and read about Detective Janis' forensic interview?

A. I did.

Q. Called it refreshing?

A. You know, Detective Janis has been trained in the Harborview model. I've seen so many interviews where people who have no training, and so I think I probably used that word.

Q. He did a good job?

A. I think overall, in my opinion. (RP 685-6)

...

Q. Now, you stated that it's important not to influence the child during an interview.

A. Correct.

Q. Didn't see any of that with Detective Janis, did you?

A. No. I thought it was a -- as I said, a good interview, and I think he made a real effort to use open-ended questions and create a situation in which the child would tell a narrative. RP 695

...

Q. So you've never -- you didn't see anything like that in Detective Janis' interview, though?

A. I thought his interview was a good interview.

RP 709

In State v. Baker, 162 Wn.App. 468, 259 P.3d 270 (Wash. 2011) the court allowed for testimony regarding past offenses to that the victim had not reported and evidence regarding the delay in the reporting of the crimes charged, this was admitted in order to allow the jury to assess the credibility of the victim/witness. The use of experts such as Det. Janis and Dr. Johnson is nothing more than using a forensic tool to explain to the jury the mechanics of something that logically does not make sense. As the court stated the delay in reporting is counter intuitive. A “normal” person would think that if a person was raped they would immediately make others aware of that horrendous act whereas in many cases such as this the victim purposefully does not report and the research has found reasons why that occurs. Information that is not possessed by the victim and can only be presented to the jury through an expert. Det. Janis’ testimony regarding this process did not dwell on the specific area, the State did not endlessly flog the issue nor did the State dwell on the issue with Dr. Johnson. The rationale was place before the jury and then the State went on.

When Barela objected to this line of testimony the court ruled that it was “going to allow the officer some – a limited – more – a limited about of leeway in this regard...” RP 541 The totality of questions regarding delay only covers portions of pages 541- 543, this very limited

testimony was relevant and the ruling by the trial court to allow it was not an abuse of discretion.

This is in effect a claim by Barela that Det. Janis is not an expert, because he is not apparently a doctor like the two defense witnesses. Clearly Det. Janis was qualified based on experience, training, and background to qualify as an expert.

This court will "...review a trial court's admission of expert testimony for an abuse of discretion." State v. Yates, 161 Wn.2d 714, 762, 168 P.3d 359 (2007). A trial court abuses its discretion when it relies on unsupported facts, applies the wrong legal standard, or when it adopts a view that no reasonable person would take. State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). ER 702 provides, " If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." "But the facts underlying an expert's opinion may be based on experience, rather than scientific research. State v. Flett, 40 Wn.App. 277, 284, 699 P.2d 774 (1985) (witness qualifications need not be based on academic credentials); State v. Aaron, 57 Wn.App. 277, 283, 787 P.2d 949 (1990) (expert testimony, based on experience, about using gloves, socks, or handkerchiefs to avoid

leaving fingerprints was not sophisticated expert testimony requiring scientific basis). As our Supreme Court recognized in State v. Ortiz, practical experience is sufficient to qualify an expert witness. 119 Wn.2d 294, 310, 831 P.2d 1060 (1992).

Barela argues that Det. Janis was not qualified to testify about whether children sometimes delay reporting because this testimony related back to the victim's credibility, the record reflects that the Detective had both experience and training that qualified him as an expert on child abuse investigations, he has ample experience interviewing children, having spent years as a child abuse investigator during which time he investigated numerous cases of sexual abuse. He had received training on interviewing child witnesses and became a trainer himself.

The record reflects no abuse of discretion in admitting the challenged testimony. *See State v. Holland*, 77 Wn.App. 420, 427-28, 891 P.2d 49 (1995);

Finally, Mr. Holland challenges the court's admission of evidence on "delayed reporting" and Ms. Welch's qualifications to testify regarding delayed reporting. An expert's opinion that it is not uncommon for a sexual abuse victim to delay reporting the abuse is appropriate when, as here, the credibility of the victim has been put in issue. Petrich, at 575-76, 683 P.2d 173. The critical question, then, is whether Ms. Welch was qualified as an expert to give an opinion on delayed reporting.

The determination of whether a witness is qualified to testify as an expert is within the sound discretion of the trial

court. Its ruling will not be reversed absent a manifest abuse of discretion. State v. Quigg, 72 Wash.App. 828, 837, 866 P.2d 655 (1994). A witness may qualify as an expert by knowledge, skill, experience, training, or education. ER 702.

Appellant does not now claim as error the testimony of his own expert, Dr. Johnson, regarding delayed disclosure. RP 693 Barela's argument fails.

**(c) Hue and Cry.**

Appellant does not claim that this alleged error should result in a reversal of the charges or a new trial, just that it was another "error, which infused the trial." (Apps brief at 23) This case was about the credibility of the victim. This was very limited testimony and the court insured that the limitation was adhered to. As indicated in State v. Ackerman, 90 Wn.App. 477, 953 P.2d 816 (Wash.App. Div. 3 1998);

The trial court's decision on the admissibility of evidence may be reversed only on a showing of manifest abuse of discretion. State v. Quigg, 72 Wash.App. 828, 835, 866 P.2d 655 (1994). Mr. Ackerman has shown no such abuse here.

The fact of complaint or "hue and cry" doctrine is a case law exception to the hearsay rule. State v. DeBolt, 61 Wash.App. 58, 63, 808 P.2d 794 (1991). It allows the State in a sex offense case to present evidence in its case in chief that the victim made a timely complaint to someone after the assault. State v. Alexander, 64 Wash.App. 147, 151, 822 P.2d 1250 (1992). Details of the complaint and the identity of the offender are not permitted. Id.

In the pretrial hearing on admissibility, P.K.'s schoolmates and the school counselor testified P.K. made a complaint of abuse and they further provided details of her statements. But at trial, the court only allowed testimony that P.K. stated she had been abused. These statements establishing that she made timely complaints were properly admitted under the fact of complaint doctrine. DeBolt, 61 Wash.App. at 63, 808 P.2d 794.

The portion of Ms. Mutch's testimony that actually addressed the allegation made by the victim is found at RP 362-6. The actual portion of her testimony that addresses the "hearsay" is set out below:

Q. Now, when you're inside the room with the door closed to the main part –

A. Uh-huh.

Q. -- of the building, did Emily disclose something to you that was significant?

A. Yeah. So –

Q. What was that?

A. -- she told me that her dad had been molesting her.

RP 363-4

One other person testified under this exception, Mrs. Lindseth. In the totality of the testimony of Mrs. Lindseth there is nothing in the record that is "hearsay" from the victim. Mrs. Lindseth states "[w]hen she shared this information" and "the allegations made" but Mrs. Lindseth never testified as to what was shared or what the allegation made by the victim was. Mrs. Lindseth testified that the administration of the church she worked for, the church the Barela's attended, called CPS but there is nothing in the record as to what was revealed. RP 375-7

This extremely limited testimony was by Appellant's own argument insufficient to require reversal standing alone, it also is not sufficient to require a new trial or reversal when taken in conjunction with any other alleged errors. The statements made to these two were admitted as required under this doctrine. They were admitted within a reasonable time. (The hue and cry doctrine requires that the victim complain to someone within a reasonable time after the abuse.) State v. Ferguson, 100 Wn.2d 131, 144, 667 P.2d 68 (1983)

**(d) Flagrant misconduct in closing.**

The alleged actions are neither flagrant or significant as Appellant has relegated them to a subsection of his argument regarding cumulative error. The court on numerous occasions reminded the jury something similar to this admonishment after an objection by the State;

THE COURT: Yeah, I'm not sure -- this is argument, again, folks, not evidence. So what Mr. Walker says somebody said is not evidence of what -- that they said anything at all. RP 869

The statement that is attributed to be a shifting of the burden "that reasonable doubt needed to be a "clean picture." When this is taken in context it shows that the prosecutor was stating that it was the Defendant who wanted "[y]ou to make reasonable doubt into some type of

comfortable, clean picture.” RP 875 The portion of closing this was taken from is as follows:

Sometimes truth is stranger than fiction. The fact that a doctor never saw her -- or anything like this -- the fact that the other doctor never saw anything like this, it doesn't mean it didn't happen. You are the weighers of the evidence. You assess the credibility. It is a tough choice. It is a tough decision that you have to make. There's no doubt about it. He's right. There's a lot riding on it, but it's what you signed up to do, as tough as it is: to assess what came out of that chair, what was said to you, to assess the credibility. You must make reasonable doubt into some type of comfortable, clean picture. That's not the standard, abiding conviction is. That Mr. Barela did these acts to his daughter.

He wants to talk about body language. Emily appeared untroubled, as he said. It happened. You saw the witness. You listened to her words, what she told you was happening to her. Chip away, chip away. Posturing, everybody's posturing; apparently, I am, too, posturing. Witness is posturing, Ms. Barela is posturing, Emily is posturing. It's a big ruse we're pulling over on you, apparently. That's what the defense would have you believe. There was even one assertion, I think, that Emily was being inappropriately influenced by me, the prosecutor. Emily did tell you that her memory was better back then. She did a couple times, at the least. Chip away. It is convenient to attack the memory of the child.

Defense counsel in closing stated the following:

And the significance of that is not the -- I guess I'll call it a "convenient position." Because if somebody can't remember something really important that is at the very basis of your case, just say, "Well, I forgot, so just overlook that." **The problem with that is you have to have a clear picture in your mind before you can convict on anything.** This is important stuff. Take my word for it. I knew at one point, but now I have no idea. I'm sitting here,

and I have no idea. And, again, I would suggest, with all due respect to Emily, that things that really happen, those facts don't change. Things that you might have said, that you might have embellished, you might have been encouraged to say by your counselor, or whatever -- however it came up, doesn't matter -- those kind of things can shift because they're not facts. RP 840

...

Remember, this is a really serious case. This requires proof beyond a reasonable doubt. **You should have a comfortable, clear, picture in your mind of what happened.** You have to for that kind of proof. **If you have something like a jumble in your head about what exactly happened, that's not proof beyond a reasonable doubt.** RP 845

The court instructed the jury that;

“it’s your duty to decide the facts in this case based on the evidence presented to you during this trial... The evidence that you are to consider during your deliberations consists of the testimony that you've heard from witnesses and the exhibits that I have admitted during the trial... The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.” RP 775-7

These written instructions went to the jury room with the jury.

State v. Vassar, 188 Wn.App. 251, 352 P.3d 856 (Wash.App. Div.

3 2015)

We “review a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and

the jury instructions." *State v. Boehning*, 127 Wn.App. 511, 519, 111 P.3d 899 (2005). We give prosecutors "wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury." *Id.*

...  
However, even improper remarks do not justify reversal " if they were invited or provoked by defense counsel and are in reply to his or her acts and statements." *Russell*, 125 Wn.2d at 86. While defendants are not obligated to produce any evidence, a prosecutor is allowed to comment on a defendant's failure to support her own factual theories: " When a defendant advances a theory exculpating [her], 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." *State v. Contreras*, 57 Wn.App. 471, 476, 788 P.2d 1114 (1990).

State v. York, 50 Wn. App. 446, 451, 749 P.2d 683 (1987) "The jury is presumed to follow the court's instructions. State v. Grisby, 97 Wn.2d 493, 499, 647 P.2d 6 (1982), cert. denied, 459 U.S. 1211 (1983)."

It is indisputable that the jury followed the instructions rather than be "swayed" by the alleged burden shifting. If the State was as astute at shifting the burden onto Barela the jury would not have acquitted Barela on any of the charges, they did. And not just any charges, the most serious charges. CP 88, 92

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IV. CONCLUSION

For the reasons set forth above this court should deny allegations raised by Mr. Barela, the decisions of the trial court should not be disturbed. This appeal should be dismissed.

Respectfully submitted this 10<sup>th</sup> day of March 2016,

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DECLARATION OF SERVICE

I, David B. Trefry state that on March 10, 2016 emailed a copy, by agreement of the parties, of the Respondent's Brief , Oliver Davis at [wapofficemail@washapp.org](mailto:wapofficemail@washapp.org)

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 10<sup>th</sup> day of March, 2016 at Spokane, Washington.

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